THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(CORAM: ODOKI, CJ; ODER, JSC; TSEKOOKO, JSC; KAROKORA, JSC; AND MULENGA, JSC.)

ELECTION PETITION NO. I OF 2001

COL (RTD.) DR. BESIGYE KIZZA :: PETITIONER

VERSUS

I. MUSEVENI YOWERI KAGUTA)

2. ELECTORAL COMMISSION)::RESPONDENTS

JUDGEMENT OF THE COURT

The Petitioner, Col. (RTD) Dr. Besigye Kizza petitioned the Supreme Court of Uganda under the Presidential Elections Act 2000, as an aggrieved candidate, challenging the result of the Presidential election held on 12th March 2001 and seeking an order that Museveni Yoweri Kaguta, declared elected as President, was not validly elected, and that the said election be annulled. He cited the said Museveni Yoweri Kaguta as 1st Respondent and the Electoral Commission as the 2nd Respondent.

The Petitioner and the 1st Respondent, who is the incumbent President of the Republic of Uganda, were among the six candidates who contested the said Presidential Election. On 14th March, 2001 within forty-eight hours from close of polling, the 2nd Respondent declared that the 1st Respondent, having obtained 69.3% of the valid votes cast in his favour was duly elected President. According to the declared results, the Petitioner was runner-up with 27.8% of the valid votes cast in his favour.

The petition was lodged in the Registry of this Court on 23rd March, 2001, that is within ten days after the declaration of results. The hearing commenced on 27th March, 2001, and ended on 13th April, 2001. Judgement was reserved to be given on notice. By virtue of article 104 of the Constitution and section 58 of the Presidential Elections Act, the petition must be inquired into and determined expeditiously and the Court must declare its findings not later than thirty days from the date the petition is filed. This Court must was therefore bound to deliver its judgement by 22nd April, 2001.

In the petition, the Petitioner makes very many complaints against the two respondents and their agents and/or servants, for acts and omissions which he contends amounted to non-compliance with provisions of the Presidential Elections act, 2000, and the Electoral Commission Act, 1997, as well as to illegal practice and offences under the Acts. Among the major complaints he makes against the 2nd Respondent are failing to efficiently compile, maintain and up-date the national voters' register, and voters' roll for each constituency and for each polling station; failing to display copies of the voters' roll for each parish or ward for the prescribed period of not less than 21 days, failing to publish a list of all polling stations within the prescribed period of 14 days before nomination; increasing the numbers of polling stations on the eve of polling day without sufficient notice to candidates; allowing or failing to prevent stuffing of ballot boxes, multiple voting and under-age voting; chasing away the Petitioner's polling agents or failing to ensure that they are not chased away from polling stations, and counting and tallying centres; allowing or failing to prevent agents of the 1st Respondent to interfere with electioneering activities of the Petitioner and his agents; allowing armed people to be present at polling stations, falsification of results, and failing to ensure that the election was conducted under conditions of freedom and fairness.

The Petitioner's case against the 1st Respondent is that he personally or by his agents with his knowledge and consent or approval, committed illegal practices and offences. These include publication of a false statement that the Petitioner was a victim of AIDS; offering gifts to voters; appointing partisan senior military officers and partisan sections of the Army to take charge of security during the elections; organising groups under the Presidential Protection Unit and Major

Kakooza Mutale with his Kalangala Action Plan, to use violence against those not supporting the 1st Respondent; and threatening to cause death to the Petitioner.

In their respective answers to the petition, the 1st Respondent and the 2nd Respondent denied the allegations made in the petition against them.

At the hearing, the learned Solicitor General Mr. Kabatsi led a team of learned counsel for the Petitioner. And Dr. Byamugisha and Dr. Khaminwa led the team of learned counsel for the 1st Respondent. At the commencement of the hearing, the Court, in consultation with learned Counsel who appeared for the parties, framed the following five issues for determination:

1. Whether during the 2001 election of the President, there was non-compliance with provisions of the Presidential Elections Act 2000.

2. Whether the said election was not conducted in accordance with the principles laid down in the provisions of the said Act.

3. Whether, if the first and second issues are answered in the affirmative, such non-compliance with the provisions and principles of the said Act, affected the result of the election in a substantial manner.

4. Whether an illegal practice, or any other offence under the said Act, was committed, in connection with the said election, by the 1st Respondent personally, or with his knowledge and consent or approval.

5. What reliefs are available to the parties?

All evidence at the trial of the petition is required to be adduced by affidavits. Cross-examination of the deponents may be permitted only with leave of the Court. Accordingly parties filed many affidavits to support their respective cases. The Petitioner filed 174 affidavits both in support of the petition and in reply to the affidavits of the 1st and 2nd Respondents, who in turn filed respectively, 133 and 88 affidavits. The filling of affidavits continues throughout the hearing of the petition. In addition leave was granted to the Petitioner to call and cross-examine one deponent, Dr. Dian Atwine, who had sworn an affidavit in support of the 1 Respondent.

Counsel for all parties read the affidavits deponed in support of their cases while making their submissions to the Court. Numerous authorities, from within and without our jurisdiction, were cited and copies were provided to the Court. We have found the authorities very helpful and we are grateful to Counsel for that assistance.

We have, since completion of hearing, had the opportunity to peruse and evaluate the evidence adduced by the parties, and to study the various authorities cited to us. We have each made findings on the issues presented to the Court. We have also come to the conclusion on the outcome of the case.

We are however not in a position to give the detailed reasons for our decision within the limited time available. This is not an ordinary case but an important case involving the election of the President of the Republic of Uganda. It raises serious constitutional and legal issues, the answers to which and the reasons therefore, need to be elaborately articulated for future guidance. The effect of the decision on the governance and development of the country, and on the well being of the people of Uganda cannot be over emphasised. We shall for now announce the decision of the Court, and on a later date to be notified, we shall each read the detailed findings and reasons there for.

The decision of the Court is constituted in the findings on the framed issues. We find:

1. ***That during the Presidential Election 2007, the 2nd Respondent did not comply with provisions of the Presidential Elections Act-***

(a) in s.28, as it did not publish in the Gazette 14 days prior to nomination of candidates, a complete list of polling stations that were used in the election; and

(b) in s.32 (5), as is failed to supply to the Petitioner official copy of voters register for use by his agents on polling day.

2. ***That the said election was conducted partially in accordance with the principles laid down in the said Act, but that-***

(a) in some areas of the country, the principle of free and fair election was compromised;

(b) in the special polling stations for soldiers, the principle of transparency was not applied, and

(c) there was evidence that in a significant number of polling stations there was cheating.

3. By majority of three to two, that it was not proved to the satisfaction of the Court that the failure to comply with the provisions of, and principles laid down in, the said Act, as found in the first and second issues, affected the result of the election in a substantial manner.

4. By majority of three to two, that no illegal practice, or other offence under the said Act, was proved to the satisfaction of the Court, to have been committed in connection with the said election, by the 1st Respondent personally, or with his knowledge and consent or approval.

5. In the result, by majority decision it is ordered that the petition be and it is hereby dismissed

We shall here further counsel on the question of costs.

DATED at Kampala this 21st day of April, 2001

B. J.ODOKI
CHIEF JUSTICE

A. H. O. ODER
JUSTICE OF THE SUPREME COURT

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT

A. N. KAROKORA
JUSTICE OF THE SUPREME COURT

J. N. MULENGA
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS IS
A TRUE COPY OF THE ORIGINAL

W. MASALU MUSENE
REGISTRAR, THE SUPREME COURT

REASONS FOR JUDGMENT OF ODOKI, CJ.

This is an election petition filed by the petitioner Col. (Rtd.) Dr. Besigye Kizza against the 1st Respondent Mr. Museveni Yoweri Kaguta and the 2nd Respondent, the Electoral Commission, challenging the results of the Presidential Election held on 12th March 2001. The 2nd Respondent organised those elections and declared the 1st Respondent the winner. The petitioner seeks this court to declare: that Museveni Yoweri Kaguta was not validly elected as President, and that the election be annulled.

The petition was brought under the Presidential Elections Act 2000 (No.17 of 2000) and the Presidential Elections (Election Petitions) Rules 2001 (SI No.13 of 2000) Article 104 of the Constitution and Section 58 of the Presidential Elections Act 2000 provide that any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission as President was not validly elected, within ten days after the declaration of results. The Supreme Court is required to inquire and determine the petition expeditiously and declare its findings not later than thirty days from the date the petition is filed. Where an election is annulled, a fresh election must be held within twenty days from the date of the annulment.
On 23 March 2001 the Petitioner lodged a petition in the Supreme Court. It was accompanied by

an affidavit sworn by him. In his petition the Petitioner complains that the 2nd Respondent failed to comply with the Electoral Commission Act and the Presidential Election Act in various instances and that the non-compliance affected the results of the election in a substantial manner. The Petitioner also alleged in the petition that the 1st Respondent committed various illegal practices or election offences personally or by his agents with his knowledge and consent or approval. Five issues were framed by the Court. The hearing of the petition commenced on 3rd March and was concluded on 13th March 2001.

The petition symbolised the restoration of democracy, constitutionalism and the rule of law in Uganda. It demonstrated the fundamental democratic values contained in the 1995 Constitution, which includes the sovereignty of the people, the right of the people to choose their leaders through regular free and fair elections and the peaceful resolution of disputes. It was an important petition because it involves the election of a Head of State, Head of Government and Commander-in-Chief of the Uganda Peoples Defence Forces and the Fountain of Honour. The petition was bound to affect the entire nation because the election of a President is by universal adult suffrage through a secret ballot. The outcome of the petition would have far reaching consequences on the peace, stability, unity and development of Uganda.

We gave our judgment on 21st April 2001 dismissing the petition with an order that each party bears its own costs. The Court's findings on each issue were as follows:

> ***"1. That during the Presidential Election 2001, the 2nd Respondent did not comply with provisions of the Presidential Elections Act:***
>
> ***(a) in s,28, as it did not publish in the Gazette 14 days prior to nomination of candidates, a complete list of polling stations that were used in the election; and***
>
> ***(b) in s.32 (5), as it failed to supply to the Petitioner official copy of voters register for use by his agents on polling day***
>
> ***2. That the said election was conducted partially in accordance with the principles laid down in the said Act, but that:***

(a) in some areas of the country, the principle of free and fair election was compromised;

(b) in the special Polling Stations for soldiers, the principle of transparency was not applied; and

(c) there was evidence that in a significant number of Polling Stations there was cheating.

3. By majority of three to two, that it was not proved to the satisfaction of the Court that the failure to comply with the provisions of, and principles laid down in, the said Act, as found in the first and second issues, affected the result of the election in a substantial manner.

4. By majority of three to two, that no illegal practice, or other offence under the said Act, was proved to the satisfaction of the Court, to have been committed in connection with the said election by the 1st Respondent personally, or with his knowledge and consent or approval

5. In the result, by majority decision it is ordered that the Petition be and it is hereby dismissed-"

We ordered that each party bears its own costs.

We reserved the reasons for our judgment. I now give the reasons for my judgment dismissing the Petition.

Background to the Petition:

On 12th March 2001, Ugandans went to the polls to elect a President. These were the second presidential Elections held under the 1 995 Constitution. The first elections were held in 1996. Those elections were won by the 1st Respondent who is the incumbent President. The term of the office of President is five years and the President cannot hold office for more than two terms.

At the March 2001 elections, there were six candidates namely: the petitioner Besigye Kizza, Awori Aggrey, Bwengye Francis, Karuhanga K. Chapaa, Kibirige Mayanja Muhammad and Museveni Yoweri Kaguta, the 1st Respondent. The Electoral Commission returned by its declaration dated 14 March 2001 the 1st Respondent as the validly elected President, having obtained 69.3% of the votes cast at the election. The Petitioner obtained 27.8% of the votes cast.

The particulars of the complaints against the 2nd Respondent are contained in para 3(1) of the petition. They are failure to publish additional Polling Stations in time, failure to publish a full list of all Polling Stations in each Constituency 14 days before nomination day, failure to supply copies of the final Voters Register, the Voters Roll for each Constituency and the Voters Roll for each Polling Station; and failure to display copies of the Voters roll for each Parish or Ward for a period of 21 days. Other complaints are chasing away of the Petitioner's agents from many Polling Stations, allowing voting before or after official polling time, stuffing ballot boxes with ballot papers and failure to open the ballot boxes in full view of those present, and allowing people to vote more than once.

The petitioner also complained against the 2nd Respondent that one of its Commissioner and two officials were involved in electoral offences and were charged in court, that the 2nd Respondent failed to control distribution and use of ballot boxes and papers resulting in commission of election offences. The Petitioner further complained that the 2nd Respondent allowed people under 18 years of age to vote, it failed to prevent Petitioner's agents being chased away from Polling Stations, it allowed people with no valid Voters Cards to vote, it allowed people with deadly weapon namely soldiers and para-military personnel to be present at Polling Stations, it denied the Petitioner's Polling Agents information concerning the counting and tallying process, and it declared results of the election when all the Electoral Commissioners had not signed the Declaration Results Form.

Other Petitioner's complaints are that the 2nd Respondent failed to ensure that the electoral process was conducted under conditions of freedom and fairness and as a result the campaigns of the Petitioner and his agents were interfered with, that some of the Petitioner's agents and supporters were abducted and arrested, that some of the 2nd Respondent's agents ticked ballot papers in favour of the 1st Respondent and others stuffed ballot boxes with ticked ballot papers

and that as a result of such non-compliance with the provisions of the Act and the Election Act affected the result of the election in a substantial manner.

The Petitioner alleges in the petition that the 1st Respondent committed various illegal practices or election offences personally or by his agents with his knowledge and consent or approval. The first allegation against the 1st Respondent is that contrary to section 65 of the Act he publicly and maliciously made a false statement that the Petitioner was a victim of Aids without any reasonable ground to believe that it was true and that this false statement had the effect of promoting the election of the 1st Respondent unfairly in preference to the Petitioner alleged to be a victim of Aids as voters were scared of voting for your Petitioner who by necessary implication was destined to fail to carry out the functions of the demanding office of President and to serve out the statutory term.

The second complaint is that contrary to section 63 of the Act the 1st Respondent and his agents with the 1st Respondent's knowledge and consent offered gifts to voters with the intention of inducing them to vote for him.

The third allegation is that contrary to section 12 (1) (e) and (f) of the Electoral Commission Act the 1st Respondent appointed Major General Jeje Odongo and other partisan Senior Military Officers to take charge of security of the Presidential Election process and thereafter a partisan section of the army was deployed all over the country with the result that very many Voters either voted for the 1st Respondent under coercion and fear or abstained from voting altogether.

The fourth allegation is that contrary to section 25 (b) of the Act the 1st Respondent organised groups under the Presidential Protection Unit and his Senior Presidential Adviser a one Major Kakooza Mutale with his Kalangala Action Plan para-military personnel to use force and violence against persons suspected of not supporting the 1st Respondent thereby causing a breach of peace and induced others to vote against their conscience in order to gain unfair advantage for the 1st Respondent in the election.

The fifth complaint is that contrary to section 25 (e) of the Act the 1st Respondent threatened that he would put the Petitioner six feet deep - which meant causing death to the Petitioner.

Finally, the Petitioner alleges that the said illegal practices and offences were committed by the 1st Respondent personally or and his agents and supporters with his knowledge and consent or approval through the Military, Presidential protection Unit and other organs of the State attached to his office and under his command as the President, Commander-in-Chief of the Armed Forces.

The 2nd Respondent filed an answer to the petition accompanied by an affidavit sworn by its Chairman, Hajji Aziz Kasujja. In its answer the 2nd Respondent admits some of the alleged facts but gives explanations and denies others.

The 2nd Respondent denied creating new Polling Stations but stated that existing Stations were split to ease the voting process and it affected all candidates equally.

The 2nd Respondent denied refusing to supply to the Petitioner copies of the final Voters Register but stated that the non-delivery was due to insufficient time to prepare the Register. It further denied that it failed to efficiently compile, maintain and up-date the Voters Register and denied knowledge of dead or illegible people remaining of the Register. The 2nd Respondent stated that the Voters Register was displayed for five days throughout the country. It denied knowledge that polling agents of any presidential candidate was chased away, and denied that it or its agents allowed voting before or after official polling hours. The 2nd Respondent denied allowing the stuffing of ballot boxes, or anybody to vote more than once. It denied intruders being allowed to tamper with Voters Registers and Rolls or voting materials.

The 2nd Respondent admitted that one Commissioner and two other employees were arrested and charged in court and their cases had not been determined; and the matter was therefore subjudice. The 2nd Respondent denied knowledge that the agents of the 1st Respondent interfered with the electioneering activities of the Petitioner, or that people below the age of 18 years were allowed to vote. It denied allowing armed people in any Polling Stations. The 2nd Respondent averred that polling agents of all candidates has access to information concerning counting and tallying process, and that the results of the election were declared in compliance with the law. It denied knowledge of any abductions or arrests of the Petitioner's agents or that its servants/agents ticked ballot papers in favour of the 1st Respondent and gave them to the voters.

The 2nd Respondent further stated in its answer to the petition that the Presidential Election process was conducted under conditions of freedom and fairness and that there was no proof of non-compliance with the Act, and that the non-compliance affected the result in a substantial manner. The 2nd Respondent denied knowledge of any allegations leveled against the 1st Respondent, and avers that the elections were free and fair as it reflected the wishes of the majority of Ugandans and international observers who monitored the elections throughout the country and confirmed this position.

In his answer to the petition accompanied by an affidavit sworn by him, the 1st Respondent denied that his agents/supporters did interfere "with the electioneering activities of the Petitioner and his agents" but he contended that the entire Presidential Electoral Process was conducted under conditions of freedom and fairness and that he obtained "more than 50% of valid votes of those entitled to vote".

The 1st Respondent stated the statement that the "Petitioner was a victim of AIDS" was not made by the 1st Respondent publicly or maliciously for the purpose of promoting or procuring an election for himself contrary to section 65 of the Act but that it was true that a companion of the Petitioner, Judith Bitwire, and her child with the Petitioner died of AIDS. The 1st Respondent had known the Petitioner for a long time and had seen his appearance change over time to bear obvious resemblance to other Aids victims that the 1st Respondent had previously observed.

The 1st Respondent denied that neither him nor his agents with his knowledge and consent or approval offered gifts to voters with the intention of inducing them to vote for him.

The 1st Respondent stated that the entire electoral process was conducted under conditions of freedom and fairness and secure conditions necessary for the conduct of the election in accordance with the Act and other laws.

The 1st Respondent denied threatening that he would put the Petitioner six feet deep as alleged in the Petition but stated that prior to the election process, in his capacity as President and commander-in-Chief, he warned that any person who interfered with the army would be put six feet deep.

He stated that he made the statement on the 27th November 2000 at the National Conference of the Movement and made this statement for the security, good governance and order of the country to deter subversion in the army. The Respondent did not make the statement for the purpose alleged.

The Issues:

Five issues were framed by the Court in consultation with the Counsel for the parties. These were as follows:

1. Whether during the 2001 election of the President, there was noncompliance with provisions of the Presidential Elections Act, 2000.

2. Whether the said election was not conducted in accordance with the principles laid down in the provisions of the said Act.

3. Whether, if the first and second issues are answered in the affirmative, such non-compliance with the provisions and principles of the said Act, affected the result of the election in a substantial manner.

4. Whether an illegal practice or any other offence under the said Act was committed, in connection with the said election, by the 1st Respondent personally or with his knowledge and consent or approval.

5. What reliefs are available to the parties?

I answered the first two issues in the affirmative and answered the third and fourth issue in the negative. Consequently I dismissed the Petition and ordered each party to bear its own costs.

The Burden of Proof:

All counsel for the parties in this petition agreed that the burden of proof lies on the Petitioner to prove the allegations made against the Respondents to the satisfaction of the Court. The common

position is supported by the provisions of Section 58 (6) of the Presidential Elections Act as interpreted by judicial decisions. Section 58 (6) of the Act provides,

"the election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the Court-"

In Mbowe v Eliufoo (1967) EA 240 Georges, CJ in the Tanzanian High Court said at page 241,

"There has been much argument as to the meaning of the term "proved to the satisfaction of the Court.

In my view it is clear that the burden of proof must be on the Petitioner rather than the Respondents because it is he who seeks to have this election declared void"

The decision in Mbowe v Eliufoo (supra) has been cited with approval by the Uganda Courts in the cases of Odetta v Omeda, Election Petition NO.1 of 1996 Margaret Zziwa v Naava Nabagesera, Civil App. No. 39 of 1 997 (CA). Katwiremu Bategana v Mushemeza and 2 Others, Election Petition No.1 of 1966 (HC) Mbarara) and Ayena Odong v Ben Wacha & Another, Election Petition No.2 of 1966 (HC.).

In my view the burden of proof in election petitions as in other civil cases in settled. It lies on the Petitioner to prove his case to the satisfaction of the court. The only controversy surrounds the standard of proof required to satisfy the court. Counsels for the parties were generally agreed on the standard of proof. Mr. Balikuddembe submitted that the standard is not proof beyond reasonable doubt but a standard slightly higher than in an ordinary civil case, that standard being the required to prove an allegation of fraud. For the Respondents both Mr. Kabatsi and Dr. Khaminwa agreed that the standard is not proof beyond reasonable doubt, but very close to it. The courts in Uganda have not been consistent but the preponderance of opinion has gravitated towards the standard of proof of beyond reasonable doubt, which is the standard required in criminal cases. In Katwiremu Bategana v Mushemeza & Other (supra) Musoke Kibuuka, J said,

> ***"A number of decisions of this Court in recent election petition trials have come out to state in no uncertain terms that the standard of proof which is required for proving allegation in election petition is proof beyond reasonable doubt. This was the position***

adopted, for instance by Ouma J in Michael A. Ogola v Akika Othieno Emmanuel, Election Petition No.2 of 1996 (at Tororo High Court Registry). It was also the position adopted by G. M. Okello, J in Ayena Odongo K C v Ben Wacha and R O Apac Election Petition No.2 of 1996 (at Gulu High court Registry). The same position was adopted by Lady Justice Mpagi Bahigeine in Aloysius Liiga v Wasswa John Richard, Election Petition No.2 of 1996 at Mukono. On the other hand Katutsi, J in Alisemera Babiiha v R. O. Bundibugvo v Bikorendia Aida, Election Petition Dir MFP 1 of 1996 at Fort Portal High Court Registry after reviewing the decisions in both Mbowe's case and Baters case (both supra) had the following to state,

'The standard of proof therefore required to prove these allegations must be proportionally higher than in ordinary civil suits. This is the standard of proof I will adopt in this case'."

Musoke Kibuuka, J agreed with the view held by Katutsi, J when he concluded,

"There is therefore one important aspect of this procedural dichotomy. That is the fact that everyone seems to be agreed that whatever name is given the standard of proof required for an allegation to be proved to the satisfaction of the court under Section 91 (1) of the parliamentary Elections (Inter IM Provisions) Statute 1996 is proof which is higher than that which is required in ordinary civil suits. That in my view is sufficient for the disposal of the allegations made in this petition."

On the other hand in Margaret Zziwa and 2 others (supra) the Court of Appeal of Uganda said,

"The effect of the holding in the Mbowe case and the Uganda cases that have followed that decision, is that grounds for setting aside an election of a successful parliamentary candidate set out in S.91 of Statute 4 of 1996 must be proved beyond reasonable doubt. This is because the court cannot be satisfied if there was a reasonable doubt."

The difference of opinion on the standard of proof in election petitions springs from the interpretation given to the decision of the Court of Appeal in Bater v Bater (1950) 2 All ER 456.

This was a divorce case where in dismissing the petition of the wife on the ground of cruelty, the court said that she must prove her case beyond reasonable doubt. On appeal the Court of Appeal held that this was a correct statement of the law and the court had not misdirected itself.

Bucknill L J said,

> ***"I do not understand how a court can be satisfied that a charge has been proved - and the statute requires that the court shall be satisfied before pronouncing a decree - if at the end of the case the court has a reasonable doubt whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind. I will add this. I regard proceedings for divorce as proceedings of a very great importance, not only to the parties, but also to the State. — If a high standard of proof is required because of the importance of a particular case to the parties and also to the community, divorce proceedings require that high standard."***

Denning LJ on his part sought to play down the difference of opinion on the standard of proof. He thought it was a matter of playing with words as there was no absolute standard in either civil or criminal cases, the standards varying from case to case depending on the gravity of the matter. He observed,

> ***"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything. It is true to that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that in proportion as to the crime is enormous so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when considering a charge of a***

criminal nature, but still it does require a degree of probability, which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject matter." -

Bater v Bater (supra) was divorce case; but it was followed in Mbowe v Eliufoo (supra), which was dealing with an election petition, because the wording of the sections imposed the burden of proof on the petition to prove the allegations to the satisfaction of the court In Mbowe v Eliufoo (supra) Georges, CJ said,

"And the standard of proof is one which involves proof to the satisfaction of the court. In my view these words in fact mean the same thing as satisfying the court. There have been some authorities on this matter and in particular there is the case of Bater v Bater (supra). That case dealt not with election petitions, but with divorce, but the statutory provisions are similar i.e. the court had to be satisfied that one or more of the grounds set out in S.99 (2) (a) has been established. There Denning, CJ in his judgement took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exist then it is impossible to say that one is satisfied and with that view I quite respectfully agree and say that the standard of proof in this case must be such that one has no reasonable doubt that one or more of the grounds set out in S.99 have been established."

It should be noted that Georges, CJ carefully avoided holding that the standard of proof was beyond reasonable doubt. On a subsequent English case, Blyth v Blyth (1966) A C 643, the House of Lords in a divorce case based on adultery by a wife, who pleaded condonation, it was held that there was no statutory requirement that the absence of condonation must be proved beyond reasonable doubt. In matrimonial cases, as in other civil cases, the proof must be by a preponderance of probability, the degree of probability depending on the subject matter, so that in proportion as to the offence is grave, so the proof should be clear. It is interesting to note that two out of three Lords dissented. Lord Denning who was among the majority had this to say,

"My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be

unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it: nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When Parliament has ordained that a court must be satisfied only Parliament can prescribe a lesser requirement. No one whether he is a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt. It may be however that in some sets of circumstances and in regard to some issues the state of being satisfied (and so eliminating reasonable doubt) is much more easily reached than in others. The measure of what is a reasonable doubt will vary with the circumstance. But the standard of proof has been laid down by parliament when it directs that a court must be satisfied."

I entirely agree with those observations by Lord Denning. The standard of proof required in this petition is proof to the satisfaction of the court. It is true t hat a court may not be satisfied if it entertains a reasonable doubt, but the degree of proof will depend on the gravity of the matter to be proved.

An election petition is not a criminal proceeding. Section 58 (7) of the Presidential Elections Act provides that nothing in this section confers upon the Supreme Court when hearing an election petition power to convict a person for a criminal offence. The high standard of proof in criminal cases is intended to protect the liberty of the citizen. If the legislature intended to provide that the standard of proof in an election petition shall be beyond reasonable doubt, it would have said so. Since the Legislature chose to use the words "proved to the satisfaction of the court", it is my view that that is the standard of proof required in an election petition of this kind. It is a standard of proof that is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance.

Affidavit Evidence:

All evidence at the trial of an election petition is required to be adduced by affidavits. Cross-examination of the deponents may be permitted only with the leave of the court. This is provided in Rule 14, which states in material parts as follows:

"(1) Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.

(2) ***With leave of the court, any person swearing an affidavit which is before the court may be cross-examined by the opposite party and reexamined by the party on behalf of whom the affidavit is sworn."***

Accordingly parties filed many affidavits to support their respective cases. The Petitioner filed 174 affidavits both in support of the petition and in reply to the affidavits of the 1st and 2nd Respondents, who in turn filed 133 and 88 affidavits respectively. The filing of affidavits continued throughout the hearing of the petition. However, leave was granted to the Petitioner to call and cross-examine one deponent, Dr. Diana Atwine, who had sworn an affidavit in support of the 1st Respondent.

Mr. Nkurunziza learned counsel for the 1st Respondent submitted that three categories of affidavits were filed by the Petitioner as follows:

(i) Affidavits which are inadmissible in law.
(ii) Affidavits specifically referred to in submission by the counsel for the Petitioner.
(iii) Affidavits filed but not referred to during submissions.

As regards affidavits, which are inadmissible in law, Mr. Nkurunziza identified again three categories namely,

(i) Affidavit sworn outside Uganda.
(ii) Affidavits sworn before advocates appearing in the petition.
(iii) Affidavits sworn in breach of Order 17r.3 of the Civil Procedure Rules.

Mr. Balikuddembe learned leading counsel for the Petitioner challenged the admissibility of the affidavit accompanying the answer of the 1st Respondent.

Hon. Okwir Rwaboni filed an affidavit sworn before a Solicitor in the United Kingdom. It was submitted by Mr. Nkurunziza that under section 7(3) of the Statutory Declarations Act No.10 of 2000, a statutory declaration taken outside Uganda cannot be received in evidence unless it is registered under the Registration of Documents Act. In this case, there was no evidence that Hon. Okwir's declaration was registered. Mr. Balikuddembe learned leading counsel for the Petitioner

argued that Hon. Okwir's affidavit was sown for use in this court and was admissible by virtue of the provisions of Sections 3 and 4 of the Statutory Declarations Act 2000.

Section 3 of the Statutory Declarations Act provides,

"After the commencement of this Act no affidavit shall be sworn for any purpose except -
(a) Where it relates to any proceedings application or other matter commenced in any court of referable to a court
(b) Where under any written law an affidavit is authorised to be sworn."

On the other hand Section 4 provides that in every case to which Section 3 does not apply, a person wishing to depose to any fact for any purpose may do so by means of statutory declaration.

Under Section 7(1) a person wishing to depose outside Uganda to any fact for any purpose in Uganda, he may make a statutory declaration before any person authorised to take a statutory declaration by the law of the country in which the declaration is made. It is provided under Section 7(3) that a statutory declaration taken outside Uganda under this section shall not be admissible in evidence unless it is registered with the Registrar of documents under the Registration Documents Act.

The issue in this case in whether the document filed by Hon. Okwir is an affidavit or a statutory declaration. The document is headed "affidavit". But at the end of it he stated "And I made this solemn declaration conscientiously believing the same to be true and by virtue of the Statutory Declarations Act 1 35." It was declared before Solicitor/Commissioner for Oaths.

It seems to me the Hon. Okwir intended to swear an affidavit, but the form the document took was that of a statutory declaration. If the document was for use in these court proceedings it could not be a statutory declaration but an affidavit. The document was witnessed by a Solicitor/Commissioner for Oaths who had the power to administer an affidavit. The most important element is that it was made on oath. I think this is a matter of form which I should disregard by applying the principle set out in article 126 that substantial justice shall be

administered without undue regard to technicalities, given the special circumstances of this Petition.

Eleven affidavits were challenged as in admissible on account of having been sworn before two advocates who were part of the team of counsel for the Petitioner, namely Mr. Kiyemba Mutale and Mr. Wycliff Birungi. Mr. Balikuddembe counsel for the Petitioner stated from the Bar that by the time the two advocates commissioned the affidavits, there were not members of the team representing the Petitioner. This statement was not challenged.

The proviso to Section 5(1) of the Commissioner for Oaths (Advocates) Act Cap. 53 states, ***"Provided that a Commissioner for Oaths shall not exercise any of the powers given under this section in any proceeding or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter or clerk to such advocate or in which he is interested."***

In view of the fact that Mr. Balikuddembe's statement was not challenged nor is there evidence to prove that the two advocates were already acting for the Petitioner or otherwise participating in the proceedings I am not satisfied that the affidavits they commissioned are inadmissible.

It was submitted for the 1 **St** Respondent that the many affidavits filed by the Petitioner offended Order 17 r.3 of the Civil Procedure Rules and were therefore in admissible. Order 17 r.3 provides,

> ***"(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except in interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated-"***
> ***(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall unless the court otherwise directs, be paid by the party filing the same."***

Mr. Nkurunziza learned counsel for the Respondent submitted that this petition was not an interlocutory proceeding but a final proceeding which will determine the rights of the parties conclusively and therefore any affidavit which is not confined to such facts as the deponent is

able to prove by his own knowledge is in breach of this rule and should be rejected by the court. Counsel relied on the decisions in Paul Semogerere and Z. Olum v Attorney General, Constitutional Petition No.3/99, Charles Mubiru v Attorney General, Constitutional Appeal No.1 of 2001. Kibwimukva v Kasigwa (1978) HCB –

Learned counsel submitted further that the affidavits did not distinguish which facts were based on knowledge, and which were based on information and belief, nor were the sources of information disclosed. He also contended that is was not possible for a court to server defective parts from other parts in an affidavit but the defective portion vitiated the whole document. He relied on the decision of the High Court in Sirazali C M Hudoni v Amiran, Tejani and Others HCS No.712 of 1995,

Mr. Balikuddembe learned counsel for the Petitioner submitted that the court had discretion to admit some parts of the affidavit and reject other which are defective in the same way the court has power to reject hearsay evidence. He referred to the decision of the Supreme Court in Reamation Ltd. v Uganda Cooperative Creameries Civil Appl. No.7/2000 and Motor Mart (U) Ltd. v Yona Kanyomozi Civil Appl. No.6 of 1999 where he contended that the court exercised its discretion to sever the affidavit and exclude hearsay matters.

In Assanand & Son Uganda Ltd. v East African Records Ltd. (1 959) EA 360 and Caspair Ltd. v Harry Grandy (1962) EA 414, the Court of Appeal held that a court should not act on an affidavit which did not distinguish between maters stated on information and belief and matters to which the deponent swears from his own knowledge, or an affidavit which does not set out the deponents means of knowledge or his grounds of belief regarding the matter stated on information. In Assanand & Sons v EA Records (1 959) EA 360 at p.364, the learned President of the Court of Appeal said,

> ***"The affidavit of Mr. Campbell was deficient in three respects. First it did not set out the deponent's means of knowledge or his grounds or belief regarding the matters stated on information and belief, and secondly it did not distinguish between matters stated in information and belief and matters deposed to from the deponents knowledge (see O.***

XVIII r.3 (1) and Standard Goods Corporation Ltd. v Harakchand Nathu &. (1950) 17 EACA 99). The court should not have acted upon an affidavit so drawn."

In Standard Goods Corporation Ltd. v Harakchand Nathu & Co. (1950) 17 EACA 99 the Court of Appeal held that it is well settled that where an affidavit is made on information it should not be acted upon by the court unless the sources of information are specified. At p.100, the court said

> ***"The affidavit in question consisted of seven paragraphs. Para 2 was the facts stated herein are within my knowledge; and para 7 was what is stated herein is true and correct to the best of my knowledge and information. As regards paragraph 2, I would observe that facts can be within a person's knowledge in two ways: (1) by his own physical observation or (2) by information given to him by someone else. It is clear that reading paragraphs 2 and 7 of the affidavit together, the deponent was stating facts without stating which were from his own observation and which were from information. An affidavit of this kind ought never to be accepted by a court as justifying an order based on the so called facts."***

Affidavits based on information and belief should be restricted to interlocutory matters. In proceedings which finally determine the matter only affidavits based on the deponent's knowledge should be acted upon. See Paulo K. Ssemogerere and Z Olum v Attorney General, Constitutional Petition No.3 of 1 999, and Charles Mubiru v Attorney General, Constitutional Appeal No.1 of 2001. In Paulo K. Ssemogerere and Z. Olum v. Attorney General (supra) the Constitutional Court of Uganda held (per Berko JA):

> ***"except in purely interlocutory matters affidavits must be restricted to matters within the personal knowledge of the deponent. They must not be based on information or be expression of opinion. Affidavits should be strictly confined to such facts, as the deponent is able of his own knowledge to prove. Affidavits by person having no personal knowledge of the facts and merely echoing the statement of claim cannot be used at the hearing."***

The Court of Appeal distinguished the cases of Nassand & Sons (Uganda) Ltd v East African Records Ltd (1959) EA 360, Standard Goods Corporation Ltd. v Harakchand Nathu 7 Co. (1950) 17 EACA 99 and Aristella Kabwimukya v John Kasigwa (1 978) HCB which concerned interlocutory applications.

The Court pointed out,

"A Constitutional Petition is not an interlocutory application. Therefore an affidavit in support of it must be restricted to facts the deponent is able of his own knowledge to prove and not facts based on information and belief"

It held that an affidavit based on information given to the deponent by someone else is hearsay and inadmissible to support the petition.

In Charles Mubiru v Attorney General Constitutional Appeal No. 1 of 2001, the Constitutional Court of Uganda held, relying on its decision in Ssemogerere & Another v Attorney General (supra) that an affidavit by the Petitioner which was merely echoing the information his advocate has given him was not based on his personal knowledge and could not be relied upon in a Constitutional Petition. An election petition is not an interlocutory proceedings but a final proceedings, which is aimed at determining the merits of the case. Therefore affidavits admissible in such proceedings must be based on the deponent's knowledge, not on his information and belief.

The issue for determination is what should be the fate of affidavits filed by either party, which do not strictly comply with the law as stated above. Specifically, should all the affidavits which do not contain matters deposed from the deponent's knowledge as well as those based on information and belief be acted upon whether they distinguish which facts are deposed from own knowledge and those based on information and belief?

There are two types of affidavits. The first is one, which distinguishes the facts based on knowledge and those on information and belief. The second category are those affidavits which contain matters based on knowledge, information and belief without distinguishing which facts are based on knowledge. A common formula for ending the second category of affidavits is

"That all that is herein stated is true and correct to the best of my knowledge and belief" as most of the affidavits in Vol. 2 of the Petitioner's affidavits. Facts based on belief are inadmissible in an election petition.

It was submitted for the Petitioner that the Court has discretion to sever the defective parts of affidavit, and act on the rest of the affidavit. There is some authority for the proposition that in proper cases, a court may sever parts of the affidavit, which are defective or superfluous instead of rejecting the whole affidavit.

In Nandala v Lyding (1963) EA 706 the affidavit supporting an application ended in para 6 with the words that "what is stated therein is true to my best of my knowledge, information and belief".

At the beginning of the hearing of an application, counsel for the defendant submitted that the whole affidavit should be struck off as it contravened 0. 17 r 13 of the Civil Procedure Rules as it did not disclose the source of the deponent's knowledge, information and belief. Sir Udo Udoma CJ held that the concluding paragraph of the affidavit was empty verbiage and unnecessary and that it should be struck off since the contents of the rest of the affidavit were statements of facts within the knowledge of the plaintiff and related to his own personal knowledge and accordingly 0.1 7 r 3 was not contravened.

Udo Udoma, CJ said at page 710,

> *"I am satisfied that the contents of pare. 6 of the affidavit are mere empty verbiage - a surplusage - which bear no relation to the contents of the affidavit as a whole. It is therefore severable from the rest of the remaining paragraphs of the affidavit, as in my view, the contents of pares 1-5 of the affidavit are statements of facts pecuniary within the knowledge of the deponent and relate to his own personal activities.*
> *In the circumstances I would strike off para 6 of the affidavit leaving thereby the rest of the affidavit as I am satisfied that the Contents thereof are facts which the deponent is*

able of his own knowledge to prove. Accordingly para 6 of the affidavit is hereby struck off"

In Zola v Ralli Bros Ltd (1969) EA 691 the East African Court of Appeal held that the trial Judge could exercise his discretion to act on an affidavit which was merely defective in some respects, and was not a nullity. Newbold R said at page 693,

"As regards the submission that the affidavit of Mr. Harkness was a nullity because it failed to comply with the provisions of 0.18 and 0.35 and the trial judge should not have acted upon it but should have dismissed the motion. I agree that if the affidavit is a nullity then the trial judge could not act on it and the motion should have been dismissed. As I have said in other cases the courts should hesitate treat an incorrect or irregular act as a nullity, particularly where the act relates to matters of procedure [see Prabhudas & Co. v The Standard Bank Ltd. (1968) EA 670]. It was urged that Mr. Harkness could not swear positively to the facts verifying the cause of action, It is difficult to envisage, in the circumstances of this case, of a more suitable person to swear the affidavit on behalf of plaintiffs, who could not themselves swear to it, than Mr. Harkness, who was the manager of the Standard Bank, one of the plaintiffs, and who had personal knowledge of at least some of the relevant facts and who would be intimately concerned with the accounts of the parties in the Standard Bank. It is to be noted that according to his affidavit the amounts lent by the plaintiffs were credited to the account of the Sisal Co. in the branch of the Standard Bank of which he was manager. It was also urged that the affidavit did not distinguish clearly between those facts within the knowledge of Mr. Harkness and those facts stated on information and belief, nor did it set out Mr. Harkness's means of knowledge, nor the grounds for belief on matters stated on information and belief. I do not agree. There is scarcely and affidavit, or indeed any document, which cannot be criticised. It may be that the affidavit could have been more explicit in certain respects, but there is set out there in the means of knowledge and the grounds of belief and the source of information in respect of each of the matters stated on knowledge, belief or information. I am satisfied that the affidavit complied with the provisions of 0.35 and 0.18 and substantially with the requirements

relating to affidavits as set out in the decisions of this court in Assanand & Sons v East African Records. (1959) EA 360 and Standard Goods Corporation v Nathu & Company (1950), 17 EACA 99, to which we were referred by Mr. Salter. I am also satisfied that there is no reason to hold that the affidavit was a nullity. If it was merely irregular in some respects it was open to the trial judge in his discretion to act upon it. He has done so and I see no reason whatsoever, to interfere with the exercise of his discretion."

In Reamation Ltd. v UGANDA Corporation Creameries Ltd. and Another Civil Application No.7 of 2001, Motor Mart (U) Ltd. v Yona Kanyomozi Civil Appl. No.6 of 1 99 and Yona Kanyomozi v Motor Mart (U) Ltd. No.8 of 98, the Supreme Court adopted a liberal approach to affidavits. In Yona Kanyomozi v Motor Mart (U) Ltd. (supra) Mulenga, JSC held that some parts of counsel's affidavits were false and that those parts were irrelevant to the application and could be ignored. On a reference to the full Court, it was argued that the impugned affidavit was capable of severance as the single judge did before arriving at his decision. The full court held that it was unable to interfere with the discretion exercised by the single judge.

From the authorities I have cited there is a general trend towards taking a liberal approach in dealing with defective affidavits. This is in line with the constitutional directive enacted in article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it.

In the present case, the only method of adducing evidence is by affidavits. Many of them have been drawn up in a hurry to comply with the time limits for filing pleading and determining the petition. It would cause great injustice to the parties if all the affidavits which did not strictly conform to the rules of procedure were rejected. This is an exceptional case their all the relevant evidence that is admissible should be received in court. I shall therefore reject those affidavits, which are based on hearsay evidence only. I shall accept affidavits, which contain both admissible and hearsay evidence but reject the parts, which are based on hearsay, and only parts which are based on knowledge will be relied upon. As order 17r 3 (2) provides the costs of affidavits which contain hearsay matters should be borne by the party filing such affidavits.

Many affidavits were filed by the Petitioner but not specifically referred to by his counsel in their submissions. Counsel provided a list of such affidavits.

There was also a list showing affidavits of the Petitioner, which had not been rebutted or controverted. It was submitted that such affidavit should be taken to be admitted. I do not agree that they should be taken as gospel truth. I shall take into account all the various affidavits depending on their status and probative value as evidence in determining the issues in this petition.

Objection was raised to the admissibility of the affidavit sworn by the 1st Respondent in support of his answer to the Petition. Mr. Balikuddembe learned counsel for the Petitioner submitted that the affidavit did not conform to the form of the jurat, in that the affidavit does not show before whom the affidavit was sworn.

Section 6 of the Commissioner for Oaths (Advocates) Act states,

> ***"Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."***

Rule 9 of the schedule provides that the form of jurat is set out in the third schedule to the Rules. The form of Jurat is as follows:

"Sworn/Declared before me……. this ……Day of ……..20….. at……
COMMISSIONER OF OATHS"

The 1st Respondent's affidavit did not indicate the name or the title of the person before whom it was made. It merely contained a signature and the seal of High Court. It was submitted for the Respondent that the signature was that of the Registrar of the High Court, Mr. Gidudu who had power to administer an affidavit by virtue of his Office. Mr. Gidudu subsequently made an affidavit confirming that he is the person before whom the affidavit was sworn.

The Registrar of the High Court has by virtue of his Office all the powers and duties of a Commissioner for Oaths in accordance with Section 4 of the Commissioner for Oaths

(Advocates) Act. The Registrar's jurat fulfilled the essential requirements of the jurat namely the place and date the affidavit was made. But it should have included his name and title to strictly comply with the Form of Jurat contained in the schedule. The lack of proper form was however cured by the affidavit sworn by Mr. Gidudu. Accordingly, the objection raised against the affidavit sworn by the 1st Respondent had no merit.

Section 58 (3) of the Act requires this Court to inquire and determine the petition expeditiously and to declare its findings within thirty days from the date the petition is filed. It seems to me that it is by reason of expedition that all evidence at the trial has to be by affidavit. However, this mode of trial may not be suitable for an important and controversial case like this where the court is denied the opportunity to see the witnesses and to subject them to cross examination so that the court can properly and fairly assess the credibility and veracity of the witnesses which is necessary for the ascertainment of the truth. It is hoped that the procedure and period of hearing of petitions in presidential elections will be reviewed.

Issue No. 1: <u>Non-compliance with the Provisions of the Act:</u>

The first issue was whether during the 2001 election of the President there was non-compliance with the provisions of the Presidential Elections Act 2000 Section 58 (6) (a) of the Act provides,

"***(6.) The election of a candidate as a President shall only be annulled on any of the following grounds if proved to be satisfaction of the Court –***

(a) ***non-compliance with the provisions of this Act, if the Court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the noncompliance affected the result of the election in a substantial manner.***

Due to the manner in which the Section is drafted, four issues were framed arising from it relating to the non-compliance with provisions, non-compliance with principles and the effect of non-compliance on the result. I think that it would have been more convenient to combine the first and second issues because they are closely linked. Mere non-compliance with the provisions of the act does, not seem to be sufficient unless it resulted in a breach of the principles laid down in the Act.

The second difficulty with the Section arises out of the provisions of Section 2 (2) of the Act, which provides,

> ***"The Commission Act shall be construed as one with this Act."***

This formula of drafting was explained in Craines on Statute Law 7th edn. 1 971 at page 1 38 as follows:

> ***"Act to be construed as one with another***
>
> ***It is now a common Practice to insert clauses which make certain Acts one for the purposes of Construction i.e. certain Acts which are to be read with one another Act or Acts. The effect of enacting that an Act shall be construed as one with another is that the court must construe as one with another Act is that the court must construe every part of each of the Acts as it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent, modified something found in the earlier Act or that from internal evidence the reference of the later to the earlier Act does not effect a complete incorporation of the provisions of the two Acts."***

A similar interpretation and purpose is given in Halsburys Laws or England 4th edn. Para 890 page 544.

The Presidential Elections Act and the Electoral Commissions Act must therefore be read together and every provision of each of the Acts must be interpreted as if it has been incorporated in one Act, unless there is a clear inconsistency or ambiguity which is resolved by holding that the later Act modified the earlier Act. This technique of drafting is sometimes referred to as incorporation by reference and is not free from difficulties of interpretation.

It seems to me that the grounds for annulling a Presidential Election must be those contained only in the Presidential Elections Act. Therefore the phrase "non-compliance with the provisions of this Act" appears to mean non-compliance with the provisions of the Presidential Elections Act only. However when considering non-compliance with the principles of the Act, it seems to

me necessary to take into consideration the provisions of the Electoral Commission Act which contain the principles relating to a free and fair election.

It was submitted for the Petitioner that failure to comply with the provisions of the Electoral Commission Act is a ground for annulling a Presidential Election.

The 2nd Respondent averred in the answered to the Petition that such noncompliance is not a ground for annulling a Presidential Election.

In my view non-compliance with the provisions of the Commission Act is not per se a ground for annulling a Presidential Election. Such non-compliance can be a ground if it affects the principles behind the provisions of the Presidential Elections Act, which govern the annulment of Presidential Elections.

The presentation of the case for the Petitioner on the first issue dealt with all the allegations of non-compliance with the provisions of the Act against the 2nd Respondent. For convenience of consideration of the issues and to avoid unnecessary repetition, I shall deal with the allegations of non-compliance with the Act under the first issue, and those of non-compliance with the principles of the Act under the second issue.

Failure to Supply the Voters' Register:

The Petitioner alleges in paragraph 3(1) (d) of the Petition that contrary to Section 32(5) of the Act, the 2rd Respondent completed compiling a purported Final Voters Register on Saturday 10th March 2001 and failed when requested by the Petitioner to supply copies of the same to the Petitioner and his agents although the Petitioner was ready and willing to pay for them. In its answer to the Petition, the 2nd Respondent denied ever refusing any request by the Petitioner for copies of the final Voters Register as alleged but stated that non-delivery thereof was due to insufficient time to prepare the Register.

Section 35 (1) of the Act provides that a candidate may be present in person or her representatives or Polling Agents at each Polling Station for the purpose of safeguarding the interests of the candidate with regard to the polling process. Sub-section (5) states,

"(***5) The Polling Agents shall have an official copy of the Voters Register of the Polling Station at the candidates cost."***

In his affidavit in support of the Petition, the Petitioner stated that he had applied through his National Co-coordinator to be supplied with copies of the Final Voters Register for use by him and his Polling Agents on payment of the necessary charges by him, but the 2nd Respondent did not do so. In answer to the Petitioner's affidavit, Mr. Aziz Kasujja, Chairman of the 2nd Respondent, admitted receiving the Petitioner's request for a copy of the Register on 11 March 2001 but explained that there was no sufficient time to print the Register for the Petitioner on the eve of polling day, and he informed the Petitioner's Agent verbally.

No sound reason is given why the Voters Register could not be printed in time to be supplied to the Petitioner as required by law.

I am satisfied on the admission of the 2 Respondent that it did not comply with the provisions of Section 32(5) of the Act, in that it failed to supply the Petitioner with an official copy of the Voters Register for use by his agents on polling day.

Non-compliance with Respect to Polling Stations:

The Petitioner complains in para 3(1) (a) of the Petition that on l0th March 2001 less than 48 hours before the Polling day in addition to the Polling Stations duly published in the Uganda Gazettes of 22nd December 2000, 19th February 2001 and 9th March 2001 the 2nd Respondent made and added new Polling Stations out of time contrary to the provisions of Section 28 (1) (a) of the Act.

In paragraph 3(1) (b) of the Petition, the Petitioner complains that contrary to Section 28 of the Act the 2nd Respondent failed to publish a full a list of all Polling Stations in each Constituency 14 days before nomination day of 8th and 9th January 2001.

In his affidavit in support of the Petition, the Petitioner avers that on 11th March 2001 the 2nd Respondent supplied him with a list of gazetted Polling Stations with added new and ungazetted

Polling Stations and as a result he failed at the eleventh hour to appoint and deploy his polling agents to supervise all these new polling stations and safeguard his interests.

In the letter forwarding the list of all Polling Stations to all Task Force Mr. Kasujja stated, ***"The Electoral Commission informs all Presidential Candidates that the list of all Polling Stations countrywide is herewith attached.***

> ***NOTE: That some of the Polling Stations have been split for purposes of easing the voting process.***
> ***For this purpose Polling Agents for each candidate should be appointed in the spilt Polling Stations.***
> ***Please note that the changes have been alphabetically effected on the Register.***
> ***It should also be noted that these are not new Polling Stations. A copy of this letter hereby informs the Returning Officers and the respective Presiding officers."***

In his affidavit in reply to 2nd Respondent affidavit, the Petitioner alleged that there were 29 new Polling Stations in Makindye Division East with different station codes. He also cited new Polling Stations in Soroti Municipality and Nakawa Division in Kampala.

The 2nd Respondent pleaded in answer to the Petition that no new Polling Stations were, created but rather some existing Polling Stations were split for purposes of easing the voting process due to the big voters in those stations and that it was within the 2nd Respondent's powers to split the said Polling Stations. In his affidavit accompanying the answer, the Chairman of the 2nd Respondent Mr. Aziz Kasujja reaffirmed what had been pleaded in answer and added that all the candidates were duly informed and were able to appoint agents for those polling stations. In his supplementary affidavit in reply Mr. Kasujja denied that the splitting of Polling Stations was done to rig elections in favour of any candidate but to provide voter convenience, and that it was not necessary to display the Voters Rolls for the split Polling Stations as the Voters Rolls for the parent stations which included list of voters for the split stations had already been displayed. Section 28 of the Act requires the Commission to publish a list of Polling Stations and supply the lists to all returning officers. The relevant provision reads:

"(1) The Commission shall by notice in the Gazette publish –

(a) a list of the Polling Stations in each constituency at least fourteen days before nomination; and

(b) A list of the candidates nominated in alphabetical order with surnames first.

(2) The Commission shall forward each list referred to in subsection (1) to all returning officers; and the returning officers shall ensure that the lists relevant to each constituency are published widely in that constituency."

It was contended for the 2nd Respondent that the list of 11th March one-day before the polling day, did not contain new Polling Stations, but split ones. But according to the evidence of Mr. Mukasa David Bulonge the Head of the Election Monitoring Desk of the National Task Force of the Petitioner, that list contained 1176 new Polling Stations while 303 were missing although originally appearing in the previous gazettes. Examples of new stations were given in Makindye Division East, Soroti Municipality and Nakawa Division in Kampala.

In his supplementary affidavit in reply, Mr. Kasujja admits that some Polling Stations which had been gazetted were deleted from the list published on March 2001 but he explains that this was due to movement of people and the need to create voter convenience. He explains that such was the case in Kotido and Kapchorwa Districts, and also in Kkome Island sub-county in Mukono District. Mr. Kasujja's explanation about giving separate code number to so-called split Polling Stations was merely for administrative convenience.

The issue is whether the 2nd Respondent published a list of the Polling Stations for each constituency at least fourteen days before nomination of candidates. It is common ground that nomination of candidates was conducted on 8th and 9th January 2001. It is also not in dispute that the list of Polling Stations was published in the Uganda Gazettes of 22nd December 2000, 19th February and 9th March 2001. It is also admitted that the 2nd Respondent supplied the Petitioner with a list of gazetted Polling Stations on 11th March. It is clear that only the publication of the list 22nd December 2000 was within the prescribed period. The lists of February 19th and March 9th and 11th were outside the prescribed period.

The evidence on record shows that in Makindye Division East the list of 11th March 2001 indicated 29 more additional Polling Stations than the list published in the Gazette of 22nd

December 2000. The number of Polling Stations in all the 7 (seven) parishes was increased by varying numbers and there is no evidence to show that the split or additional Polling Stations were part of other Polling Stations.

In Soroti Municipality there were originally two Polling Stations as per gazette of 22nd December 2000, but in the list of 11th March 2001, there were four Polling Stations with separate codes. In Kinambogo Parish Buyende sub-county in Kamuli District, the original number of Polling Stations was four but on 11th March the number was increased to five. In Nakawa Division, Mbuya I Parish, the number of Polling Stations was increased from 8 to 10.

After carefully evaluating the evidence on this matter of additional Polling Stations I find that the split stations were in fact new Polling Stations with different codes. It is not necessary to establish the number of additional Polling Stations but the Petitioner's evidence which was not challenged put the number at 1176. The publication of these additional Polling Stations on 11th March 2001 was grossly out of time.

I must therefore find that the 2nd Respondent did not comply with the provisions of Section 28 of the Act when it failed to publish in the Gazette 14 days prior to the nomination of candidates' a complete list of Polling Stations that were used in the Presidential Election.

Conclusion on Issue No.1:

In his submission Mr. Mbabazi referred to the functions and powers of the 2nd Respondent in respect of registration of voters, update of Voters Registers, compilation of the Register and supply of Voters Roll to candidates agents, and submitted that there was no National Voters Register by 22nd January 2001, the date appointed by the 2nd Respondent as when the exercise of updating the Voters Register would be completed. He submitted further that the 2nd Respondent failed to supply the Voters Roll to the Petitioner because the Register was not ready.

He argued that the display period was inadequate and contrary to the prescribed period of 21 days. He contended that the issuance of cards was not properly done as the number of registered voters was not known. He submitted that in Makindye Division, there was an excess of votes by 97,787, and yet the 2nd Respondent explained that this was due to arithmetic error.

Mr. Mbabazi learned counsel for the Petitioner submitted that there was no National Voters Register by the 22 January 2001 the date appointed by the Chairman of the Commission as the date when the updating exercise would be completed. He submitted further that the register was not ready by 8th March 2001. As regards the display of the Voters' Register, Mr. Mbabazi submitted that it was supposed to be done within 21 days and the period must be gazetted to enable the Voters' Register to be subjected to public scrutiny.

As regards noncompliance with regard to Polling Stations, Mr. Mbabazi submitted that there were 11 76 new Polling Stations while 303 were missing although originally published in the Gazette. He also submitted that there were sham Polling Stations which did not appear in the Gazette or in the list of 11 March 2001. He referred to the affidavit of James Oluka who stated that he knew that there were two designated Polling Stations. But on the final list there were four Polling Stations and two for Akisim NRA Barracks. He referred to the affidavit of the Returning Officer where he admitted that there were three designated stations. Mr. Mbabazi concluded that it can be implied that there were two additional Polling Stations.

Learned counsel also referred to the affidavit of Ebulu Vicent who stated that inside Mbuya Barracks there were seven Polling Stations and Capt. Ondoga admitted they were seven. But in the list of Polling stations there were under Mbuya I and Mbuya II outside Quarter guard and yet in the Gazette there was one Polling Station as a Special area outside Quarter guard. He submitted that therefore there must have been at least six extra Polling Stations, but the number of people who voted there is not known. He asked whether these voters were part of the National Voters Register.

Mr. Mbabazi also referred to the affidavit of Mukasa who stated that there were five sham Polling Stations in Kitgum. These are also referred to by Ongee Marino who stated that they were six new stations not designated. Counsel submitted that the results from the tally sheets indicate that the 1st Respondent benefitted from these sham stations. Mr. Mbabazi concluded that if you examine the web of evidence from the lack of register you end up with the following malpractices multiple voting, ballot stuffing, denial to vote, voting by the under aged, ghost voters and falsification of results.

I think the submissions of Mr. Mbabazi have some merit. However he did not specifically address the principles which noncompliance with the provisions infringed. It is clear however, that the failure to produce an impeccable voter register resulted in a number of malpractices listed by Mr. Mbabazi like multiple voting, ballot stuffing, ghost voters and denial to vote. I shall deal with these aspects individually later.

The principles which were undermined by a defective voters' register were the principle of voter registration, right to vote, free and fair elections and transparency. The failure to publish the list of Polling Stations in time undermined all the principle of transparency. The failure to supply the Voters Rolls to the Petitioner's agents also undermined the principle of transparency.
Therefore there was partial compliance with the provisions of the Act.

Issue No.2. <u>Non-compliance, with the Principles of the Act:</u>

The second issue is whether the 2001 election of the President was not conducted in accordance with the principles laid down in the provisions of the Presidential Elections Act 2000. As I have already observed, Section 2 (2) of the Act stipulates that "the Commission Act shall be construed as one with this Act", thus incorporating the principles laid down in the Commission Act into the Presidential Elections Act.

Mr. Mbabazi learned counsel for the Petitioner submitted that the principles of the Act are transparency, representation of a candidate at a Polling Station, the right to vote, the right to register, freedom to vote and values of a democratic society. The principles were laid down in Section 12 and 19 of the Commission Act and articles 56 and 61 of the Constitution.

Later Mr. Mbabazi summarised the principles to consist of free and fair elections, right to vote, adult suffrage secret ballot and transparency. He concluded that the totality of the principles is that there must be a valid election under Section 51 of the Act and article 104 of the Constitution and a President who is validly elected.

Dr. Khaminwa learned counsel for the 1st Respondent observed that the Constitution and the Act do not define the principles of the Act. He submitted that the principles can be found in the Constitution and its Preamble, the Presidential Elections Act, the Electoral Commission Act, and

the Common Law cases. He cited the case of Hackney (1874) 31 L.T. 69, which contains the principles of secret voting, electors having a fair opportunity to cast their votes and arrangement of districts for convenience of voters.

The above principles were adopted in the case of Morgan v Simpson (1 975) Q B 151 (1974) 3 ALL ER 722 (CA) which emphasises that there must be voting by secret ballot, there must be no substantial departure from the procedure set out by Parliament as to render an ordinary person to condemn the election as a sham, and a substantial proportion of qualified voters should not be disfranchised. He summarised the principles to be that the elections must be free and fair, it must be by secret ballot and must be conducted in accordance with the procedure laid down by Parliament. The most important test is that a considerable number of voters must not be prevented from voting. The burden was on the Petitioner to demonstrate that a substantial number of voters were prevented from voting.

Mr. Kabatsi, learned counsel for the 2nd Respondent agreed with Mr. Mbabazi's list of principles of free and fair elections, vote by secret ballot and universal suffrage. These principles are contained in the Act and the Constitution. He submitted further that the principles of freedom and fairness were laid down in the case of AG v Kabourou (1995) 2 LRC 757 which emphasised that there must be laws put in place that promote conditions of freedom and fairness. He submitted that the Presidential Elections Act did that.

In my opinion, the principles of the Act can be summarised as follows:

- The election must be free and fair
- The election must be by universal adult suffrage, which under pins the right to register and to vote.
- The election must be conducted in accordance with the law and procedure laid down by Parliament.
- There must be transparency in the conduct of elections.
- The result of the elect ion must be based on the majority of the votes cast.

The overriding principle in my view is that the election must be free and fair. It is stated in the Commission Act that the Commission must ensure that the election is conducted under

conditions of freedom and fairness. In order to do so, the Commission must be independent and impartial in the conduct of elections.

The concept of free and fair elections is not defined in the Constitution or in any Act of Parliament. No judicial authority was cited to explain the concept. However, Mr. Walubiri learned counsel for the Petitioner referred to us passages from his book entitled "Uganda. Constitutionalism at Cross Roads 1999 (Walubiri PM (Ed) at p. 312 where he writes,

> ***"Article 69 (1) of the constitution requires that the choice of a political system be done through free and fair elections or a referendum. The Constitution does not define or describe the concept of "free and fair elections or referendum" International law and practice has over the years defined what contributes a free and fair election or referendum. You have to look at the totality of the exercise and make a value judgment."***

The author then quotes from Guy and S Goodwin Gills International, Law and Practice Inter Parliamentary Union Geneva, 1 994 where it is stated,

> ***"A successful election does not depend solely on what happens on ballot day, the totality of the process must be examined, including preliminary issues such as the nature of the electoral system, Voter organisation and civic education. The indices of a free and fair election are especially important with respect to the conduct of the election campaign, at which point a number of fundamental human rights come into play together with the responsibility of the State as described in article 2 of the 1966 Covenant on Civic and Political Rights to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant, without distinction of any kind such as race, colour, sex, language, religion, political of other opinion, national or social origin, property, birth or other status. Specifically national and international observers will need to know whether freedom of movement, assembly association and expression have been respected throughout the election period; whether all parties have conducted their political activities within the law, whether any political party or special interest group has been subjected to arbitrary and unnecessary restrictions in regard to access to the media generally in regard to their freedom to communicate their views;***

candidates and supporters have enjoyed equal security, whether voters have been able to cast their ballots freely; without fear or intimidation whether the secrecy of the ballot has been maintained; and whether the overall conduct of the ballot has been such as to avoid fraud and illegality."

Elections are the highest expression of the general will. They symbolise the right of the people to be governed only with their consent. The people have a right to make and unmake a government. Article 21 of the Universal Declaration of Human Rights 1948 provides,
"The will of the people shall be the basis of the authority of government: this will be expressed in periodic and genuine elections which shall be hold by secret vote or by equivalent free voting procedures."

Article 25 of the UN Covenant on Civil and Political Rights 1966 is in the same terms. The two articles also recognise the rights of everyone "to take part in the government of this country directly or through freely chosen representatives."

Our Constitution incorporates those principles in article 1 (4) which states,
"The people shall express their will and consent on who shall govern them and how they should be governed through regular free and fair elections of their representatives or through referenda."

An election is the mechanism whereby the choices of a political culture are known. These choices should be expressed in ways which protect the rights of the individual and ensure that each vote cast is counted and reported properly. An electoral process which fails to ensure the fundamental rights of citizens before and after the election is flawed.

To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and the citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or government Ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery,

violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of results in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine election disputes speedily and fairly.

Elections are a vital process in establishing a stable and legitimate political order. They are crucial instruments for peaceful and orderly transfer of power. The ballot must replace the bullet as a means of changing government. They should be conducted regularly in a free and fair manner. Political actors and leaders must be prepared to accept the results of elections and to lose gracefully. The Electoral Commission should be granted adequate powers and facilities, to build capacity, efficiency and credibility in its conduct of elections so that they are free and fair and always reflect the general will of the electorate.

Failure to Compile, Update, and Display Voters Register:

The Petitioner further alleges in para 3(1) (a) that contrary to Sections 12 (e) and 18 of the Electoral Commission Act, the 2nd Respondent failed efficiently to compile, maintain and update the National Voters Register, the Voters Roll for each constituency and the Voters Roll for each Polling Station within each constituency and that as a result the Voters Register and the said Voters Rolls contained many flaws such as dead people's names and names of people who ought not vote in Uganda remaining on the register while several persons who were eligible voters had their names omitted from the said Register and Rolls.

Furthermore the Petitioner complained in para 3(1) (f) that contrary to Section 25 of the Electoral Commission Act, the 2nd Respondent failed to display copies of the Voters' Roll for each Parish or Ward in a public place within each Parish or Ward for a period of not less than 21 days and as a result the Petitioner and his agents and supporters were denied sufficient time to scrutinise and clean the Voters Roll and exercise their rights under the law.

The 2nd Respondent also denied that it failed to efficiently compile, maintain and update the National Voters Register or the Voters Rolls for constituencies and Polling Stations and further that it had no knowledge of people who ought not to vote in Uganda remaining on the Register while several persons who were eligible voters had their names omitted from the Register and Rolls. The 2nd Respondent averred that even if the said allegations were true, they did not constitute a ground upon which the election of a candidate as a President could be annulled.
As regards non-display of Voters Register, the Respondent answered that the Voters Register was initially displayed countrywide for three days and everybody was free to scrutinise the said Register. The 2nd Respondent further states that after consultations with and on request by agents of all Presidential candidates including those of the Petitioner, the 2nd Respondent extended the time for display of the Voters Register for another two days. The 2nd Respondent avers that the failure to display copies of the voters Roll for each parish or Ward in a public place for not less than 21 days does not constitute a ground upon which the election of a candidate as a President can be annulled.

Before considering the evidence, which was adduced in support of these grounds, it is necessary to consider the law upon which they are based with a view to ascertaining whether the grounds are maintainable in law. Mr. Mbabazi learned counsel for the Petitioner referred us to the preamble and Sections 2(2) and 29(4) of the Presidential Elections Act. He also relied on Sections 12 and 18 of the Electoral Commission Act 1 997, and as amended in Section 19(7) by the Electoral Commission (Amendment) Act 4 of 2000. Reliance was also placed on article 65(1) of the Constitution.

The Presidential Elections Act 2000 is a special law intended to provide a legal framework to govern future elections to the office of the President. But in Section 2(2) of the Act, it states that "The Commission Act shall be construed as one with this Act."

Section 18 of the Commission Act lays down the Commission obligation to compile, maintain and update a National Voters Register as follows:

"(1) The Commission shall compile, maintain and update on a continuing basis a National Voters Register, in this Act referred to as the Register, which shall include the names of all persons entitled to vote in any national or local government election.
(2) The Commission shall maintain as part of the voters Register, Voters' Roll for each constituency under this Act.
(3) The Commission shall maintain as part of the Voters Roll for each constituency a Voters Roll for each Polling Station within the constituency as prescribed by law."
Section 12 of the Commission Act provides for additional powers to enable the Commission carry out its functions under chapter five of the Constitution. Article 65 of the Constitution sets out the functions of the Commission, which include compiling, maintaining and updating the Voters Register.

The 2nd Respondent has a statutory duty to update the Voters Register before any election is held. The 2' Respondent must display for public scrutiny the Voters Roll for each Parish or ward for a period of not less than 21 days duly notified in the Gazette. In this connection Section 25(1) of the Commission Act stipulates:

> ***"Before any election is held, the Commission shall by notice in the Gazette appoint a period of not less than twenty one days, during which a copy of the Voters Roll for each Parish or Ward shall be displayed for public scrutiny and during which any objections or complaints in relation to the names included in the Voters Roll or in relation to any necessary corrections; shall be raised or filed."***

In the present case, it admitted that the display was carried out for only five days. The only question to be decided is whether the 2nd Respondent has powers to abridge the period of display. It was contended for the 2nd Respondent that it has powers to do so under Section 38(1) of the Commission Act which provides,

> ***"Where during the course of an election it appears to the Commission that by reason of any mistake miscalculation, emergency or unusual or unforeseen circumstances any of the provisions of this Act or any law relating to the election other than the Constitution,***

does not accord with the exigencies of the situation, the Commission may by particular or general instructions extend the time for doing any act, increase the number of election officers or Polling Stations or otherwise adapt any of those provisions as may be required to achieve the purposes of this Act, or that law to such an extent as the Commission considers necessary to meet the exigencies of the situation."

It was contended for the Petitioner that the above provision authorised the 2nd Respondent to increase but not reduce the period of display. I believe counsel was relying on the ejusden generis rule which is explained in Halsburv's Law of England Vol.44 4" edn. Para 877, page 535 in these terms:

"As a rule where in a statute there are general words following particular words, the general words must be confined to things of the same kind as those specified, although this as a rule of construction must be applied with caution and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the ejusden generis rule to apply the specific words must constitute a category class of genus, and the general words must not by their nature exclude themselves from the category class or genus, so that for example, a superior thing will not be held within a class of inferior things. If the particular words exhaust a whole genus the general words must be construed as referring to some larger genus. It seems that the ejusden generis rule can have no application where the general words precede the enumeration of particular instances and may not be relevant for the construction of international conventions."

On the other hand counsel for the 2nd Respondent submitted that the Commission has powers to reduce the period of display, to meet the exigencies of the Situation.

In my opinion, the ejusden generis rule of construction does apply to the provisions of Section 38(1) of the Commission Act with the result that the 2nd Respondent has no powers to reduce the period of display of the Voters Register. Display must be given sufficient time to enable the updating and cleaning of the Register to promote the principle of voter registration and

transparency. Failure to display for the prescribed minimum period undermined those two principles and was responsible for complaints relating to voting.

The question is whether the 2nd Respondent failed efficiently to compile, maintain and update the National voters Register, the Voters Roll for each Polling Station with each constituency as a result of which the register and Rolls contained many flaws. There is no direct evidence that the Voters Register and Voters Rolls were not efficiently compiled, maintained and updated. It was contended by Mr. Mbabazi for the Petitioner that there was in fact no National Register of Voters. Evidence was called of Mr. Mukasa David Bulonge who testified about the disparity in the total number of voters as communicated by the Chairman of the 2nd Respondent from time to time.

Mr. Mukasa stated in his affidavit that on 10th March 2001 while the display of Voters Register was still in progress the Chairman of the 2nd Respondent announced while addressing International Observers that the number of registered voters was still 11.6 voters, this number having been obtained from the returns received from the field after the National Voters Register update exercise as claimed by the Chairman in his letter to candidates dated 7 March 2001 in which he admitted he had no final Voters Register. But on 11 March 2001, the Chairman of the 2nd Respondent announced at a final briefing for candidates that the number of registered voters was 10,674,080 while the number of Polling Stations was 17,147. But when the results were declared the number of registered voters and Polling Stations had increased to 10,775,836 and 17,308 respectively as per provisional declaration of results. The Petitioner contended that because the exact number of registered voters was not known, the 2nd Respondent procured more ballot papers than the number of voters whose use or whereabouts remain undisclosed.

In his supplementary affidavit in reply, Mr. Kasujja stated that the National Voters Register had existed since 1993 when a National Voters Register was first prepared for the purpose of the Constituent Assembly and that since then the National Voters Register has been maintained and updated. It was updated before the 1996 Presidential Elections and the Register was subsequently cleaned before the Referendum. Re repeated that for the Presidential Election the update of the Register was done at village level from 11th January 2001 to 22nd January 2001. Mr. Kasujja

pointed out that in February 2001 the National Voters Register was printed and displayed at Polling Stations in the form of Voters Rolls in four components i.e. the previously registered voters, the newly registered voters, the transferred voters and the voters recommended for deletion for ease of scrutinising the register.

Furthermore Mr. Kasujja stated that the display was carried out for three days and after consultations and in agreement with all candidates' agents, the period was extended for another two days and both periods were gazetted. He explains that the time of display and update of the Register was affected by a decision to have photographic voters' cards, which required fresh registration. The exercise was commenced but due to unforeseen delays in delivery of all the necessary equipment which had not arrived by 31st December 2000 the 2nd Respondent was forced to revert to the old system of updating the existing Register having lost a lot of time.

Explaining the disparity in the total number of registered voters Mr. Kasujja stated that after the Referendum of June 2000, the Register on cleaning had about 9,308,173 voters. After the update the number rose to 9,308,173 voters. After the display and cleanup the number reduced to 10,672,389. This number however did not include soldiers and adults living with them and when they were included the number rose by 103,447 to 10,775,836. Mr. Kasujja stated further that the National Voters Register is made up of 214 Constituency Rolls and the Constituency Rolls are in turn made up of all Polling Stations rolls in the Constituency and on 11th March 2001 these had already been printed, and the number of Registered Voters was known.

On the evidence adduced in this petition I am satisfied that the 2nid Respondent did not efficiently compile, maintain and update the National Voters Register and Voters Rolls for each Constituency for the Presidential Elections. This violated the principles of registration of voters, fairness and transparency.

Voting by Underage Persons:

The Petitioner alleges in the petition that contrary to Section 19 (1) (b) of the Commission Act, the 2nd Respondent's Agents or Servants in the course of their duties allowed people under 18

years of age to vote. The 2nd Respondent in answer to the petition denied the allegation. Section 19 (1) (b) of the Commission Act provides that any person who is a citizen of Uganda and is eighteen years of age or above shall apply to be registered as voter in a Parish or Ward where the person originated from or resides or works in gainful employment. It is provided in Subsection (2) that no person shall be qualified to vote unless that person is not registered as a voter in accordance with article 59 of the Constitution. This section lays down the principle of universal adult suffrage.

The Petitioner filed several affidavits in support of his allegation, which were controverted by the 2nd Respondent. Suliman Niiro, a Polling Monitor of the Petitioner in Bukode North Constituency, deponed that he visited bus part A Polling Station where he saw soldiers from the RDC's Office threatening and forcing young children below 18 years to vote. Niiro states that he and others tried to refuse them to vote but the soldiers overpowered them, and arrested him for 30 minutes. After chasing away Polling Agents, the soldiers brought many small children to vote. The Agents went back after almost four hours. He said he saw others vote in the name of the dead people and mentioned two. He states further that the declaration results forms were very inaccurate in a number of stations.

His evidence is challenged by Magezi Abu who was the Presiding Officer at bus Park A Polling Station. Magezi states that no soldiers ever came to his Polling Station nor did they force young children or unauthorised people to vote. He stated that the Petitioner's Agents witnessed the voting exercise from the beginning to the end and both of them duly signed the Results Declaration Forms.

Nava Nabagesera, the Resident District Commissioner Bugiri District also denied the allegations made by Niiro that soldiers from her Office threatened people and forced young people to vote. She stated that she has three escorts who were all the time with her and did not go to Bus Park (A) Polling Station. She received no reports of soldiers threatening or arresting any person during elections in her District. These two witnesses cast very serious doubts on the claims made by Suliman Niiro that soldiers forced underage children to vote.

John Kijumba who was appointed a Monitor for the Petitioner in Bukonjo West Constituency in Kasese District stated that on the polling day he found six underage children lined up to vote at Kasika Polling Station. The Polling Officials ignored him although he does not say what he did about it. He claimed that the 1st Candidates agent's threatened to stone him and he went and reported to Bwera Police Station. At Rusese Kyampara Polling Station, he saw two underage people lined up to vote. He pointed them to the Presiding Officer but he allowed them to vote. He does not explain what he meant by underage or how he came to the conclusion that they were underage.

The Presiding Officer Mupaghanja Boniface in his affidavit denied talking to Kajumba. He admitted that Baluku Henry the Polling Agent for Presidential Candidate Mohamed Kibirige Mayanja pointed out to him two girls who had lined up to vote as being underage based on the fact that they were Primary School pupils. He checked the voters register and found their names therein. He also found that they had valid voter's cards. He questioned the girls' father Manymayuro Ezra who said that the girls were over 18 years of age. He then discussed the matter with the Polling Agents present and it was resolved that any prospective voter suspected to be underage should provide a birth certificate for verification or that their age be verified by their parents. He allowed the two girls to vote. He denied allowing any underage to vote.

Lucia Naggayi, Head of the Election Monitoring Team of Kiboga District for the Petitioner claimed that at Malagi Polling Station she found a Kasozi Bernard voting using card No.15094729 who upon examination was found to be underage and was thereafter reported to Police. There is no indication that Kasozi voted. Wabuyelele Martin who was the Presiding Officer for Kyalajoni AL Polling Station in Kiboga district denied that there was such Station known as Malagi in Lubiri Parish.

The evidence of Boniface Ruhindi Ngaruyu who was deployed to oversee the performance of the Polling Agents for the Petitioner in Mbarara Municipality states that while he was at Mankeke Polling Station he saw a number of Fuso lorries and pick-ups loaded with students escorted by armed Military Police who were driven to Kakyeka Stadium and the military ordered the election constable to allow them to join the line and vote without agents questioning their identity. The

witness does not say whether these children were underage or not registered in the area they voted. This evidence is worthless.

The allegations were denied by Aspol Kwesiga who was the District Registrar of the Commission in-charge of Mbarara District. His evidence was that Makenke was never used as a Polling Station during the Referendum of 2000. He stated that the allegations made by Ruhindi were completely false because as one of the persons, who supervised elections, no such incidents took place at Kakyeka Stadium and the Petitioner's Polling Agents signed the respective Declaration of Results Forms.

Ssentongo Elias an overseer of the Polling Agents for the petitioner in Ntungamo Town Council and Kahunga Sub-country claimed that at Karegyeya Polling Station he found armed soldiers who had camped at lrenga, the home of Mrs. Janet Museveni and the said soldiers allowed children who were clearly under the age of 18 years to vote for the 1st Respondent.

Another witness Patrick Matsiko Wa Mucoori, a Senior Reporter with Monitor Newspaper claimed that he saw a young girl of about 1 2 years coming to vote with a card and she was given a ballot paper. When he asked why the child was voting, the Presiding Officer said that the girl was voting for her father who was reportedly sick in the barracks. This voting was technically improper.

Byaruhanga Yahaya who was a Polling Agent for the Petitioner at Maracha D Polling Station, South East Parish Busia Town council, Busia District, claimed that there were 6 underage children who were allowed to vote and his attempts to stop them were ignored by the Presiding Officer.

On the evidence adduced it cannot be positively concluded that the alleged children were under 1 8 years. There was no proof of under age. A birth certificate or medical evidence would be credible evidence, See Sang v Re (1971) EA.539

Multiple Voting:

The petitioner complains in paragraph 3 (1) (j) of the petition that contrary to Section 31 of the Act, the 2nd Respondent's Agents or Servants or Presiding Officers in the course of their duties and with full knowledge that some people had already voted allowed the same people to vote more than once. The 2nd Respondent denied allowing anybody to vote more than once. Section 31 (1) of the Act provides that "No person shall vote or attempt to vote more than once at any election." It is an offence under section 71 (b) of the Act to vote more than once at an election. The principle behind this provision is equality and fairness.

Patrick Matsiko Wa Mucoori, a Senior Reporter with Monitor Newspaper, claimed that he saw voters continuing to vote several times at Kanyaruguru Special voting Station for the Army and when he informed the Presiding Officer, he stopped them from voting. He claimed that he saw the Battalion Intelligence Officer voting more than five times by changing his clothes each time he came to vote. He did not name the Intelligence Officer or how he knew his post. When multiple voting was stopped, he got scared and stopped pointing out other malpractices and made arrangements to leave.

He claimed that when he wanted to go the Presiding Officer confiscated his personal effects and ordered him to be taken to the quarter guard where he was detained for 10 minutes and released and taken back to the polling station where they met on the way the Battalion Commanding Officer, Capt. Kankiriho who threatened to beat him if he went near the polling station or revealed what he had seen at the station. Later he was allowed to recover his personal effects and left that very night for Kampala by bus.

Ssentongo Elias, an overseer of the Polling Agents for the Petitioner in Ntungamo Town Council and Kahunga Sub-county claimed that Tom Muhoozi, the Deputy Chairman District Public Service Commission colluded with the Presiding Officer to allow some people to vote more than once at Kabuhame Polling Station. But Tom Muhoozi in his affidavit denied seeing Ssentongo at the Polling Station. He denied colluding with the Presiding Officer to allow people to vote more than once.

Hingiro John who was a Polling Agent of the Petitioner for Kabungo Primary School I Polling Station in Ntungamo claimed that the Presiding Officer Muhwezi Mark and the Polling Assistant Muhumuza Fred were issuing many ballot papers to individuals who were known to be supporters of the 1st Respondent. These included Kilama L and Byaruhanga B. The same Presiding Officers gave many unticked ballot papers to Karuhanga Davis Muvale the LC 111 Chairman of Rwekiniro Sub-county and they were taken to unknown destination. But he does not say what happened to the ballot papers whether they were cast or not. He only says he refused to sign the declaration form though he was forced to do so.

However, Muhumuza Fred denied the allegations made by Hingiro. He stated that he did not issue any ballot papers as alleged since his work as Polling Assistant was to check for the names of the voters in the Register and tick against whoever cast his or her vote. Muhwezi Mark who was the Presiding Officer similarly denied the allegations. He stated that he was the only person who was issuing ballot papers whereas Muhumuza was marking the names of the voters who had come to vote. He issued only one ballot paper per voter and no more. He explained that the Petitioner's Agents left the Polling Station on their own before the closure of the polling exercise and that is why they did not sign the Forms.

Kasigazi Noel who was a Polling Agent for the Petitioner at Rweranura Polling Station claimed that he saw Sibomaana Amos a Campaign Agent of the 1st Respondent casting a bundle of ballot papers after colluding with the Presiding Officer. He lodged a written objection to the Presiding Officer who rejected it. This is unhelpful. How many ballot papers were cast and how were they cast, one by one or by bundle? Were they already ticked, or he ticked them? When he questioned why Sibomaana was allowed to cast a bundle of ballot papers, he was threatened with violence by the LC I Chairman and LC Ill Chairman and others. He claimed that during the scuffle Turyakira was given all the remaining ballot papers by the Presiding Officer, which he ticketed and put in the ballot box. But Sibomaana Amos denied being a Campaign Agent for the 1st Respondent in Kitashekwa. He denied voting more than once or put a bundle of ballot papers in the ballot box. He also denied threatening anybody.

Karenzyo Eliphaz who was a Polling Agent of the Petitioner at Bihomborwa Polling Station in Kanungu District claimed that at the Polling Station he saw a lady called Specioza Kiiza at the table where ballot papers were being filled and she was insisting on ticking them for voters in favour of the 1st Respondent. She ticked on the open table hundreds of ballot papers for the 1st Respondent. At one time two ballot papers were given to one lady and when she protested1 she was mishandled. He claims he saw Deo Barabona, Vice Chairman LC II cast over 100 ballots as he helplessly watched Barabona did not ink his thumb throughout the process. Another old lady was given five ballot papers and she cast them. Burayobera, a Congolese employee of Kanyabitabo - who was the Parish Movement Chairman, also cast 10 ballots although he was not a Ugandan. He decided to go away and report to the Petitioner's Campaign Office at Kihiihi. He did not report to any electoral or Police Officer. It is not clear how he was able to count the votes cast when he claims he was being harassed and threatened with death.

Guma Majid Awadson who was a Polling Monitor for the Petitioner in Kuru Division Polling Station in Yumbe District stated that he saw Achaga Safi the LC Ill Vice Chairman of Kuru Division voting at two Polling Stations using different voter's cards. The Polling Stations are Bura B, Bura A, and the polling cards were No.0027587 and No.00267715 respectively. He reported the matter to the Prison Constable deployed to take charge of the area but he feared to arrest Achaga who was a Member of the Task Force of the 1st Respondent.

He claimed that at Geya Parish Aliba A Polling Station he saw the presiding Officer Abele Young Majid giving six ballot papers to the LC Ill Chairman Kuru County called Drasi Ali, a Member of the Yumbe Task Force of the 1st Respondent. But Drasi Au denied the allegations against him. He stated that he was not given six ballot papers nor did he arrest anybody on polling day.

Ronald Tusiime the Petitioner's Polling Agent in Mparo, Rukiga County of Kabale District claimed that he saw some people who had voted at Kihanga Playground Polling Station come and vote again at Rukiga County Headquarters Polling Station. He named Baryakira Colling who used D Tindimwensi's card and Dunga Bugari who used voter card of G. Twesogome. He claimed that the Petitioner's Agents were forced to sign the declaration forms.

Mugizi Frank who was a Polling Agent of the Petitioner at Rubanga Polling Station, in Ntungamo District, claimed that he witnessed massive rigging whereby people were being allowed to vote more than once, and when he protested, the 1st Respondents supporters namely, Simon, Twahirwa Sura, Kanyogisa, Siriri, and Karyhota Muyambi threatened to assault him and chased him away from the Polling Station. After leaving the Polling Station Ali Mutebi Campaign Manager of the 1st Respondent offered him Shs.15,000/ in order to go back and sign the Declaration of Results Forms but he refused. There is no description of how the multiple voting was done and the names of voters involved.

But Namanya Allen who was the Presiding Officer at Rubanga Polling Station denied that any person voted more than once. He admitted that Mugizi witnessed the polling exercise from commencement but he voluntarily left the Station between 3.00 p.m. and 4.00 p.m. and did not return and therefore did not sign the declaration of results forms.

Kidega Michael who was a Monitor in Nwoya County in Gulu District stated that he went to Alero Polling Station outside the barracks where he found 50 soldiers who had voter's cards but were not on the register. He says he tried to intervene but the soldiers said they had superior orders from a major to Paraa Polling Station where voting ended at 5.00 p.m. and then started again at 7.30 p.m. and continued to 10.00 p.m. He states that he discovered later that the same soldiers he got at Alere were the same soldiers voting in Paraa where they were led by Lt. Peter.

I find the evidence adduced by the Petitioner on this allegation convincing and I accept it despite denials by evidence from the Respondents. The allegation of multiple voting in several Polling Stations has been proved; it violated the principles of equality and fairness.

Voting Before or After prescribed Time

The Petitioner alleges in his petition that contrary to Section 29 (2) and (5) of the Act, the 2 Respondent and its agents or servants allowed voting before the official polling time and allowed people to vote beyond the polling time by people who were neither present at Polling Stations nor in the line of voters at the official hour of closing. The 2nd Respondent denied the allegation

and averred that only people present at the polling stations or those in the line of voters at the official closing time were allowed to vote out of time.

Section 29 (2) of the Act provides that

"At every polling station, polling time shall commence at seven o'clock in the morning and close at five o'clock in the afternoon."

This section promotes the principle of transparency.

Moses Babikinamu who was a Polling Agent for the Petitioner at Lwebifakuli Polling Station in Mawogola Country, Sembabule District claimed that on the polling day he reported at the Polling Station at 6.30 a.m. but by that time voting had started. He asked the Presiding Officer why the voting commenced before 7.00 a.m. but she simply to him to sit down and concentrate on his work. At about 10.00 a.m. the Member of Parliament Hon. Sam Kuteesa came and asked how many people had voted and he was told 300 whereas he had counted 52. By 5.00 p.m. he had recorded 160 voters, but at the end of the exercise the Presiding Officer declared 510. When he disputed the number declared, the 1st Respondent's Agents threatened him with arrest. The Presiding Officer forced him to sign the documents without him reading through and he did so. He did not report this matter to any authority. Instead he signed the Declaration Result Forms. He must be deemed to have signed the forms voluntarily in the absence of any other evidence to support his claim of duress.

Oliver Karinkizi denied the allegations made by Babikinamu. He denied being a Campaign Agent of the 1st Respondent. He stated that he was the Presiding Officer at the Polling Station and the voting commenced at 7.00 a.m. in the presence of other agents except Babikinamu who came after 7.00 a.m. He denied making him sit at a distance of five meters away. He admitted Hon. Kuteesa came to the Polling Station but in the afternoon. He stated that the number of people who voted at the Polling Station was 510, which was declared in the presence of al agents. He revealed that Babikinamu and his colleague willingly signed the tally sheets in the presence of many people. Hon. Sam Kuteesa admitted visiting the Polling Station, but denied interfering with the voting process at that Polling Station.

Ngandura John was a Polling Agent for the Petitioner at Nyakabengo Primary School Polling Station in Kisoro District. He claims that he arrived at the Polling Station at 4.00 a.m. and the

polling began at 6.00 a.m. despite his request that it starts at 7.00 a.m. which was turned down by the Presiding Officer. Livingstone Tenywa, the District Police Commander, Kisoro District, denied receiving any report from Ngandura on the polling day.

Tumusiime Enock who was in charge of overseeing the operations of Polling Agents for the Petitioner in Kajara Country in Ntungamo District, claimed that at 7.30 p.m. on polling day after completing the tallying of results in Ntungamo Town Council, he received information that voting was still going on at Kayenje Polling Station. At 11 .30 p.m. he and the Returning Officer of Ntungamo District and six Police Officers went to Ntungamo Catholic Social Centre following information that voting was taking place there. They found voters still casting their votes in favour of the 1st Respondent even though the place was not a polling station. They found nine ballot boxes already delivered at the Centre from Ngoma, Rugarama, Kagagu, Kayonza, Kikoni, Kahengyeri, Kabingo, Rwebirizi and Rusunga.

When the Returning Officer questioned the Presiding Officer why he had allowed voting at an ungazetted place, the Presiding Officers responded that the Chairman of the Electoral Commission had extended the time for voting to midnight. Because of these irregularities the Petitioner's Agents decided not to sign the Tally Sheets and the Declaration of Results Forms for the District. The witness does not say how he came to know that the voters were voting for the 1st Respondent. Secondly he does not indicate what action was taken against the Presiding Officers by the Returning Officer or the Police. His tale is incomplete and is not corroborated.

Musisi Francis a Polling Agent of the Petitioner at Bailambogwe Polling Station in Mayuge District, claimed that on polling day when he reported at the Polling Station at 6.00 a.m., he discovered that the voting exercise had already started in the absence of all other Polling Agents for different candidates. Then who was conducting the elections or who was present? The witness is silent as to who was present. How many people had voted?

I find that the evidence by the Petitioner not credible and convincing. I believe the evidence by the Presiding Officers that they conducted the voting within the prescribed time. Therefore the principle of transparency was not violated.

Pre-ticking of Ballot Papers:

In para 3 (1) (x) of the Petition, the Petitioner alleges that contrary to sections 70 (f) and (j) and 71 (b) of the Act, some of the 2nd Respondent's Agents or Servants as presiding Officers or Polling Agents, in the course of their duties, ticked ballot papers in the 1st Respondent's favour and later gave them to voters to put in the ballot boxes, and other interfered with ballot papers and stuffed them with already ticked ballot papers. I shall deal later with the allegation of ballot stuffing. The 2nd Respondent denied the allegation. Section 70 (f) and (j) of the Act provide as follows:

> ***"70. Any person who*** *–*
> ***(f) Knowingly and intentionally puts into a ballot box anything other than the ballot paper which he or she is authorised to put in, …….***
> *(j)* ***not being authorised so to do under this Act makes any mark on a ballot paper issued to a person other than the person making the mark, with intent that the ballot paper shall be used to record the vote of that other person;***
> ***Commits an offence and is liable on conviction to a fine not exceeding two hundred currency points or imprisonment not exceeding five years or both."***

This provision is intended to safeguard the principles of secret ballot and transparency.

I shall now consider the evidence adduced to support the allegation. Muhairwoha Godfrey who stated that he was a Polling Agent for the Petitioner in-charge of Kajaaho 4 in Kajaaho Parish Kikagati Sub-country Isingiro Country South Constituency alleged that he witnessed numerous malpractices and massive rigging at the said Polling Station for the 1st Respondent. He states that at around 10.00 a.m. one Charles Rwabambari a supporter of the 1st Respondent went to the desk of the Presiding Officer accompanied by one Kanyanurwa Parish Chief, Kajaaho Parish, and took over the station from Katsimbazi the Presiding Officer and started issuing ballot papers and ticking them for voters. When he protested, the Parish Chief ordered that he be arrested tied up and taken to Prison at the sub-country but when an armed uniformed UPDF Reserve Force Officer tried to arrest him he escaped.

Mulindwa Abasi of Kabolwe Zone LC I Kibuku Parish in Pallisa District states his affidavit that he was a Monitor for the Petitioner in Kibuku Parish. At all Polling Stations he visited, there were voters who could not vote because on reporting they were told their names had been ticked and they were told they were not supposed to vote. When they complained they were chased away. He claims when he raised complaints he was threatened and his life is still under threat and he is being accused of being a rebel. Mulindwa does not mention which Polling Stations he visited or even a single vote whose name was ticked and he was denied a right to vote. It seems much of his information is hearsay.

Wasunia Amis who was a Monitor for NGO Election Monitoring Uganda (NEMU Group Uganda) in charge of Rurama Polling Station in Kayenje Parish in Ntungamo District, stated that at that Polling Station voters were allowed to tick from the Presiding Officers table under the guidance of the Presiding Officer, one Kamukama H. who was ordering them to vote for the Respondent.

The evidence of this witness is challenged by Tumwebaze Mukiga who was the District Registrar for Ntungamo District, employed by the Electoral Commission. He stated that on polling day he was in charge of supervision of Ruhama County, which comprises Ntungamo Sub-county, Ntungamo Town Council, Nyakyera Sub-County, Rukoni Ruhama and Rweekiniro sub-counties. He stated that he travelled to almost all Polling Stations and could positively state that the polling exercise was conducted peacefully.

Referring to Wasiima's affidavit, he stated that he knew him very well and Wasiima is not illiterate and the signature on the affidavit is not his signature. He says that he personally reached Rurama Polling Station and found no problem. He received no complaint from Wasiima or any other person. He reached the Polling Station at the closing of the polls shortly after 5.00 p.m. and even talked to Wasiima who assured him there was no problem at the Polling Station. The evidence of Tumwebaze casts serious doubts on the credibility of Wasiima's affidavit.

Betty Kyimpairwe who was a Polling Agent for the Petitioner in Mbarara claims that at Kyabandasa Kanyegamere Polling Station, she found the Presiding Officer and Polling Officials

maliciously spoiling ballot papers cast for the Petitioner by adding small tick on the 1st Respondent. She does not explain at what stage this action was committed because if the ballot papers had already been cast in the ballot boxes, it is difficult to understand how they were taken out and spoilt.

Although the evidence on this allegation is scanty, I believe the Petitioner's evidence. It is my finding that the Petitioner has proved to my satisfaction that some people pre-ticked ballot papers and put them into ballot boxes or marked ballot papers for other voters to use for voting as alleged, in a few places. This infringed the principles of voting by secret ballot and transparency.

Ballot Stuffing:

The Petitioner complains in para 3 (1) (i) of the Petition that contrary to Section 30 (1) of the Act the 2nd Respondent's Agents or Servants in the course of their duties, allowed commencement of the poll with ballot boxes already stuffed with ballot papers and without first opening the said boxes in full view of all present to ensure that they were devoid of any contents. The 2nd Petitioner denied the allegation. Section 30 (7) of the Act provides,

> ***"The Presiding Officer at each Polling Station shall at the commencement of the poll and in full view of all present, open the first box, turn it upside down with the open top facing down to ensure to the satisfaction of everyone present that the ballot box is devoid of any contents and after that place the ballot box on the table referred to in paragraph (c) of subsection (5)."***

This provision promotes the principles of fairness and transparency.

Betty Kyampaire, who was a District Monitor for the Petitioner in Kamwenge District claims in her affidavit that while she was monitoring with James Birungi and 2 other members of her Monitoring Team, she discovered at Busingye Primary School Polling where Mr. Bwengye LC Ill Vice Chairman stuffed 300 ballots papers into the box. She claims she saw the destroyed ballot books at the Polling Station. She does not explain whether she witnessed the stuffing or merely heard about it. She does not explain how it was done and at what time.

She claims further that she saw that stuffing of ballot boxes by LC Officials and Members of the 1st Respondent's Task Force and ticking from the table was common at most polling "Stations in Kamwenge sub-county where she monitored. No names of these officials are given, nor how many ballot papers were stuffed. She does not explain what did happen as a result of these malpractices.

Mugenyi Silver who was an Election Officer in charge of Mid-Western Region responsible for preparation and dispatch of election materials and monitoring of elections denied the allegation that at a polling station known as Busingye Primary School 300 ballot papers were stuffed in one ballot box by the LC III Chairman. He stated that there is no such polling station in the District, and the nearest polling station is Busingye Trading Centre Polling Station, which was supplied with 800 ballot papers and declaration of results forms indicated that 792 valid votes were cast, 7 were invalid and 1 remained unused. He stated further that if any ballot papers had been stuffed into the box, it would have inflated the number of votes cast, which was not the case at the said station. He denied instructing the 1st Respondent's Agents to cast votes for some people, who were not the 1**st** Respondent's supporters, nor did he collude with the Presiding Officer to allow people to vote more than once.

In her affidavit, Lucia Naggayi who was the Head of the Election Monitoring Team of Kiboga for the Petitioner claims that at Kyalojani Polling Station (A-M) he found bulky ballot papers stuffed in the ballot box and upon complaint he was chased away. He does not explain how he found that the box had been stuffed before voting. However, Wabuyelele Martin who was the Presiding Officer at the Polling Station denied the allegation of ballot stuffing, prior ticking of ballot papers and chasing away the Petitioner's Agent. Nkangabwa Godfrey who was a Presiding Officer at Kyalojani MZ Polling station in Kiboga District stated that there was no such a polling station as Kyalojani Polling Station (A-M) but the polling stations in Lubiri are Kyalojani AL, Kyalojani MZ and Katugo. He too denied that any ballot papers were staffed in the ballot box and that some voters were given ballot papers already ticked.

Ntume Noellene who was the Presiding Officer for Bukomero II N-Z Polling Station stated that Naggayi never counted any ballot papers in any ballot book, and it was not true that there were

110 ballot papers in one book. Since he did not count the ballot papers he could not establish the number of ballot papers in the books.

Ndifuna Wilber, appointed election monitor for the Petitioner in Busia Town Council, Busia District, claimed that upon information received, he went with Police Officers and tricked Bazilio that he was a voter and wanted to vote for the 1st Respondent. Bazilio came with bundles of ballot papers, marked voters' cards and a voter's register. He then gave one voters' card and ticked it against the name of Jogo Joseph in the Register. Two girls came and were issued with ballot papers. The Police Officers whom he had tipped came and arrested them and he handed the ballot paper to the Police. The suspects were taken to the Police Station but later released without charge. This was an attempted rigging or stuffing which failed.

Abduraham Mwanja stated that he was the Chairman for Kigulu South Constituency and Chairman Bulamogi Sub-county and was appointed as a monitor. He does not indicate which Presidential Candidate appointed him. He says that he visited Iganga Town Council Polling Station to ensure that the voting was free and fair. He claims that he saw a vehicle, Hilux double cabin Reg. No. UG 0095 B, bringing ballot boxes with ballot papers and deposited them in Iganga Hospital. When he approached the area the people involved shifted the boxes to Kasokoso Primary School, which had two Polling Stations A and B. He followed them on his motor-cycle and when he insisted on checking the ballot boxes, the people involved who were soldiers refused and took the boxes away. It is not clear how Mwanja came to know the boxes to be stuffed with ballot papers. He does not disclose where the ballot stuffing was done and by who.

Mwanja further claims that at around 4 p.m. the Health and Medical Officers and the Mayor of Iganga Ismail Kyeyago ordered those who had old voter's cards to vote and those who had cards but names did not appear on the list of voters to vote and they voted. But Ismail Kyeyago denied the allegation made by Mwanja in respect to ordering people to vote as alleged because he had no power to do so. Gwaivu Abdalla who was the Election Supervisor in charge of Iganga Town Council stated that he did not receive any report or complaint about the vehicle depositing stuffed ballot boxes at Iganga Hospital or any report against Ismail Kyeyago allowing unauthorised voters to vote.

James Birungi Ozo who states that he was appointed a District Monitor by the Petitioner and also District Campaign Coordinator for Kamwenge District claims that he was informed by Kahesi Slaya a supporter of the Petitioner that the LC II Vice Chairman one Bwengye stuffed 300 ballot papers ticked in favour of the 1st Respondent in the ballot box during the election at Busingye Primary School Station. Kahesi Slaya never swore any affidavit. This evidence is therefore hearsay and inadmissible.

Tukahebwa Kenneth who was a Polling Agent for the Petitioner at Kyenzaza Trading Centre Polling Station in Bunyaruguru, Bushenyi District, claimed that at 200 p.m. one Banyezaki, a driver of one Watuwa Schola from State House tried to stuff ballot papers in the ballot box and they protested against him and a home guard arrested him with the ballot papers. Within five minutes Schola came and took away her driver and the home guard was disarmed. This was a mere attempt; there was no ballot stuffing.

In any case Watuwa Schola denied the allegation. She explained that on polling day while she arrived at Kyenzaza Trading Centre where she received information that her driver Abdu Banyenzaki had a scuffle with a vigilante near the Polling Station.

She was unable to establish the details of the scuffle. She rushed home and found Abdu who informed her that the vigilante was drunk and armed and his identity was doubtful. She went back to the Polling Station with the LC Ill Chairman Frank Mubangizi and found the vigilante drunk and armed near the Polling Station. The Chairman then disarmed the vigilante and then summoned the LDU Commander to deal with him for being drunk and carrying a firearm near the Polling Station.

Mary Frances Ssemambo who was the Chairperson of the Elect Besigye Task Force, Mbarara District, claimed that a lot of malpractices and rigging took place in Mbarara District. Examples of this include the fact that in some polling stations the total number of votes shown as cast for the 1st Respondent far exceeds the total number of votes cast for all the candidates and the total number of ballot papers issued to the Polling Station. In some stations there were large numbers

of ballot papers shown as having remained unused even where the number of ballot papers issued to the various polling stations were shown as not exceeding the total number of ballot papers actually used, an anomaly which was not explained. She attached some copies of the Declaration of Results Forms.

Her evidence is challenged by the affidavit of Hezz Kafureka who was the Returning Officer of Mbarara District. He states that the anomalies and discrepancies referred to were all contained in an official document known as the Declaration of Results Form Dr. which are prepared by the Presiding Officers of respective Polling Stations. He was responsible for the supervision of the tallying process in the district whereby apparent anomalies and discrepancies were resolved and recorded in the Official Tally Sheet. He explains that the anomalies in the Forms were a result of human error by the Presiding Officers. He points out that despite the anomalies and discrepancies the Petitioner's Agents endorsed the Declaration of Results Forms and did not dispute the results of the elections.

Ssemambo does not state she witnessed any malpractice herself. She is relying on information given or compiled by others. Secondly, the statistics do not prove ballot stuffing since in some instances figures indicate many unused ballot papers. Thirdly, the forms she attached to her affidavit were all signed by the Petitioner's Agents without objections. Therefore her evidence cannot establish ballot stuffing. Moreover the anomalies and discrepancies have been satisfactorily explained away by the Returning Officer.

The evidence adduced on ballot stuffing is credible although some is exaggerated and based on hearsay. There is sufficient evidence to support the allegation. My finding is that the Petitioner has proved to my satisfaction by the evidence adduced that the 2 Respondent's Agents failed to comply with the provisions and principles of Section 30 (7) of the Act and that there was ballot stuffing as this infringed the principles of fairness and transparency.

Chasing Away Polling Agents from Polling Stations:

The Petitioner complains in para 3 (1) (g) of the Petition that contrary to the Provisions of Section 32 and Section 47 (4) and (5) of the Act, on the polling day, during the polling exercise, the Petitioner's Polling Agents were chased away from many Polling Stations in many Districts of Uganda and as a result, the Petitioner's interests at those Polling Stations could not be safeguarded.

The 2nd Respondent denied the allegation. It stated that it had no knowledge that the Polling Agents of any Presidential Candidate were chased away by its servants or any other person and that the Petitioner's Agents were free to observe and monitor the voting process.

Section 32 (1) of the Act provides,

> ***'A candidate may be present in person or through his or her representatives or polling agents at each Polling Station for the purpose of safeguarding the interests of the candidate with regard to the polling process."***

According to sub-section (2) not more than two agents may be appointed for each Polling Station. Section 32 (4) provides that the Polling Agents shall be seated in such a place as to enable them observe and monitor clearly the voting process. On the other hand, Section 47 deals with the process of counting votes after the voting. Section 47 (4) and (5) deals with the votes of the Polling Agents during the counting and provides as follows:

> ***"(4) Subject to this Act, a candidate is entitled to be present in person or through his or her agents at the Polling Station throughout the voting and counting of the votes and at the place of tallying of votes and ascertaining of the results of the poll for the purposes of safeguarding the interests of the candidate with regard to all stages of the counting and tallying processes.***
>
> ***(5) The Presiding Officer and the candidate or their agents, if any, shall sign and retain a copy of a declaration stating –***
>
> ***(a) The polling station;***

(b) The number of votes casting in favour of each candidate and the Presiding Officer shall there and then announce the results of the voting at the Polling Station before communicating them to the Returning Officer."

The objective of these provisions is to promote transparency in the voting, counting and tallying of results.

The Petitioner adduced evidence by affidavit from several districts relating to the complaints of chasing away his Polling Agents from Polling Stations and tallying centres and the problems of tallying of results generally as reflected in the Declaration of Results Forms and Tally Sheets. I shall first consider the evidence in relation to chasing away agents from Polling Stations.

Mary Frances Ssemambo who was the Chairperson of the Elect Besigye Task Force in Mbarara District claimed that in many Polling Stations particularly in Nyabushozi County and lsingiro County South Polling Agents for the Petitioner were harassed, arrested, beaten tied up and detained or threatened with violence and chased away from the Polling Stations by heavily armed UPDF soldiers and the 1st Respondent's Agents, and therefore the interests of the Petitioner were not safeguarded at the Polling Stations. She swears these facts to the best of her knowledge but does not disclose the source of knowledge whether she actually witnessed these incidents. The names of agents involved and the Polling Stations are not disclosed. It is just an omnibus allegation she attaches to her affidavit about 22 Declaration of Results Forms, which are all, signed by the Petitioner's Agents from various Polling Stations in Mbarara District. This tends to prove that the Petitioner's Agents were present during the polling at these Polling Stations. The Returning Officer for Mbarara District, Hezzy Kafureka denied her allegations.

Alex Busingye who was in charge of overseeing the operations and welfare of the Polling Agents for the Petitioner in Kazo County, in Mbarara District claimed hat in the majority of the Polling Stations he visited, he found that the Polling Agents for the Petitioner had been chased away by armed UPDF soldiers. At a Polling Station called Nkungu, he alleges that he found a monitor for that station tied up by the UPDF soldiers and bundled on motor vehicle No. 114 UBS pick-up in which they were travelling.

But Mbabazi Kalinda who was the Presiding Officer at Nkungu Trading Centre Polling Station A-K denied the allegation by Busingye and confirmed that she was a Polling Agent at the said Polling Station. He stated that Busingye did not complain to him about the arrest of a Monitor and he denied that the incident ever took place. He stated further that both Busingye and Byaruhanga Polly who were agents of the Petitioner freely endorsed the Declaration of Results Form.

Basajabalaba Jafari who was the Secretary to the Elect Besigye Task Force for Bushenyi District stated that on the polling day at Kalanda Primary School Polling Station, he saw one agent for the 1st Respondent called Ryamenga manhandling the Petitioner's Agent and chasing him away from the Polling Station. The Presiding Officer allowed voting to take place for three hours until the Sub- county Chief and the Police intervened following his report to Katerera Police Post.

Evarist Bashongoka, Sub-county Supervisor of the elections in Katerera in Bushenyi District denied the allegation by Basajabalaba that the Petitioner's Agents were chased away because he found them monitoring elections at Katanda Primary School Polling Station.

Tumwebaze Arthur stated in his affidavit that he was a Polling Agent for the Petitioner at Kataraka Primary School Polling Station. He claims that he was asked to sit 20 metres away by the Election Constable at around 2.00 p.m. He was the Constable handing out voters' cards to voters while voting was going on. He states that some persons who never appeared at the Polling Station like Bangirana Livingstone and Tukahiirwa Arthur had their names ticked in the voters register as having voted when they never voted and their cards used by other persons who impersonated them.

He also claims that he saw multiple voting at the said station in favour of the 1st Respondent. His complaints were ignored and he refused to sign the Declaration of Results Forms on account of the malpractices.

Wamanya Isaac, who was the Presiding Officer at Kataraka Primary School Polling Station in Ntungamo District, denied the allegation by Tumwebaze Arthur that he prevented him from monitoring the voting on behalf of the Petitioner. He stated that he gave Tumwebaze a seat near other candidate's agents, and he received no complaint from any of the Agents. He denied that

any other per son issued voters cards except himself, nor did he see any person carrying out double voting at the Polling Station. His evidence is that candidates' agents except for the 1st Respondent went for lunch at 3.00 p.m. but did not return by the time polling had closed; and therefore did not sign the Declaration Forms.

James Musinguzi who was in charge of the Petitioner's Campaigns in Southern Region of Uganda stated that on the day of election, he visited Kashanja, Nyarurambi, Kijumbire and Ntungamo Polling Centres in Kanungu District and in all these places he found that the Polling Agents of the Petitioner were chased away from the polling area and there was no actual voting since the ballot papers were being pre-ticked in favour of the 1st Respondent by Polling Officials who would then direct the voters to put them in the ballot boxes. He complained about this to the Returning Officers but in vain. He claimed that at Kifumbwe Polling Centre, the Petitioner's Agents who had been chased away were dragged from their homes to come and sign the Declaration of Results Forms in respect of voting they had not witnessed.

Boniface Ruhindi Ngaruye who is a District Councilor and was a Member of the Elect Besigye Task Force in Mbarara stated that on the polling day he was deployed to oversee the performance of the Polling Agents for the Petitioner in Mbarara, surrounding areas and Ishongororo Sub-county. At Biharwe Polling Station he saw that the Presiding Officer had denied the Petitioner's Agents to be present until he went at about midday and explained to the Presiding Officer that he had no such authority. He found no Polling Agents at the newly created Polling Station called Makenke A-J, Makenke A-N, Makenke O-Z which had not been included in the parking list handed to him on 11 March 2001 by the Returning Officer, Mbarara. By the time he approached agents for the said stations at Makenke, the polling was about to close and the Petitioner's candidates only witnessed the counting process.

But Aspol Kwenja, who was the District Registrar, Electoral Commission in- charge of Mbarara District, denied the allegations by Ruhindi Ngaruye. He stated that the persons who were sent as Polling Agents for the Petitioner originally lacked proper documentation but subsequently brought them and they eventual signed the Declarations of Results Forms, copies of which were attached to his affidavit. I have looked at the form and two agents of the Petitioner signed the form for Makenke K-N Polling Station.

Ssentongo Elias who was in-charge of Polling Agents in Ntungamo Town Council on behalf of the Petitioner stated that at Nyaburiza Parish and at Kabuhone Polling Station the Chairman of the District Service Commission and a known supporter of the 1st Respondent, Tom Muhozi chased away all the Polling Agents except those for the 1st Respondent. However, Muhozi Tom denied chasing away candidates agents. He stated that after casting his vote at 10.00 a.m. he went back to his home. He returned later to the Polling Station after the voting closed and he saw all the Petitioner's Agents present who duly signed the Declaration of Results Forms.

Koko Medad a Polling Monitor for the Petitioner in Kanungu District but does not indicate the area of monitoring stated that at Nyarutojo he found that a District Councilor had chased away the Polling Agents from the Polling Station, and forced to stand 50 metres from the ballot boxes where they could not see what was going on. He states that all people except the Agents of the 1st Respondent had been chased away from the voting area. He further claims that he and another agent were chased away from Nyarugando Parish Polling Station. At Ruhandagazi Polling Station he found that one of his agents had been beaten by the LC Ill Chairman, Arthur Mugisha and his supporters were in disarray. It is not clear whether he witnessed the beating of his agents.

The evidence of Koko is disputed by Rutazaria Silver who was the Presiding Officer at Kyamugaga II (A-K) in Nyantojo Parish, Kambuga Sub-county in Kanungu District. He states that no agents were chased away from his Polling Station by Mugisha or anyone. According to him all the agents sat together with election monitors close to the polling desks during the whole voting process. He stated that the voting area was not deserted until after voting closed at 5.00 p.m.

Tukahirwa David who was a registered voter at Nsambya Polling Station in Mubende District claimed that when he went to the station to collect his votes card on polling day as promised by the Polling Official, the Presiding Officer refused to give one saying his was missing. But others were being issued with cards. He was unable to vote because he had no voter's card though he had a registration certificate.

He claims that as soon as the voting started the Presiding Officer ordered the Polling Agents for all candidates to go away from the area earmarked with a rope where counting was going to take place. When counting of votes started, the Presiding Officer held the ballot papers close to his chest and read out the names of candidates and thereafter passed over the same to his assistant. He would not show the ballot papers to the people to see in whose favour each ballot paper to the people to see in whose favour each ballot papers was ticked.

After counting of the results he raised a complaint and the Presiding Officer allowed the Election constable to conduct a recount for him.

Barnabas Mutwe, who was the Presiding Officer at Nsambya Polling Station in Mubende District, stated that there were only four people whose names did not appear on the Register and he did not allow them to vote. He told the Agents to move two metres away from the ballot papers so as not to tamper with them. He denied the allegation that he did not show every ballot paper to the public and the candidates' agents and confirmed that he did so. He denied that there were any soldiers near the Polling Station and nobody threatened anybody during the voting or the counting of the votes. He stated that after the counting nobody raised any complaint, and the Petitioner's Agent signed the Declaration Results Forms without any complaint.

Hamman Rashid who was a Polling Agent of the Petitioner for Kilangazi A Polling Station in Ngoma Nakaseke County in Luwero District claimed that when he arrived at the Polling Station at 6.30 a.m. polling had started and he saw voters voting more than once. At about midday Major Bwende came and threatened him and ordered him to go away and he did so. He was therefore not able to witness the counting of votes. But Major Bwende denies the allegations made by Rashid. Major Bwende says there was no such Polling Station.

Senyonga John who was a Polling Agent of the Petitioner posted at Katuntu Polling Stations, Lwebitakuli Parish in Sembabule District, claimed that on polling day he went to Lwebitakuli Polling Station and when he introduced himself to the Presiding Officer, and asked for a seat, he was chased away alleging that he was not a resident of the village. He explained to the Presiding Officer that he was appointed a monitor and many people from his village were registered at the Polling Station. After 30 minutes of argument he was allowed to do his work but asked to sit far

away from the Presiding Officer's desk. He accordingly sat 10 metres away from his desk. He also states that he was prevented by the Presiding Agent from looking at the register and voters cards. Later he was given documents by the Presiding Officer and was forced to sign them.

The evidence of Senyonga is disputed by Karamuka Abel who was a Polling Assistant for Kantuntu Polling Station, Lwebitakuli Parish in Sembabule District. He states that on the polling day at 7.00 a.m., the Presiding officer called the Polling Agents of the Petitioner and the 1st Respondent himself and the crowd to witness the opening of the ballot box which he showed to everybody. At around 9.00 am. Senyonga John came to the Polling Station claiming to be an Agent of the Petitioner but he was carrying an appointment letter in the name of Mutyaba Julius. The Presiding Officer refused him to act as an Agent because he did not have his own appointment letter. Senyonga went away and came back at about 12.00 p.m. with an appointment letter in his name after cancelling the names of Mutyaba Julius. The Presiding Officer allowed him to monitor the voting, which went on smoothly. Senyonga and another agent of the Petitioner Mpeke both signed the Declaration of Results Forms freely without any threat from anyone.

Kipala John who was deployed as a monitor for the Petitioner at Mugab Parish Kakunto in Rakai district stated that when he complained to the Presiding Officer about malpractices of people attempting to vote twice and refusing to dip fingers in the ink or ticking ballot papers he was chased away by the Presiding Officer and he was rescued by his colleague Kimera who drove him away in his vehicle at 3.30 p.m. (This affidavit is not controverted).

Suliman Niiro, a monitor for the Petitioner in Bukooli North Constituency claimed that Agents of the Petitioner were chased away for 4 hours from Bus Park A Polling Station in Bugiri town Council by armed soldiers during which period they forced young children to vote. The agents came back after 4 hours before the voting ended. But Magezi Abu who was the Presiding Officer at Bus Park "A" Polling Station disputed the claim of Suliman Niiro. He stated that during the voting no soldiers came to his Polling Station or forced unauthorised people to vote. He stated that the security at the Polling Station was in the hands of one Policeman who was the Election Constable.

Kimunwe Ibrahim who was a Polling Monitor in-charge of Bukoli South Constituency in Bugiri District claimed that at every Polling Station he visited on the polling day, the Petitioner's Agents had been chased away by the Presiding Officers, 8 metres away. The witness does not explain why he calls this chasing away agents or the effect of being seated 8 metres away. Kirunda Mubarak, a Polling Monitor of the Petitioner in Mayuge District stated that he found at Mpungwe Polling Station that the appointment letters of the Polling Agents had been withdrawn from them on the ground that the Presiding Officers suspected them to have been fake and they had been chased away. When he asked the Presiding Officer why the Polling Agents had been sent away, he replied that they were not sure of the Agents and had told them to sit far. Kirunda states that the Agents were not allowed to write down anything. He reported the matter to the Chief Administrative Officer who ignored his complaint. He claims further that the LC I Chairman got hold of him and chased him away out of the polling house.

However, the evidence of Kirunda is disputed by Balaba Dunstan who was the Acting Chief Administrative Officer (CAO) of Mayuge District at the time of the election. He states that he does not know Kirunda and he never received a report from him alleging that the Petitioner's Agents had not been allowed to witness the voting exercise and protect their candidate's interests.

Helen Ayeko who was a Polling Agent for the Petitioner at Kalapata "A" Polling Station in Kumi District claimed that the Presiding Officer Richard Napokol chased her away when the voting started and refused her to monitor the number of ballot papers and names of registered voters. She stated that the presiding officer did not want her near the table where ballot papers were being issued and the ticking of the register was done. Later she was forced to sign the Declaration of Results Forms.

In his affidavit in reply Napokol admitted knowing Aeko as Agent of the Petitioner, but also her sister in law. He stated that Aeko arrived at the Polling station after polling had started but another agent of the Petitioner had been present at the commencement of the exercise. She was given a seat and monitored the polling process. He stated that the two ballot paper books had been dispatched from the Electoral Commission when they were not full and all the agents who were present at the commencement of the exercise had been informed. At the end of the exercise

all Polling Agents endorsed the exercises as having been conducted freely without any irregularities and they duly signed the Declaration of Results Forms. He did not force any agent to sign the forms.

Dennis Odwok a Campaign Agent of the Petitioner in Amida Sub-county in Kitgum District claimed that he found that at the ungazetted Polling Stations for the Army namely, Ngom-Orono (A-4), Ngom-Orono (F-N) and Ngom-Orono (O-Z) UPDF soldiers were the ones conducting the elections instead of Officials of the 2nd Respondent, and there were no Candidates' Agents to observe and monitor the elections. He alleges further that thereafter the Presiding Officer entered the results from the three Polling Stations in the Tally Sheet for Lukung Sub-county. He does not explain how he was able to monitor all these.

Olanya James, who was the Presiding Officer for Ngom-Orono O-Z Polling Station in Kitgum District, denied the allegation by Dennis Odwok that the election at that Polling Station was conducted by the army instead of officials from the Electoral Commission. He stated that they were all candidates' agents present at the Station and all of them signed the Declaration of Results Forms, which was attached to the affidavit. I have booked at the form and it is true that one agent for each Presidential Candidate signed the form.

It seems to me there were a number of problems associated with Polling Agents. Some did not have proper identification and when this was corrected they were allowed to carry out their duties. Some complained of having been asked to sit too far away to be able to monitor the voting effectively. The distances are not uniform as they range from 5 to 20 metres. It is not clear what the ideal distance is. In some new Polling Stations, it may be that the Petitioner did not have adequate time to appoint agents. In other cases it may be that the agents were harassed by polling or security officials. Despite these complaints it appears from the declaration of results form attached to the affidavits of both parties that the majority were signed by the Petitioner's Agents. Most of the Petitioner's evidence has been seriously challenged by the 2 Respondents witnesses.

On the evidence before me I do not find that it has been proved to my satisfaction that the 2nd Respondent or his agents or any other person chased away the Petitioner's Agents in

contravention of Section 32 (1) and section 47 (4) and (5) of the Act. Therefore the principles of transparency were not violated.

Complaints Relating to the Tallying of Results:

I shall now deal with the complaints relating to the process of tallying the results. Both the Petitioner and the 2nd Respondent adduced evidence in support or defence of their respective cases.

In his affidavit in support of the Petition, the Petitioner challenges the election results of Mawokota County South and Makindye Division East where he alleges that the number of votes cast was more than the number of the registered voters making the percentage as 105.34% and 109.86% respectively. The full details are indicated in his affidavit. He states that from the two constituencies there were 2,184 + 7,797 = 9,981 votes cast in excess of the registered voters. The Petitioner further states that he has looked at the Declaration of Results Form DR for Bukaade Primary school Polling Centre in Buwologoma Parish, Bukenga Sub-county, Luuka County Constituency in Iganga District and noted that the number of votes cast exceeded the number of ballots issued for the Polling Station. The total votes cast were 856 while the number of votes issued was 650. He attached form DR for Bukaade Primary School Polling Station in annexed hereto as annex R4.

Mr. Aziz Kasujja, Chairman of the 2nd Respondent, in his affidavit in answer to the Petition stated that the results received by the Commission and declared on 14 March 2001 were as shown on the Result Form B and detailed in District Result Sheets annexed hereto as R1 and R2. He stated that Annexture R3 to the Petitioner's affidavit did not contain authentic results as the proper results are contained in the summary result sheets by district attached to his affidavit as R2.

Kasujja denies that the number of votes cast for Makindye County East were more than the number of registered voters. He explains that what was shown in the table of results attached to the Petitioner's affidavit was an arithmetical error as explained in annexture R 3 (a) and (b) and was corrected as shown in annexture R 3 (c) (I) and (ii).

R 3 (a) is a letter from Mr. G.T. Mwesigye, Returning Officer, and Kampala, addressed to the Chairman of the 2nd Respondent. It is headed "Results for Makindye East" and states,

> ***"On* 13th *March 2001 I dispatched results for Makindye East which were erroneous. This error came out as a result of faulty tallying from the DR Form. This problem was brought to my attention yesterday 19" March by one Leticia of the Commission. This morning we revisited the DR Forms and found that our original tallying was faulty and gave a picture of more voters than those registered in the Constituency. We regret the error. Attached is the correct result for Makindye East, and the report of the Tallying Clerk."***

R 3 (b) referred to above is a letter dated 27 March 2001 signed by Tumwesigye David on behalf of the Counting Officers addressed to the Returning Officer Kampala. It is headed "Error made in tallying the Votes for Makindye" states in part,

> ***"The error has been identified and rectified in relation to the recently concluded Presidential Elections.***
> ***The error was made by carrying forward for (sic) from one Tally Sheet to another and wrong adding. While on some tally sheets the totals were carried forward on others the totals were not carried forward. And even then the summary that was added for each tally sheet included the totals that were already carried forward. This caused double counting. This led to votes cast for the candidates totaling to 86,087.***
> ***The error has been rectified by tallying the votes on new tally sheets.***
> ***The correct total vote cast for candidates is 570,018 as indicated on the Transmission Form."***

R 3 (c) (I) is the summary of the Transmission of Results, which indicates the correct total of votes for each candidate, which is reflected in R 3 ***(C)*** (ii) Constituency Provisional Results for Kampala District.

According to Mr. Kasujja the results in the Petitioner's affidavit in respect of Mawokota County South were not correct, the correct results being shown in Annexture 4 to his affidavit, with 40,887 registered voters, and the total number of votes cast as 27,234. Mr. Kasujja denied that

the 9981 votes were cast for candidates in the two Constituencies of Mawokota County South and Makindye County East in excess of registered voters as alleged in the Petitioner's affidavit. He stated that in Mawokota 40,887 voters were registered and 27,234 voted making a percentage of 66.6% and in Makindye there were 79,078 registered voters and the total votes cast were 57,018 which is 72.1% of the registered voters.
Furthermore Mr. Kasujja explained that the tabulation of figures on the Declaration of Results Form "P 4" attached to the Petitioner's affidavit is not correct and is not an authentic document of the 2nd Respondent. The correct results were as shown in the document annexed to his affidavit as R5.

The Petitioner in his affidavit in reply to Mr. Kasujja makes many allegations including falsification of results, ballot stuffing, results inconsistent with the number of papers issued and cast, ghost voters and multiple voting. Much of the information contained in the affidavit is hearsay or merely his opinion; and not based on his personal knowledge. However he attaches Declaration of Results Forms to support his opinion.

He states that the results announced on Radio and broadcast on TV were finally changed in the results declared on 14 March 2001 and contained in Annexture P 3 to the affidavit of Kasujja. He claims that the results of Makindye Division East where the error was admitted in tallying and corrected on 27 March 2001 are proof of ballot stuffing and alleged correction of an arithmetical error is falsification of the results by the Respondent.

The Petitioner further claims that the Declaration of Results Forms from a number of Polling Stations in Bushenyi, Mbarara, Mbale, Masindi, Mpigi, Mayuge, Mukono, Sembabule, Soroti, Kamuli, Wakiso, Kiboga, Kabarole, Jinja, Ntungamo, Kasese, Kayunga, Luwero and Iganga show that the number of votes cast at the Polling Stations exceeded the number of ballot papers issued to the Polling Stations. Copies of the forms were annexed to his affidavit.

Examples are given. At Bukoko TCA (N-Z) Polling station Bubulo Constituency in Mbale District, the number of votes cast for the 1st Respondent exceeded the number of valid votes cast for all the candidates. At Kimengo (M-Z) Polling Station, Buruli Constituency in Masindi

District, the number of ballot papers issued were equal in numbers with the votes cast but the total number of unused ballots was 410 ballot papers. At Mayembe Upper Prison C, Mawokota County North in Mpigi District the number of ballot papers cast exceeded the number of ballots counted as there were 416 ballot papers unused. At Ishaka Adventist College Igara County West, Bushenyi District, the number of ballot papers issued at the Polling Station was 477 equivalent to the number of ballot papers counted yet 353 ballot papers were unused. The Petitioner stated that the above acts, which constituted ballot stuffing, characterised the election countrywide. But it is interesting to note that all the 190 copies of Declaration of Results Forms attached to his affidavit were signed by his agents. The Petitioner alleges further that Annexture P 4 given to him by his Agent was not signed by his Agent and it contrasts with annex R 5 to the affidavit of Mr. Kasujja.

Mr. Kasujja denied the above allegations in his supplementary affidavit. He stated that there was no falsification of election results in favour of any candidate at all and Annextures R 3 (a) (b) (c) (i) (ii) to his previous affidavit were genuine documents and that no tallying was done after announcement of results. What was done was the correction of errors.

Mary Frances Ssemambo was the Chairperson of the Elect Besigye Task force in Mbarara District. She claims that a lot of malpractices took place in Mbarara District, and there was massive rigging of the elections. She states that in some Polling Stations the total number of votes shown as cast for the 1st Respondent far exceeds the total number of votes cast for all the candidates and the total number of ballot papers issued to the Polling Station. She attached copies of the Declaration of Results Forms filled by one of the Polling Stations to demonstrate this and was marked as Annexture MFS-A-l.

She claims that there were large numbers of ballot papers shown as having remained unused in a number of Polling stations even where the number of ballot papers issued to the various Polling Stations were shown as not exceeding the total number of ballot papers actually used, an anomaly which was not explained. She attached about 15 copies of Declaration of Results Forms filled to demonstrate the anomaly.

Edith Byanyima stated that she was a Tallying Agent for the Petitioner in Mbarara District. She was given an official copy of the Return Form for transmission of results (Annexture EB-A-1) and also read the official declaration of results for the Electoral Commission (Annexture EB-A-2). She compared the results from Mbarara on the two documents and found that they were not the same. Whereas on Annexture EBA-l the Petitioner is recorded as having received 37,226 votes in Annexture EB-A-2 the Petitioner is recorded as having received 37,180 votes and the 1st Respondent is recorded as having received 426 votes in Annexture EB-A-1 and 430,929 votes in Annexture EB-A-2.

Ndyomugenyi Robert stated that on 7th April 2001 he was given a letter of introduction by the Head Counsel for the Petitioner to Mbarara and Bushenyi. He reached the two areas on 10 April 2001. Upon presentation of the letter to the District Returning Officer Mbarara who wrote a Minute to the District Registrar to take appropriate action. The District Returning Officer of Bushenyi, Mr. Bitabareho opened 3 ballot boxes in the presence of OC CID Bushenyi and the 1st Respondents four representatives and the District Registrar of the Commission. The three ballot boxes were for Ishaka Adventist College, Mushumba Parish Headquarters and Kalungi Mothers Union Polling Station. He picked the declaration forms together with the voters' rolls, which were later certified by the Commission as true copies.

He proceeded to Mbarara and met the District Returning Officer and four boxes were opened for the following stations, Ruti 2 (L-Z) Mirongo 4, Nyamityobola and 4 Kyarubungo. At Mirongo the number of voters on Voters Register who voted was 687 and yet the tally sheet certified by the Electoral Commission indicated that the 1st Respondent alone got 781 votes more than the number of people who voted.

Mr. Kasujja, Chairman of the 2nd Respondent denied the above allegation. He stated in his affidavit in reply that the Annextures Mr. Bulonge attached to his affidavit was not correct and his findings in Annexture A are misleading. He explained that the number of voters who voted at Mirongo 4 Polling Station were 827 and not 687 and the correct figures are indicated on the copy of the Declaration of Results Form marked E and the copy of the Tally Sheet marked F. The Polling Agents of the Petitioner endorsed the forms and filed no complaint.

Hezzy Kafureka who was the Returning Officer of Mbarara District denied the allegations made by Mary Frances Ssemambo and Edith Byanyima. In reply to the affidavit of Ssemambo, Kafureka states that the alleged anomalies and discrepancies are all contained in an official document known as the Declaration Results Form DR which were prepared by the Presiding Officers of the respective Polling Stations. Before the official results for Mbarara District were publicly announced the information contained in the Results Forms had to be tallied. The process of tallying involved various forms which included the accountability of Ballot Papers at the Polling Station Form, the Packing List, the Official Report book and form TVB which is filled before opening the ballot box and counting ballot papers. The process of tallying was carried out under his supervision in his capacity as the returning Office of Mbarara District. During the tallying process the tallying clerks for every county would resolve any anomaly or inconsistency arising in the Declaration of Results Form prepared by the respective officers. The apparent anomalies and discrepancies reflected in the Annextures to Ssemambo's affidavit were all resolved and recorded in the Official Tally Sheet. Kafureka stated that despite the anomalies and discrepancies reflected in the annextures to Ssemambo's affidavit, all the Polling Agents of the Petitioner endorsed the Declaration of Results Forms and did not dispute the results of the election. He explained that the apparent anomalies in the forms were a result of human error by the Presiding Officers while completing the forms. He stated that Ssemambo did not seek an explanation from him nor participate in the tallying process.

As regards Edith Byanyima's affidavit, Kafureka stated that she attended the tallying exercise but arrived when the process had begun and left before it was concluded. He said that the Annexture referred to as EB- A-Z in Byanyima's affidavit was a copy of a newspaper publication of the New Vision dated March 1 6 2001 and was not an official document of the Electoral Commission. But the document referred to as Annexture EB-A-1 by Byanyima is the Official record of the results in Mbarara District.

John Tumusiime who was the Chairperson of the Elect Besigye Task Force for Bushenyi District claimed that there was a large number of ballot papers shown as having remained unused in a number of Polling Stations even where the number of ballot papers issued to the various Polling

stations were shown as not exceeding the total number of ballot papers actually used, and this anomaly was not explained. He attached copies of Declaration of Results Forms to demonstrate the anomalies. He alleges that the packing list, which was availed to him, did not indicate how many ballot papers had been issued to each Polling Station. He states that he was denied the tally sheets by the Returning Officer, nor were they availed to the tallying agents for the Petitioner in Bushenyi District.

But Johnston Bitabareho, who was the Returning Officer of Bushenyi District, denied the allegations by John Tumusiime. He denied that there were a lot of malpractices in the conduct of elections in the District, and also denied the specific allegations made by Tumusiime. He stated that the Presiding Officers at the Polling Stations specified erroneously recorded the number of ballot papers issued to the voters at the Polling Station in the place of the number of ballot papers issued by the Electoral Commission to the Polling Station. He attached copies of the official report books of the various Polling Stations showing the actual number of ballot papers issued to the said Polling Stations.

He explained that in order to reach the numbers of unused ballots the Presiding Officers were required to deduct the valid, invalid and spoilt ballots from the number of ballot papers issued to the station but the arithmetic was flawed and affected by wrong entries in the cases cited. Despite the arithmetic errors in the entries, there were no unaccounted for ballot papers in the Polling Stations mentioned and the Presiding Officers nonetheless filled in the actual number of ballots remaining at the Polling Stations. He stated that when the entry regarding the number of ballots issued to the Polling Stations is corrected in accordance with the Official Report book, and the valid, invalid and spoilt ballots are deducted, the figure derived in all the cases mentioned is the same as the unused ballots entered in the declaration of results appearing in annextures to Tumusiime's affidavit.

He stated further that Tumusiime was not entitled to receive any parking lists, but packing lists containing the number of ballot papers issued were duly sent to every Presiding Officer at every Polling Station in the District. He denied refusing to give Tumusiime tally sheets and stated that in the morning of 13 March 2001, he announced to everyone present including Tumusiime that

he would announce the results in the afternoon of the same day and he did so but in the absence of the Petitioner's Agents. On 15 March 2001 Tumusiime came to his Office and asked for the tally sheets, but he informed him that the District Registrar had taken them to the Electoral Commission in Kampala.

Anteli Twahirwa who was the Kabale District Chairman for the Petitioner's Campaign Task Force alleged that their Agents were forced to sign Declaration of Results Forms. He stated that he had perused the Declaration of Results Forms from his District and found that nearly all of them are inaccurate. He claims that they indicate the total numbers of ballot papers in possession of Polling Officials, which were higher than the total numbers of ballot papers officially received at the respective Polling Stations. Copies of the some of the forms containing these anomalies were attached to his affidavit. His conclusion is that the elections were massively rigged in favour of the l Respondent. It is not clear how he arrives at this conclusion when 10 out of the 11 Declaration of Results Forms he attached to his affidavit were signed by the Petitioner's Agents.

Katengwa Samuel who was the Returning Officer for Kabale District denied the allegations made by Twahirwa. He stated that it was Twahirwa as the Petitioner's Campaign Chairman who went on air at Voice of Kigezi Radio Station calling upon all the Petitioner's Agents to withdraw from Polling Stations and not sign the Official Declaration of Results Forms. His view that only those agents who may not have heard the announcement or saw no reason for refusing to sign what they had witnessed freely signed the said forms.

Katengwa further explains that the anomalies referred to in Annextures E marked "C 1" - "C l" were partly a result of the Polling Officials running short of ballot papers due to having received insufficient numbers and borrowing from neighbouring stations but this was evidenced by the report of the Electoral Commission Sub-county Supervisor; a copy of which was attached to his affidavit.

As regards the alleged inaccuracies in the Declaration of Results Forms attached to Twahirwa's affidavit, he explained that they were not deliberately commuted by the Presiding Officers who prepared them but the said anomalies and discrepancies were in some cases a result of human and arithmetical error. He states further that in all cases the Presiding Officers at all the Districts'

Polling Stations forwarded the Declaration of Results Forms to him and before the official results were forwarded to the Electoral Commission in Kampala, he had a duty to carry out a tallying exercise when all candidates were entitled to be present and participate. He explained that during the tallying exercise they rectified the arithmetical errors and therefore the anomalies and discrepancies complained of by Twahirwa were resolved in the presence of candidates tallying agents. The Petitioner's representatives refused to sign the Transmission of Results Return form due to Twahirwa's Radio announcement. The results he transmitted from his district were cross-checked and confirmed at the Tallying Centre at the Commission in Kampala.

Suliman Niiro who was a Monitor for the Petitioner in Bukooli North Constituency in Bugiri District stated that he found that some calculations on the Declaration of Results Forms were elevated and very inaccurate at several Polling Stations like Kamango, Nkavule Parish sub-county Kaprani, Buwelya Makoova, Mayenge Parish, Budhaya Primary School.

Ongee Marino was appointed a Monitor for the Petitioner in Kitgum District. He stated that at about 2 p.m. he found that six Polling Stations had been created and voting was conducted without agents for the Petitioner at the Polling Stations of Pajimo Barracks A, Pajimo Barracks B, Ngom-Oromo (A-E), Ngon-Oromo (E-N), Ngom-Oromo (O-Z) and Malim Abondo's Home II when the results were being tallied the exercise continued smoothly for the gazetted Polling Stations but when it came to the above created Polling Stations the Returning Officer refused to declare the results and said the details would be known later when the ballot boxes and the Declaration of Results Forms had been submitted to him.

When he objected the proposed procedure he was forcefully removed from the place of tallying by the Police. He went and reported the matter to Hon. Okello Okello who was in-charge of the Petitioner's Campaigns in the district. Hon. Okello wrote a letter to the Returning Officer, which was attached to the affidavit. In his letter Hon. Okello Okello was urging the Returning Officer to allow Ongee to perform his duties including checking all the tallies. On his return to the tallying centre he found the exercise completed and his request to look at the results of Polling Station by Polling Station was refused by the Returning Officer.

Aliga Michael the Presiding Officer for Malim Abondro Home II Kitgum Polling Station denied that the polling went on without Agents of the Petitioner. He denied further that the Returning Officer refused to declare the results but he himself declared the results at the Polling Station in the presence of voters and candidates' agents. Akena Kennedy a Presiding Officer at Malim Ambondo Home II Kitgum corroborated the evidence of Aliga Michael.

Charles Owor stated that he was requested by the National Elect Kizza Besigye Task Force together with Richard Turyahabwe to go to the Electoral Commission officer to witness the receipt and tallying of election results on behalf of the Petitioner. They carried a letter of introduction to the Chairman of Electoral Commission. At the Electoral Commission they met Mr. Wamala who agreed to show them around the Offices where the results were being received and tallied. But he and his colleague were refused to enter the Data Centre by the person dressed in civilian clothes who demanded that they get permission from the Chairperson of the Electoral Commission himself. After failing to get the permission they left the Commission Offices between 4.30 and 5.30 p.m. and reported the matter to the Legal Counsel to the Petitioner's Task Force, Mr. Balikuddembe.

Robert Kironde stated that on 13 March 2001 at about 8 p.m. the Petitioner and his task force asked him to go with Mr. Kawalya to the Electoral Commission Offices to witness the counting and tallying of the national results of the Presidential Election. At about 9.00 p.m. Mr. Flora Nkurukenda, the Deputy Chairperson of the Commission allowed them to enter both the Communication Room and the Data Centre and asked Mr. Wamala to take them around.

In the Communication Room he observed the election results were being received from the District Returning Officers by phone, radio voice or radio data or fax. In the Data Centre he found about four men and one lady at a desk receiving electoral information on results, tallying and verifying the results and thereafter handing the results to another desk where they were fed in the computers and then sent back after printing them on the computers for proof-reading by the people on the first desk. Thereafter the results would be forwarded to the International Conference Centre for declaration and publication to the nation.

On the first desk where the election results were being received from the Communication Room, the first person to receive the results was Hon. Charles Bakkabulindi, the Workers' Member of Parliament and one of the well known Chief Campaign Agents for the 1st Respondent. He knew that Hon. Bakkabulindi was not an employee of the Commission. When he wanted to make his own notes about the figures of the results that were being counted, tallied, Mr. Wamala stopped him and advised him to go to the International Conference Centre where he would get the final figures as they were being declared. He and Mr. Kawalya then left the Commission Offices at about 10.30 p.m.

Flora Nkurukenda, the Deputy Chairperson of the Electoral Commission stated that the Petitioner's Agents were allowed to witness the tallying of the results at the Commission Headquarters on production of letters of introduction. She admitted that an introductory letters for Charles Owor and Richard Turyahabwe was left at the Headquarters pending its endorsement by the Chairman of the 2nd Respondent. Later in the day Lead Counsel for the Petitioner, Mr. Balikuddembe and Mr. Yona Kanyomozi introduced two gentlemen to her as the Agents of the Petitioner. The gentlemen did not have letters of introduction so their names were substituted in place of Owori and Turyahabwe by the Lead Counsel. She personally introduced the two agents who she learnt to be Dr. Kironde and Mr. Bwogi Kawalya, to the tallying staff and allowed them into the Data Processing Department and they witnessed the tallying of results after which they left on their own accord. I have looked at the copy of the introduction letter in which the names of the agents were substituted as indicated by Mrs. Nkurukenda.

Wamala Joshua who was the Acting Head Election Management Department of the Electoral Commission denied the allegation by Robert Kironde that Hon. Bakkabulindi was the first person to receive results as he was not handling results but observing the tallying process. He explained that Hon. Bakkabulindi was in the tallying centre as an agent of the 1st Respondent as much as Kironde was the agent for the Petitioner.

Frank Mukunzi who claims to be a Data Analyst made an affidavit to which he attached a report entitled Data Analysis Report on the 2001 Presidential Election which was commissioned by the Petitioner. He was requested to establish the practical viability of the results declared by the

Electoral Commission. According to his report, he used techniques of applied science in the field of statistics, mathematics and experimental social psychology. He claims that his analysis revealed that whereas the Commission presented figures with high precism, they were grossly inaccurate by an error margin of over 50% in the Commissions' figures of the voters' register. His opinion was that the error was so significant that the possibility of the actual poll results showing a different picture from the one given by the Electoral Commission could not be ruled out. However, from the data available, he was unable to determine to what extent the above errors affected each candidate.

Mr. Mukunzi criticises the figure of 10,775,836, registered voters declared by the Commission. He agrees with the figure given by the Bureau of Statistics of 8.9 as realistic. But his own calculations bring him to a figure of 10,627,118, thus making a difference of 10,756 with the figure of the Electoral Commission. In reaching this figure he made a number of assumptions when calculating the number of Ugandans who qualified to vote after the 1991 census, without considering those who died.

I am unable to rely on this opinion. The expertise of Mr. Mukunzi as Data Analyst was not established but was disputed by those in the data analyst profession. His opinion was purely speculative.

I accept the evidence of the Petitioner that here were anomalies and discrepancies in the Declaration of Results Forms and in Tally Sheets. These have been admitted by the 2nd Respondent. However, I accept the explanation given by the 2nd Respondent that the mistakes were due to arithmetic errors committed by Presiding Officers and Tallying Officers, and were not deliberately made to falsify the results or rig the elections. I also accept the evidence of the 2nd Respondent that the Petitioner's Agents were not refused to witness the tallying of the result. Therefore the principle of transparency was not undermined.

Failure to Control the Distribution and Use of Ballot Boxes and Ballot Papers:

The Petitioner complains in Para 3 (1) (m) of the Petition that contrary to Section 12 (1) (b) and (c) of the Electoral Commission Act, the 2nd Respondent failed to control the distribution and use of ballot boxes and papers resulting in the commission of numerous election offences under part x of the Act. The offences listed are:

(i) Unauthorised persons getting possession of ballot papers and other documents relating to the election and using them during the election;

(ii) Unauthorised persons and or officials of the 2nd Respondent using ballot documents acquired to stuff ballot boxes, tick ballot papers on behalf of the voters voting more than once and or doctoring figures in the Voters Register and Rolls.

The Petitioner alleges that as a result, a Commissioner and other official of the Electoral Commission were arrested on the Election Day and charged on 14th March 2001 before the Buganda Road Chief Magistrates Court under Criminal Case No.344 of 2001. In his affidavit in support of the petition the Petitioner states that he knows that Hajati Miiro a Member of the Commission was arrested with two Senior Officers in the Data Centre of the Commission of the polling day and were charged in Buganda Road Chief Magistrates Court with electoral offences and he attached a copy of the charge sheet.

Mr. Kasujja, the Chairman of the 2nd Respondent admitted that Commissioner Miiro and 2 other Officers were arrested and charged in Buganda Road Court but they were not yet tried or convicted and therefore presumed innocent and their cases were subjudice. It is common ground that Mrs. Miiro, a Member of the Electoral Commission and two others namely, Timothy Wakabi a Statistician and Ibrahim Lutalo, Acting Head Voter Registration in the Commission were charged with two counts of abuse of office and neglect of duty before the Buganda Road Chief Magistrate Court. The particulars of the charge of abuse of office allege that for the purpose of rigging the election and in abuse of their authority they did arbitrary acts prejudicial to rights of the Commission in that they printed excess voter’s cards in various names and for various electoral areas. They are also charged with neglecting to print the correct number of voters’ cards thereby resulting in printing of excess voter’s cards.

This is a criminal case, which has not been tried. The accused are presumed innocent until proved guilty. The matter is subjudice and cannot be used as evidence of wrong doing by the 2nd Respondent until the case is determined.

I have already dealt with allegations of stuffing ballot boxes, ticking of ballot papers on behalf of the voters, multiple voting, failure to compile and update Voters Register and Rolls. I shall now first deal with allegations relating to failure to control the distribution and use of ballot boxes and papers.

Section 12 (1) (b) and (c) of the Commission Act provides:

> ***"(1) The Commission shall, subject to and for the purposes of carrying out its functions under Chapter Five of the Constitution and this Act, have the following powers*** –
>
> ***(b) to design, print, distribute and control the use of ballot papers;***
>
> ***(c) to provide, distribute, and collect ballot boxes."***

The Petitioner alleges that the 2nd Respondent's failure to control distribution and use of ballot boxes and papers resulted in the commission of numerous election offences under part X of the Act. But Part X deals with election petitions and not election offences. However such offences are covered under Part Xli of the Act, particularly Section 105. I shall now consider the evidence, which was adduced by the parties in relation to the complaint.

Lucia Naggayi claimed in her affidavit that at Bukomero II Polling Station in Kiboga County East Constituency, he found ballot books containing ballot papers with similar serial number viz 3873301-3873400 making the 1 number of ballot papers as 110 in a ballot book. She further claims that at the four Polling Stations he visited the ballot papers in the box were either 40, 50 or 60 instead of the exact number of 100. For instance the numbers at two of the Polling Stations were:

Bukomero I:	Serial Nos:	387540-3875450
		3874741-3874800
Bukomero II:	Serial Nos:	3875451-3875500

I see nothing to suggest that these serial numbers were or could not have been issued to the Polling Stations as they are. There is no evidence to prove that other ballot papers were unused or stuffed in ballot boxes.
Ntume Noellene who was the Presiding Officer for Bukomero II N-Z Polling Station stated that Naggayi never counted any ballot papers in any ballot book and it was not true that there were 110 ballot papers in one book.

Kipala John was a Polling Monitor for the Petitioner at Magabi Parish Kakuuto County in Rakai District. His evidence was that at 7.00 a.m. at Gayaza Polling Station when the ballot box was opened it contained seven booklets, six of which contained 1 00 ballot papers each and the other contained 52 ballot papers only. When he asked the Presiding Officer what had happened to the 48 ballot papers, he said he did not know.

Bernard Masiko who was a Campaign Agent for the Petitioner and a Polling Monitor in Kayonza Sub-county stated that on polling day when he reached the Polling Station at 6.30 a.m. with his agents they found that he voting had already started. He claims that all the voting was done by the 1St Respondent's Agent called Rehema Biryomumaisho who had about 200 ballot papers. She ticked all of them and put them in the ballot box. He found out that the same had been done in all Polling "Stations by Sulait Mugaye and Ismail, who were the 1st Respondents Agents. He does not say how he found out.

Basajjabalaba Jafari who was the Secretary of the Elect Besigye Task Force for Bushenyi District stated that he was in-charge of overseeing Polling Agents in Bunyaruguru County. At Kyenzaza Trading Centre Polling Station he received information from the Petitioner's Agents that one Kyomuhangi Allen had 13 ballot papers ticked in favour of the 1st Respondent and that when she tried to cast them she was intercepted and they were removed from her and handed- over to the Monitor of the Station. He approached the Monitor and the ballot papers were handed over to Fr. Vincent Birungi, District Co-ordinator of the NEMO GROUP who took them to Bushenyi Police Station. He went to the Police Station and made his statement. He attached copies of the ballot

papers to his affidavit. I have looked at the ballot papers and they are all ticked in favour of the 1st Respondent except one, which has crosses against the Petitioner and Karuhanga Chapaa - Thus making it a spoilt ballot paper.

Patrick Tumuhairwe who was the Presiding Officer at Kyenzaza Trading Centre Polling Station stated that in the afternoon of the polling day, he was approached by a Monitor called Fr. Vincent Birungi. Fr. Birungi asked him about an alleged incident whereby Allen Kyomuhangi was caught with 13 ballot papers while attempting to put them in the ballot box at the Polling Station. He informed Fr. Birungi that the incident could not have occurred without his knowledge and none had reported the matter to him or his Polling Assistants and record of incidents, which occurred, were recorded in the Official Report Book, which he attached to his affidavit. The report book does not contain the allegation or complaint; and it is signed by the Agents of the Petitioner namely Aruho Michael and Tukahebwa Kenneth.

John Tumusiime stated that he was the Chairperson of Elect Besigye Task Force for Bushenyi District. He claims he saw a lot of malpractices and rigging in Bushenyi District. He claims that some Polling Stations received ballot book with some of the ballot papers already plucked off. He attached copies of Declaration of Results Forms to demonstrate this. But the forms do not show how the ballot papers were plucked off and how many. He states that cases reported to Bushenyi Police Station included multiple voting, impersonation being in unlawful possession of ballot papers and selling of voter's cards. He does not indicate who committed these malpractices and to what extent. He also claims that a large number of ballot papers were shown to have remained unused - in a number of Polling Stations even where the number of ballot papers issued was shown as not exceeding the total number of ballot papers actually used, an anomaly which was not explained. About twelve copies of Declaration of Results Forms were attached, but they were all signed by the Petitioner's Agents without complaint. He also claimed that he was denied the Tally Sheets by the returning Officer nor were they availed to the Tallying Agents for the Petitioner for Bushenyi District.

John Bitarabeho, who was the Returning Officer for Bushenyi District, denied the allegations made by Tumusiime. He stated that it was not true that the Polling Stations received ballot books

with some of the ballot papers already plucked off. He explained that the number of ballot papers dispatched in all cases concurred with those received at the Polling Stations. He attached copies of packing lists showing that in all cases the number of ballot papers dispatched were the same as those received and noted in Annextures JF.A1 and JF. A2.
He also denied that a large number of ballot papers remained unused even when those issued to the Polling Station did not exceed those used. He explained that the Presiding Officers of the said Polling Stations erroneously recorded the number of ballot papers issued to the voters at the Polling station in the place of number of ballot papers issued by the Commission to the Polling Station. He attached copies of the Official Report Books of the various Polling Stations showing the actual number of ballot papers issued to the Polling Stations.

Betty Kyimpairwe who was the District Monitor for the Petitioner in Kamwenge District claimed that at Kyabandara Kanyegaramire Polling Station where the Petitioner had support, she found the Presiding Officer and Polling Officials maliciously spoiling ballots cast for the Petitioner by adding a small tick on the 1st Respondent. As a result of this she complains most of the Petitioner's ballots became invalid. She states that this same thing happened at Nkongoto Primary School.

But Mugyenyi Silver, who was the Election Officer, Election Management Department in-charge of Mid Western Region denied the allegations. He stated that at the Polling Station only 2 ballot papers were declared invalid and only one ballot paper was recorded as spoilt. A copy of the Accountability of Ballot Papers Form ABP for the Polling station was attached to confirm his statement.

James Birungi Ozo who was a District Monitor for the Petitioner in Kamwenge District claimed that at Kakinga Polling Station at around 3.30 p.m. he found the Parish Chief removing the votes cast for the Petitioner from the ballot box using sticks inserted into the box. He alleged that the said Chief was standing at the ballot box and would check all ballot papers ticked and those ticked for the Petitioner would be torn. But Mugyenvi Silver who was the Election Officer Management Department in-charge of Mid Western Region denied the allegation. He explained that the size of the slot on the ballot box could not allow for the alleged removal of ballot papers.

Magumba Abdu who stated that he was appointed a Polling Agent of the Petitioner at Munyonyo Muslim School Polling Station in Mayuge District stated that of the nine ballot papers booklets one of them had ten (10) ballot papers missing, and upon inquiring from the Presiding Officer, he was informed that the booklet had been handed over to him in that condition.

Balaba Dunstan who was the Returning Officer for Mayuge District stated that he caused the voting materials to be delivered to their respective places while they were still in the sealed form in which they had been dispatched from the Electoral Commission. In support of what Balaba has said, Maigovu Jowali who was the Polling Agent for the 1st Respondent at the said Polling Station, stated that he was present when voting materials arrived at the Polling Station at Minoni Muslim School which is mistakenly referred to as Munyonyo Muslim School by Magumba. The number of ballot papers booklets were verified in the presence of Magumba. He confirmed that of the 9 booklets that he saw each of the 8 booklets contained 100 ballot papers and it was only the 9th booklet which had less than 100 ballot papers. All this tallied with the parking list inside the ballot box. At the end of the polling exercise all other candidates' agents voluntarily signed the Declaration of Results Forms.

Musisi Francis who was a Polling Agent for the Petitioner at Baitambogwe Polling Station in Mayuge District claimed that at the Polling Station, when the first booklet of papers containing 100 ballot leaves got finished, the Presiding Officers produced a second booklet which had seventy three (73) ballot papers missing as only 27 were displayed to them. On inquiring, they were informed by the Presiding Officer that they had been removed and taken to another Polling station.

Ojok David Livingstone who was the Chairman of the Namatala Ward Task Force for the Petitioner in Mbale Municipality stated that on the polling day he and his fellow Monitor Massa Musa received information at Namatala Police Post that one lady was distributing voter's cards. Accompanied by a Police Officer, they went to her home. He knew her as Nakintu. On being asked about the allegations she admitted that she had received 50 voters' cards from one councilor, Charles Wafula to distribute to the supporters of the 1st Respondent. She said she had

distributed 11 voter's cards to her fellow supporters of the 1st Respondent. She produced the remaining cards together with the bottle of jik one tablet of cussons Imperial soap and a drying rug for removing the marking ink. The Police Officer arrested her and took her to the Police Station together with the exhibits. The following day she was released.

Wafula Charles who is a Councillor of Industrial Division Council Mbale Municipality denied the allegations made by Ojok David. He admitted knowing Nakintu Margaret but denied giving 50 voter's cards to Nakintu to distribute to supporters of the 1st Respondent. He never received any voter cards from any person for distribution to the 1st Respondent's supporters.

Maliki Bukoli who was a voter at Doko Cell Polling Station in Mbale Municipality claimed that at 11 am. while he was proceeding to the Polling Station he met a crowd of people gathered around a man at the Catholic Church Polling Station. He noticed a man known to him as Mukonge who had been arrested with 5 voter's cards. He saw him being taken to Mbale Police Station. After 2 days he saw Mukonge back in his area. He does not say whether he actually saw the voters' cards or what happened to them thereafter.

Helen Ayeko, a Polling Agent for the Petitioner at Kalapata "A" Polling Station in Kumi District alleged that the pads of ballot papers did not contain the regular number of 100 papers per ballot paper pad. One of the pads contained only 29 ballot papers and another had only 20 ballot papers. But she also stated she was chased away from the desk where ballot papers were by the Presiding Officer.

But the Presiding Officer of that Polling Station Napokol Richard explained that the two ballot paper books referred to had been dispatched from the Commission when they were not full and all the Polling Agents who were present at the commencement of the voting exercise were notified of the fact.

Ongee Marino who was the Petitioner's Monitor in Kitgum District claimed that on the polling day he witnessed the delivery of an additional ballot box destined for Pandwong was apprehended and handed over to the Police with a request that it be opened but the Police

refused. He also witnessed the delivery to Kitgum Police Station of a ballot box meant for Palika, which he believes, was used for rigging the election. No time is given, and he does not state whether the boxes were empty or stuffed.

He further claims that Capt. Nuwagaba landed in Kitgum in a helicopter with 3 additional ballot boxes and the Registrar Geoffrey collected the said ballot boxes in a pick-up under army escort together with the said Nuwagaba. He states that the ballot boxes were meant to be taken to Ngom Oromo at around 8.00 p.m. He objected and at around 10.00 p.m. they took the boxes to, the Police Station and requested that the boxes be opened, but the Returning Officer refused since the ballot boxes were stuffed with ballot papers and were heavy.

Godfrey Okot who was the Registrar/Election Officer of Kitgum District stated that he had about 200 Polling Stations both civilian and army. On 11 March 2001 he received all polling materials and distributed them to all Polling Stations without a shortage in his electoral area. On polling day at 7.30 p.m. Capt. Nuwagaba came to Kitgum with 3 ballot boxes meant for Ongom Oromo Polling Stations. He informed Capt. Nuwagaba that there was no shortage in Ngom Oromo and all the army units had voted and Capt. Nuwagaba left with them the ballot boxes sealed. Capt. Nuwagaba, the Returning Officer Kitgum and himself decided to take the three boxes to the Police station. The seal of the boxes has not been opened to date. He denied that the three ballot boxes were stuffed with ballot papers as claimed by Marino because they were not used during the elections.

Katehangwa Samuel the Returning Officer for Kabale District in reply to Anteli Twahirwa's complaint about anomalies in tally sheets in Annextures Cl-Cl2, he explained that they were partly a result of Polling Officials running short of ballot papers due to having received insufficient numbers and borrowing from the neighbouring stations, but this was evidenced on the report of the Electoral Commission Sub-county Supervisor (a copy was attached marked C). He attached copies of two requests for more ballot papers from two Presiding Officers. Another copy was returning a balance of ballot papers.

Wamala Joshua who was the Acting Head of Election Management Department of Electoral Commission explained the allegation that certain booklets contained less than 100 ballot papers. He stated that the Commission ordered for 11 million ballot papers for the elections, which arrived in the country in booklets containing 100 ballot papers each. Since however the numbers of voters at the various Polling stations were not in denomination of exact 100s and the ballot booklets contained 100 ballot papers each, some booklets had to be split for ease of distribution to Polling Stations.

Looking at the evidence as a whole, I accept the evidence of the 2nd Respondent as regards the explanation as to why some ballot books did not have 100 ballot papers. It was due to convenience of distribution to Polling stations where the number of voters did not require round figures of 100 ballot papers in each ballot book. There is also the explanation that the calculations by Presiding Officers were inaccurate in many Polling Stations. There was borrowing of ballot papers from neighbouring stations. At the end of the polling exercise, the results were correctly tallied to correspond to the actual number of ballot papers issued to the Polling Station. The claims that unauthorised persons were found with ballot papers have also been satisfactorily explained or refuted.

Unauthorised Possession of Voters Cards:

I shall now consider the evidence relating to unauthorised possession of voter's cards. Both the Petitioner and the 2nd Respondent filed affidavits in support of their respective cases. Wafid Amir who was a Monitor for the petitioner in Mutoto Bungokho Sub- County in Mbale District stated in his undated affidavit that while he was at Munkaga Stage, the Resident District Commissioner, Hassan Galiwango came in his vehicle and parked at the stage. The Sub-county Chief Nambale - Mutoto was at the stage and went to talk to Mr. Galiwango. After the discussions the RDC continued towards Tororo. At the same time the area Movement Chairman, Geoffrey came from Tororo side on a motor cycle driven by one Sonya David and he went towards Musoto, which was his next destination.

At Musoto, he found Musongole the Vice-Chairman of his village holding discussions with the Sub-county Chief Nambale. When he reached where they were, Sonya drove his motor cycle in the opposite direction allegedly carrying a black handbag which he did not possess when he was driven to Musoto. As he suspected rigging of elections, he told his driver to turn back and give a chase. At the local railway crossing, Sonya's motor cycle developed a problem and he found him there. He asked Sonya what he was carrying in the black handbag but when Sonya tried to grab the bag and run away he struggled for the bag which got torn and more than 50,000 voters cards and some official stamps plus Return Forms for the Sub-county of Bungoko were poured down. He raised an alarm, which was answered by a crowd, which assisted him to arrest Sonya and retain the bag. The Movement Chairman and the Sub-county Chief came to the scene and tried to rescue Sonya, but in vain. Sonya was detained until Police Officers from Mbale Police Station came and took him into custody together with the exhibits. He escorted Sonya to the Police Station. Two days later, he saw Sonya back home.

Wamaye Kenneth who is the Sub-county Chief of Bungoko Mutoto in Mbale District denied the above allegations. He stated that on the polling day he received a report from the Presiding Officer of Musoto A Polling station that some people had been refused voting because they did not have valid voter's cards and that some people had voter's cards but their names were not appearing on the voter's register. He requested for a lift from Mr. Musonya David to go and find out the position. He carried with him envelopes containing returns for voter's cards, Registers Rolls inkpads and pens. On his way back, he was ambushed in Marare Village by Wafid Amir who started raising an alarm to the effect that the tax collector meaning him was stealing votes. He ran away for fear of being lynched.

He denied being in possession of 50,000 voter's cards at the time, and stated the number of voters in the sub-county is 20,000. He said that the balance of the cards he was returning to the sub-county headquarters was less than 3,000. Wafidi Ali and Musongole Julius grabbed from him the balance of voter's cards from 4 Polling Stations, namely Nauyo "A", Nauyo "B", Nauyo "C" and Bunamwami Church of Uganda. He denied engaging in any election malpractices as alleged.

Wafid Amir's affidavit is technically inadmissible as not being dated. But even if it were admitted, the allegations therein have been rebutted by Wamae Kenneth whose explanation is credible in the circumstances.

Mubaje Sulaiti a voter at Bukwanga Store Polling Station in Bungokho county, Mbale District claimed that he saw a person in-charge of the marking ink holding about 10 voter's cards and 10 ballot papers and when he complained about this, the Presiding Officer, two armed LDU assaulted him and removed the papers from him and put them in the ballot box. He was not allowed to vote as his voter's card was removed from him and he was chased away. He reported the matter to Mbale Police Station where he made a statement.

This evidence is refuted by Kasakya Hakim who was the Presiding Officer for Bukwanga Trading Centre B Polling Station. Kasakya states that at about 11 .00 a.m. a group of five people came with valid voter's cards but whose names were not on the register. He informed them that they could not vote and asked them to leave. Mubaje joined the Petitioner's Agents and beat him until he was rescued by a Local Defence Unit Officer, whereupon Mubaje left and later reported the matter to Mbale Police Station. He denied that there was any lady who attempted to cast 10 ballot papers into the ballot boxes as alleged. He denied forcefully removing Mubaje's voter's card or threatening violence against him.

Arajabu Mugamba who was deployed at Bukwanga "C" Polling Station as a Police Constable denied being armed on that day. He knew Mubaje, who came at 10 a.m. with lssa Kibwiti and went to the Presiding Officer's table. While at the table, Mubaje and Kibwiti attempted to grab ballot papers from the Presiding Officer, Mr. Kasakya Hakim. He intervened and pushed them away. They grabbed him and bet him severely, after which they ran away. He reported the matter to the Returning Officer when he reported to the Polling Station at 2.00 p.m. He therefore denied assaulting Mubaje and removing ballot papers from him and put them in the ballot box.

Karenzyo Eliphaz a Registered voter at Rwenyerere Polling Station in Kihiihi, Kanungu District stated that when the Voters Register was displayed he went to his Polling Station and was given his voter's card. But he noticed that many newly registered voters especially youths who had

only recently reached voting age had been denied cards on the ground that they were rebels. He alleged that Abel Turaaakira the LC Il Chairman was involved in this practice. He claims that the Polling Officials were left with many "unclaimed cards" which they then distributed to the LC I Chairman for distribution to others; but they never did so. Later, he alleges, Mrs. Jackline Mbabazi wife of Hon. Amama Mbabazi convened a meeting in the Lukiiko Hall at Kihiihi and directed the Chairman to keep the voting cards safely to be used for the 1st Respondent. He claims that he was outside the Hall and heard her clearly.

Jackline Mbabazi denied the allegation made by Karenzyo. She denied convening a meeting in the Lukiiko Hall at Kihiihi where she directed Chairman of LC I to keep voting cards of unclaimed cards safely for use and benefit of the 1st Respondent's election.

Idd Kiryowa who was a Polling Agent for the Petitioner at Nabiseke Polling Station in Sembabule District claimed that at around 1.00 p.m. one Makasa who was a Campaign Agent for the 1st Respondent was found distributing voter's cards to some people behind a building. He was offered money to give up supporting the Petitioner but he refused. He left them there and lodged a complaint to the Presiding Officer but to no avail.

Kakuba Nathan who was the Polling Agent for the 1st Respondent at Nabiseke A-L Polling Station where he cast his vote denied requesting Nabosa to approach Idd Kiryowa for any reason whatsoever. He denied being behind any building since he was supposed to keep near the Presiding Officer's desk all the time. He also denied stuffing any ballot papers in the ballot box.

Fazil Masinde, who was a Monitor in-charge of seven Polling Stations in Mayuge District, claimed that on the polling day, at Babuli Polling Station, he found the area Chairman of LC I Mr. Isa Bwana with voters' cards which he was distributing to people who were not registered voters instructing them to vote for the 1st Respondent. He reported the matter to Mayuge Police but no action was taken. At Butangalo, one Mrs. Kidiri Mukoda was also distributing voters' cars to many registered voters and among the people who were given was Isha Nabirye and Baina Nakagolo who was arrested while trying to vote. At Busakera B Polling Station, a Gombolola

Security Officer, Ahmed Gesa was also issuing voters' cards and directing people to vote for the 1st Respondent.

But Gesa Ahmed who was the Defence Secretary LC II Kaluuba Parish and Gombolola Internal Security Officer (GISO) at Katyelera Sub-county, Mayuge District denied the allegation made by Masinde. He stated that he was not an Agent of the Respondent neither did he hold any official position in the electoral process. He therefore did not issue any voters' cards to any person or direct people to vote for the 1st Respondent. He stated that he was busy performing his duties of monitoring the general security situation in the sub- County and only appeared at the Polling Station of Busakera B at about 2 p.m. to cast his vote and then left. He denied threatening anybody at the Polling Station. The Presiding Officer, Mudaaki Emmanuel also denied the allegation made by Masinde.

Sulaiti Kule who was a Monitor for the Petitioner in Kasese District claimed that one Robert Kanunu came to him complaining and handed him 1 6 voters' cards allegedly given to him to supply to other people. He took the cards to Kasese Police Station. He noted the names and numbers of the cards in his notebook. There is no indication as to who supplied the cards and for what purpose, and what Polling Station he was at, at the time. Kugonza James who was the Presiding Officer at "Below the Town Agent House L-Z" Polling Station refuted Kule's allegations about the Petitioner's Agents sitting 3 to 5 metres away from the Presiding Officer's desk instead of 2 metres agreed earlier. Kugonza stated that the agents sat 2 metres away. This evidence casts doubts on the credibility of Kule.

Guma Majid Awadson who was a Polling Monitor for the Petitioner at Kuru Division Polling Station at Lomunga, Aleapi and Geya Parish claimed that at Aleapi Parish, Ojinga Polling Station he saw one Mawa a Member of the 1st Respondent's District Task Force and Campaign Manager distributing voters' cards to people who were not appearing on the Register and who did not have voters' cards. He arrested Mawa and got the voters' cards for one Leila Alungaru No.002279l67. While he was recording the number of the second card, armed Military Personnel came and took Mawa away with the other cards threatening to arrest him. He also claimed that Drasi LC Ill

Chairman of Kuru County had been issued with six ballot papers to vote for Aliba A Polling Station.

But Drasi Ali denied that he was given six ballot papers to vote by Abele as alleged above. Okot Araa Sam the District Police commander, Yumbe District admitted receiving a complaint from Guma Majid at 9 am. that Drasi had been issued with 6 ballot papers to vote at Aliba Polling Station. He instructed his junior staff to go to the scene and investigate the matter. The investigations revealed that the allegations against Drasi were false and no arrests were made.

The issue and distribution voters' cards are the responsibility of the 2nd Respondent and any person or officer it may authorise to do so. In some of the complaints, the Presiding Officers or Polling Officials were criticised for issuing voters' cards. There was no evidence that they were not so authorised. It may also be true that time for issuing voters' cards had lapsed. But the allegations of unauthorised possession and distribution of voters' cards before or on the day of polling have been denied by the evidence adduced by the 2nd Respondent. This evidence has cast serious doubts on the evidence and allegations by the Petitioner. I therefore find that it has not been proved to my satisfaction that the 2nd Respondent failed to control the distribution and use of ballot boxes and ballot papers resulting in the commission of numerous election offences.

Failure of All Commissioners to Sign Declaration of Results Form B:

It is alleged in Para 3 (1) (u) of the Petition that contrary to Section 56 (2) of the Act the 2" Respondent declared the results of the Presidential Election when all the Electoral Commissioners had not signed the Declaration of Results Form B. Section 56 (1) and (2) of the Act provides,

> ***"(1) The Commission shall ascertain, publish and declare in writing under its seal the results of the Presidential Election within forty-eight hours.***
>
> ***(2) The declaration under sub-section (1) shall be in Form B or Form C as specified in the Seventh Schedule to this Act as the case may be."***

The form has places for signatures of seven Commissioners and the Secretary to the Commission.

However, Section 56 (2) of the Act does not provide how decisions of the Commission relating to elections or any other matter are to be taken. This is provided for in Section 8 of the Commission Act, which states in part as follows:

> ***"(1) Every decision of the Commission shall as far as possible be by consensus.***
>
> ***(2) Where on any matter Consensus cannot be obtained, the matter shall be decided by voting; and the matter shall be taken to have been decided if supported by the votes of a majority of all the Members of the Commission.***
>
> ***(3) In any vote under sub-section (2) each Member of the Commission shall have one vote and none shall have a casting vote.***
>
> ***(4) The quorum of the Commission at any meeting shall be five.***
>
> ***(5) The Commission may act notwithstanding the absence of any member or any vacancy in the office of a member.***
>
> ***(6) The Secretary shall cause to be recorded minutes of all proceedings of the Commission"***

The Declaration of Results Form B was signed by five Commissioners and the Secretary. Mrs. Miiro who was a Commissioner did not sign because she was in custody facing a criminal charge. It is common knowledge that Lady Justice Maitum ceased to be a Commissioner on appointment as a High Court Judge. The Commission had capacity to act notwithstanding any vacancy on it or absence of a member provided it had a quorum of five. The Declaration of Results Form B was signed by five Commissioners and therefore the Commissioners' decision declaring the results of the election was in accordance with the law. The independence, impartiality and integrity and indeed its authority was not thereby undermined in any way.

Allowing People with Deadly Weapons at Polling Stations:

The Petitioner complains in Para 3 (1) (r) that contrary to Section 42 of the Act the 2nd Respondent and its Agents or Servants in the course of their duties allowed people with deadly weapons to wit soldiers and para-military personnel at Polling Stations - a presence which

intimidated many voters to vote for the soldiers boss - the 1st Respondent - while many of those who disliked to be forced for that candidate stayed away or refrained from voting at all. In reply the 2nd Respondent denied allowing any unauthorised armed people in any Polling Station and stated that no voters were refrained from voting for a candidate of their choice as alleged.

Section 42 of the Act provides,

> ***"(1) No person shall arm himself or herself during any part of polling day with any deadly weapon or approach within one kilometre of a Polling station with deadly weapons unless called upon to do so by lawful authority or where he or she is ordinarily entitled by virtue of his or her office to carry arms.***
>
> ***(2) Any person who contravenes sub-section (1) commits an offence."***

This provision appears intended to provide an atmosphere of freedom at or near the Polling Station. It prohibits the holding of deadly weapons at Polling Stations unless so authorised or unless the weapon is heed by virtue of office. This section creates an offence committed by a person, and it appears to be it may not be breached by the 2nd Respondent unless it unlawfully authorised any person to hold a deadly weapon at a Polling Station. The Act does not contain a definition of a deadly weapon but it must be such a weapon when may cause death when used for offensive purposes. A gun or a panga could be a deadly weapon.

Section 40 of the Act makes a Presiding Officer to require the assistance of a Police Officer or other persons present to aid him or her in maintaining peace and good order at the Polling Station. Section 41 provides that where there is no Police Officer to maintain order in a rural Polling Station and the necessity to maintain such order arises the Presiding Officer shall appoint a person to be an Election Constable to maintain order in the Polling Station throughout the day. But a Presiding Officer may only appoint a person other than a Police Officer to be an Election Constable where there is actual or threatened disorder or when it is likely that a large number of voters will seek to vote at the same time. It is clear therefore that security at Polling stations is required to be maintained by Police Officers or election constables.

The Petitioner adduced the evidence of several witnesses to support his case. Alex Busingye who was in-charge of overseeing the operations and welfare of the Polling Agents for the Petitioner in Kazo County in Mbarara District claims that at the majority of the Polling Stations he visited he found that the Polling Agents for the Petitioner had been chased away by armed UPDF soldiers. She gives only one example of one Polling Station called Nkungu where she found a Monitor for the Station had been tied by UPDF soldiers and bundled on a motor vehicle Reg. No. 114 UBS pick-up in which they were travelling.

Mbabazi Kalinda who was the Presiding Officer at Nkungu Trading Centre Polling Station A-K denied the allegations made by Busingye. He stated that Busingye never complained to him that an Election Monitor had been taken away by soldiers. He denied that at his Polling Station a Monitor was tied up by soldiers and bundled on a pick-up.

Mary Frances Ssemambo who was the Chairperson of the Petitioner's Task Force in Mbarara District claims that in many Polling Stations in Nyabusozi County and lsingiro County South, Polling Agents for the Petitioner were harassed, arrested, beaten, tied up and detained or threatened with violence and chased from the Polling Stations by heavily armed UPDF soldiers, LDUs and the 1st Respondent's Agents, and the interests of the Petitioner in numerous Polling Stations were not safeguarded. She does not indicate how she came to know this or any agent who was so treated.

Hezzy Kafureka, the Returning Officer of Mbarara District denied the allegations made by Ssemambo. He stated that the anomalies in the Declaration of Results Forms were a result of arithmetic errors, which were corrected during the polling process, and the forms were endorsed by all Polling Agent of the Petitioner.

Koko Medad who was a Polling Monitor for the Petitioner in Kanungu District claimed that when he reported at his Polling Station, he found Polling Officials working together with non-officials including an army veteran called Kakambe and others. Kakambe was guarding the ballot box armed with a gun and he threatened to kill anybody who touched it. He also claims that the Petitioner's Agents were chased from the polling area, to stand about 50 metres away.

This was done by a District Councillor Peter Mugisha. But Rutanaza Silver who was the Presiding Officer denied the allegations and stated that all Polling Monitors were present till the counting of votes.
John Kijumba who was a Monitor for the Petitioner for Bukonjo West Constituency in Kasese District claims that prior to the polling day, a soldier by the name of Kilindiro William who came to [is area and said that he had been sent by State House to arrest those campaigning for the Petitioner, and that he had their list, which included his name. On the polling day, at Katojo Polling Station, he noted that there were about 10 army men all armed with guns guarding The Polling Centre. He did not say that the soldiers intimidated or interfered with the voting.

Milton Wakabalya who was the Presiding Officer for Katojo Polling Station in Kasese District denied the allegations made by John Kijumba. He stated that on the polling day, Katushabe Marusi identified to him as the appointed Polling Constable. He never saw Marusi carrying any firearm nor did he see any armed men at the Polling Station, nor did he receive any report of their presence.

Imoni Stephen a Campaign Agent for the Petitioner in Kwapa County, Tororo District claimed that on polling day at the close of the polling the Presiding Officer convinced all Agents to sign the Declaration Forms before votes were tallied. Before the votes could be counted, the LC Ill Chairman, Alfred Obore returned to the Polling Station after 6.00 p.m. with a gun cocked it and ordered everybody to disappear.

They disappeared but returned 30 minutes later only to find that at the end of the exercise 1 60 ballot papers had not been used leaving 65 ballot papers unaccounted for. After disagreement the agents of the Petitioner insisted that the 65 votes be destroyed. The matter was reported to CID Malaba who arrested the Presiding Officer but later released him.

Masasiro Stephen who was a Polling Agent for the Petitioner at Nkusi Primary School Polling Station claimed that while at the Polling Station a disturbance was started by the Area Sub-county Chief Abdu Mudoma, the Chairman of the 1 Respondent’s Task Force, All Mukhholi the Sub-county Councillor, Mr. Michael Namundi who came to the Station with 4 armed soldiers.

The soldiers shot in the air. The Polling Agents for the Petition - himself and Mr. Wafuba were severely assaulted. After the assault, he alleges that the Sub-county Chief, the Sub-County Councillor and the Chairman of the 1st Respondent's Task Force put ballot papers in which the 1st Respondent's picture had been ticked into the ballot box. When they tried to intervene, they were assaulted further and removed from the ballot box. He struggled with Ali Mukholi and snatched 5 ballot papers from him. He took the ballot papers to Mbale Police Station where he made a report. Magezi Abu who was the Presiding Officer at Bus Park "A" Polling Station in Bugiri District denied that any soldiers ever came to his Polling Station and forced unauthorised people to vote as alleged by Niiro.

Baguma John Henry was appointed a Monitor for the Petitioner in the whole of Bukonjo County in Kasese District. He alleges that on 1 2 March 2001, the RDC in-charge of Bukonjo West, one Aggrey Mwami came to Musaa Polling Station, with a lorry full of armed soldiers. Mwami ordered the Presiding Officer to allow all soldiers to vote and handed to the Presiding Officer the names of the soldiers when the Polling Station had its own register before the RDC arrived. When he protested he was overpowered and threatened with death by a soldier in-charge of operations at Nyabwongo Army Battalion Headquarters. He noted that the men who had voted at Nyabwongo Army Barracks had been transported to Rwenghuyo and Kisenga Trading Centre Polling Station where they voted again. When he pointed this out to the Presiding Officer, he was chased away by Major Muhindo Mawa who threatened to kill him if he continued to protest against the soldiers voting from any Polling Station (NB soldiers were voters). No guns were seen. He does not explain how he recognised soldiers who had voted in other Polling Stations.

Major Mawa Muhindo of the UPDF stationed at 13th Battalion Bwera in Kasese District denied the allegations made by Baguma John that he went to Rwenghuyo and Kisenga Trading Centres. He stated that he voted at Kisolholho Primary School Polling Station, which is approximately 20 kilometres away from Kisenga Trading Centre. He denied chasing away Baguma or threatened to kill him as alleged.

Alex Otim who was a Monitor of the Petitioner in Paico Division in Gulu District stated that while he was at Paico P.7 School together with another Monitor, they found that two soldiers

were deployed at each Polling Station. He claimed that the soldiers were forcing old people to vote according to their choice. He mentions the following soldiers as being involved in the malpractices - Opoka Denis, Mawa Rasheet, Dumba Julius and Ocen Francis. He alleges that when they chased the soldiers away from the Polling Station, they went to a nearby barracks and came back armed and were also using an army vehicle (mamba). The soldiers assaulted and arrested him and Okello Saul and released them at 8.00 p.m. after voting.

Despite denials by the witnesses of the Respondents, I accept the evidence for the Petitioner that in a few Polling Stations there were some armed people contrary to the law.

Abduction and Arrest of Agents and Supporters:

The Petitioner complains in Para 3(1) (w) of the petition that his agents and supporters were abducted and some arrested by the Army to prevail upon them to vote for the 1**st** Respondent or to refrain from voting contrary to Section 74 (b) of the Act. The Petitioner does not specify in his supporting affidavit, the names of those abducted or arrested to prevent them from voting for him save for Hon. Rabwoni Okwir. But other witnesses have given statements to support the complaint. It is necessary to consider first the complaint in respect of Hon. Okwir who was the Chairperson of the Youth and Students Committee of the Elect Besigye Task Force.

In his affidavit sworn from London on 23 March 2001 Hon. Major (Rtd.) Okwir Rabwoni MP states that he was illegally arrested, detained and tortured and intimidated during the Presidential Campaigns in Uganda which ran from 8th January to 12th March 2001 when he was in the National Campaign Team of the Petitioner, On 19 January 2001, he was confronted by members of the Presidential Protection Unit (PPU) in Rukungiri District at Kanungu Trading Centre and prevented from meeting with their supporters. He was held hostage with his supporters but later left for his next meeting in Rugyeyo Sub-country, Rukungiri District. Twelve armed soldiers under the command of Capt. Ndahura surrounded him there and his supporters and ordered him to leave the District while assaulting the Petitioner’s supporters.

Hon. Rabwoni further states that on 19th February 2001 he was made to sign a document announcing his withdrawal from the Elect Besigye Task force (EBTF), by two UPDF officers: Major General David Tinyefuza and Lt. Col. Noble Mayombo at Nile Hotel, Kampala on 20 February 2001, he avers that he was unlawfully and violently arrested at Entebbe International Airport, beaten and sat upon in a military police pick-up in the presence of journalists, diplomats and colleagues and illegally detained at the Chieftaincy of Military Intelligence (CMI) Headquarters in Kampala. During the arrest he sustained injuries to his leg and chest and for which injuries he was still undergoing treatment. He went through six-hour grueling interrogation session conducted by seven officers of the Chieftaincy of Military Intelligence.

He further states that on 21st.February 2001, he had a telephone conversation with H.E. the President Museveni when he was in Gulu where he tried to convince him to leave "that wrong group" and promised to allow him leave the country and to take care of his interests while he was abroad.

On the same day he claims that he was freed to make a statement disassociating himself from the Presidential candidate Dr. Besigye's Task Force, in the presence of Major General Elly Tumwine, Major General David Tinyefuza, Maj. General Jeje Odongo and Lt. Col. Noble Mayombo, a statement which he later read to the press at Parliament Buildings the same evening. He claims that from 21st February 2001 he was virtually under house arrest at his residence in Bbunga, guarded by officers and men of UPDF under the guise of "state protection;" against his own candidate and supporters.

On 27 February 2001, he claims he had to leave the country as he felt his life was in danger and he was currently living in the United Kingdom with his family. He concludes his affidavit by claiming that consequently, he did not vote in the 12th March 2001 Presidential elections, which is a denial of his constitutional right.

Hon Okwir's account of how he was arrested at Entebbe International Airport is supported by the affidavits of the Petitioner and his wife, Hon. Winnie Byanyima. According to the Petitioner's affidavit in support of the petition, on 19 February 2001 at about 7 p.m. he arrived from

Bundibugyo and found Hon. Okwir at his house with his wife Solange and Ms. Anne Mugisha. Hon Okwir narrated to him how he had been intimidated for two days by Maj. Gen. David Tinyefuza and Lt. Col. Mayombo. He also informed him how he has been taken to the International Conference Centre and forced for his safety to sign a document to the effect that he had resigned from the Petitioner's Task Force and that they were getting funds from countries hostile to Uganda. After signing the document he had been taken to Nile Hotel for lunch. The Petitioner defended further that after discussing the matter with Hon. Okwir, it was decided that the public be informed through the press about what had happened and they continued with the campaign normally. After the press conference they went to the Petitioner's residence where Okwir spent the night. The following day on 20 February 2001 the Petitioner was scheduled to address rallies in Adjumani and Moyo Districts, and had planned to travel by a chartered aircraft from Entebbe at 9.30 a.m. together with some members of his Task force including Hon. Okwir. They arrived at the Entebbe VIP Lounge at about 9.30 a.m. As they proceeded to the aircraft at about 10.00 a.m. an official of the airport informed him that the aircraft has been refused clearance to take off and that they should return to the Lounge while clearance problems were sorted out. As they arrived back in the Lounge and official of the Civil aviation Authority named B. Monday came and informed Hon. Okwir that he had instruction to take him away but Hon. Okwir refused to go. The official went but shortly afterwards Capt. Rwakitarate Moses from the PPU came with some armed men putting on civilian clothes and instructed Okwir to get up and go with him. Hon. Okwir refused to comply, as they were not authorised under the law to arrest him.

At about 3.00 p.m. Col. Kasirye Gwanga arrived with a large group of armed soldiers and forcefully arrested Hon. Okwir and damped him on a pick-up and sat on his head, chest and legs, and drove off. The rest of his affidavit in which he depones on what Hon. Okwir told him about his interrogation and telephone conversation with the 1st Respondent is hearsay.

Hon. Winnie Byanyima also made an affidavit to support Hon. Okwir's claim that he was abducted from Entebbe Airport. She states that on 19th February 2001 Hon. Okwir turned up at her home at Port Bell in the evening and he narrated how he had been pressurised and coerced by Maj. Gen. Tinyefuza, Lt. Cot. Mayombo, Col. Kasirye Gwanga and other senior army officers to

make a statement of withdrawal from the EBTF but he stated that since he had escaped from them he was back into the EBTF although he feared for his life. On 20 February 2001, the Petitioner, Hon Rabwoni and herself and other members of EBTF went to Entebbe International Airport to board a plane to Adjumani where they were scheduled to address a rally. While at Entebbe International Airport, Hon. Rabwoni Okwir was forcefully abducted from the VIP Lounge by a big number of soldiers, which include Capt. Moses Rwakitarate of the PPU who appeared to be in-charge of the operation, which lasted five hours. She states that Hon Rabwoni was never charged with any offence but has since fled into exile.

The allegations made by Hon. Okwir have been answered by the affidavits of the 1st Respondent, Maj. Gen. Jeje Odongo, Maj. Gen. David Tinyefuza, Lt. Cot. Mayombo and Capt. Rwakitarate Moses. In his affidavit in support of the answer to the petition, the 1st Respondent states that it is not true that on 21 February 2001 he had a telephone conversation with Hon. Okwir where he tried to convince him to leave that "wrong group". He states that on that day he had a telephone conversation with Hon. Okwir where he asked him whether it was Maj. Gen. Tinyefuza or Hon. Okwir himself who was telling the truth about the voluntariness of the statement he had signed stating that he had withdrawn from the Petitioner's Task Force. He further states that Hon Okwir told him that the Monitor Newspaper report which alleged that he had stated that he was forced to withdraw from the petitioner's Task Force was false. The 1st Respondent asked him what he intended to do and Okwir replied that he wanted to go abroad for medical treatment and rest. The Respondent asked him further how he would be able to maintain himself abroad as a Member of Parliament of Uganda. He advised Hon. Okwir to notify the Speaker of Parliament so that he could continue to draw his salary until he returned home.

In his affidavit, Maj. Gen. Tinyefuza denied that on 21 February 2001 Hon Okwir was forced to make a statement disassociating himself from EBTF in his presence. He stated that in the ordinary course of his duties as Senior Advisor to the Commander-in-Chief, he details and receives information from various persons acting under lawful covert circumstances, reports concerning security matters within Uganda.

He deponded that on numerous occasions he had assigned Hon. Okwir the task of covertly gathering information and reporting to him matters of highly sensitive nature relating to the security of Uganda. On 15 February 2001 Hon. Okwir requesting him for a meeting which was held on 17 February 2001 at Okapi Gallery in Bbunga where they held long discussions concerning national security matters in which the Petitioner was named. He informed Lt. Col. Noble Mayombo about the information he had received from Hon. Okwir and the three agreed to meet at Sheraton Hotel, the venue selected by Hon. Okwir.

Major Gen. Tinyefuza further states that on 18 February 2001 Hon. Okwir offered to escort him to Sembabule to attend a funeral of a relative. While there Hon. Okwir informed him that he had decided to withdraw from EBTF, and Hon. Okwir addressed mourners informing them of his decision.

On 19 February 2001 he proceeded to the International Conference Centre where he found that Hon. Okwir had already written a statement which was being typed announcing his withdrawal from the EBTF. Lt. Cot. Mayombo was in the room. After the statement was signed Hon. Okwir voluntarily signed it, and the two shook hands. Hon. Okwir promised to put in writing the reports he had given verbally within 3 days, they had lunch with Hon. Okwir and his wife at Nile Hotel. According to Major General Tinyefuza Hon. Okwir asked for facilities including security to enable him meet his Youth Constituents, at the Ranch on the Lake to brief them about his decision. Security was provided to Hon. Okwir by Lt. Col. Mayombo consisting of a pistol and two guards. In the evening Hon Okwir could not be traced. On 20th February he received information that Hon. Okwir had been apprehended at Entebbe International Airport and taken to the headquarters of the Military Intelligence.

In his affidavit, Lt. Col. Noble Mayombo, the Ag. Chief of Military Intelligence and Security of the Uganda People Defence Forces (UPDF) and a Member of Parliament representing the UPDF denied the allegation by Hon. Okwir and Hon. Byanyima that on 19 February 2001, he and Maj. Gen. Tinyefuza forced him to sign a document at Nile Hotel, announcing his withdrawal from the EBTF.

Lt. Col. Mayombo states that his job involves collection, analysis and dissemination of intelligence reports on matters of security and distribution of such information to the President, Army Commander, Commanders of various units and other security organisations of the country. He further states that on 1st January Hon. Okwir who is his young brother and very close friend came to his house for the New Year celebrations and in the course of a political debate told him of his intention to support the Petitioner. From the time Hon. Okwir returned from Rwanda, he had been using him to collect intelligence and security matters in Uganda and Hon. Okwir had given him very good intelligence reports on security matters in Uganda. Lt. Col. Mayombo states that he encouraged Hon. Okwir to join the EBTF so that he gives him information about security related plans of that group and he agreed to do so. On many occasions between that date and 17 February 2001 Hon. Okwir had given him information of a security nature for which he received remuneration from him. As a result of information received from Maj. Gen. Tinyefuza, a meeting was arranged in Sheraton Hotel where he booked the room. The meeting was held till 4.00 a.m. and food and drinks were served. Hon Okwir informed the meeting that the Petitioner and Naser Ssebagala were planning to start insurgency in the event that the Petitioner lost the elections. Hon. Okwir also informed the meeting that they had linked up with people who were throwing bombs in the city, that they were hatching plots to kidnap their own members and blame it on the Government and had hired assassins to kill prominent politicians and leaders in Government. Hon. Okwir further informed the meeting that they had imported guns and were receiving money from neighbouring countries, which were interested in destabilising Uganda.

Lt. Col. Mayombo stated that on 19 February 2001 he went to Hon. Okwir's residence where he found many people including his brothers, and had breakfast with them after which he travelled with them to the International Conference Centre room 328. Hon. Okwir wanted typing services for his statement withdrawing from EBTF and his Secretary Aida provided the services. While at the Conference Centre, Hon. Okwir discussed with him and other officers who included Lt. Col. Mugasha, Lt. Col. Gowa, Col. Kasirye Gwanga about his decision to abandon EBTF because it was involved in planning subversive activities. Thereafter, Hon. Okwir signed the document withdrawing from EBTF and they went to have lunch at Nile Hotel.

Lt. Col. Mayombo further states that Hon. Okwir asked for security and he was given a pistol and two armed escorts, one uniformed guard at his house and other in civilian attire to travel with him. After leaving the hotel attempts to contact Hon. Okwir proved fruitless; and Lt. Col. Mayombo got worried. He suspected that Hon. Okwir could have been kidnapped by the EBTF after hearing the statement on radio. He received intelligence information that Hon. Okwir was going to be killed in Adjumani by the EBTF members. He telephoned the Director of CID and the Inspector General of Police and it was decided to stop Hon. Okwir from travelling. He deployed Capt. Monday and Capt. Rwakitarate to stop Okwir from travelling. When these officers were obstructed by the Petitioner and others he informed the Director of CID who instructed his officers at Entebbe to effect the arrest. Hon. Okwir was subsequently arrested and brought to Lt. Col. Mayombo's office at Kitante Road. Hon. Okwir said he was not feeling well and a doctor was called from Mbuya Military Hospital who checked him and found him with no serious injuries. Hon. Okwir was given a bed, blanket and bed sheets and received food and cigarettes supplied by his wife. Hon. Okwir asked Lt. Col. Mayombo to avail him an opportunity to talk to H.E. the President that he wished to travel abroad for treatment, rest and adequate security.

Lt. Col. Mayombo deponed further that upon the Respondent's directive he requested the British Government to issue Hon. Okwir and his wife with visas, which were obtained together with tickets and money to use abroad. Hon Okwir was later escorted to his residence in Bbunga where he stayed with his father and 4 relatives for one week before travelling abroad. He states that Hon. Okwir was escorted to the airport by members of his family and received by the staff of the Uganda High Commission in London and he is still in contact with him.

Capt. Moses Rwakitarate made an affidavit to explain his role in the arrest of Hon. Okwir. He is the Intelligence Officer of the Presidents Protection Unit (PPU). He states that he was requested by Lt. Col. Mayombo to oversee the arrest of Hon. Okwir at Entebbe International Airport. He went to the Airport and found the arrest in progress. He asked Hon. Okwir to go with him to Kampala to answer some questions as required by Lt. Col. Mayombo. The Petitioner and others prevented Hon. Okwir from coming voluntarily. Eventually Hon. Okwir was arrested by combined efforts of the Police and Army Officers who include Capt. Kayanja Muhanga.

The provisions of Section 74 (b) are as follows:

"74 A person commits the offence of undue influence –

(b) ***if by abduction, duress or any fraudulent device or contrivance impedes or prevails upon a voter either to vote or to refrain from voting."***

The right to vote is a fundamental political right. Article 59 (1) of the Constitution provides that "Every citizen of Uganda of eighteen years and above has a right to vote." It is also provided in Article 59(3) that "The State shall take all necessary steps to ensure: that all citizens qualified to vote register and exercise their right to vote". The arrest or abduction of Hon. Okwir from the Entebbe International Airport was a matter of political significance in the Presidential Elections.

The evidence adduced by the Respondents on this matter casts serious doubts as to the credibility of Hon. Okwir's claim that he was forced to sign a statement withdrawing from the EBTF and that he fled to United Kingdom for his own safety. The possibility that Hon. Okwir was an informer of the UPDF and that he voluntarily made and signed the statement and that he went to the UK for treatment and rest cannot be excluded. No reason was given as to why he alone of all the members of EBTF should have feared for his life to force him flee the country and thereby fail to vote in the Presidential Elections. However the fact of his arrest and detention and eventual flee amounted to violation of his liberty and intimidation of supporters and agents of the petitioner and interfered with his campaigns. This contravened the principle of free and fair election.

I shall now deal with other cases where it is claimed that agents or supporter were abducted or arrested in order to prevent them from voting.

Kiiza Davis who was a Polling Agent of the Petitioner at Ganyenda Polling Station in Kamwenge Town claimed in his affidavit that he was arrested on 11 March at 9.00 at Kamwenge Town by two Local Defence Force Officers and taken to a Railway Line where he found another agent arrested. At about 10.00 p.m. 2nd Lt. Richard instructed the LDF officers to take away his identity card and continue detaining him. At 1 .00 a.m. he was transported to Kamwenge Army Detach and put in a detach where he was guarded by armed soldiers. On the Election Day he was

taken to the polling centre of Kamwenge Primary School Block One where Lt. Richard ordered the Presiding Officer to tick for him a ballot paper in favour of the 1st Respondent. He was given the ticketed ballot paper and escorted by 2 armed soldiers to the ballot box where he put the same. He was released at about 6.00 p.m. and aid not to carry out his duties as a Polling Agent.

In his affidavit, Bukenya Samuel who was a campaign Agent of the National task Force Team of the Petitioner in Nakawa Division claims that on 11 March 2001 at 6.30 p.m. while he was at the Trading Centre of Kinawataka Zone, he was forcefully arrested by armed soldiers in a car covered by the 1 Respondent's posters. He was taken to Mbuya Military Barracks where he was asked which candidate he intended to vote for during the Presidential Elections. He told them that he supported the Petitioner for whom he would vote. He was detained in the cells until 21 March 2001 when he was released after the elections. He claims that he was beaten and tortured during the arrest and detention. No reason is given for his arrest in the first place and why he was detained after the polling day. The witness seems not to have told the whole story. From the evidence of Kiiza Davis and Bukenya Samuel I find that they were arrested by the Military and denied the right to vote for candidates of their choice.

I am satisfied on the evidence adduced that some of the Petitioner's Agents and Supporters were abducted or arrested in several areas and this caused intimidation and harassment and denial of right to vote which infringed the principle of a free and fair election.

Intimidation by the Army, PPU, and Para-Military Personnel:

The Petitioner complains in Para 3 (1) (v) of the Petition that contrary to Section 12 (1) (e) and (f) of the Electoral Commission Act, the 2nd Respondent failed to ensure that the entire Presidential electoral process was conducted under conditions of freedom and fairness and as a result the Petitioner and his Agents campaigns were interfered with by the military including the Presidential Protection Unit and the Para-military personnel such as that led by Major Kakooza Mutale.

Section 1 2 (1) (e) and (f) of the Commission Act provide for the following powers of the Commission:

"(e) To take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness.

(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this Act or any other law."

The principle behind these provisions is that of free and fair elections. It is convenient to deal with this complaint together with the allegation of interfering with electioneering activities of the Petitioner since this is an aspect of failure to provide conditions of freedom and fairness during campaigning and voting. The Petitioner complains in Para 3 (1) (n) of the Petition that contrary to Section 25 of the Act, the 1st Respondent's Agents and Supporters interfered with the electioneering activities of the Petitioner and his Agents.

Section 25 of the Act creates an offence of interfering with electioneering activities of any person. The offences is committed by uttering or writing words to create hatred or disharmony; organising groups to train them in the use of violence or force; obstructing the free exercise of voting; compelling a candidate to withdraw; threatening any candidate or voter or inducing candidates or voters to fear through of witchcraft or divine censure. The principle underlined here is again of free and fair election.

Section 2 (1) of the Act defines agent by reference to a candidate as including his representative and polling agent of a candidate. In this complaint it is alleged that it was the 1st Respondent's Agents and Supporters who interfered with the electioneering activities of the Petitioner and his Agents.

The UPDF was accused of playing a major role in carrying out acts of intimidation, harassment, arrest through violence, which undermined the principle of freedom and fairness. The PPU played a special role in Rukingiri and it was also accused of intimidation, harassment and causing injury and death. Other security agencies like the LDU5 were also accused. The RDCs, DISOs, GISO5 and LC officials and the 1st Respondent's Supporters were also alleged in participating in these acts of violence and harassment. I shall now deal with the evidence that was adduced by the Petitioner to support the allegations and the evidence in rebuttal by the 1st and 2nd Respondents.

In his affidavit in support to the Petition, the Petitioner alleges that during the whole period of the Presidential Election Campaigns, the 1st Respondent deployed the Army and Major Kakooza Mutale's paramilitary personnel of Kalangala Action Plan all over the country and directed the Army Commander Major General Jeje Odongo and other Senior Military Officers to be in-charge of security during the whole Presidential Election process and subsequent to this, his supporters, campaign agents and himself were harassed and intimidated and a number of his supporters and campaign agents were assaulted and arrested.

He states that the 1st Respondent deployed the Presidential Protection Unit soldiers in Rukungiri District as soon as the Presidential Election Campaigns started to protect his supporters and these PPU soldiers intimidated and harassed his supporters and campaign agents all the time.

On 16th February 2001 when he went to address a Campaign Rally at Kamwenge Town in Kamwenge District, he found that agents and supporters of the 1st Respondent had organised themselves along the streets of Kamwenge Town carrying posters of the 1st Respondent, singing their campaign slogans and throwing stones at their vehicles and this interfered with his campaign and his supporters were intimidated and assaulted. As the programme of the Presidential Campaigns shows the 1st Respondent was supposed to be doing his campaigns in Gulu on that day.

On 2nd March 2001 at about 10.30 p.m., he arrived in Rukungiri Town in a convoy of motor vehicles of his supporters who had met him at the Kahengye Bridge about 20 km from Rukungiri Town. As the convoy came into Town, many town residents who were his supporters came to the roadside clapping as a sign of welcome. He then saw may soldiers, of the Presidential protection Unit come from all directions wielding truncheons and submachine guns and started beating the people on the roadside ferociously causing them to run screaming in all directions. The soldiers then attacked the people in the vehicles of his convoy and some came to attack the vehicle in which he was seated. The policemen who were detailed as his bodyguards had to threaten to open fire in order to stave off this attack.

His convoy continued slowly under the protection of the police guards to his village home in Rwakabengo. Many of the supporters who had been attacked by the presidential Protection Unit in the town ran to his compound and spent there the night for fear of being attacked if they dared go back home that night.

At about 10.30 p.m. he went back to Rukungiri Town to Rondavles Hotel where he found the Regional Police Commander (South Western) Mr. Stephen Okwalinga and reported what had happened that evening. He reported to him that he had information from them that the PPU soldiers planned to stop people from attending his rallies the following day. The Regional Police Commander assured him that he would effect deployments to ensure that his planned campaign rally would not be disrupted and that he was going to stay in the District to personally supervise the security for the period of the Presidential Election.

On the 3rd March 2001 as he addressed rallies at Nyarushanje, Nyakishenyi, Kanungu and Kihiihi, and at all these places, he observed that all his supporters were in terrible fear for their personal security because of the heavy deployment of the Presidential Protection Unit and the Local Defence Unit in their respective areas by reason of intimidation and harassment. Due to the said heavy deployment of PPU soldiers and LDUs in the whole district of Rukungiri and the resultant tension, he was forced to cut out rallies organised for him at Bwambara and Bugangari in Rujumbura County in order to get the main campaign rally at Rukungiri Town early.

On that day he arrived at the main rally in Rukungiri town at about 5.00 p.m. and in his address to the people he informed them that he was aware of the state of terror created by the PPU soldiers and that for their sake he had to be very brief so that they could return home before dark; and he appealed to all his supporters to refrain from violence even in the face of extreme provocation. The main Rally in Rukungiri Town ended at about 6.00 p.m. and the people moved out of the playground the venue of the Rally peacefully. He then went back to his home to collect his luggage and proceed to Kampala. Shortly after getting home he heard gunshots from the direction of Rukungiri town Centre which continued for about 20 minutes; and then he saw some people come running from town to his home for safety.

He went back to town at about 7.00 p.m. and found the town completely deserted except for the PPU soldiers and a few people wearing campaign T-shirts of the 1st Respondent and he saw next to Ijumo Hotel a White Truck surrounded by about 10 to 12 PPU soldiers who were throwing people onto this White Truck. He stopped by Mr. Charles Makuru's residence where he found many people having taken refuge in Makuru's compound and left for Mbarara town where they spent the night.

When he reached Mbarara town he telephoned Mr. Charles Makuru to find out the situation in Rukungiri town and he told him the situation was still tense and that he had tried to get in touch with the Regional Police Commander and discovered that he had been recalled to Police Headquarters in Kampala early that afternoon. Subsequently he went back to Rukungiri and was shown the grave of one Berondera who had been shot dead in that incident.

He stated that he then knew that one person died, 15 persons were seriously injured and hospitalised and very many others sustained minor injuries as a result of the attack by soldiers on that day in Rukungiri Town and all this was reported in the Sunday Monitor of 4th March 2001. He further claimed that all this time when Presidential Protection Unit soldiers were deployed in Rukungiri District, President Museveni was not physically present in that district.

The Petitioner then details out his evidence regarding the Okwir saga, which has already been considered above. The Petitioner claims that the 1st Respondent made repeated statements justifying the actions of the Military including PPU during the Presidential Election process. He states that following all these events he cancelled his scheduled campaign trip to Adjumani and other Districts of West Nile and lost 3 days of campaign. In the meanwhile he sought audience with the Electoral Commission to complain about the escalating level of violence, intimidation and harassment of his agents and supporters and he did so when he met the Electoral Commission on the 22 February 2001.

Following this meeting with Electoral Commission, the Chairman of the Electoral Commission wrote to the 1st Respondent, of the Armed Forces appealing to him to restrain the army from interfering with the Presidential Election process and not to deploy the PPU where the President

of Uganda is not personally present. The letter, which is dated 24th February 2001, read as follows:

"RE: Violence and Intimidation of Candidates

The Commission wishes to appeal to you, Your Excellency, as the head of State and fountain of honour in Uganda, to intervene and save the democratic process from disintegration by ensuring peace and harmony in the electoral process.

The Commission has received disturbing reports and complaints of intimidation of Candidates, their agents and supporters, which in some cases has resulted in loss of life and property.

In a meeting that the Commission held with Candidate Dr. Kizza Besigye on* 22nd *February 2001 A number of issues of public concern were raised regarding the way security matters have been handled, particularly during the campaign period.

We wish Your Excellency to draw your attention to the Electoral Commission Act. Section 12 (1) which confers powers to the Commission and we quote:

'(e) to take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness;

(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election In accordance with this act or any other law.'

In addition, Section 20 (1) of the Presidential Elections Act, No. 17 of 2000 provides that the Commission shall ensure that the relevant organs of the state provide during the• entire period of campaign, protection of each candidate and adequate security at all meetings of candidates.

The Commission is aware of its operational limitation in enforcing the powers under the above mentioned provisions of the law and had therefore, entrusted the keeping of security during these elections to the Police. The Commission has pointed out to the Police that in case there was need for reinforcing the security deployment then it would be the Police to seek assistance from other security organs so as to ensure smooth running and conclusion of the entire electoral process.

We also expect that the deployment of PPU is made where the President is expected to be as this is a facility that Your Excellency is entitled to as the incumbent. We have also

issued press statements instructing public Institutions including RDCs and DISO to treat all candidates equally as is provided for in the Presidential Act 2000 and we expect them to abide by those instructions.

The Commission therefore, would like to request you as Commander-in-Chief of the Armed Forces to instruct armed personnel not to do anything that would be Interpreted as interference in the electoral process contrary to law and thus jeopardise the democratisation principles that our country has embarked on since the Government of NRM came into power.

Your early intervention in this matter will go a long way to enable us fulfill our duties as laid out in the constitution and other Laws of this country."

The letter was copied to the Minister of Internal Affairs, the Minister of State for Security, the Inspector General of Police and All Candidates' Task forces.

Earlier on the 20th February 2001, the Deputy Chairperson of the Electoral Commission wrote to the Army Commander and Inspector General of Police appealing to them to ensure that Candidates' campaigns continue without unnecessary interference. The letter stated:

"Complaint from Dr. Kizza Besigye

Col. Dr. Kizza Besigye, Presidential Candidate **was** ***scheduled to address rallies in Adjumani today. However, Candidate Besigye telephoned the Electoral Commission from Entebbe Airport this morning to inform us that Military Intelligence personnel led by Captain Rwakitarate were insisting on arresting Hon. Major Rabwoni 0kw!, with whom he was travelling to Adjumani. As a result, Candidate Kizza Besigye told the Electoral Commission that he would not proceed with the campaigns because the electoral process was being interfered with. When the Electoral Commission urged Candidate Besigye to continue to Adjumani without Major Rabwoni, he said that he was not leaving Rabwoni behind and that he was besieged by Military personnel.***

The purpose of this letter therefore is to draw your attention to Section 12 (1) (e) and (f) of the Electoral Commission Act, 1996 and Section 20 of the Presidential Elections Act

2000 and to request you to ensure that Candidates' campaigns continue without unnecessary interference, more so as we approach polling day."

The Petitioner continues that contrary to the pleas of the Electoral Commission, the Army Commander Maj. Gen. Odongo Jeje addressed a press conference and issued a press statement confirming the Army's involvement in the security of the Presidential Election process. The Press Statement which was dated 9th March 2001, stated,

"The <u>Role of UPDF in the 2001 Presidential Elections</u>

Following the contention by some presidential candidates as to the role of the Army involvement in the electoral process, the National Security Task force has found it imperative to explain the need for the involvement of UPDF in the security detail before, during and after elections.

Although the electoral laws do not specifically refer to the Army in regulating the electoral process, the Uganda Police or any other civilian authority can be assisted by the Army under article 209 of the Constitution of the Republic of Uganda where functions of UPDF include:

(a) Preserving and defending the sovereignty of Ugandans Directives 4 (I) of the Constitution.

(b) Co-operating with civilian authorities in emergency situations.

Indeed the involvement and co-operation of joint forces for security during elections is not a new phenomenon. This can be exemplified by what happened in the 1989 National Resistance Council expansion elections, the 1992 Local Council Elections, 1996 Presidential Elections and Parliamentary Elections where the NRA/UPDF was actively involved without raising any controversy.

In the recent past, threats of especially urban terrorism necessitated the formation of a joint anti-terrorism force involving the UPDF, ISO, ESO and Police who successfully co-operated to eliminate the threat. This was formed in 1998 and is still operational.

Today, as Ugandans campaign and prepare to have their Presidential Elections of 2001, our intelligence information indicates that some negative forces against peace are

planning assassinations, riots, demonstrations, acts of violence, looting and other criminal acts during and after elections.

On top of this demand on the Police, there are presently 17000 polling stations, which require policing during the elections. At the same time Police is required to escort electoral materials, officials and still guard Presidential Candidates, above the normal Police schedule of duties.

With all this to be done, there is no doubt that a 15000 strong Police force would not even be adequate to man all polling centres, let alone keeping peace and security. Hence the need for the UPDF to lend a hand.

In fact, the Chairman of the Electoral Commission has written to the Army leadership requesting that the Army uses its personnel and resources to provide security during the electoral period. This is contrary to the erroneous belief that the Army had usurped the powers of the Electoral Commission.

The Army has certainly not been involved in the electoral activities like registration of voters, display of registers, acting as polling agents and will not be involved in the counting of votes or any other related electioneering activity.

On the basis of the above, we wish to assure all Ugandans, Presidential Candidates inclusive, that the UPDF has not, and does not intend to, usurp anybody else's role but is serving as a STAND-BY force that will come in only when the National Security Task force in conjunction with the Electoral Commission identifies a security need for it to."

The Petitioner states that at the beginning of March, 2001 the Inspector General of Police assured the public of security during and after the Presidential Election and this was reported in the Monitor Newspaper of 2nd March, 2001. On the 7th March, 2001 4 Presidential Candidates including himself wrote to the 2nd Respondent complaining about flaws in the Presidential election process. The letter stated:

"RE: FLAWS IN THE PRESIDENTIAL ELECTORAL PROCESS. 2001

We the undersigned Presidential candidates are writing to express our concern about the serious flaws in the on-going Presidential Electoral process:

1. ***Security, violence and Intimidation***

As you are aware, President Museveni has deployed Major Gen. Jeje Odongo, the Army Commander together with other senior army officers to take charge of security during the Presidential Electoral process. The Presidential Protection Unit (PPU) has also been deployed in different parts of the country even where the security situation does not warrant it.

As you rightly pointed out in your communication to President Museveni as Commander-in-Chief of the armed forces, on 24 February, 2001 it is the duty of the Electoral commission to ensure the security of the Presidential Electoral process and in pursuance of this responsibility the Electoral Commission entrusted the keeping of security during elections to the police, President Museveni's act of deploying the military in this exercise has usurped the powers of the Electoral Commission and the police, who are by law responsible for security during any electoral process.

Violence and intimidation by PPU and para-military personnel has escalated of late and has resulted in loss of lives and injury to citizens of this country.

2. ***Serious Flaws in the Electoral process***

We have noted with great concern the delay in the issuance of the cleaned, final voter's register and yet we have only 4 days to polling day. Furthermore voters' cards are being issued using a national voter's register which is not final

According to the National Bureau of Statistics, Uganda cannot have more than 8.9 million citizens of voting age and yet you have quoted a figure of 11.06 million registered voters on the basis of which voter's cards have been printed and are being issued out.

We have evidence that the Electoral Commission and/or its contracted suppliers have printed blank voters' cards, which can be easily abused. We also draw your attention to the very poor quality of voters' cards that can be easily reproduced

In certain parts of Uganda such as Kampala City, there are less polling stations currently gazetted than those in the June 2000 Referendum.

To date we have not received any explanation about the reported intrusion, activities and identity of the culprits who entered the data processing centre of the Electoral Commission.

Public officers such as Army Officers, RDCs, DISOs, GISOS who are supposed to be non-partisan under the law continue to campaign for candidate Museveni.

In view of the above stated flaws, we demand that you convene a meeting of ALL Presidential candidates (and not their representatives) not later than Friday March 9th, 2001 to resolve these serious and very urgent issues."

The 2 Respondent reply dated 8 March 2001 stated as follows:

"FLAWS IN THE PRESIDENTIAL ELECTIONS PROCESS, 2001

This is to acknowledge receipt of your letter dated March 7th, 2001 which was signed by Presidential Candidates Dr. Col (Rtd.) Kizza Besigye, Mr. Chapaa Karuhanga and Mr. M. Kibirige Mayanja. You raised issues of violence, intimidation and serious flaws in the electoral process. We wish to respond to these issues as follows:

a. Security, Violence and Intimidation.

The Electoral Commission in line with Section 20 (1) (a) and (b) of the Presidential Elections Act. 2001 has contacted the Police and other State Security Organs to provide during the entire campaign period, protection of each Candidate and adequate security at all meetings of Candidates. To this effect the Commission has availed Police protection to each Candidate at home and while travelling and addressing Campaign Rallies.

With regard to violence and intimidation, the Electoral Commission has written to the Head of State as the Commander In Chief of the Armed Forces, to contain the Army and to the Inspector General of Police to ensure that the Police carry out their mandate as provided under Article 212 of the Constitution of Uganda.

It is incumbent upon the Police when necessary to seek reinforcement from other State Security Organs to contain any deteriorating security situation, maintain law and order and protect the lives and property of Ugandans.

Following these communications, reports from the Police indicate that the security situation during the campaigns has improved and acts of violence and intimidation have reduced considerably countrywide.

b. Serious Flaws in the Electoral Process.

You have expressed concern over the delay in producing the final Voters Register. Please be assured that the final Voters Register will be ready in time for Polling.

Your worry about the number of Voters on the Voters Register has been noted. It is important to note that the last Population Census for Uganda was conducted in 1991. What the National Bureau of Statistics has provided you with are population projections which might not rhyme with the list of eligible electors. The figure of 11.6 million Voters on the Register is derived from returns received from the field after the national Voters Register Update Exercise. It is during this exercise that new Voters are registered, those who wish to transfer to other voting centres are transferred, the dead and other non bona tide Voters are deleted from the Register. You will recall that at the request of the Presidential Candidates the period for this exercise was extended to allow the Voters more time to scrutinise and clean the Register. There is no way the Commission can cause the number of Voters on the Register to rhyme with the figure of 8.9 million citizens of voting age projected by the National Bureau of Statistics because the mandate, methodology and legal requirements of the two Government bodies are different.

A few blank Cards were mistakenly issued to some Polling Stations. These should have been returned to the Commission and appropriate ones issued. It should be pointed out that these Cards are to be used for the Presidential Elections only. The Electoral Commission could not invest a lot of money in them by way of quality. However, they have sufficient security features to allow for detection of any imitations. Holders of suspected fake Cards should be reported to the authorities.

Various factors are considered when creating Polling stations. Should these factors change, new Polling Stations may be created or existing one could be closed. The Commission relies very much on the input from the field. It would have been helpful if you had indicated specific names of Polling Stations affected so that remedial action is taken or reasons are given for their being degazetted if at all.

The matter of the intruders into our Data Processing Centre is being handled by the Police. We wish nevertheless to assure you that our data was not damaged, tampered with or corrupted.

With regard to Army Officers, RDCs, DlSOs and GISOs campaigning for certain Candidates, the Commission issued instructions to all those concerned to stop the practice. The Commission will be grateful to receive specific names and places of persons still engaging in this practice so that appropriate action can be taken.

I am sure the issues you have raised have been satisfactorily answered and in view of the Candidates' and Commission's last minute activities currently going on, the meeting of all Presidential Candidates demanded for will not be practicable."

The letter was copied to the Command-in-Chief of the UPDF, the Inspector General of Police, the 1st Respondent as a Presidential Candidate and Candidates A. Awori and F. W. Bwengye.

On 9 March 2001 the Candidates again wrote to the 2 Respondent a letter which read,

"RE: FLAWS IN THE PRESIDENTIAL ELECTION PROCESS, 2001:

We acknowledge receipt of your letter dated 8th March 2001 in response to our letter to you dated 7th March 2001. We will respond as follows:

Security:

Although it is incumbent upon the police when necessary to seek reinforcement from other state security organs to contain any deteriorating security situation, maintain law and order and protect the lives and property of Ugandan: the Police has not yet admitted that it has failed in its work. Reference is made to a letter dated 8th March 2001, addressed to Di Kizza Besigye Task Force by Mrs. Flora Nkurunkenda, Deputy Chairperson, and Electoral Commission.

We are requesting the Electoral Commission to ensure that the army, which has been deployed for the presidential election process by the Commander-in-Chief of the Armed Forces, be withdrawn within 24 hours, otherwise we will have no alternative but to take drastic steps. The police should remain in charge even when they seek reinforcement from other state security organs.

The Electoral Commission will bear the consequences of the confusion that may arise out of deploying different security organs."

James Musinguzi was in-charge of the Petitioner's campaigns in the Southwestern Region of Uganda. He claimed that in the course of discharging his responsibilities he was exposed to enormous intimidation, harassment and violence throughout the region. He states that shortly after the Petitioner had announced his intention to stand as a Presidential Candidate soldiers belonging to the Presidential Protection Unit (PPU) were heavily deployed in the Districts of Rukungiri and Kanungu. The said soldiers he alleges unleashed terror and suffering on the local people believed to be supporters of the Petitioner and the people affected including Richard Bashaija, Sam Kaguliro, Henry Kanyabitabo and many others complained to him about the harassment and he forwarded the complaint to the 2 Respondent and the Police, but no action was taken. The soldiers continued to harass suspected supporters of the Petitioner till elections.

During the entire period of the campaigns, he further claims Gad Buluro the Gomborora Internal Security Officer (GISO) for Kihiihi Sub-County, Peter Mugisha a Councillor for Kambuga, Stephen Rujaga, Godfrey Karabenda and many other civilians on the 1st Respondent's Task Force regularly went around with guns, threatening Besigye supporters to compel them to support the 1st Respondent. He reported the matter to the 2nd Respondent and the Police and the Regional Police Commander Mr. Stephen Okwalinga sent a Mobile Police Unit to Kanungu to arrest Rujaga but without success. The following day, the Regional Police Commander was ordered out of the region, the very day, the Petitioner was to address a rally in Rukungiri Town. The District Police Commander had earlier been withdrawn.

Musinguzi claims that in the absence of any Senior Police Officer in the Town, the PPU soldiers unleashed even more terror and in the process they shot to death one of their supporters and injured 14 others without any provocation whatsoever. He states that as a result of this terror that agents feared to converse for support for their candidate.

It is not clear how much of the above allegations are based on Musinguzi's actual knowledge or belief since his affidavit is based on both. It may be that part of his evidence is hearsay.

Kakuru Sam who was the Chairman of the Petitioner's Task Force for Kiruma Sub-county in Kanungu District made several allegations regarding how security agencies interfered with the

Petitioner's campaigns and harassed him. The stated that in early January 2001, they could not hold a meeting at James Musinguzi's home at Kiragiro because they were surrounded by about 1 4 PPU personnel who came in the vehicle of Deputy RDC, Mugisha Muhwezi. About two weeks later when he went to Kambuga to meet Major Okwir, he found PPU personnel beating up Henry Kanyabitabo and Chappa Bakunzi for mobilising people to meet Okwir. He was also beaten and chased on this motorcycle using the double cabin pick-up belonging to Capt. Ndahura. The PPU also forced them to close their offices.
In mid-February 2001 when their Campaign Task Force went to meet Kirima Task Force, the GISO and his group smashed the windscreen and lights of the vehicle of the said Campaign Task Force, as they stopped at Modern Hotel, Kanungu. On 11 March, 2001, the same group went to Kihanda and rounded up all the Petitioner's Agents in the Parish and put them in custody until after the polling day. He alleged that PPU was heavily deployed all over the district. On voting day he claimed that all Policemen who voted at the Stadium were ordered to tick their votes at an open table, in the presence of GISO "boys" when he objected to Polling Officials ticking for other people, he was manhandled, beaten and chased away.

At around 5.00 p.m. he claims that he was removed from his house by stone wielding thugs who threatened to demolish it. He did not oblige, and was taken to the Polling Station and ordered to sign the Declaration or Results Forms but he refused. He was taken to the RDC, his Deputy and the GISO and others and forced to sign the forms. He claims that similar incidents were widespread in his area and surrounding counties and he personally witnessed many of them.

John Hassy Kasamunyu was a Campaign and Polling Agent of the Petitioner in Kanungu District claimed that on 17 February 2001 at Kanungu, he found that Makerere student had been molested by the 1st Respondent's supporters and the matter was reported to Police. When he and Mbabazi was about to reach the Police Station, a gang of people attacked them and threw them off the motorcycle. One member of the gang drove off with his motorcycle. After they had reported the matter to the Police he asked for the motorcycle, but the Police refused, claiming it was a government motorcycle which should not be used for campaign. On 9 March 2001 while they were holding a Task Force Meeting for Kihanda Parish about 15 vigilantes of the 1st

Respondent attacked them. They were half named and were carrying sticks, whistles and stones. They started beating up the Petitioner's Supporters.

They made an alarm and the vigilantes run away when the alarm was answered. They arrested one vigilante whom they took to Kihiihi Police Station. The next day the Police and PPU started hunting for them. Nine people were arrested and taken to Kanungu Police Station where they stayed in custody till 16 March 2001. He claims that these nine people who were the Petitioner's Agents never voted or monitored the voting. He claims he was hunted and never worked as an agent and he is still hiding away from his home.

Bashaija Richard who was a Polling Agent at Butagazi Polling Station and a coordinator for the Petitioner in Rukungiri District Task Force alleges that on 27 January 2001 at around 3.00 p.m. while they were holding their candidates meeting at Kyeijanga Kirima, four Policemen from Rukungiri came and arrested them claiming the meeting was illegal. They were kept in custody at Rukungiri Police Station for three days after which they were released on police bond and later closed the case.

On 20 February 2001, at Kanungu when he was coming from checking on one of their Agents, he and Owembabazi were arrested by the GISO of Kirima who had set up a roadblock. They were beaten, thrown on a pick-up truck and taken to Karengye. He was thrown in a pit and buried under the soil leaving only the head in the open. After they had left, Owembabazi rescued him. As he was trying to go to Rukungiri, Police Station to report the incident, Police fired tear gas at him preventing him from doing so.

A day later the GISO and Police demanded that he takes them to the scene. They found the owner of the land where he had been buried and he corroborated his statement. They told him to report to the Police Station the next day, but when he did so, he was arrested and locked up for three days, taken to court and charged with leading a demonstration and released on bail.

On 2 March 2001, as they were waiting for the Petitioner in front of their District Campaign Office, PPU soldiers attacked and beat them up, dispersing and preventing them from meeting

the Petitioner. In the evening, PPU soldiers found him in Ijumo Hotel, arrested and dragged him to the streets, removed his shoes and kicked him for about 30 minutes and then released him.

On 3rd March 2001, as they were arranging to hold a rally with the Petitioner, he found Capt. Ndahura of the PPU at Hotel Holiday. Capt. Ndahura called him to his table and pulled out his pistol; held it at his head and warned him that he would shoot him if anything happened to PPU personnel in Rukungiri. The same day after the Petitioner's rally the PPU soldiers went on rampage in the town, shooting many bullets in the air and shooting at their supporters resulting in the killing of one Baronda. He states that they had neither provoked the PPU nor breached the peace but they were just walking back from the venue of the rally. From then on, he claims, the PPU soldiers started actively looking for him and he went into hiding till the morning of the voting when he sneaked in and cast his vote.

Mubangizi Dennis was the Vice Chairman for the Petitioner's Task Force in Bwambara Sub-country in Rukungiri District, claims that on 5 February 2001, the GISO Kajuna Warren came and arrested him saying that Capt. Ndahura, Commander of the PPU in the district wanted him. He went and reported the incident to Rukungiri Police Station. Q 3rd March 2001, three PPU soldiers arrested him at the Bikarunga rally before the Petitioner arrived. He was taken to Nyarubare Barracks and was beaten. He spent a night there and was released after another thorough beating. He was threatened with death if he reported the assault or went to any hospital. He reported the matter to the District Task Force who sent him a vehicle, which took him to Nyakibale Hospital where he was hospitalised.

Orikiriza Livingstone, a Polling Agent for the Petitioner for Nyarushanje, Rubabo County in Rukungiri District, claims that in the course of campaigns, one Sebagyenzi, Chairman LC Ill and Dezi Rwabona, the Treasurer LC Ill at Nyarushanje restricted him from campaigning for Petitioner and threatened to arrest him until he left the village on 20 January 2001 and took refuge in Kabale Town for a week. When he returned to his village, he started conducting campaigns secretly throughout the period of January.

Around 7 February 2001 a group of armed personnel moved around his village at night targeting homes of the Petitioner's Supporters and ordering those supporters to desist from supporting and campaigning for the Petitioner. Thereafter it was difficult for him to continue with the campaigns in his area, and the exercise of cleaning up the Voters Register was not conducted at all. On 10 March 2001 the Petitioner's Campaign Agents from Kampala were prevented from campaigning by Rwabona and soldiers of the PPU, despite Police clearance. He and others hid till the polling day. On polling day, he was forced by Rwabona to sign the Declaration of Results Forms despite irregularities he had observed.

Mpwabwooba Callist, who was the co-ordinator for the Petitioner's Task Force for Rugyeyo Sub-county in Kanungu District, alleged that on the day of elections the PPU soldiers were deployed throughout his village and neighbouring ones and Gomborora Headquarter to "monitor elections". The night before some were distributed at the homes of some of the known supporters of the Petitioner such as James Musinguzi and Byaruhanga Benon. That night he found them there and in the whole area. On voting day, the PPU soldiers were distributed in Parishes where the Petitioner was known to have strong support and they kept chasing him and his supporters wherever they went. On his way from one polling station to another he claims that one Mugisha Muhwezi pointed a gun at him while he was in his car, but he continued with his journey.

Koko Medad who was a Polling Agent for the Petitioner in Kanungu District stated that throughout the district, and Rukungiri, generally army men from the PPU had been deployed and were prominently present in Kambuga, Kihiihi, Kayonza and other places. He states that he was travelling a lot and saw them for about three months. They used to move with Mugisha Muhwezi (Deputy RDC) who would point out the Petitioner's Supporters who would be harassed and dispersed during meetings. When Major Okwir came to address them, they chased him away. They beat up a lot of people including Henry Kanyabitabo and Kalisti. They rounded up the Petitioner's Supporters and put them in jail at Kambuga. He claims similar incidents were widespread in the area and surrounding counties and he personally witnessed them.

Peter Byomanyire who was a Campaign Agent for the Petitioner co-ordinating Mbarara and Kamwenge District stated that he experienced violence against himself during the campaign. On 1 6 February 2001, at around 5.00 p.m. after the Petitioner had finished addressing a campaign

rally at Kamwenge, they met a mob of the l Respondent's Supporters armed with stones, bricks and sticks who started beating them shouting "kill Besigye Supporters". They were chased to Kamwenge Police Station where they took refuge. He says that on that day he was badly assaulted and had to go for medical treatment for two weeks. He does not state who assaulted him.

On 8 March 2001 he states that James Birungi Ozo and him went to Mahyoro to consult with agents of the Petitioner and while they were there he was surrounded by five armed and uniformed UPDF soldiers who ordered them to leave the area and they left before consulting their agents.

On the same day they found Capt. Kankiriho, the Commanding Officer of Bihanga with two escorts at RBT Lodge in Ibanda Town. Capt. Kankiriho ordered Birungi who was wearing a T-Shirt bearing the Petitioner's picture to leave the area. As Birungi was leaving Capt. Kankiriho pulled a pistol and shot at him but the bullet never hit him. He claims that thereafter Capt. Kankiriho went around the town tearing the posters of the Petitioner whenever he saw them. During the night of the same day, he heard six gun shots and the following day he came and reported the matter to the Chairperson of the Task Force at Mbarara.

Bernard Masiko who was a Campaign agent for the Petitioner and a Polling Monitor in Kayonza Sub-county in Kanungu District claimed that on 9 February 2001 at around 3.00 p.m. the Deputy RDC Mr. Mugisha Muhwezi Nyindombi accompanied by the Gomborora Internal Security Officer (GISO) Paul Bagorogozi came to his office with army men from the PPU and ordered the attendant to remove the Petitioner's posters and sign post and keep them inside and it was done. Four days before the polling day, Mrs. Jackline Mbabazi came and held a meeting with Sergeant Nankunda Bagorogoza and ordered the 1 s Respondent's Supporters to beat up all the Petitioner's Supporters. He further claims that Sam Karibwende, Chairman LC Ill threatened to shoot them if they did not close the Petitioner's Campaign Office.

Dallington Sebarole who was the Chairperson of Kirima Sub-county Task Force for the Petitioner in Kanungu stated that on 27 January 2001 at 4.00 p.m. after he had held a consultative

meeting at his house at Kyeyanga, a vehicle carrying armed Policemen came. Four of them were ordered to board it, himself, Richard Bashaija, Yuro Rwagara and one lady. They were taken to Rukungiri Police Station where they were remanded. They were released on police bond on 30 January 2001 after the intervention of Hon. Bibihuga and others. They continued reporting to the Police until he was finally discharged on 14th March 2001, without being charged with any offence.

On 28 February 2001 after answering his police bond, he boarded a vehicle belonging to the Petitioner's Task Force at Rukungiri on his way to Kihiihi via Bugangari and Rwambura. At Rwambura, they found a roadblock manned by army officers. When they stopped nine of them were arrested and reported at Rwambura Police Station where they were given a police vehicle to take them to Rukungiri Police and they were remanded at 7.00 p.m. but were released after 3 hours after the intervention of George Owakuriroru.

Anteli Twahirwa who was the Kabale District Chairman for the Petitioner's Task Force claimed that during the campaigns the RDC Mr. Mwesigye together with LDUs, Parish Chiefs and Gomborora Internal Security Officer (GISOs) kept them under constant harassment. The harassment was widespread and occurred in almost every part of the district they attempted to visit.

Sande Wilson, who was a Mobiliser for the Petitioner's Task Force in the whole of Kabale District, alleged that during the campaigns the RDC, Mr. Mwesigye kept them under constant harassment. In early March 2001 the RDC mobilised LC Officials and the 1st Respondent's supporters who were used to violently stop them from holding a rally at Ryakaramira Trading Centre in Rubaya. He claims that the RDC kept threatening them with arrest until they abandoned the Petitioner's campaign. At public rallies, he claims further that people should compile lists of the Petitioner's supporters and send them to him. On polling day he found that many of their agents had been chased away from Polling Stations, or arrested and jailed. When they complained to the Chief Administrative Officer, he advised that they should report to the Police. They did but the Police proved powerless. He claims that at almost every Polling Station he visited, he found people ticking votes in full view of the Polling Officials and the public.

Byomuhangi Kaguta who was a Polling Agent for the Petitioner at Rushaaya Polling Station states that on 11 March 2001 on the eve of elections, he was arrested by three armed soldiers of the PPU who had been deployed all over the district. He claims he was thrown in a pit (ndaki) in the barracks where he spent the whole night. The following day, Bulerere and Tukahiirwa also Agents of the Petitioner were brought in custody to join him. They spent the whole of the voting day in the said pit, and accordingly did not vote. He claims there was general harassment of his colleagues on the Petitioner's Campaign Team in Rukungiri especially from the time the PPU and senior administrators actively started on a deliberate process to prevent any form of support for the Petitioner in Rukungiri and Kanungu Districts.

Owembabazi Placidia who was an Agent of the District Task Force for the Petitioner in Rukungiri District stated that on 11 March 2001 with apparent intention to intimidate and scare her not to vote for the Petitioner, two armed Policemen and one plain clothes Policeman and some other an identified persons without a search warrant surrounded her premises and said they were searching for military equipment in her possession to wit, guns, uniforms and others. But nothing was found in her possession. Surprisingly, she does not mention the arrest of Richard Bashaija who claims to have been buried in a pit and she rescued him on 20 February 2001.

Alex Busingye who was in-charge of overseeing the operations and welfare of the Polling Agents for the Petitioner in Kazo County, Mbarara District, claimed that at a Polling Station called Nkunge, he found a Monitor for that Station tied up by soldiers and was bundled on Motor vehicle Reg. 114 UBS pick-up in which they were travelling. He does not say that the soldiers were stationed at the Polling Stations or had arrested the Monitor from the Station.

James Birungi Ozo who was a District Monitor for the Petitioner in Kamwenge District claimed that during the campaigns, on 8th March 2001, he was shot at by Capt. Kankiriho, the Commanding Officer of Bihanga Barracks in order to prevent him from campaigning for the Petitioner. The shooting was in the presence of Peter Byomanyire and Engineer Dan Byamukama and LC Ill Movement Chairman for Ibanda. The bullet did not hit him. He reported the incident to Ibanda Police Station.

Idd Kiryorwa who was a Polling Agent for the Petitioner at Nabiseke Polling Station in Sembabule District alleges that after seeing people pushing a heap of ballot papers in the ballot boxes he and his colleague refused to endorse the Declaration of Results Forms but the Presiding Officer and a Security Officer threatened to arrest him if he refused and he signed. He did not indicate what kind of security officer was.

Robina Nadunga who was a registered voter at Bugema A Centre in Bungokho Sub-county, Mbale District stated that on the polling day she met two men including one Masaba who assaulted her with a hippo hide stick alleging that she was going to vote for the Petitioner. When her voter's card fell down Masaba picked it up and never gave it back to her. She reported the matter to LC I Chairman Burahani, who sent her to report to Mbale Police Station. The Police gave her medical forms and a letter to the Presiding Officer at Bugema. She was allowed to vote. On her way back Masaba came with a gun in a vehicle and warned her not to stay on the village. She ran away to Kampala where she stayed for some days.

Julius Okwi, a Polling Agent of the Petitioner at Kereng B Polling Station in Kumi District claimed that at the Polling Station one Okolimong Martin a Clinical Officer at Malera Health Centre and one Ochom Charles the Parish Chief of Kachede had motor cycles which they were given to ferry people to vote. These people voted and yet their names were not in the Voters Register. They voted against the names of the people who did not collect their cards for reasons of death, migration or others. At the time of counting votes, one Okurut alias Tolong was threatening to shoot one Opolot, a Supporter of the Petitioner and he managed to scare other people away from the counting process.

Ediba Justine Emokol who was a Polling Agent for the Petitioner at Kapoken A Polling Station, in Kumi District claimed that on polling day, Haji Okodel came and asked him to leave the Station which he resisted. He was warned that if the Petitioner lost, he would have to leave the area. He ordered the other agent of the Petitioner Iporut to remove his shoes and sent him away from the Polling Station and his whereabouts are not known to-date.

Dan Okello who was a registered voter at Otara Ill Polling Station in Erute North Constituency in Lira District claimed that on the polling day as he and Saul Okot were approaching Aromo Sub-country Headquarters where his Polling Station was situated they met the Commandant of Aromo UPDF detach Sergeant Sempijja who was being given a lift on a motor cycle of the Sub-county Chief or Aromo. The Commandant stopped him and pushed Okot off his bicycle. At Aromo Trading Centre he heard of his imminent arrest and reported to the District Police Commander Lira. He got a letter from the DPC to allow him to go and vote, but on the way they were arrested by t he UPDF Commandant at 3.30 p.m. and taken to Wileta Polling Station where he was locked up in a double cabin vehicle and guarded by soldiers till 6.00 p.m.

The Respondents filed many affidavits in rebuttal of the Petitioner's evidence. There is evidence of Security Officers involved in the elections or mentioned by the Petitioner's witnesses. There is evidence of LC Officials, Election Officials and Election Agents of the Respondent. Then there is the evidence of voters and members of the public. I shall start with evidence of Security Officers.

Major General Jeje Odongo who has been the Army Commander of the Uganda Peoples Defence Forces (UPDF) since 3rd January, 1998 stated that his duties as Army Commander included the overall Command and direction of the UPDF which is enjoined by the Constitution of the Republic of Uganda to preserve the sovereignty and territorial integrity of Uganda. He was by virtue of his duties a member of the National Security Council, which is enjoined by Constitution to oversee and advise the President on matters relating to national security.

He stated that sometime in January 2001, at one of its routine meetings, the National Security Council noted that there were indications that election-related crimes were on the increase and could jeopardise the general peace and security of the country. During the same period, he received intelligence reports from various parts of the country pointing to the same situation.

On the basis of the foregoing he briefed the Commander-in-Chief/President of the country and indicated to him the need to put a mechanism to handle the situation. About the same time, he had a discussion with the Minister of Internal Affairs who pointed out to him the inadequacies of the Police Force in relation to the task ahead and requested that Police be augmented by the

UPDF. He further briefed the Commander-in-Chief and suggested the formation of a joint security task force to oversee, handle and ensure peace and security during the electoral process.

A joint security task force comprised of the Police, the Army, the LDUs and the Intelligence agencies was formed, under the Chairmanship of the Army Commander, deputised by the Inspector General of Police and the Director General of Internal Security Organisation. The joint security task force constituted a joint Command structure whereby in each District, the District Police Commander was the overall in charge of security of the District and the Armed forces were put on the alert for assistance as and when need arose.

He explained that the formation of such a joint security task force was not new phenomena in this country as the same course of action had always been resorted to whenever need arose. Examples were:

- the 1987 currency exchange exercise
- the 1989 expansion of the NRC elections
- the 1992 Local Council elections
- the 1996 Presidential elections
- the 2000 Referendum exercise
- The visit of the United States President Bill Clinton.

For the foregoing reasons, he denied that the 1st Respondent appointed him and other Senior Officers to take charge of the election process for partisan purposes. He denied that the army was deployed all over the country and that such deployment resulted into any voters voting the Respondent under coercion or fear or that they abstained from voting. To the best of his knowledge, save for the Polling Stations where members of the Armed Forces were ordinarily registered as voters, he could confirm that members of the Armed Forces never went to any Polling Station for the purposes alleged by the Petitioner.

He stated further it is not true that the Respondent organised groups under the Presidential Protection Unit (PPU) to use force or violence against the Petitioner as alleged in Paragraph 3 (2) d of the Petition. He asserted that members of the PPU, which was a specialised unit for the

protection of the President, were deployed in Rukungiri in advance to his visit to the area sometime in January 2001 and their stay was necessitated by his planned returned to the area, having taken into consideration the safety of the person of the President and the general peace and security of the area.

He denied the allegations about the members Of the PPU harassing, intimidating, or in any way misbehaving against the Petitioner and/or his supporters as alleged by the Petitioner. He stated that on the 3rd March 2001, he received a report that there was a clash between groups of people in Rukungiri after the Petitioner had addressed a public rally and in the process some members of the groups pelted stones, bottles and sticks at the soldiers and in the process of self defence, one person was fatally wounded by a stray bullet. He denied that either him or any other officer of the UPDF was partisan in the execution of their duties or that they carried out their duties in such a manner as to promote the candidature of the Respondent as alleged.

The evidence of John Kisembo corroborated that of Major Gen. Jeje Odongo regarding the general deployment of the UPDF. John Kisembo who was the Inspector General of the Uganda Police from 9th April 1999 stated that one of the main duties of the Uganda Police Force by the law is the protection of lives and property and the maintenance of peace and order. In the execution of these duties the Uganda Police often and where the need arises acts jointly and in concert with other security organs of the State such as the Army and Intelligence Organs. By virtue of his appointment, he is a member of the National Security Council.

He stated further that it is the requirement of the law that the Electoral Commission ensures that the Police and other relevant organs of the State provide adequate security for the conduct of the elections and the protection of the candidates. Given the magnitude of the electoral process of the Presidential Elections for 2001, it was found out that the Uganda Police which comprises about 15,000 personnel were not going to be adequate to police about 18,000 Polling stations and the related election activities in addition to its ordinary day to day duties.

The intelligence reports he received and incidents recorded indicated a rise in possible election-related crimes which necessitated his requesting the Minister of Internal Affairs on 25th January,

2001 that other security agencies be brought into play during and immediately after the election exercise. The letter read as follows:

> ***'THE <u>PRESIDENTIAL ELECTIONS 2001</u>***
> ***As discussed in the National Security Committee, this is to confirm that the Uganda Police Force will require reinforcement from other security agencies.***
> ***There are about 17500 polling stations as against the strength of 14800 police personnel. As we police the polling exercise there is need for continued general surveillance, patrols and management of crime and other offences that may be election related.***
> ***I am accordingly requesting that other security agencies be brought into play during and immediately after the election exercise."***

Thereafter, a Joint Security Task Force was set up between the Uganda Police, the Uganda Peoples Defence Forces and the Intelligence Organs to oversee and manage security in the country during the electoral process and the same was chaired by the Army Commander, by virtue of his seniority, and deputised by himself and the Director General of the Internal Security Organisation. He explained that this was not the first time such a joint security task force has been formed and previous instances include. Those already mentioned by Maj. Gen. Odongo Jeje.

He stated that under the Command of the Joint Security Task Force, security in the districts was under the command of the District Police Commander for each district with support from members of the other security organs. However, policing of the polling stations and tallying centres during the electoral process was only under the Uganda Police save for the army barracks for which the Electoral Commission had made other arrangements. He denied that the Uganda Police abdicated from its duties or that the policing of the electoral process was taken over by the Uganda Peoples Defence Forces as alleged.

He concluded that there were no security related incidents reported during the whole period of the electoral process save for a few electoral malpractices which are under investigations or in the Courts of law and he had not received any reports involving the 1st Respondent. The evidence of Capt. Atwooki B. Ndahura is very relevant to the deployment of the PPU and the

allegations of intimidation and harassment made against the Unit. Capt. Ndahura stated that he was the Commander of the few troops from the Presidential Protection Unit that were deployed in Rukungiri in advance to the President's visit in January 2001 as usual to prepare and secure the area for his visit on 16 January 2001. Since the President was soon returning to the District for another rally the soldiers under his command stayed in Rukungiri and were camped at the State Lodge. The PPU always deployed and also retained a skeletal presence at Presidential lodges countrywide and reinforced or reduced as was deemed fit by the unit authorities.

In response to the affidavit of Frank Byaruhanga, he denied that the PPU beat up people in Rukungiri for supporting the Petitioner. He stated positively that no PPU soldier moved out of station without him or his knowledge. These soldiers were permanently stationed at the State Lodge in Rukungiri and only a few at a time moved out with his express permission.

On 3rd March-2001 the Petitioner addressed a rally in Rukungiri Town. On that day, no PPU soldiers moved to Bwambara Sub-county. He denied that the PPU moved to Bwambara on 3d March-2001 or beat up people or dispersed Sebunya's rally as alleged by Frank Byaruhanga, but it remained in camp until late in the evening when he moved to town with his escorts in response to the shooting which he heard in town, to find out what was happening. He never participated. He stated that he was not aware of the allegation that a one Zikanga was found with voters' cards and he never instructed Seezi or anybody else to release anybody in connection with election malpractices as alleged by Frank Byaruhanga.

He denied that men from PPU accompanied the Deputy RDC, Mugisha Muhwezi, to Kayonza Sub-county when he allegedly ordered the removal of Besigye's signpost and posters from his offices as alleged in the affidavit of Bernard Masiko. He also denied that the PPU soldiers in Rukungiri District were deployed and were prominently present in Kambuga, Kihiihi, Kayonza and other places as alleged in Koko Medad's affidavit. He asserted that he and his soldiers were based in Rukungiri Town at the State Lodge. The PPU also scouted the routes, which the President was likely to use in his visit to the district for purposes of reconnaissance; but this did not include surrounding or entering people's houses.

He denied that the PPU harassed Supporters of the Petitioner or tore the Petitioner's posters or dispersed his supporters as alleged by Koko Medard. He also denied that he chased Hon. Rabwoni Okwir from Rukungiri or dispersed his rallies. He only assisted the Kanungu Police with transport to disperse what the O/C deemed an illegal rally, which Hon. Okwir was addressing in Rugyeyo. He also ordered his soldiers to arrest Hon. Okwir's unauthorised escort who was a UPDF soldier in active service. The police also arrested two people for uttering abusive words against the President. He further denied that PPU beat up people including Kanyabitookye, Kallist and many others.

The allegation in the affidavit of John Hassy Kasamunyu that Police and PPU hunted Besigye supporters for beating a vigilante in Kihinda Parish in Kirima Sub-county was not true. He denied deploying PPU in Kihinda Parish for the purpose or at all. In reply to the affidavit of Mpwabwooba Kallist, he stated that it was not true that PPU was distributed at the homes of the Petitioner's Supporters nor was PPU present at any Polling Station, They remained encamped at their station and never moved out on polling day.

In reply to the affidavit of Bashaija Richard, Capt Ndahura stated that it was not true that he met him in Hotel Holiday or that he drew a pistol on his head. He never met Bashaija in Hotel Holiday on 3 March 2001 or anywhere else. He stated that the allegation by Byomuhangi Kaguta that on 11th March 2001 he was arrested by armed soldiers from PPU from Bwambara village in Bwambara Sub-county was false. There was no PPU in Bwambara on 11th March 2001 and there was no UPDF barracks in that area where he was alleged to have been thrown in a pit.

He denied sending Kijina Warren or any other person to arrest Mubangizi Dennis as he alleges in his affidavit. He stated that it was not true that the PPU went on the rampage and shot at Besigye's Supporters. A joint force of Police and UPDF soldiers from the Garrison Battalion 2 Division was charged with the security of the town and PPU was not involved. The joint force was conducting patrols and intervened to disperse a rowdy and violent crowd of the Petitioner's Supporters who pelted stones at civilians and also at the joint security force. The shooting was in the air and meant to disperse them to save the situation from getting out of hand. Two people had already got seriously wounded by the Petitioner's stone throwing Supporters. On the previous day, 2nd March 2001, the crowd of the Petitioner's Supporters had attacked the joint patrol under

the command of IP Bashaija and injured 4 soldiers and a policeman who were admitted in Nyakibare Hospital.

The allegations by Mumbangizi Dennis that he was arrested by PPU and taken and beaten in Nyabubare Barracks on 3rd March 2001 were false. There was no PPU personnel who ever left their camp in Rukungiri on that day. In reply to the allegations made by James Musinguzi, he stated that it was not true that he unleashed terror in Rukungiri and he was not responsible for the death of one person and injury of 14 others, which were only a result of clashes between the Petitioner's supporters and the Joint Security Force. The clashes were provoked by the violence of the Petitioner's Supporters.

The allegations relating to the deployment of Major Kakooza Mutale and his Kalangala Action Plan para-military were answered by him in his affidavit. Major Kakooza Mutale stated that his duties as a Special Presidential Advisor on Political Affairs among others included mass mobilisation, which involved organising conventions, seminars, conferences, workshops and discussion groups for persons interested in discussing and disseminating political opinions. In pursuance of his duties in mobilisation, he organised a convention of movement mobilisers from all over the country in Kalangala.

The convention was held from the 25th to 28th September 2000 and was addressed by several guest speakers notably Hon. Ruhakana Rugunda, the Minister in charge of the Presidency and the 1st Respondent. The Convention at its closure adopted some policies known as the Kalangala Action Plan. A photocopy of the proposed plans was attached to his affidavit. He denied that the people who attended that convention were members of a para-military force as stated in the petition and he does not lead any para-military group. The Convention was attended by citizens of Uganda of diverse professions and occupations. A list of the persons who attended the Convention was attached to his affidavit. He stated that he knew from his military training that the three days spent at the Convention in Kalangala was too short a period to train and or drill civilians into a para-military force and no military training ever took place. The Convention was attended by the 1st Respondent in his capacity as President of Uganda and the participants presented the Respondent with a Memorandum A photocopy of the Memorandum was attached to his affidavit. The 1st Respondent in his capacity as President of Uganda addressed the

Convention. A copy of his speech was attached. After the Convention in Kalangala, the various mobilisers who attended returned to their respective districts and counties to continue with their work of mobilisation. He denied the allegations made by Hon. Winnie Byanyima that he alone or with armed men beat up and intimidated the Petitioner's Supporters at Mbale Municipality.

Mugisha Muhwezi who was the Deputy Resident District Commissioner for Rukungiri District against whom many allegations were made responded to the affidavits of Bernard Matsiko, Kakuru Sam, Mpwabwooba Callist and Koko Medad. He denied the allegations made by Bernard Matsiko and stated that it was not true that on 9th February 2001, he went with PPU, GISO and Sub-country Chief of Kayonza Sub- County to the Petitioner's campaign office and ordered the office attendant to remove the Petitioner's signpost and posters and keep them inside the office. Throughout the campaign period he never went to or entered the said office at all as alleged by Matsiko. He knew the LC Ill Chairman of Kayonza Sub-county as Karibwende but not Beikirize.

With regard to allegations by Kakuru Sam Mpwabwooba Callist he also denied them. He stated that he was not aware that PPU used his vehicle as alleged by both of them. The PPU had its own transport and never used his vehicle. He stated that allegations contained in Sam Kakuru's affidavit were false. He never went to Kihiihi Police Station to forcefully release the alleged assailant. He never returned to Kihiihi to round up Besigye's Agents in Kihanda as alleged by Kakuru Sam. It was not part of his job to round up or arrest people. The allegation that the RDC and himself forced Kakuru to sign the Declaration of Results Forms was false. He was not aware that Sam Kakuru was the Petitioner's Agent for any Polling Station on polling day and he did not know whether he signed or not.

He did not know Mpwabwooba Callist and he never pointed a gun against him as he alleged in his affidavit. In reply to Koko Medad's allegation, he stated that he never travelled with PPU to point out the Petitioner's Supporters to be harassed. He did not know which people supported Besigye or any other candidate and never harassed anybody or used PPU to do so.

Mutebe Jerome was the Officer in charge of Kanungu Police Station in Karima Sub-county. He denied the allegations made by Sam Kakuru and John Hassy Kasmunyu. He stated that on 10

March 2001 the Chairman LC I of Kihanda reported to his station that Yatuhonde had been abducted by persons led by Kasamunyo and Tukahiirwa Esau on 9 March 2001 and he did not know his whereabouts. Investigations by the Officer-in-charge of CID revealed that Yatuhinde was a Supporter of the 1st Respondent and the abductors were Supporters of the Petitioner.

He and the Officer-in-charge of CID, the LC I Kihanda and his staff proceeded to Kihiihi Police Station to verify the allegations. On the way they met Yatuhinde who was identified by the area LC I Chairman. Yatuhinde revealed to them the nine culprits who were arrested and the case referred to Rukungiri Police Station. He denied that Kakuru was manhandled while he looked on because no policemen were deployed in Karuhanda Polling Station due to shortage of manpower.

As regards the allegations made by Kasamunyu, Mutebe stated that Kasamunyu had reported to his Police Station that the motorcycle had been stolen yet it was brought to the Station in the company of a policeman. When he demanded documents of ownership from Kasamunyu, he did not return. Later an NGO called Uganda Farmers Association (UNFA) wrote to him stating that the motor cycle should not be released to him because it belonged to the NGO and that the Chairman of UNFA was to personally collect the motorcycle from the Police Station. It is not clear who is telling the truth, Kakuru and Kasamunyu or the Police Officer, Mutebe. One side must be telling lies.

Lt (Rtd.) Jamil Kakombe of Kambuga Rukungiri District denied the allegations made by Koko Medad. He stated that he never worked with Polling Officials at his Polling Station at Nyakulungiira 1 (L-Z) Ruhangazi Parish where he voted. He was not armed when he went to cast his vote, nor did he guard any ballot box or swear to kill anybody at his Polling Station. He went away at 8.00 a.m. and did not return to the Polling Station. He did not prevent or allow anybody to vote or witness the counting of votes as he had left the Polling Station. Peter Mugisha who was the District Task Force member for the 1st Respondent's Task Force for Rukungiri District and a District Monitor for his Candidate also denied the allegations made by Koko Medad. He denied chasing away the Petitioner's Agents from the ballot box because he saw agents seated together at the polling desk. Mugisha stated that he did not see or hear of any deployment of PPU forces in the Polling Stations he visited before during and after the elections and in his view the voting process was free and fair.

Samuel Epodoi who was the district Police Commander of Mbarara District stated that during the elections he headed a joint security command comprising of the Uganda Police Force and Uganda Peoples Defence Forces, which was constituted for purposes of monitoring security in the district. He denied the allegations made by Mary Frances Ssemambo that in many Polling Stations particularly in Nyabushozi County and Isingiro South the Petitioner's Agents were harassed, arrested, beaten, tied up or threatened with violence and chased away by heavily armed UPDF soldiers, LDUs and the 1st Respondent's Agents.

He stated that on polling day both Nyabushozi and lsingiro South County were policed by mobile crews constituted by both Policemen and UPDF soldiers under the leadership of Police Officers. He denied that the alleged incidents never took place and the allegations of harassment of the Petitioner's Agents were false. He asserted that on the Election Day the whole of Mbarara District was peaceful and only two election related incidents were reported.

Emodingo Anthony who was the District Police Commander Lira admitted that Dan Okello came to Lira Police Station and reported to him an impending arrest by one Commandant Sempijja of Aromo UPDF detach. He wrote to the said Commandant a note to allow Okello to vote without hindrance. He denied that Okello recorded a statement with him or that he came back to him the following day. He stated that elections in Lira were free and fair and held in a peaceful and conducive atmosphere.

Sempijja Gerald who was the Commandant of Aromo UPDF detach stated that he received intelligence report on 11 March 2001 that Dan Okello was mobilising voters to create insecurity during the elections. He reported the matter to the Commanding Officer Major Bylima of Aromo UPDF detach on the same day. In the evening Okello came to him with a note from the DPC Lira requesting him to allow Okello to vote. He denied having at any time refused Okello to vote. He also denied arresting Okello at any time or visit Waleta Polling Station as he voted at Otala Polling Station about 10 miles from Waleta, and thereafter he returned to Aromo UPDF detach for duty 13 miles from Waleta where he stayed.

Karebenda Godfrey a registered voter at Kanungu Polling Station in Kanungu Town denied the allegations made against him by Kakuru, Tugume, Kasamanyu and James Musunguzi. He denied

no talking to Musunguzi or seeing him on polling day. He voted at his Polling Station at 11 .00 a.m. and never met the Chairman LC Ill at the station. He denied directing the smashing of the windscreen of the vehicle as alleged by Kakuru. He stated that when he reached Kanungu on that day, he found the windscreen already smashed and there was chaos with the Petitioner's Supporters chasing people with pangas. He called the Police who took over the matter.

He denied that on 10 February 2001 he went with the Deputy RDC to Kihiihi to forcefully release a suspect. He denied moving with the Deputy RDC or travelling outside Kanungu Town. He denied that he returned to the Polling Station and also denied that he and the Deputy RDC forced Kasamunyu to sign the Declaration of Results Forms. He further denied that he was involved in the seizure of Kasamunyu's motorcycle or handing it over to the Police. He denied Musinguzi's allegations that he used to move with a gun and stated that he does not own one.

He also denied Bashaija's allegation that he arrested him. He denied setting up any roadblock in Kanungu Town on 20 February 2001. He denied that Bashaija and others were arrested and thrown on a pick-up and taken to Karengye. He denied that Bashaija was thrown in a pit and buried. He stated that he did not know Bashaija and did not know why he raised totally false allegations against him.

Korutookye Ganeozo was the Presiding Officer at Bikomero Polling Station in Rukungiri District. He denied that 14 soldiers were deployed in his area and surrounding villages before and during the elections. He stated that all the agents were allocated a bench close to the polling desk and none was chased away. He denied being the Presiding Officer at Kifunjo as alleged by Mpwabwooba.

James Mwesigye who was the Resident District Commissioner (RDC) Kabale District denied the allegations made by Sande Wilson because the events alleged never happened. He also denied the allegations made by Antelli Twahirwa. He stated that none of the Government Officials mentioned by Twahirwa were involved in any form of election malpractice before or during the elections. The letter to the Electoral Commission was not copied to him as the Returning Officer Kabale. Didas Kanyesigye Vice Chairman LC 5 - Kabale District Council also denied interfering with the Petitioner's Polling Agents in Kabale District as alleged by Sande Wilson.

Namara Merab was among those injured in the violence. She stated that on 3 March 2001 at about 5.00 p.m. she was standing on a shop veranda in Rukungiri Town when she was hit by a stone which came from the Petitioner's Supporters and she got injured on the head. That day, the Petitioner had addressed a rally in the Stadium in Rukungiri Town and his Supporters were coming back from the Stadium. When they approached where she was, they started throwing stones and before she could run away one stone hit her on the head. She was rushed to Rwamahwa Health Centre as the Police tried to chase away the Petitioner's Supporters.

Jaffar Olupot who was a Polling agent for the 1st Respondent at Kapoken/Akalabai A-E Polling Station denied the allegations made by Ediba as false because Haji Okodol never visited the Polling station and nobody ever chased him away from the Polling Station as evidenced by his signing the Declaration of Results Form which was annexed to the affidavit. He stated that he never heard of any person by the names of Iporut and nobody was arrested at the Polling Station.

Hon Capt. Charles Byaruhanga, who is a Member of Parliament for Kibaale County Kamwenge District, stated that he was actively involved in the campaign for the last Presidential Elections. He admitted knowing Betty Kyampaire and Henry Muhwezi. He denied threatening, intimidating or harassing anyone during the election campaign as alleged in the affidavits of Betty Kyampaire, Muhwezi and Moses Tibanyendera.

On 28 February 2001 he addressed a rally at Kyakazafu but did not see nor speak to Tibanyendera nor did he attend a party at Byodi Training Centre. On that day Noah Kassim stayed at Kyakarafu Trading Centre and did not even attend the rally. He denied tearing down posters of any candidate as alleged by Tibanyendera. He also denied being interrogated by any Police Officer or Human Rights Commission about allegations of torture, intimidation or harassment of any person and he was not aware of any complaint having been filed against him. He asserted that he did not try to convince Muhwezi Henry to support the **St** Respondent nor did he do so forcefully or by intimidation as alleged.

In answer to Mary Nadunga's affidavit, Muhamud Masaba of Bungokho Mutoto Sub-county, Mbale District stated that he knew Nadunga as a neighbour and Member of the Petitioner's Task Force of Bungokho South Constituency. He admitted meeting Nadunga at the Bodaboda Stage in

Munkaga Trading Centre in the company of Wamae Kenneth the Sub-county Chief of Bungokho-Mutoto but it was not true that he assaulted her with a hippo hide stick. He denied that he picked her voter's card while declaring that she was not going to vote for the Petitioner. He stated that he was not rebuked by anybody for assaulting Nadunga.

He admitted going to Mbale Police Station on the polling day but this was in respect of a case of attempted arson of his house and vehicle committed the previous night, and not in respect of Nadunga's case. He denied that on polling day after Nadunga had voted, he stopped her on her way home and he warned her not to stay in the village. He stated that he was not a member of the security forces and had never held a gun.

Gesa Ahmed who was the Defence Secretary LC II Kulumba Parish and the Gombolola Internal Security Officer (GISO) of Kityelera sub-county in Mayuge District denied the allegations made by Fazil Masinde. He stated that during the campaigns and elections he remained neutral and only performed his duties of monitoring the general security situation in the Sub-county. He denied threatening any voters at Busakira B Polling Station as alleged by Masinde.

Mudaaki Emmanuel who was the Presiding Officer at Bulangata Training Centre Polling Station also denied Masinde's allegations. He said he did not receive any complaint from him or any other person. The voting proceeded smoothly and in transparent manner and all agents signed the Declaration Results Form.

Karungi Rosebell who was the Presiding Officer at Busheka 2 (A-L) Polling Station in Bukanga County Mbarara District denied the allegations made by Peter Byomanyire. She stated that the Polling Agents of the Petitioner namely Ntaho and Musipari were present and remained at the Polling Station throughout until they signed the Declaration of Results Form. She denied the allegation that the agents sat 30 metres away.

In answer to Ediba Justine's allegations Haji Umari Okodel the LC 5 Chairperson of Kumi District stated that he does not know nor even met Ediba. On polling day he did not visit any polling station at which Ediba was an Agent. He never ordered one Iporut to remove his shoes nor did he send him away from the Polling Station. He denied the allegation that he monitored

the ticking in the basin and watched many people during the voting nor did he intimidate anyone to vote for any candidate against his wish.

Findings of Intimidation:

I accept the evidence adduced by the petitioner. It is detailed, consistent and credible. The denials and explanations in the Respondents' evidence have not sufficiently rebutted the various allegations of intimidation made by the Petitioner. It is not disputed that the Army was deployed throughout the country at the time of voting. It is not also disputed that the PPU was stationed in Rukungiri throughout the period of election campaign and during the polling.

I find that the highest concentration of intimidation, violence and harassment took place in Rukungiri, Kanungu and Kamwenge. The intimidation interfered with the Petitioner's campaigns in those Districts. In Rukungiri and Kanungu, it was perpetuated mainly y the PPU. In Kamwenge it was done by UPDF soldiers. The intimidation of Agents and Supporters extended to closing branch offices and tearing of posters, disposing consultative meetings and rallies, abduction, arrest and causing injury or death to Agents and Supporters. On polling day, intimidation consisted of ordering voters to vote for the 1st Respondent and harassing Petitioner's Polling agents.

Elsewhere in the country, the degree of intimidation was less pronounced. In Kabale intimidation seems to have been perpetuated by the RDS, GISOs and some LC Officials. In Mbale, Kumi and Lira there were isolated intimidation by UPDF soldiers, LC Officials and the 1st Respondent's Supporters who were civilians.

There is however no evidence that the general deployment of the Army during the polling period was a source of intimidation and harassment of the Petitioner's Agents and Supporters. There is also no evidence that Major Kakooza Mutale intimidated Agents and Supporters of the Petitioner.

My conclusion on intimidation by UPDF and PPU is that it was established to my satisfaction that they caused intimidation and harassment to the Petitioner's Agents and Supports but it was limited to a few areas most of which are mentioned above. This intimidation undermined the principles of free and fair election and transparency.

Issue No. 3; Effect of Non-compliance with the Provisions and Principles of the Act on the Results.

I shall now consider the third issue which is whether if the first and second issues are answered in the affirmative, such non-compliance with the provisions and principles of the said Act, affected the result of the election in a substantial manner.

In his Petition, the Petitioner avers in para 3 (1) (y) that such non-compliance affected the result of the election in a substantial manner in the following instances:

> ***"(i) The number of actual voters on the Voter Roll/Register remained unknown and some people were disfranchised; and the number of votes cast during the election at certain Polling Stations exceeded the registered number of registered votes or the ballot papers delivered at the station.***
>
> ***(ii) The identity of the voters could not be verified.***
>
> **(iii)** ***The electoral process regarding the voters' register was full of serious flaws and voters were denied the chance and sufficient time to correct those flaws.***
>
> **(iv)** ***No sufficient time was allowed for the Petitioner and his agents and supporters to scrutinise the voters roll/register and take corrective measures regarding the same.***
>
> **(v)** ***The Petitioner's Polling Agents were denied the opportunity to safeguard their Candidate's interests at the time of polling, counting and tallying of votes and in the absence illegal voters voted while legitimate voters voted more than once.***
>
> **(vi)** ***The Petitioner was unduly hindered from freely canvassing for support by the presence of the Military and para-military personnel who intimidated the voters.***
>
> **(vii)** ***It cannot positively be ascertained that the 1st Respondent obtained more than 50% of valid votes of those entitled to vote."***

In answer to the Petition, the 2nd Respondent refuted the allegations and stated:

"(a) that there is no proof that the 2" Respondent did not comply with the provision of the Presidential Elections Act 2000 and the Electoral Commission Act 1997 and that non-compliance in any - which is not admitted - affected the result in a substantial manner.

(b) ***That in any case non-compliance with provisions of the Electoral Commission Act is not a ground for nullification of results of a Presidential Election.***

(c)***That the number of Voters on the Voters Register/Ross was known and no persons were disenfranchised and votes were cast following the Voters Registers.***

(d) It is not true that the identity of Voters could not be verified.

(e) There are no serious flaws in the Voters Register and no Voters were denied a chance to scrutinise the Registers with a view to correcting flaws if any.

(f) It is not true that the Petitioner's Polling Agents were denied the opportunity to safeguard the interests of the Petitioner at the time of polling, counting and tallying of votes and there is no evidence that illegal voters voted and legitimate voters voted more than once as alleged

(g) The 2nd Respondent did not hinder the Petitioner from freely canvassing for support but on the contrary the Petitioner traversed the whole country during the campaign period.

(h)From the results declared by the 2" Respondent, it is evident that the **1St** ***Respondent obtained 69.3% of the valid votes cast."***

The Lead Counsel for the Petitioner and two of his colleagues addressed us on issue No. 3. Mr. Mbabazi who was the first to address us submitted that there are two types of non-compliance. The first one is that which goes to the root of the Constitution. Such act is substantial because the Constitution is supreme. The second is non-compliance with the Act. He contended that the failure to have an up-dated register offended a cardinal principle and therefore affected the

results of the election and made the elections a sham. The involvement of the army affected the freedom of elections.

Mr. Mbabazi referred to the history of the country and the desire to hold free and fair elections as contained in Article 1 of the Constitution and the National Objective and Directive Principles of State Policy. He submitted that the noncompliance affected substantially the constitutional values - the value of secret ballot. He contended that substantial effect was not a question of quantity. As regards quantity, he cited instances where ballot papers were stuffed in 22 districts and over 200 ballot papers stuffed at one polling station and about 600 people voted at a sham polling station. He also referred to falsification of results. It was his contention that the results were substantially affected if seen in the context of free and fair elections. However, Counsel was unable to state to what degree the results were substantially affected.

Mr. Walubiri, Learned Counsel for the Petitioner, also addressed us on Issue No. 3. He submitted that the principles of the Act were derived from the Constitution particularly the need to reverse our political history of political and constitutional instability as indicated in the Preamble to the Constitution. The principles in the Preamble are meant to promote peace, freedom, democracy, equality, social justice and progress. There are democratic principles recognised in the National Objective and Directive Principles of State Policy. The principles are meant to empower and encourage active participation of all citizens at all levels in their governance. This tied up with Article 1 of the Constitution, which deals with sovereignty of the people. In terms of Presidential Elections, it was Mr. Walubiri's submission that the overriding principle and benchmark was that the elections must be free and fair. He referred to Article 1 94) of the Constitution and Section 12 of the Commission Act.

Learned Counsel then submitted that what the Court has to decide is whether the non-compliance affected the results in a substantial manner. The problem was what test would be used to determine "substantial manner". He contended that the submission by Dr. Khaminwa and Mr. Kabatsi for the Respondents that the test was one of the numbers was a wrong approach. Mr. Walubiri submitted that the auhtorities both Counsel relied on of Mbowe Eliufoo (1967) EA 240 and Ibrahim v. Shagari (1985) LCR (Cont) 1 were at variance with the underpinnings of the values of the Constitution. In his view Mbowe v. Eliufoo (supra) was dealing with political and

constitutional setting that is not in accordance with the democratic setting in Tanzania of today, and the decision should be discarded as out of date. He submitted that instead the Court should rely on the case of Attorney General v. Kabourou (1 995) 2LRC 757 which is more modern.

As regards the Nigerian case of Ibrahim v. Shagari (supra) he submitted that it should be ignored because it exposes poor jurisprudence. In his view, the decision did not assist to promote social and economic stability since the decision was followed by a military dictatorship.

He contended that it is dangerous to use numbers. To determine whether the non-compliance affected the results is a value judgment, a qualitative decision not based on quantities. Counsel submitted that not all numbers can satisfy free and fair elections and if the election is not free and fair, then such an election exercise is invalid and could be nullified if it went to the root of the matter.

Mr. Walubiri emphasised that the Court has to put meaning to a concept of free and fair election, which entails looking at the entire electoral process from voter registration to date of election and the voting, and tallying of the results. There is a need to assess the entire process to determine whether it was free and fair, and make a value judgment. Counsel cited his book on Constitutionalism at Cross Roads (supra) where there is a quotation from G. Grill, Free and Fair Elections International Practice 1994.

He submitted further that non-compliance cannot be quantified in numbers for instance, intimidation, and lack of freedom, and it is impossible to quantify their effect. His argument was that numbers are relevant for proving non-compliance but for proving the effect, one had to look at the principles and values, the gravity, the climate and the activities to see how they affected the results. The question, he submitted was, did the people really exercise their sovereignty? Mr. Walubiri contended that the opinion of the International Observers was not based on any numbers. The 2nd Respondent relied on their opinion not numbers. He submitted that the elections were not free and fair.

Learned counsel contended that even on numbers, the Petitioner had adduced evidence to prove substantial effect. He referred to the evidence of Frank Mukunzi who examined 254 Declaration of results Forms and made a report of his analysis. He also cited the evidence of Twinomasiko

Jackson which showed a voters roll printed on 9 March 2001 which showed that all voters were supposed to have voted except one on each page. He submitted that this was not voting.

Mr. Walubiri then referred to the affidavit of Ndomugenyi Robert which showed that a total of 687 people voted whereas the tally sheet certified by the Commission indicated that the Respondent alone got 781.

He cited Mr. Mukunzi's opinion, which was that nationwide there were 2,579,802 ghost voters that is one in every 3 ballots, because of un updated register, and therefore the numbers made a substantial effect. According to Counsel, Mukunzi showed that the gap had narrowed. He relied on the case of Mbowe v. Eliufoo (supra) which stated that if a making adjustments the gap appears to narrow the results would be annulled.

Winding up submissions for the Petitioner on Issue No. 3, the Lead Counsel for the Petitioner, Mr. Balikuddembe emphasised that the 2nd Respondent did a shoddy job in organising and managing the Presidential elections. The 2nd Respondent had a minimum of four years to prepare for and cause the election to be held under conditions of freedom and fairness but it failed to do so.

Learned Counsel referred to the letter the chairman wrote to the 1st Respondent begging him to rescue the electoral process which was being adversely affected by the deployment of PPU and questioned whether the Court could hold that the elections were held under conditions of freedom and fairness when the petitioner was being prevented from campaigning and his supported were being harassed and injured, resulting in the killing of one of his supporters in Rukungiri by a gun wielding soldier.

Mr. Balikuddembe submitted that the Petitioner had led evidence showing that the 2nd Respondent tailed to comply with the preparation of the register and update the register on continuous basis, that the Petitioner was unable to appoint Polling Agents for additional polling stations and that the failure to comply with the provisions and the principles embedded in the Act affected the results in a substantial manner both in quality and quantity.

Mr. Kabatsi the learned Solicitor General submitted that .the Petitioner had failed to prove the incidents alleged. He contended that the incidents were too few to prove that the elections were not conducted under conditions of freedom and fairness. He referred to the evidence of the Chairman of the 2nd Respondent which attached reports of the following International Observers who declared that the elections were free and fair: the Libyan Ambassador, the Tanzanian Delegation and the Gambian Delegation.

The learned Solicitor General also relied on the Reports of Returning Officers who testified that the elections were free and fair, namely from Kisoro, Kitgum, Mayuge, Tororo, Rukungiri, Ntungamo and Kasese. He also referred to the affidavit of Mr. Francis Bwengye, a former presidential Candidate, who stated that there were no malpractices in the elections. Mr. Kabatsi referred to the interview of Bob Mutebi with the Petitioner in Rukungiri after casting his vote where the Petitioner did not say that the election was not free and fair. Lastly Mr. Kabatsi referred to the affidavits of Maj. Gen. Jeje Odong, Army Commander, and Mr. John Kisembo, Inspector General of Police who stated that the conditions under which the elections were held were free and fair. The learned Solicitor General concluded that the Petitioner had failed to discharge the heavy burden of proof that the elections were not free and fair.

In his submission Dr. Khaminwa learned counsel for the 1st Respondent emphasised that this was not an ordinary petition but one that is in respect of the President of the Republic of Uganda, who is the Head of State and Head of government. He cited the case of Bush v Gore Supreme Court of United States No.00-949 December 1 2, 2000 in which the US Supreme court emphasised that they were dealing with an election of the President of the United States. The Supreme Court said,

> ***"We deal here not with an ordinary election but with an election of the President of the United States. In Burroghs v United States, 290 US 534 (1934) we said,***
>
> > ***'while presidential electors are not officers or agents of the federal government (Green 134 US 377) they exercise federal functions and discharge duties in virtue of authority conferred by the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of***

its relationship to and effect upon the welfare and safety of the whole people cannot be strongly stated.

Learned counsel pointed out that the President is the only Chief Executive Officer of the Nation who is elected by universal adult suffrage, and is not confined to a small constituency. He observed that this was the first petition coming before the Supreme Court under the 1 995 Constitution there has been an election in 1 996 but there was no petition. This Court has no authorities on the petition as the only authorities were from inferior courts on election of Members of Parliament. It was his submission that the Court will therefore set the law on this matter.

On the question of substantial effect, Dr. Khaminwa referred to the case of Ibrahim v Shagari (1 985) LRC Const. 1 where it was held that "substantial" does not carry the same meaning as "absolute compliance". He referred to the judgment of lrikefe, JSC who said, at page 91

"It is not disputed that only one return is contemplated within the intendment of Section 7 of the Electoral Act, 1982 and that 'exhibit B in this case is such return. A return to an election will not be avoided if it appears to any court hearing the petition that challenges the return that the Electoral Act. (See Section 123 (1) of the Electoral Act). This is that part of the Act relied upon by the appellant and which deals with electoral malpractices. The word used in the section is substantial which does not carry the same clout as absolute compliance."

Counsel also referred to the judgment of Nnamani JSC at page 21 where he stated,

"As was rightly submitted by the learned Attorney General of the Federation, Chief R.O. Akinjide, S.A.N. (for the 2nd Respondent). The Court is the sole judge and if it is satisfied that the election has been conduced substantially in accordance with Part II of the Act will not invalidate it. The wording of Section 123 is such that it presumes that there will be minor breaches of the regulations but the election will only be voided if the non-compliance so resulting and established in court by credible evidence is substantial. Furthermore the court will take into account the effect if any which such non-

compliance with provisions of Part II of the Electoral Act 1982 has had on the result of the election."

He submitted that the wording of the section presupposes some minor breaches and that the Nigerian Section is substantially similar to the Uganda provision.

Referring to the affidavit of Mr. Frank Mukinzi, Dr. Khaminwa argued that his evidence was in favour of the Respondents because he stated that it was not possible to tell how the irregularities affected each candidate. It was counsel's contention that one has to show that the mistakes affected the results in a substantial manner.

Learned counsel referred to the votes obtained by the two candidates. He pointed out that the 1st Respondent scored 5,123,360 votes, which was 69.3% of the votes cast. The Petitioner scores 2,255,795 votes, which was 27.8% of the votes cast. He submitted that this was a big number of votes and that one could only score that percentage of 27.8% when the elections were free and fair. He observed that the other three candidates got smaller numbers but they were contended. He concluded by submitting that the difference in votes between the 1st Respondent and the Petitioner of more than three million was a colossal number.

The first question to address is what is the yardstick used in determining the effect of non-compliance on the results. Mr. Walubiri for the Petitioner advanced the proposition that this question is determined by a value judgment - whether the election has been free and fair. He played down the role of numbers. Mr. Walubiri relied on the opinion of the Court of appeal of Tanzania in the case of AG v Kabourou (supra).

In that case it was held that the underlying principle that election should be free and fair meant that an election which was generally unfree and unfair was not an election at all as envisaged by the Constitution and the Elections Act, and anything which rendered an election unfree and/or unfair was a valid ground to annul the election, and any law which sought to protect unfree or unfair elections from annulment would be unconstitutional. On the other hand, a non-compliance with the Elections Act might affect the election results, but not necessarily make the election unfree and unfair. But this opinion was obiter dictum and was not the ground on which the election was declared void.

I am of the view that the value judgment is only relevant in considering the process of the election, and the principles underlying the process. At the end of the elections a value judgment can be made that an election was not free and fair, but that is not the result of the election. It is only one of the principles noncompliance with which may render the election to be set aside if it has affected the result in a substantial manner.

It has been held that the "result" means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate: Clara Eastern Division, Case (1892) 4 GM. & H, 162 at p. 164. In Ruffle y Rogers (1982) GB 1 220, (1982) 2 ALL ER 157, where votes were wrongly rejected and inclusion of such votes would have resulted in a tie, which would then have been determined by the Returning Officer by lot such a tie was a "result" for those purposes. The result of the poll was that the conservative candidate was defeated by a majority of two.

The second question to sounder is when is the result said to be affected by the non-compliance with the Act or irregularities in the election. Courts in Uganda have relied greatly on the decision of Georges, CJ in Mbowe v Eliufoo (supra) in defining the phase "affected the results of the election" which appeared in Section 99 (b) of the National Assembly (Elections) Act 1964. Geroges, CJ referred to the case of Re: Kensington North Parliamentary Election Petition (1 960) 2 ALL. ER 1 50 where the Court said,

> ***"Even If the burden rested on respondent, I have come to the conclusion that the evidence is all one way. Here Out of a total voting electorate of persons who recorded their votes, three or possibly four are shown by the evidence to have voted without having a mark placed against their names in the register and each of them voted only once. Even if one was to assume in favour of the petitioner that some proportion of the reminder of 111 persons, whom we have not seen were in somewhat similar case, there does not seem to be a thread of evidence that there is any substantial non, compliance with the provision requiring a mark to be placed against the voters names in the register; and when the only evidence before the court is that of three, or possibly four people who are affected in that they recorded their votes without having a mark placed against their names, each voted only once, one cannot possibly come to the conclusion***

that although there was a breach of the statutory rules, the breach could have had any effect on the result of the election. Even if all the 117 persons were similarly affected, it could not possibly have affected the result of this election; therefore, although there was a breach in regard to the matter set out in para 3 (1) of the petition, I should be prepared to say that there was a substantial compliance with the law In this respect governing elections and that omission to place a mark against the names did not affect the result."

Georges, CJ defined the phrase affected the result in this way, at page 242,

"In my view in the phrase "affected the result," the word "result means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected after making adjustments, the effect of proved irregularities the contest seems much closer than it appears 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 it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."

In Mbowe v Eliufoo (supra) that unsuccessful candidate in the National Assembly elections petitioned for an order that the election in one constituency was null and void, the ground for the petition were that polling agents were not properly appointed, the eligible voters did not vote because ballot papers were exhausted; and that threats were used to influence voters to vote for the Respondent.

The results of the election were as follows:

-Number of votes in the list -	30,889
-Votes for the Petitioner -	6,393
-Votes for the Respondent -	20,213
-Majority margin -	13,820

The High Court of Tanzania held that non-compliance with the provisions of the law was not substantial and did not affect the results of the election.

In Gunn v Sharpe (1974) IQB 808 it was held the irregularities had affected the result. This was a local government election for the three councillors. At ten Polling Stations 102 papers were rejected because they did not bear official mark. Of the rejected papers 98 came from one Polling Station, constituting more than half of the 189 papers issued at the station. If the votes on rejected papers had been counted, two petitioning candidates would have been successful instead of the Respondents who had in fact been elected. The Petitioners sought a declaration that the election was not conducted substantially in accordance with the law as to elections within S.37 (1) of the Representation of the People Act 1949 and that the errors affected the result of the election.

It was held that the errors were substantial and such as to be likely to affect the result of the election, since they had resulted in more than halt the voters who had sought to vote at one Polling Station being disfranchised and this prevented them from voting. It was held further that since the errors had in fact affected the result the election of the Respondents would therefore be declared void.

In Morgan v Simpson (1974) 3 ALL ER 722, (1975) 1 QB 151, the elections were declared invalid. The facts of the case were that 23,691 votes were cast in a local government election. Forty-four ballot papers were rejected because they were not stamped with the official mark as required by the applicable rules, the error having been made by the Polling Clerks. It was established that if the 44 ballot papers had not been rejected, but had been counted, the Petitioner who was a candidate at the election would have won by a majority of seven votes over the Respondent. It was held that where breaches of election rules though trivial had affected the result that by itself was not enough to compel the court to declare the election void (though conducted substantially in accordance with the law as to elections. The elections were declared invalid.

Lord Denning made interesting propositions regarding the law governing elections, at (1975) I QB p.164,

> ***"Collating all these cases together I suggest that the law can be stated in these propositions:***

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected or not. That is shown by the Hackney Case of OM & H 77, where two out of 19 Polling Stations were closed all day, and 5,000 voters were unable to vote.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the lslington Ca 17 TLR 210 where 14 ballot papers were issued after 8.00 p.m.

3. But even though the election was conducted substantially in accordance with the law as to elections nevertheless if there was a breach of the rules or a mistake at the polls - and this did affect the result - then the election if vitiated. This was shown by Gunn v Sharpe (1974) QB 808 where the mistake in not stamping 102 ballot papers did affect the result."

In the Borough of Hackney, Gill v Reed (1874 XXXI L.T. 69 Grove J said,

"The result of the election would in my judgment be affected if instead of majority or 10 or even 10, upon scrutiny the matter might be very different. –

In Ibrahim v Shagari (1985) LRC Const. 1, Nnamani JSC held at page 19 that the word return had been defined in Section 164 of the Electoral Act 1982 No.8 as –

"the declaration of the result of the election in accordance with the appropriate provisions of this Act and includes a certificate of return in form EC 8 in the Schedule to this Act."

The learned Justice of the Supreme Court added,

"It is my view that the result of the election is in Exhibit B and Exhibit Bi. It was by Exhibit B 1 that the l Respondent was declared as winning the election."

Although the provisions in the English and Nigerian electoral laws are slightly different from the Ugandan law, I am of the opinion that the authorities from these countries are relevant and

persuasive.

In the instant petition, the result of the election is contained in the Declaration of Results Form 3, which was signed by the five members of the 2 Respondent and its Secretary, and was dated 14 March 2001. The result indicated the number of valid votes polled by each candidate, the percentage of the total valid votes cast, the total number of valid votes cast for candidates, the total number of invalid votes and the percentage of the total number of votes cast, the number of votes cast and the percentage of the total number of registered voters, and the candidate who was declared to have been elected as President.

In term of figures, the result was as follows:

1. Awori Aggrey - 103,915(1.4%)

2. Besigye Kizza - 2,055,795 (27.8%)

3. Bwengye Francis A. W. 22,751 (0.3%)

4. Karuhanga K. Chapaa - 10,080(0.1%)

5. Kibirige Mayanja Muhammad - 73,790 (1 .0%)

6. Museveni Yoweri Kaguta - 5,123,360 (69.3%).

The total number of votes cast was 7,389,691. The total number of invalid votes was 1 86,453 amounting to 2.5% of the total number of votes cast. The total number of votes cast was 7,576,144 amounting to 70.3% of the total number of registered voters. The candidate who obtained the highest number of votes in the election and the votes cast in his favour being more than fifty percent of the valid votes cast at the election and was declared elected President of the Republic of Uganda was Museveni Y. Kaguta, the 1st Respondent.

Section 65 (a) of the Act lays down the principle that an election cannot be set aside unless the non-compliance with the provisions and principles of the Act has affected the result in a substantial manner. Dealing with a similar provision in the Parliamentary Elections Statute, in the case of Odetta v Omeda, Election Petition No.001 of 1996, Ntabgoba PJ, said,

"What must the Petitioner prove? He must prove that whatever noncompliance with the provisions of the Statute must have affected the result in a substantial manner. Such proof would involve an analysis of the result."

In Katwiremu Bategana v Mushemeza Election Petition No.1 of 1996 (HC - Mbarara) the irregularities complained of by the Petitioner included lack of or improper display of voters register, voting by unregistered voters, improper assistance to voters to mark ballot papers under pretext of disability, impersonations voting with cares not in own name and voting more than once by some voters. Although some of the irregularities were proved to have been true, it was held that the irregularities had not affected the result of the election in a substantial manner. Musoke Kibuuka J, said,

"Although the Petitioner has in many instances proved to the satisfaction of the Court that there were irregularities in the process of conducting the Parliamentary elections in Sheema South Constituency he has not gone beyond that as the law requires. He had to show that those irregularities affected the result of the election in a substantial manner. That he has not done. The Petition therefore fails on issue number one."

Similarly in Ayena Odong v Ben Wacha, Election Petition No.2 of 1996 (HC) Okello, J said,

"In the instant case, there was no evidence of the effect of any alleged irregularities on the results that could be adjusted from the result. All that there is an address by the Petitioner from the Bar, that the effect of the communication of the malpractices to the voters, affected the result of the election in a substantial manner because they changed the minds of the voters in favour of the Respondent. That is not evidence ... the winning margin here is 8,000 votes. That is quite a substantial margin. Without any evidence of the effect of the alleged irregularities proved to be adjusted to the above figure, it is difficult to say that the irregularities affected the result of the election in a substantial manner."

The need to prove that the result was affected in a substantial manner was emphasised by Ntabgoba, PJ in Odetta v Omed Election Petition N.001 of 1996, as follows:

"I must say that with the additional words in our provision in "substantial manner" the standard of proof under s91 of Statute No.4 of 1996 becomes a great deal higher than the standard of proof in the case of Tanzania discussed by Georges, CJ. What must the Petitioner prove? He must prove that whatever non-compliance with the provisions of the Statute must have affected the results of the election in substantial manner. It is not sufficient therefore to allege and even prove that there was harassment, intimidation and house burning. The Petitioner must go further than that and show that the results of the election were thereby affected and not merely affected but affected in a substantial manner-"

Elections must not be set aside on light or trivial grounds. It is a matter of great public interest. In Gunn v Shame (supra). Wills, J said that "elections should not be lightly set aside simply because there have been informalities and errors. In the Hackney Case (supra) cited with approval in Morgan v Simpson (supra) Grove, J emphasised that an election should not be annulled for minor errors or trivialities. He stated,

"An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated really to affect the result of the election. I think that is a way of viewing it, which is very consistent with the terms of the section. So far as it appears to me the rational and fair meaning of the section appears to me to prevent an election from becoming void by trifling objections on the ground of informality, but the judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect upon the election."

The judge concluded,

"That being my construction of the section, I cannot say considering the very large number of electors who have been disabled from voting upon the present occasion, that under these circumstance it has been an election which may be fairly taken to represent the voices of the electors of Hackney."

What is a substantial effect? This has not been defined in the Statue or judicial decisions. But the cases of Hackney (supra) and Morgan v Simpson (supra) attempted to define what the word substantial meant. I agree with the opinion of Grove, J. The effect must be calculated to really influence the result in a significant manner. In order to assess the effect the court has to evaluate the whole process of election to determine how it affected the result, and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produced those numbers, numbers are useful in making adjustments for the 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 result was substantial.

In this petition, the Petitioner has proved that there was non-compliance with the provisions and principles of the Act in quite a number of instances. There is no doubt that these irregularities and malpractices had some effect on the results one way or the other. If we take the result of the election as indicated on Form B, there is no evidence adduced to show how the non-compliance with the provisions and principles of the Act affected the results of each candidate, including the Petitioner. No adjustments or calculations based on those irregularities were done even taking into account the factor of intimidation or absence of conditions of freedom and fairness in some instances.

It is understandable to argue that the failure to efficiently compile and update the voters register resulted in ghost voters remaining on the Roll and eligible voters being excluded from the register and thus being denied their right to vote. But there was no evidence that only supporters of the Petitioner were omitted from the Voters Register. The number of eligible voters who were denied the right to vote was not produced. The presence of ghost votes on the Register could have facilitated rigging through impersonation and multiple voting. Again we do not know how many ghost voters were left on the Register.

Attempts were made to prove that the total number of voters announced by the 2 Respondent was inflated. But there was no actual or correct number proved from official or private documents

dealing with population census. Instead an academic or theoretical analysis of previous population figures by Mr. Makunzi, an Engineer turned Data Analyst, was presented which was in any case inconclusive.

The failure to supply the Voters rolls to the Petitioner to be used during polling and the failure to publish all Polling Stations must have in one way or another affected the Petitioner's preparations for monitoring elections. But what was the effect of these omissions on the result of the election?

It was submitted that in the new Polling stations especially in the special areas where the Army soldiers voted, there were more irregularities because there were no Polling Agents and that the 1s Respondent got proportionally more votes than in the surrounding areas in the same District. Even if the facts were correct, this only proves that the non-compliance affected the results, but did it do so in a substantial manner? There was no evidence to this effect.

There was no sufficient evidence to prove the effect of other irregularities like multiple voting, ballot stuffing and pre-ticking of votes. The fact that these malpractices were proved to have occurred is not enough. The Petitioner had to go further and prove their exigent, degree, and the substantial effect they had on the outcome of the election.

I would say the same thing for the malpractices and offences, which caused intimidation and harassment to the agents and supporters of the petitioner which were proved to have occurred. Their intensity and effect varied from area to area. They were intense in Rukungiri and Kanungu where the Petitioner originates and was expected to have big support. They were also experienced in Kabale, Mbale and Kamwenge. Again it must be assumed that the intimidation had some effect, but how much effect?

On the other hand objective facts indicate that the Petitioner performed reasonably well by obtaining 2,055,795 votes, which was 27.8% of the total number of votes cast. He won outright in some District even where the special areas for voting by soldiers existed like Gulu and Kitgum. He performed reasonably well in other Districts of Uganda where there was intimidation and irregularities.

The 1st Respondent got overwhelming support from the population as indicated in the result he got of 5,123,360 votes cast which was 69,3% of the total votes cast. The voter turn up of 70.3% was very high. The difference between the votes obtained by the Respondent and the Petitioner is over 3 million votes. This is a big margin, which cannot be bridged by any reasonable adjustment given to the Petitioner say of 10%.

The international election observers gave their verdict that the elections generally were tree and fair and reflected the general will of the people of Uganda. The observers gave an objective opinion on the elections. Their opinions should be given the due respect they deserve.

Therefore although several malpractices and irregularities were proved in this petition, the Petitioner failed to adduce sufficient evidence direct or circumstantial to satisfy me that those aspects of non-compliance with the provisions and principles of the Act affected the result of the election in a substantial manner.

As Anamansi, JSC said in Ibrahim v Shagari (supra) at p. 24

> ***"Although it seems obvious it needs emphasis that courts of law can only decide issues in controversy between parties on the basis of evidence before them. It would be Invidious if it were otherwise."***

My findings on issue No.3:

My conclusions on Issue No.3 are that it has not been proved that the number of actual voters on the Voters Roll/Register remained unknown and that the number of votes cast during the election at certain Polling Stations exceeded the registered number of registered voters or the ballot papers delivered at the station. On the contrary the number of registered voters was declared by the 2nd Respondent and known. Some people could have been disfranchised through errors and inefficiency but the number was not established nor do I consider it significant given the high voter turn up.

I have found that the 2nd Respondent did not display the Register for 21 days but only 5 days. I am of the view that this period was insufficient for public scrutiny of the register by voters,

updating the register and efficient cleaning of the register. However it has not been proved as to how this affected the results and whether the effect was substantial. The Petitioner has failed to establish that the identity of the voters could not be verified. There was evidence, which was credible that there was a national register of voters and roll of voters containing the identity of voters. There was also evidence that voters' cards were issued to facilitate identification of voters. It is true that some registered voters were not issued with cards and could have been refused to vote on this account. But such number was not established nor do I think it was significant. It was not established to my satisfaction that the electoral process regarding the voters register was full of serious flaws and that voters were denied the chance and sufficient time to correct those flaws.

The Petitioner has failed to prove to my satisfaction that the failure to publish a list of additional Polling Stations, and failure to supply his agents with copies of Voter Register and Rolls affected the results of the election in a substantial manner.

The Petitioner has not satisfied me that his Polling Agents were denied the opportunity to safeguard his interests at the time of polling, counting and tallying of votes. The evidence adduced on this allegation was riddled with inconsistencies and exaggerations and was seriously challenged by the Respondents. I am satisfied that the Petitioner's Agents and Supporters were abducted and arrested, but it has not been proved that this affected the results in a substantial manner.

The Petitioner has not proved to my satisfaction that he was substantially hindered from freely canvassing for support by the presence of the military and paramilitary personnel who intimidated the voters. The evidence on record indicates that the Petitioner was able to campaign freely throughout the country except a few areas where his campaigns were interfered with by the military and paramilitary personnel. These areas included Rukungiri, Kanungu, Ntungamo, Mbale and Kamwenge. The effect of this on the elections was not established leave aside whether it was substantial.

While irregularities in the voting exercise were proved in some areas, they were not widespread throughout the whole country, and their extent, degree and effect were not established or proved to have substantially affected the results.

The burden was on the Petitioner to prove that the 1st Respondent did not obtain more than 50% of the valid votes of those entitled to vote. He failed to do so. His attempt to prove by statistical analysis what percentage of votes the 1st Respondent could have obtained in a free and fair election was academic, theoretical, speculative and lacking in expertise and credibility. There was no attempt to analyze the actual votes cast or not cast to determine the pattern of voting and how the Respondent benefited from it and the Petitioner was deprived by it.

I therefore hold that the Petitioner has failed to prove to my satisfaction that the non-compliance with the provisions and principles of the Act affected the result of the election in a substantial manner.

Issue No4: Illegal Practices by 1st Respondent:

Issue No.4 which is solely directed against the 1st Respondent is whether an illegal practice or any other offence under the said Act was committed in connection with the said election by the Respondent personally or with his knowledge and consent or approval.

There are five illegal practices alleged against the Respondent. These are the allegation that the Petitioner had Aids, the allegation of offer of gifts to voters, the deployment of a partisan army during elections, the allegation of intimidation of the Petitioner's Supporters by the PPU and Major Kakooza Mutale's Kalangala Action Plan paramilitary personnel, and the allegation of threat to cause death to the Petitioner. I shall deal with each of these allegations in the order in which they are listed.

Before I consider the various alleged illegal practices of offences, it is convenient to address legal points relating to the scope and effect of the provisions of Section 58 (6) of the Act which provides,

"(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court –

(c) ***that an illegal practice or any offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."***

There are two preliminary points that I wish to dispose of in respect of the scope of illegal practices as a ground for nullifying a presidential election. The first point is to emphasise that the three grounds specified in Section 6 are independent of each other. The effect of this is, in my judgment, that there is no requirement to prove that the illegal practice in Section 6 (c) affected the result in a substantial manner. There seems to have been a deliberate intention by Parliament to ensure that candidates conduct themselves in an exemplary manner during the elections and that the commission of illegal practices or election offences makes them unfit to hold the office for which they seek election. But is seems to me there is no bar to such a candidate standing again in a subsequent election. Whether any trivial illegal practice committed by a candidate should be sufficient to nullify an otherwise free and fair election where the illegal practice has not affected the election in a substantial manner, is a matter for future consideration.

The second point is about the principle of agency. Normally a principal or master is liable for the actions of his agent or servant committed in the Course of his employment either with actual, implied or apparent authority. It seems that this is the position under English electoral law.

Mr. Walubiri submitted that a candidate is liable for the actions of the agent done within the scope of his employment even when the agent was strictly prohibited from doing a particular act. He relied in Case Law 2nd edn. 1924 and Vol. 20 of the Digest: 1982 (Butterworth's) para 646 page 72 where the concept of implied consent is discussed.

He contended that if a candidate employed a candidate who bribed, the candidate would lose his seat. Referring to Section 65 (c) of the Act, he argued that knowledge could be inferred from the fact of appointment and the fact that the agent was acting to solicit votes for the 1st Respondent.

Mr. Bitangaro for the 1st Respondent did not agree with the submissions of Mr. Walubiri. He contended that the authorities cited by Mr. Walubiri were irrelevant. If an Agent were to bribe without the knowledge and consent of the Candidate the latter would not be liable for the illegal

practice. He argued that there must be express not implied or apparent authority. There must be evidence of agency.

He submitted that the crucial test is whether there has been employment or authorisation of the agent to do some election work. In the present case, the Respondent appointed his agents and the letters spell out the terms of agency.

With respect, I accept the submissions of Mr. Bitangaro on this point. The wording of Section 6 (c) is clear and unambiguous. It requires that the Candidate be liable for the actions of his agents only when they are committed with his knowledge and consent or approval. To this extent the general principles of the law of agency have been modified.

The Allegation of Aids:

The Petitioner complains in para 3 (2) (a) of the Petition that contrary to Section 65 of the Act, the 1st Respondent publicly and maliciously made a false statement that the Petitioner was a victim of AIDS without any reasonable ground to believe that it was true and this false statement had the effect of promoting the election of the 1 s Respondent unfairly in preference to the Petitioner alleged to be a victim of AIDS and voters were scared of voting for him who was by necessary implication destined to fail to carry out the functions of the demanding Office of President and to serve out the statutory term.

In answer to the Petition, the 1s Respondent states that the statement that the Petitioner was a victim of AIDS was not made by him publicly or maliciously for the purpose of promoting or procuring an election for himself contrary to Section 65 of the Act. However he states that it is true that the companion of the Petitioner, Judith Bitwire, and her child with the Petitioner died of AIDS. He states further that he has known the Petitioner for a long time and has seen his appearance change for a long time to bear obvious resemblance of other AIDS victims that he had previously observed.

Section 65 of the Act provides,

'Any person who, before or during an election, publishes a false statement of the illness, death or withdrawal of a candidate at that election for the purpose of promoting or procuring the election of another candidate knowing that statement to be false or not knowing or believing it on reasonable grounds to be true, commits an illegal practice."

In his affidavit in support of the Petition, the Petitioner states that he knows that he is not suffering from AIDS but the 1st Respondent maliciously made false allegation that he was a victim of AIDS without any reasonable grounds for believing that it was true and this false and malicious allegation against him had the effect of promoting the election of the 1st Respondent unfairly in preference to him alleged to be a victim of AIDS as voters were scared of voting for him who by necessary implication was destined to fail to carry out the functions of the demanding office of the President and serve the statutory term. He attached a copy of the Monitor Newspaper of 8 March 2001 reporting the 1st Respondents statement.

In his affidavit in reply to the Respondent, the Petitioner admitted that Judith Bitwire was his companion up to 1991 and that she died in 1999 but that he did not know the cause of her death. He also admitted that he had a child with the late Judith Bitwire and that the child died in 1991 but the child did not die of AIDS. The Petitioner stated that the statement admittedly made by the 1st Respondent that the Petitioner was a victim of AIDS was meant to stigmatise him and undermine his candidature before the electorate through demoralising his supporters and voters in general and to promote his own candidature against his.

The Petitioner asserted that the statement was false in all respects and that the Respondent had never diagnosed him or tested him and found him as an AIDS victim, and had never asked him about his health status. He explained that his appearance which is natural just like any other person could not enable one to know or to believe that he was a victim of AIDS. He stated that there was no obvious resemblance of AIDS victim for knowing or believing that a person was an AIDS victim and none had been given by the 1st Respondent. He was not and had not been bed-ridden in his life and he was able to work normally and during the Presidential Campaigns he traversed the whole of Uganda without breaking down or feeling particularly fatigued. The 1st Respondent's false Statement that the Petitioner was an AIDS victim was made publicly in an interview with a Time Magazine Journalist called Marguerite Michaels for publication in

the Time Magazine and Website known as http://www.time.com/time/magazine/prinout/0,8816,101373,00.htm. The Time Magazine was sold all over the World including Uganda where copies are purchased on the Street. He attached a copy he purchased from the streets of Kampala. The petitioner states further that the Website of Time Magazine was also publicly available as an electronic version and one can access, read, download or print copies. A copy of the printed article by Marguerite Michaels was attached to his affidavit. He alleges that the 1st Respondent thereafter explained the meaning of his statement in a Press Conference held on 11th March 2001 with all journalists and reporters local and international that his statement meant that "State House is not a place for the invalid. A President should be someone in full control of his faculties both mental and physical".

He complains that by referring to him as an invalid without all his faculties and incapable of being a President, the 1st Respondent undermined his candidature before the voters while promoting his own candidature to his prejudice at the election. He states that this Statement was published in the Newspapers in Uganda viz New Vision, Monitor, copies of which were attached and broadcast on all Radio Stations namely Radio Simba, Central Broadcasting Service, Radio One, Capital Radio and Uganda Television.

As a result of the 1st Respondent's said statements he claims his agents appointed during the electoral process and some of his supporters expressed their concern with his health status and sought for his explanation. He asserted that he knew the meaning of an invalid but that he was not invalid as suggested by the Respondent in his Press Conference held on 1 1th March 2001.
Dr. Ssekasanvu Emmanuel who holds a Degree of Bachelor of Medicine and Surgery of Makerere University and a Masters Degree in Medicine - Internal Medicine of Makerere University stated that he has 10 years experience as a Registered Medical Officer in Uganda and was currently doing research in HIV Associated Infections. He gave his professional opinion on the allegation of AIDS made by the 1st Respondent against the Petitioner by giving a professional definition of AIDS. His opinion which was sent to Lead Counsel for the Petitioner by letter dated 1 April 2001 stated,

"Re: Report on case definition of AIDS

Following your request for a case definition of AIDS from me, this is my report on the subject;

The acronym/term AIDS in full stands for acquired immune deficiency syndrome. This is used to mean a conglomeration of signs and symptoms associated with late HIV disease.

The internationally accepted full definition of AIDS has been compiled by the Centres for disease control Atlanta Georgia USA the content of which is included herein; Appendix 1.

However, the World Health Organisation (WHO) experts came up with a clinical definition for AIDS using signs and symptoms. These are grouped as major and/or minor signs; Appendix 2.

Presence of any one of the major signs is diagnostic of underlying HIV disease Combining one Major plus two or more of the minor signs makes a presumptive clinical diagnosis of AIDS.

It must be noted that such a clinical criteria can only be used by trained medical personnel to make a presumptive diagnosis and even then, after detailed examination of the person in question.

Likewise, the diagnosis of HIV infection as well as AIDS cannot be made in a person merely because of loss of a Partner and/or child due to AIDS. This is because on some occasions the infection may not necessarily be passed onto the partner despite intimate contact. Indeed, the issue of discordant couples is not uncommon in clinical practice.

A pathologist can recognise AIDS at post - mortem examination of an HIV infected body. However, such individuals usually die of HIV associated illnesses as the immediate cause of death other than HIV disease itself, for example, they could die from severe infection with bacteria or respiratory failure etc as the immediate cause of death. The term died from HIV associated illness would be more appropriate."

Appendix 2 which contains the WHO clinical definition of AIDS using signs and symptoms states,

"The clinical Diagnosis of HIV Disease

A. ***Major Findings/signs:***

- ***Kaposis sarcoma***
- ***Crypoloccal meningitis***
- ***Esophageal cadidiasis***
- ***Hepres zooter in patients below 50 years***
- ***Oral thrush in-patients below 50 years.***

B. ***Minor Findings/signs***

- ***Weight loss > 10% of original body weight***
- ***Recurrent fevers > 1 month***
- ***Recurrent diarrhea > 1 month***
- ***Generalized lymphadenopahty***
- ***Generalised maculopapular rash***
- ***Disseminated tuberculosis***
- ***Risk esposure e.g. multiple sexual partners, blood transfusion after 1975".***

The Petitioner also filed an affidavit of Major Rubaramira Ruranga in support of his complaint relating to the allegation of AIDS made against him. Major Ruranga stated that he was 53 years and was the Head of the National Guidance and Empowerment Network of People with HIV/AIDS (NGENT). He disclosed that he had been living with HIV for 16 years but he was going about his duties normally. He was married to two wives, one with whom he had lived for 29 years and had three children with her, and the second one whom he married in 1991 and had one child with her aged 1 1/2 years. He asserted that despite the fact that they interacted sexually whenever they tested for HIV, he and the second wife were positive but his first wife and the 11/2 years old child tested negative. He disclosed that he had sought the consent of his spouses to divulge matters pertaining to their health in his testimony in this case.

The 1st Respondent adduced the evidence of Dr. Diana Atwine to support his allegation of AIDS against the Petitioner. She stated that she was a medical doctor employed by Joint Clinical Research Centre (JCRC). In the ordinary course of her duties at the Centre she signs death certificates in respect of deceased patients of the Centre. She confirmed that she signed a Certificate of Cause of Death of the late Judith Bitwire in the course of her duties at the JCRC.

In the copy of the Death Certificate attached to her affidavit, in respect of Judith Bitwire who was admitted on 11 May 1999 and died on 21 May 1999, the cause of death is indicated as "Empysema, Respiratory Failure". Other significant conditions contributing to death but not related to disease or condition include "Advanced lmmuno Suppression".

Dr. Atwine was the only witness whom the parties applied to call for cross- examination. The application was made by the Petitioner. When she testified before the Court, she confirmed that she had signed the death certificate in respect of the deceased, Judith Bitwire. She stated that the death certificate was given to her father and the Petitioner who was by then her husband.

Moses Byaruhanga who was the Secretary to the National Task Force (NTF) of the 1st Respondent stated that he knew Judith Bitwire because he studied with her at Makerere University between 1987-1990. While at Makerere he used to take photographs and at one time she wished him to take photographs of her child at a house on Plot 9 Akii Bua Road Nakasero where she was cohabiting with the Petitioner as wife and husband.

The 1st Respondent also adduced evidence of Prof. John Rwomusana who stated that he is a Medical Doctor who did his Post Graduate Studies in Medicine and Clinical Pathology, involving studies in virology, genetics and immunology, which are basis to the science of HIV Disease. He is the Director of Research and Policy Development at the Uganda AIDS Commission.

He co-ordinates all AIDS related bio-medical and social research in the country, involving the gathering of research results and research related information in the country, packaging such information for dissemination for the purpose of policy development and further research in

HIV/AIDS prevention, care and support. He is involved in the development of research guidelines, approaches, standards and plans. He is therefore very conversant with the research results pertaining to both medical and social aspects of AIDS. He revealed that research in Uganda has established that there is a concept of "Community Diagnosis" of AIDS based on Community perceptions, beliefs and observations concerning HIV/ AIDS. The said concept is a useful research tool that enables research into the community awareness as to the risk and dangers of the spread of HIV/AIDS.

He explained that research in Uganda has revealed than it is a common widespread practice in lay conversations to refer to individuals in community who have lost partners and very young children presumably due to AIDS, as person suffering from AIDS. An example of such observations can be taken from research settings such as in Kyamulibwa, Masaka District where the Uganda Virus Research Institute and the Medical Research Council have undertaken community-based research for a period of over ten years.

The practice is common at funerals in reference to deaths of persons and is used by the Community to protect families through guarding against inheritance of spouses who have lost partners and other sexual based relationships. He concluded that the practice is of a societal advantage, which is more widespread in a country where there are high levels of awareness and openness about AIDS, such as Uganda. The practice has developed a right upon people in the community to openly express their beliefs in matters concerning AIDS and its transmission. The research has shown that it is normal practice for ordinary people to make presumptions that an individual is suffering from AIDS upon observation of skin changes and the individual's AIDS's related bereavement.

Mr. Balikuddembe learned lead counsel for the Petitioner noted that the 1st Respondent admitted making the statement but denied making it publicly or maliciously. He referred to the affidavit of Dr. Ssekasanvu Emmanuel and Major Rubaramira. He dismissed the affidavit of Marita Namayinja as hearsay. She had claimed to have known how several women friend of the Petitioner had died of aids.

Learned counsel criticised the evidence of Prof. Rwomusana as gossip and idle talk, since his search was not available. He dismissed the evidence of Dr. Atwine as useless as she may have referred to a different person from the one referred to by the Respondent. He contended that death certificate did not conform to the Birth and Deaths Registration Act, as was not signed by a pathologist. Counsel argued that the death certificate does not say that Judith Bitwire died of AIDS since any other condition could cause immune suppression.

Mr. Balikuddembe submitted further that the 1st Respondent as he was interviewed by a journalist and the statement appeared in the Times Magazine and on Internet on 8 March 2001 and therefore he knew it would be published in the press. Learned counsel cited the case of Attorney General V Kabourou (1995) 2 LRC 751 where the Tanzanian Court of Appeal said, at p.783,

"The evidence adduced at the trial shows that these statements were widely published in the press. There can be no doubt that those who uttered those statements were aware that the statements would be published in the press."

Learned counsel argued that the Petitioner confirmed the publications when he made a statement at a Press Conference on the eve of election on 11 March 2001 where he referred to the Petitioner as an invalid.

As regards the question whether the 1s Respondent made the statement maliciously, Mr. Balikuddembe observed that the 1st Respondent does not explain why he made the statement and repeated it. Counsel submitted that the Respondent therefore made the statement with the intention of undermining the Petitioner's chances of being elected, and this amounted to malice.

Mr. Balikuddembe also referred to the affidavit of Dr. Ssekasanvu, which attached a Declaration of Paris Aid Conference of 1984 of which Uganda was a signatory. He submitted that since the Declaration obliges political leaders to act with compassion towards AIDS victims, the 1st Respondent must have made the statement maliciously to stigmatise the Petitioner. He argued that the statement was false and therefore maliciously made.

Learned counsel for the Petitioner submitted further that there is no evidence that the 1st Respondent attended the funeral at which occasion it was announced that Judith Bitwire had dies of AIDS. He contended that the 1st Respondent did not specify resemblance of people with AIDS, and that even Prof. Rwomusana did not give signs or resemblance of victims of AIDS.

Mr. Balikuddembe concluded his submission that the sum total of the evidence was that the 1t Respondent made a false statement which he knew to be false and published a malicious statement which he knew was going to be published, in order to promote his election. The 15t Respondent therefore committed an offence under Section.23 (5) (a) (b) and (7) of the Act, and this would dispose of the Petition in accordance with Section 59 (b) and (c) of the Act.

Dr. Byamugisha lead counsel for the Respondent pointed out that para.51 of the Petitioner's affidavit was a repetition of the allegation in the Petition. He submitted that this was not evidence as Section 65 of the Act provided for proof of evidence. It was his contention that the Petitioner had to produce evidence that he does not have AIDS. He argued that the Petitioner must also prove a publication of a false statement knowing it to be false or believing not to be true and that it was to procure the election of another candidate. He invited the Court to consider whether another candidate involves the same candidate.

Learned lead counsel for the 1st Respondent submitted that the Petitioner was hiding the cause of death of his wife and that of his child since he took away the body and got post mortem report. Referring to the statement by the Petitioner that the lst Respondent had not tested him, he asked why the Petitioner did not himself go for the list. He contended that if the Petitioner is to be believed he must present the diagnosis of his condition. It was not enough for him to claim that his appearance is like that of a normal person and that he had never been bedridden, and had campaigned throughout the whole country. He referred to the affidavit of Major Rubaramira where he stated that although he has AID he goes about his business normally. Counsel submitted that this circumstantial evidence was not sufficient to prove falsity of the statement.

Dr. Byamugisha referred to the affidavit of Dr. Ssekasanvu where it stated that AIDS means Acquired Immune Syndrome which appeared on Judith Bitwire's death certificate. He pointed

out that according to Dr. Ssekasanvu, clinical diagnosis uses signs and symptoms. He submitted that Dr. Ssekasanvu did not carry out this clinical examination on the Petitioner nor did the Petitioner examine himself.

Learned counsel for the 1st Respondent argued further that theist Respondent based his opinion on his own presumptions, since the doctor concluded that a layman could hold that a person had AIDS because his spouse died of AIDS, his client, the 1st Respondent, has reasonable grounds to believe that the Petitioner had AIDS.

Dr. Byamugisha relied on the affidavit of Prof. Rwomusana who he referred to as an AIDS expert who has had medical and social experience of AIDS. Counsel referred to Prof. Rwomusana's opinion that there was an established concept of community diagnosis of AIDS based on loss of partners and children, which the community uses to protect families by guarding against inheritance of spouses. Counsel submitted that research shows that ordinary people make presumptions based on skin changes. He argued that this evidence was the basis of his client's honest belief that the Petitioner had AIDS. He contended that the Respondent was not required to prove that the Petitioner has AIDS, but that the 1st Respondent had reasonable grounds for believing that the Petitioner had AIDS. It was the Petitioner who had a duty to prove that he had no AIDS.

On the burden of proof, Dr. Byamugisha submitted that it lay on the Petitioner to prove falsity and he had failed to discharge the burden. As regards the question of promoting the 1st Respondent's election, learned counsel submitted that the 1st Respondent was telling an American Paper, not promoting his election. Moreover, counsel argued, the Petitioner did say in the Monitor Newspaper that the publication would not affect him because the statement was the sign of a desperate man facing defeat. Furthermore Dr. Byamugisha concluded that the 1st Respondent was responding to allegations from the Petitioner that he was arrogant and had been in power for too long. Therefore the statement was not malicious because the Petitioner knows why it was made.

As regards the question whether the statement was made without reasonable grounds, Dr. Byamugisha referred to the 1st Respondent's answer to the Petition and his affidavit in support

and submitted that the 1 s respondent had reasonable grounds to believe the statement to be true because:

(i) he has known the Petitioner for a long time

(ii) the Petitioner's wife died of AIDS

(iii) the Petitioner's body appearance bears resemblance to other AIDS victims

(iv) Prof. Rwomusana supports the above manner of proving AIDS based on community perceptions.

Dr. Byamugisha referred to para.5 of the Petitioner's affidavit where he states that voters were scared of voting for him. Counsel submitted that the Petitioner did not tell the Monitor Newspaper about this, nor did he adduce any evidence of a single voter who had refused to vote for him because of this statement. Learned counsel concluded that the Petitioner had failed to prove the ingredients of the offence.

It is trite law that the burden of proof lies on the Petitioner to prove all the ingredients of the illegal practice under Section 65 of the Act. In C.D. Field's Law of Evidence (In India and Pakistan) 1 0th edn. VoI.V at page 4152, para. 87 it is stated,

> ***"In Dr. Jagfit Singh v Glenn Singh, AIL 1966 Sc. 772, ft was held that the onus to prove the essential ingredients prescribed by Sub-section (4) of Sec. 123 of the Representation of the People Act is on him who alleges publication of false statements of fact. The election Petitioner has to prove that the impugned statement has been published by the Candidate or his Agent or if by any other person, with the consent of the candidate of his election agent. He has further to show that the impugned statement is false and that the candidate either believed that the statement to be false or did not believe ft to be true. It has further to prove inter alia that the statement was in relation to the personal character or conduct of the complaining candidate. Finally ft has to be shown that the publication was reasonably calculated to prejudice the prospects of the complaining candidate's election. But though the onus is on the election Petitioner to show all these things, the main things that the election Petitioner to prove are that such publication was made of a statement of fact and that that statement is false and is with respect to the***

personal character of conduct of the Petitioner. So the main onus on the Petitioner is to show that a statement of fact was published by a candidate and also to show that the statement was false and related to his personal character or conduct. Once that is proved, the burden shifts to the candidate making the false statement of fact to show what his belief was."

As far as the shifting of the burden of adducing evidence is concerned it is stated in Sarkar's Law of Evidence Vol.2 14th edn. 1993 Reprint 1997 pages 1338-1340 as follows,

"It ***appears to me that there can be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one sides or the other, and saying that if there were two feathers on one side and one on the other that could be sufficient to shift the onus. What is meat is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence Stoney v Eastbourne RD Council (19727) I ch. 367,397)."***

The main elements of the illegal practice under Section 65 of the Act which must be proved are as follows:

(I) that a statement was published,

(ii) that the statement was false,

(iii) that the statement concerned illness, death or withdrawal of a candidate,

(iv) that the maker knew that the statement was false, or knew or believed it on reasonable ground to be true,

(v) that the statement was made for the purpose of election of another candidate.

I think it is common ground that the alleged statement was published and that it concerned the illness of the Petitioner. The highly contested question was whether the statement was false or whether the 1st Respondent knew that it was false or knew or believed it on reasonable grounds to be true. In other words, it is not sufficient to prove that the statement was false, it must also be proved that the maker knew that the statement was false or did not believe it to be true.

The first question to consider is whether the 1 Respondent made a false statement. A false statement has been defined in Black's Law Dictionary, 6th edn. 1 990 at p.602 as follows:

> ***"Statement knowingly false or made recklessly without honest belief in its truth and with the purpose to mislead or deceive.***
> ***An incorrect statement or acquiesced in with knowledge of incorrectness or with reckless indifference to actual facts and with no reasonable ground to believe it correct."***

In Halsburys Laws of England Vol.1 5 4 edn. Para. 705 page 540, it is stated that it is an illegal practice before or during an election for any person to make or publish any statement of fact in relation to the candidates personal character unless he can show that he had reasonable grounds for believing and did believe the statement to be true. The authors go on to state,
"It is irrelevant whether the statement has or has not been provoked by a statement of a similar character made on the part of an opponent." Mommoth Boroughs Case (1901) 5 O'M & H 166 at 173.

The Petitioner adduced no independent or expert evidence to support his statement that he has no AIDS and that his looks are normal and was able to campaign throughout the whole country presumably like a healthy person. The affidavit of Major Rubaramira that he has AIDS but is able to carry out his normal duties and marital obligations and that one of his wives and child are HIV negative did not help much the Petitioner's case. It only proved that one can have AIDS and enjoyed normal life and that one spouse can be positive and the other negative. Even the evidence of Dr. Ssekasanvu did not advance the Petitioner's case. Instead, Dr. Ssekasanvu stated that it is contrary to Medical Ethics and Hippocratic Oath for a Medical Doctor to discuss or reveal the ailments of his or her patients to third parties whether dead or alive. It is not clear whether he had examined the Petitioner and was therefore claiming professional privilege.

We are therefore left with the evidence adduces by the 1st Respondent to substantiate his statement. Dr. Byamugisha summarised the evidence in his submissions. It was disputed that the 1st Respondent had closely known the Petitioner for a long time. It was not disputed that the Petitioner's companion or wife Judith Bitwire and her child died. It is also common ground that

she died of Advanced Immuno Suppression. The 1st Respondent also based his opinion on the appearance of the Petitioner, which had changed. The 1st Respondent based his opinion on all above facts to come to the conclusion that the Petitioner had AIDS.

The question is whether the opinion reached by the 1st Respondent was based on reasonable grounds. Would a reasonable, ordinary person who is not an expert on AIDS or health worker come to the same conclusion? Prof. Rwomusana has ably explained the concept of community diagnosis of AIDS based on loss of partners and children, which is used to protect families against inheritance of spouses after death of the husbands. He explained that ordinary people also make presumptions about AIDS based on skin changes. Signs are also listed by Dr. Ssekasanvu as diagnostic signs for AIDS.

The conclusion I make out of the above analysis is that the Petitioner has failed to establish to my satisfaction that the statement made by the 1 Respondent that the Petitioner had AIDS was false. In fact in this case there was no shifting of the burden of adducing evidence on the question of falsity or absence of reasonable grounds because the Petitioner did not establish a prima facie case on either of these ingredients.

Nevertheless the l Respondent adduced credible evidence to prove his grounds for holding that the statement he made that the Petitioner was not false, and that he knew or believed on reasonable grounds to be true. Having failed to prove these two crucial elements, the Petitioner has failed to prove that the 1st Respondent committed the alleged illegal practice under Section 65 of the Act. That being the case, it is not necessary to consider whether the statement was intended to promote or procure the election of the Respondent

Offering of Gifts:

It is alleged by the Petitioner in para 2 (b) of the Petition that contrary to Section 63 of the Act the Respondent and his agents, with the 1st Respondent's knowledge and consent offered gifts to voters with the intention of inducing them to vote for him. This allegation does not seem to be

supported by any averments in the affidavit in support of the Petition and would therefore be technically untenable.

However in reply to the Respondent's affidavit in support of his Answer to the Petition, the Petitioner gave details of the alleged gifts offered by the 1st Respondent or his agents. In this affidavit the Petitioner stated that the 1st Respondent at a campaign meeting held at the International Conference Centre on Friday 26th January, 2001 to solicit support from Motor-cyclists (Boda-boda) the 1st Respondent gave a gift of a new Motor-cycle to one of the cyclists/voters by the name of Sam Kabugo in order to influence the Motor-cyclists/voters to vote for him. The gift giving ceremony by the Respondent was published both in The Sunday Monitor and Sunday Vision of 28th1 January 2001 copies of which he attached. Subsequently he personally heard the said Sam Kabugo on Central Broadcasting Corporation FM Radio urging his fellow Boda-boda cyclist to support the Respondent in his bid for the Presidency of Uganda.

In rebuttal, the Respondent adduced the evidence of Kabugo Sam aged 20 years old who admitted that he was given a motorcycle by the 1st Respondent but for the reason that he was his Campaign Agent. He stated that he was an ardent supporter of the Respondent. When the Respondent offered to stand for the elections he decided to mobilise support for him especially among his Bodaboda business colleagues. On 9 January 2001 while he was at Kololo Airstrip to witness the nomination of the 1st Respondent he was asked by Moses Byaruhanga to carry the 1st Respondent from one corner of the Airstrip to the podium as the crowd congestion could not allow easy passage of his motorcade. He accepted the request and carried it out.

After nomination he was appointed a Campaign Agent for the 1st Respondent and a copy of his letter of appointment was attached. Later he agreed with Byaruhanga that the Task Force for the 1st Respondent would give him a motorbike to facilitate his mobilisation. The motorbike was handed to him by the Respondent on 26 January 2001. His mobilisation and campaign included advertisement, which were broadcast over radio stations. He therefore denied that he was given a motorbike to influence him to vote for the 1st Respondent because he was already his supporter, mobilise and agent.

Section 63 (1) of the Act provides,

"Any candidate or agent of the candidate who either before or during an election gives or provides any money, gift or other consideration, to a voter with the intention of inducing the person to vote for him or her commits an illegal practice."

This provision is intended to safeguard the integrity of the electoral process and promote fairness.

I accept the submission of Mr. Bitangaro that the Petitioner must prove the following ingredients to establish the illegal practice of offering gifts:

- That a gift was given to a voter.
- That the gift was given by a candidate or his agent.
- That the gift was given to induce the person to vote for the candidate.

Kabugo's evidence has not been challenged and I accept it. I find that the motorcycle was not given to him with the intention of inducing him to vote for the 1st Respondent but to facilitate him as a Campaign mobiliser or agent. This action did not amount to offering a gift and therefore did not violate any principle of the Act.

The Petitioner alleged further that the Respondent with the intention of inducing persons to vote for him offered the following:

(a) Abolished Cost sharing in all Government Health Centres including those operated by Local Governments.

(b) Increased the salaries of Medical Workers in the middle of the budget year.

(c) Offered to increase pay to teachers and indeed made this offer in a meeting at the International Conference Centre with all the teachers in Kampala on 5th March, 2001.

(d) Hurriedly caused his Minister of Works and campaign agent Hon John Nasasira to publicly and out of the ordinary in full view of voters to sign contracts for the tarmackng and upgrading of roads using his position as the incumbent President to execute the said contracts and deliver on his promises to the people of the beneficiary districts:

(i) Busunju-Kiboga

(ii) Kiboga-Hoima

(iii) Arua-Pakwach

(iv) Ntungamo-Rukungiri and that the tarmacking and upgrading of these roads was part of the 1st Respondent's Campaign Manifesto.

(e) At a campaign meeting at Arua on 12 February 2001 the 1st Respondent offered a gift of money to voters who attended the Rally and a record of this rally was Video recorded - a copy of the recording was submitted as an exhibit.

The 1st Respondent denied the allegations in his answer to the Petition. He stated both in the Answer and the affidavit supporting it that neither himself nor his agents with his knowledge and consent or approval offered gifts to voters with the intention of inducing them to vote for him.

The Petitioner adduced no evidence to prove that the increase was directed at voters and intended to induce them to vote for the 1St Respondent. This alone would be sufficient to sustain a finding that such offer of gifts has not been established. However the 1st Respondent adduced evidence to prove that the measures were part of Government programmes decided much before the elections and had been incorporated in the National Budget and other national programmes. In his affidavit rebutting the allegations regarding abolition of cost-sharing in Government Health Centres, Dr. Crispus Kiyonga, the Minister of Health denied that Government abolished cost sharing in Government Health Centres with the intention of inducing persons to vote for the 1 **St** Respondent as alleged by the Petitioner. He explained that cost sharing had been introduced some years back to assist in filling the financial gaps in Health Sector Budget.

Under the Constitution, Primary Health Care is the responsibility of the Local Governments (Districts) but the Central Government can always come in to assist and finance directly where there is need by prioritising the sector. In 1997, the Government introduced the Primary Health Care Conditional Grants, under which the Government increased funding to the sector aimed at improving the health of the population particularly the poor of the poor. At the same time, there has been an on-going debate and no consensus in government as whether to abolish Cost Sharing or not because it was blocking the poor people's access to health services.

The conditional grant has been increasing over the years whereby Shs.39 billion was budgeted for Primary Health Care in the Financial Year 2000/2001 compared to Shs. 12 billion of the previous year. Of the Shs.39 billion, one billion shillings was reserved for purchase of supplementary drugs. The Primary Health Care Conditions Grant was inter alia to cater for salaries and allowances of Health workers in peripheral health units which were previously supposed to be paid by Local Council Ills and the districts who have proved to have no capacity to sustain these payments.

In the month of October 2000, well before the campaigns, he addressed Donors to the Health Sector and informed them how the 1s Respondent was concerned that the poor could not meet the user charges which was denying them access to health services. By December 2000, the Central Government had disbursed half of the money budgeted for supplementary drugs in that Financial Year. By February of this year, all the health units were reasonably staffed or supplied with the drugs acquired using money from the conditional grant.

Therefore it was no longer justified to deny the poor health services due to inability to pay under the Cost Sharing policy. With or without elections the Government Agenda on cost sharing has already been set by the budget of the Financial Year 2000/2001. He concluded that it was therefore not correct to say that the 1st Respondent abolished Cost Sharing to induce voters in view of the Government Agenda.

The allegation relating to the increase of salaries for medical workers and teachers was answered by Hon. Benigna Mukiibi, who is the Minister of State for Public Service, currently holding the portfolio because the substantive Minister for Public Service is on leave. She stated that the scope of this portfolio extends to making proposals for the increase of adjustment and or regulation of salaries of public servants and emoluments of pensioners.

During the National Budget for the Financial Year 2000/2001 the Minister of Finance made provision for the implementation of recommendations in the Pay Strategy Report prepared by the Ministry of Public Service to address the plight of the middle rank professionals. A copy of the Budget speech read on 15th June 2000 as attached to the affidavit. On page 25 of the Official Budget speech under the sub-heading “IMPROVING THE PERFORMANCE OF THE PUBLIC

SERVICE" the Minister of Finance outlined the budget for Public Service Reform. Pay and Pensions.

The modalities for the disbursement of these funds were worked out between our Ministry and the Ministry of Finance to allot these excess funds to increase the salaries for different categories of mid rank professionals. In January 2001, the Ministry of Public Service issued a press release relating to the increase of pay for Medical workers. A copy of the press release was attached to her affidavit.

The increment of salaries for medical workers and teachers was a result of funds designated in the Budget under the Public Service Pay Reform Program and was not done by the 1 **s** Respondent to induce voters alleged in paragraph 22 (b) and 22 (C) of the Petitioners affidavit in reply dated 5th April 2001.

There is no evidence to challenge the explanation given by Hon. Mukiibi that the increase of salaries had been planned and budgeted for before elections. The only complaint which can be raised was that the implementation of the programme was close to the campaign period. But there is no evidence to prove conclusively that it was done to induce voters to vote for the 1st Respondent.

Hon. John Nasasira, Minister of Works, Housing and Communications answered the allegations regarding signing of contracts for tarmacking and up-grading roads. He denied the allegation that he publicly and out of the ordinary course of his duties as Minister signed contracts for tarmacking and upgrading the roads mentioned by the Petitioner.

He explained that the contracts referred to by the Petitioner were not signed by him but by Charles Muganzi; the Permanent Secretary of the Ministry of Works, Housing and Communications and he attended the functions in his capacity as the responsible Minister. The said road contracts were part of the implementation of the Governments Ten Year Road Sector Development Program, which commenced in 1996. He attached a copy of the executive summary of the Governments Ten Year Road Sector Development Programme.

The Credit Agreement between the Government of Uganda and the World Bank for the financing of the implementation of the tarmacking and upgrading of the Busunju—Kiboga-Hoima and Arua-Pakwach was signed in November, 1999. A copy of the Credit Agreement was attached to the affidavit. The advertisement for short listing contractors for the tenders for the tarmacking of Busunju-Koboga; Kiboga-Hoima and Arua-Pakwach was issued in November, 1999. A copy of the said advertisement was attached. The letters inviting the short listed contractors for the tenders for the tarmacking and up-grading of the roads referred to above were issued in July 2000. Copies of the letters were also attached to his affidavit.

Hon. Nasasira denied that any agreement had been signed for the tarmacking and up grading of the Ntungamo-Rukungiri Road. He explained that the tarmacking and upgrading of the Ntungamo-Rukungiri Road was part of the Ten Year Road Sector Development Program and only the contract for tarmacking and upgrading the Ntungamo-Kagamba section had so far been signed as part of implementing this programme.

The signing of contracts for tarmacking and upgrading of roads under his Ministry had always been done publicly. He concluded that it was false to allege that the award and signing of the road contracts resulted from the 1st Respondent's campaign manifesto or at all. I accept Hon. Nasasira's evidence, which has not been challenged.

Another allegation of bribery made by the Petitioner was that on 12 February 2001, the 1st respondent offered money to voters at a rally in Arua. Counsel for the Petitioner tendered in Court a tape recording of the occasion. This evidence was inadmissible in absence of an affidavit explaining how the tape was recorded. There was no evidence that the people offered money were voters. The allegation was refuted by Moses Byaruhanga who stated that on the alleged day, the 1st Respondent was not in Arua but in Masindi. This allegation was therefore not proved.

As regards offering gifts by agents, Ssali Mukago a registered voter in Rubaale Trading Centre in Ntungamo District, claimed that on 9 March one Daudi Kahurutuka a campaign agent for the 1st Respondent came at around 8.00 p.m. and found him at All Mutebi's Hotel and told him that he would give him any amount of money he wanted from the 1st Respondent's Task force so that he could allow to steal the votes. He does not say what his response was. But he alleges that on the

polling day at Rubaale Moslem Primary School Polling Station during the counting of votes, he saw ten ballot papers, which were folded together and ticked in favour of the 1st Respondent. When he complained to the Presiding Officer, he said it was allowed.

But David Kahurutuka a resident of Rubaale Trading Centre in Ntungamo District denied the allegations made by Ssali Mukago. He stated that he never met Ssali at Ali Mutebi's Hotel on 9 March 2001 as falsely alleged. He never asked Ssali to mention any amount of money he wanted from the 1st Respondent's Task Force. He said he was not a member of that Task Force but only the volunteer group and did not have any plans whatsoever to rig the election as alleged. He asserted that the Volunteer Group had sufficiently canvassed for votes for the 1st Respondent. He concluded that there was no bribery offered to Ssali or rigging of the election as alleged.

Gariyo Wellington who was in charge of overseeing the operation of Polling Agents for the Petitioner in Rubire Sub-county claimed that at around 11.00 am. He visited Kyanyazire Cell and saw Mwesigwa Rukutana loading people on a motor vehicle Reg. No. UAA 006A Nissan pick-up and he was giving Shs. 5,000/ = to every person who was boarding and instructing them to vote for the 1st Respondent. He mentions no date but it may be assumed to be polling day. He does not indicate where the people boarding were going or being taken. Not even one person who was given money is mentioned.

Mwesigwa Rukutana who is a Member of Parliament for Rushenyi County in Ntungamo District stated that he was not an Agent of the 1st Respondent during the Presidential Elections. He denied the allegations made by Gariyo that he was at Kyanyanzira village loading people on pick-up Reg. No.UAA 006 A and giving Shs.5,000/= to every person who boarded it. He stated that on that day he never stepped in the said village, nor did he load anybody on the alleged vehicle or give any money to anybody. He further states that on polling day he cast his vote at Ruyonza Polling Station at around 7.00 a.m. after which he proceed to Omugyenyi where he found Bob Kabonero with whom he moved around his constituency in his vehicle Prado Reg. No. UAA 915 S which was being driven by Richard Asingwire. During his movements he never went to Kyanyanzira Village or Rwaharamira Polling Station.

Bob Kabonero a voter at Omugyenyi Polling Station in Rushenyi Ntungamo District refuted the allegations made by Gariyo Wellington. He stated that he voted at Omugyenyi Polling Station shortly after 7.00 a.m. During the Presidential Elections he was neither appointed nor did he act as a campaign agent for the 1st Respondent. After casting his vote he spent the rest of the day driving around Rushenyi and other parts of Ntungamo in the company of Hon. Mwesigwa Rukutana. He stated that he did not see Hon Mwesigwa Rukutana offering Shs.5,000/= or any sums of money to voters as alleged by Gariyo. Moses Byaruhanga who was the Secretary of the National Task Force (NTF) of the Respondent denied that Mwesigwa Rukutana was either a campaign agent or a polling agent for the 1st Respondent.

Mugizi Frank who was a Polling Agent for the Petitioner for Rubanya Polling Stations in Ntungamo District, claimed that at the Polling Station he witnessed massive rigging whereby people were allowed to vote more than once and when he protested the 1st Respondent's supporter namely Simon, Twahirwa Sura, Kanyagira Simon and Kakyota Muyambi threatened to assault him and chased him from the Polling Station. After leaving the Polling Station one All Mutebi a Campaign Agent of the 1st Respondent offered him Shs.15,000/= to go back and sign the Declaration of Results Form and not to report the malpractices but he refused to accept the money or to sign the forms.

Omalla Ram who was the co-ordinator of Eastern Region veterans for the Petitioner claimed that on 12 March 2001 while he was monitoring the voting process he received a report from Opio Kalamira that in Pyuwo Polling Station, Councillor Onyango Wilbroad had given his father Odomi money to give to people to vote for the 1st Respondent. He drove to Payawo Trading centre near the Polling Station where he found Onyango's father was with many people and he denied the allegation. When he contacted other people they denied that Odomi had been given money by Onyango his son. This evidence is not only hearsay but adverse to the Petitioner's case. It was a false allegation of bribery.

Drabbo Joseph a mobiliser for the Petitioner in Adumi Sub-county, Ayivu County, Arua District claimed that on the polling day he saw the LC I Chairman of Ndru Sub-parish called Godfrey Asea telling people to vote for the 1st Respondent riding on motorcycle. He saw the said Asea giving out unspecified amounts of money to one Odipio Inyasio at Lea Polling Station with

directives that the same be given to all women so that they voted for the 1st Respondent. He reported the matter to the Police Constable but the suspect was not apprehended. There is no proof that Asea was an agent of the 1st Respondent and that the 1st Respondent knew and consented or approved his actions. Therefore the allegations of offering gifts by the 1st Respondent or his agents have not been proved.

Threat to Cause Death to the Petitioner:

In para 2 (a) of the Petition, the Petitioner complains that the 1st Respondent threatened that he would put the Petitioner six feet deep - which meant causing death to the Petitioner when he was in the public interest, pointing out grievances on mismanagement in the UPDF and this had the effect of scaring voters to vote for the 1st Respondent to guarantee their own safety.

The 1st Respondent denied the allegation. He stated that prior to the electoral process he had in his capacity as President and Commander-in-Chief warned that any person who interferes with the army would be put six feet deep. He stated further that he made the statement on the 27 November 2000 at the National Conference of the Movement and that he made the statement for the security, good governance and order of the country to deter subversion in the army. In his affidavit in reply to the Petition, the 1st Respondent denied uttering the threat against the Petitioner. He explained that he made this statement at the National Conference of the Movement on 27 November 2000 and he made for the security good governance and order of the country and to deter subversion in the army. He did not make the statement for purposes alleged in the Petition.

It is not clear under what provision of the law the complaint is based. It seems however that the Petitioner is alleging intimidation of his voters by the 1st Respondent's threat. The threat is admitted by the 1st Respondent, but not the motive or effect as alleged by the Petitioner.

The Petitioner adduced no evidence to support the allegation that the statement was made in reference to himself as a candidate or to scare his supporters, or that any of his supporters were indeed scared or voted for the 1st Respondent. The statement was made in November 2000 before nomination of candidates and the 1st Respondent has explained the purpose of making

statement. I find that the Petitioner has failed to prove to my satisfaction that the 1st Respondent committed an illegal practice or offence by making the alleged statement.

Deployment of Partisan Army During Elections:

The Petitioner complains in para 3 (2) (c) of the Petition that contrary to Section 12 (1) (e) and (f) of the Electoral Commission Act, the 1st Respondent appointed Major General Jeje Odongo and other partisan Senior Military Officers to take charge of the Presidential Election process and thereafter a partisan section of the army was deployed all over the country with the result that very many voters either voted for the 1st Respondent under coercion and fear or abstained from voting altogether.

The 1st Respondent states in his affidavit in reply that the deployment of security forces was done by the Government for the purpose of securing law and order throughout the country. He did not appoint any military officers to take charge of the security of the Presidential Election process as alleged in the Petition. He knows that Government deployed security forces throughout the country for security preservation of law and order.

In his affidavit in answer to the Petition, the 1st Respondent denied knowledge of the allegations contained in para 3 (1) of the Petition except the arrest and charging in court of Hajati Miiro. He stated that he was not present at the times and places where they were alleged to have occurred and did not witness them.

He stated that he instructed his campaign agents to mobilise for his election on the basis of his election manifesto entitled “Consolidating the Achievements of the Movement” only and he had no knowledge of their having acted contrary to law, conduct which he did not consent to or approve of on the part of any person.

He further states that because the Police were inadequate and the security situation so required the government decided to and did deploy, security forces throughout the country to keep peace and order but he had no personal knowledge of nor did he in his capacity as President of the Republic of Uganda, receive any reports of intimidation of voters by soldiers and para-military personnel at Polling Stations. He asserted that the elections were conducted under conditions of

freedom and fairness and under secure conditions as a result of sufficient deployment of security forces throughout the country by the Government.

On the allegation of general deployment of the Army during the campaign period, Mr. Walubiri learned counsel for the Petitioner submitted that the 1st Respondent did not deny deployment of the Army but claimed that the electoral process was conducted under conditions of freedom and fairness and explains the need for deployment. Mr. Walubiri refers to the affidavits of Major General Jeje Odongo and Mr. John Kisembo, who supported the 1st Respondent's reason for deployment namely that it was necessary in order to supplement the Police to curb electoral violence, which was on the increase.

Learned counsel for the Petitioner argued that the Army did not provide security, but it was a cause of insecurity as the evidence on record showed that it was torturing people or making it impossible for the Petitioner to campaign. Counsel then referred to the various affidavits, which gave evidence of harassment by the military, including the affidavits of Kimunyu in Kamuli, Baguma in Kasese, Kijumba in Kasese, Ssemambo in Mbarara, Busingye, Masasiro in Mbale and Twihirwa in Kabale.

Dealing with what he called the legal angle, Mr. Walubiri submitted that the deployment of the army in previous instances like the currency reform, the Local Government elections and the Presidential and Parliamentary election was all illegal. He concluded that there was no provision allowing deployment of the Army in the Currency Reform Statutes or in later Statutes dealing with the elections. He submitted that the role of the UPDF is set out in article 209 and has nothing to do with internal policing which is the mandate of the Police under article 112.

Learned counsel for the Petitioner further argued that under section 41 of the Act, the Police are required to provide security, but if there was no police then the presiding officer would appoint anybody present to act as an election constable, only in restricted circumstances, where there was actual or threat to public order. Since there was no state of emergency, Mr. Walubiri submitted the deployment was unconstitutional and illegal, and constituted an offence under s.15 (b) and (c) of the Act. He further contended that the deployment of the Army and PPU was with the

consent of the Respondent, which occasioned intimidation of many people including Major Okwir.

Mr. Walubiri further contended that a candidate is liable for the actions of the agent done within the scope of his employment even where the agent was strictly prohibited from undertaking the particular action. He referred us to The News Digest of English Case Law 2nd ed. 1924, and Digest: Annotated British Commonwealth and European cases 1982 (Butterworth's para. 646 P. 72) where the concept of implied consent is discussed.

Dr. Byamugisha learned lead counsel for the 1st Respondent submitted that Section 12 (1) of the Commission Act requires the 2nd Respondent to take measures for ensuring that the entire electoral process in conducted under conditions of freedom and fairness. Learned counsel referred to the affidavits of Major General Jeje Odongo explaining why the UPDF got involved in maintaining security after Police had requested for augmentation. The reason was to take charge of security as it had been done on previous occasions. The evidence of Major General Jeje Odongo was corroborated by the Mr. John Kisembo, Inspector General of Police.

Dr. Byamugisha also referred to the evidence that the Commission had written to the candidates informing them how he had contacted the Police and other security agencies to provide security during the entire campaign period. The Chairman of the Commission stated that the security situation had improved after the Joint Security Force had been constituted. Learned counsel concluded that the deployment of the UPDF was therefore not illegal. Secondly, the deployment was not used for an illegal purpose to persuade voters to vote for the 1st Respondent.

As regards the abduction or arrest of Major Okwir, Dr. Byamugisha submitted that the circumstances of his arrest are explained by Lt. Col. Mayombo and his evidence is supported by that of Maj. Gen. David Tinyefuza. Dr. Byamugisha submitted that it is not true that Major Okwir was arrested to remove him from the Petitioner's group but to save his life from the Petitioner's group who wanted to deal with him for spying on them.

Dr. Byamugisha further contended that there was no evidence adduced to prove that a partisan army was deployed over the whole country, which harassed and coerced voters. He also submitted that there was no evidence of how many voters abstained from voting due to coercion

and fear. He argued that the provision of Section 3 (2) (c) and 12 (1) (a) and (f) of the Commission Act do not constitute an offence but are obligations of the Commission.

On the question of agency, Dr. Byamugisha submitted that the Petitioner went beyond the requirements of the Act by adding officers attached to his office as President since these officers cease to be his agents under the Act. He submitted that the President is not a candidate in his capacity as Chairman of the Movement or Commander-in-Chief of Uganda Armed Forces.

The first point to consider is whether the general deployment of the army was unconstitutional and illegal as submitted by learned counsel for the Petitioner. The Uganda Peoples Defence forces (UPDF) as a state agency is established by article 208 of the Constitution. Clause 3 (2) and (3) of article 208 provide,

> ***"(2) The Uganda Peoples Defence Forces shall be non-partisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established by the Constitution.***
>
> ***(3) Members of the Uganda Peoples Defence Forces shall be citizens of Uganda of good character."***

The Constitution sets out the functions of the UPDF in article 209 which, states,

> ***"209. The functions of the Uganda Peoples Defence Forces are –***
> ***(a) to preserve and defend the sovereignty and territorial integrity of Uganda;***
> ***(b) to co-operate with the civilian authority in emergency situations and cases of natural disasters;***
> ***(c) to foster harmony and understanding between Defence Forces and civilians; and***
> ***(d) to engage in productive activities for the development of Uganda."***

It seems to me that the purpose of the above provisions was to create a national rather than a partisan or personal Army. There was no evidence that there is a partisan section in the army or that the army, which was generally deployed, was partisan. There was no evidence of

appointment of partisan commanders. Maj. Gen. Jeje Odongo was already the Commander of the Army when appointed to take charge of security.

The second objective appears to me to be to create a professional and disciplined army, which would respect the rights of the people. It was mandated to foster harmony and understanding between the army and the public. It was intended to create good civil-military relations and to promote a pro-people army as its name suggests.

The third goal appears to establish an army which though primarily responsible for the defence of Uganda, would co-operate with other security agencies in emergency situations and natural disasters. Other security agencies here include the Police. It was submitted that the army could only come to assist the Police in a state of emergency. I am not persuaded by this argument since the provision does not refer to a state of emergency, but emergency situations, which may involve security.

The fourth objective was to establish a productive army, which contributed to the development of Uganda especially in times of peace. I have attempted to explain the constitutional character and role of the UPDF because it is important for understanding the role it played in these elections.

It is not in dispute that the UPDF was requested by the Police to assist with the maintenance of security during the elections including the campaign period. The reasons for this request have been adequately indicated in the affidavits of the 1st Respondent, the Commander of the UPDF, the Inspector General of Police and Chairman of the 2 Respondent. It is well established that the maintenance of internal security is the primary function of the Police. Article 212 provides for the functions of the Uganda Police Forces to include:

"(a) to protect life and property;

(b) to preserve law and order

(c) to prevent and detect crime; and

(d) to co-operate with the civilian authority and other security organs established under this Constitution and with the population generally."

It was under article 21 2 (d) that the Police requested the Army to assist them in maintaining security throughout the country. In my judgment it was not unconstitutional or illegal to deploy the UPDF to assist in maintaining security to ensure that the elections were conducted under conditions of freedom and fairness. Whether the Army exceeded its mandate or engaged in activities incompatible with its role during elections is another matter.

In Liversege v Anderson (1942) AC 206 Lord Macmillan stated at page 253,

> ***"As Lord Park said in the Zamora (1916) 2 A.C. 77,107 those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matter should be made the subject of evidence in a court of law or otherwise discussed in public."***

The evidence as a whole does not indicate that intimidation was caused by the general deployment of the Army. Intimidation was restricted to some areas where the soldiers would probably have been even if there was no general deployment. Places near barracks were a case in point. Another case is the PPU, which was deployed in Rukungiri for a specific purpose. As regards the question of agency, I am of the view that the general principles of agency do not apply. Therefore English decisions and the case of Muwonge v Attorney General (1967) EA 17 are not applicable.

In view of the strict provisions of Section 65 (c) it must be proved that the illegal practices were committed by the agent with his knowledge and consent or approval. There was no express evidence that the 1st Respondent knew and consented or approved the acts of violence or intimidation, which were perpetuated by members of the UPDF. Reliance was placed on the letter written to the 1st Respondent requesting him to take action to save the electoral process from being derailed. There was no evidence that the 1st Respondent received the letter or consented or approved those actions. He expressly denied knowledge of them or their approval. The burden was on the Petitioner to prove this essential element in the illegal practice alleged. It would be dangerous to imply authorisation by the 1st Respondent merely because the soldiers belonged to the UPDF of which he is the Commander-in-chief. The purpose of the law would not

be achieved by such an interpretation. A reasonable degree of guilty knowledge is required under the section.

In my judgement, the Petitioner failed to prove to my satisfaction that the 1st Respondent knew and consented or approved the illegal practices committed by members of the UPDF.

Deployment of PPU and Major Kakooza Mutale's Kalangala Action Plan
Para-military Force:

In para 3 (2) (d) of the Petition, the Petitioner alleges that contrary to Section 25 (b) of the Act, the 1st Respondent organised groups under the Presidential Protection Unit and his Senior Presidential Adviser one Major Kakooza Mutale with his Kalangala Action Plan Para-military personnel to use force and violence against persons suspected of not supporting the 1st Respondent thereby accusing a breach of the peace, disharmony and disturbance of public tranquility and induce others to vote against their conscience in order to gain unfair advantage for the 1st Respondent during the Presidential Elections.

In his affidavit in support of his answer to the Petition, the 1st Respondent stated that he did not directly or indirectly organise groups of persons under the PPU or Major Kakooza Mutale with his Kalangala Action Plan personnel and whatever such persons are stated to have done by the Petitioner was without his knowledge and consent or approval.

Section 25 (b) of the Act states,

> ***"Any person who before or during an election for the purposes of effecting or preventing the election of a candidate either directly or indirectly –***
> ***(b) organises a group of persons with the intention of training the group in the use of force violence, abusive, insulting, corrupting or vituperative songs or language calculated to malign, disparage, condemn, insult or abuse another person or candidate or with a view to causing disharmony or a breach of the peace or disturb public tranquility so as to gain unfair advantage in the election over that other candidate;***

Commits an offence and is liable on conviction to a fine not exceeding eighty currency points or imprisonment not exceeding one year or both."

This provision prohibits the establishment of special group of people with the intention of training them to interfere with the peaceful organisation of free and fair elections and to intimidate other candidates and supporters in order to gain unfair advantage over the candidate. There is no evidence that the PPU was established or organised with the intention of training it to interfere with the elections. The evidence on record is that the PPU is a standing facility for the protection of the security of the President of Uganda. Although there was evidence that it was deployed in Rukungiri District; there is no evidence of special training to carry out the activities prohibited in Section 25 (b) of the Act. Whatever activities or electoral offences they were engaged in, there is no evidence that the 1st Respondent personally organised or mandated them to do so. It is therefore not possible to conclude that those provisions of the Act or principles behind them were violated by the PPU.

As regards the allegations against Major Kakooza Mutale and his Kalangala Plan of action, the Petitioner adduced no evidence of their activities, and how they violated the provisions of Section 25 (b) of the Act. In the absence of that evidence it is not possible to understand what principles of the Act were violated. On the contrary Major Kakooza Mutale has given a reasonable and uncontroverted explanation of the origin, composition, purpose and activities of the Action Plan. It does not contain those prohibited acts mentioned in Section 25 (b) of the Act.

In his submissions, Dr. Byamugisha referred to the affidavit of Capt. Ndahura who was the Commandeer of the PPU in Rukungiri who explained why he was sent to prepare and secure the areas for the visit of the 1st Respondent on 16 January 2001. Capt. Ndahura whose evidence has been earlier reviewed denied that the PPU was involved in acts of violence and intimidation. He also denied sending soldiers to Polling Stations and stated that they were permanently camped at State Lodge in Rukungiri.

Learned lead counsel for the 1st Respondent argued that the 1st Respondent's witnesses had exonerated the 1st Respondent, and he was not personally involved in the acts of terror and

violence. He submitted that the PPU are agents of the State not of the President and does not pay them. He contended further that the PPU is in each area where there is a State Lodge, and the President does not deploy PPU, but that is done by the UPDF. He submitted that the 1st Respondent was a Presidential Candidate and therefore the case of Muwonge v Attorney General (1967) E.A. 17 does not apply.

I have already held that the PPU were involved in acts of intimidation in Rukungiri. It is not necessary for me to decide whether their continued stay in Rukungiri was necessary or desirable. The reason given for their continued stay was to prepare for the return of the 1st Respondent probably for campaign. The 1st Respondent was entitled under the Act to retain his security facilities as Head of State. On this basis it cannot be said that the deployment of PPU in Rukungiri was illegal.

The PPU exceeded their powers by engaging in of intimidation and harassment of the Petitioner's Agents and supporters. The question is whether the 1st Respondent is responsible for their actions. There was no evidence adduced to prove that the 1st Respondent knew and consented to those actions or approved them. It may be said that as Head of State, who is guarded by the PPU, he ought to have known what the PPU was doing in Rukungiri. That may be a good moral judgment or expectation but is not evidence or tact. The 1st Respondent was also a candidate who was busy campaigning throughout the country. There was no evidence that he was responsible for deployment of the PPU. Therefore it cannot be assumed that he knew a consented to their actions. The Petitioner failed to discharge the burden of proof to my satisfaction on this allegation.

Issue No. 5: Reliefs to the Parties:

Issue No.5 was what reliefs are available to the parties? In the Petition the Petitioner prayed for the following reliefs:

> ***"4. Therefore your Petitioner prays that this Honourable Court declares:***
>
> ***(a) That Museveni Yoweri Kaguta was not validly elected as President.***

(b) That the election be annulled

5. The Petitioner prays for costs of this petition."

In view of my findings on Issue No.3 and No.4 that the Petitioner had failed to satisfy me that the non-compliance with the provisions and principles of the Act affected the results of the election in a substantial manner and that the 1st Respondent committed any illegal practice or offence, I held that the Petition be dismissed. Consequently the reliefs prayed for in para (a) and (b) were refused.

On the question of costs Dr. Byamugisha learned lead counsel for the 1st Respondent submitted that the 1st Respondent be awarded costs of the petition since the petition had been dismissed. He contended that under Section 27 of the Civil Procedure Act, which governs the award of costs, costs of any action should follow the event unless the Court, for good reasons, orders otherwise. In this petition the costs should follow the event of dismissing the petition by awarding the successful party his costs. It was his submission that a person coming to court should weigh the consequences of his action to stop frivolous petitions.

Mr. Deus Byamugisha learned counsel for the 2nd Respondent agreed with the submission of Dr. Byamugisha that costs normally follow the event and therefore since the Petition was dismissed, the Petitioner should pay the costs of the litigation. He asked for a certificate of two advocates.

On the other hand Mr. Balikuddembe learned lead counsel for the Petitioner contended this was a historic and unprecedented case, brought by the Petitioner as an aggrieved party in the interest of Uganda, for the development of electoral law. He argued that the Petitioner had succeeded on some of the issues framed touching on the non-compliance with the provisions of the law. It would be unfair, he contended, to reward the 2nd Respondent for failure to comply with the law. He argued further that litigants should be allowed access to courts when aggrieved. He concluded that the petition was in public interest. He submitted that the 1st Respondent should be responsible for the intimidation which occurred, which forced the Petitioner to appear before this Court. He therefore prayed that each party bears its own costs.

It is well settled that costs follow the event unless the court orders otherwise for good reason. The discretion accorded to the court to deny a successful party costs of litigation must be exercised judicially and or good cause. Costs are an indemnity to compensate the successful litigant the expenses incurred during the litigation. Costs are not intended to be punitive but a successful litigant may be deprived of his costs only exceptional circumstances. See Wambugu vs. Public Service Commission (1972) E.A. 296.

In awarding costs, the courts must balance the principle that justice must take its course by compensating the successful litigant against the principle of not discouraging poor litigants from accessing justice through award of exorbitant costs.

In the present petition, I am of the considered opinion that the interests of justice require that the Court exercises its discretion not to award the costs to the Respondents. I agree with Mr. Balikuddembe that this was a historic and unprecedented case in which a presidential candidate who is a serving President was taken to court to challenge his election. The petition raises important legal issues which are crucial to the political and constitutional development of the country. In a sense, it can be looked at as a public interest litigation. It promotes the culture of peaceful resolution of disputes. The petition was not frivolous or vexations as the Petitioner succeed on issue No.1 and No.2. the petition was therefore of great public importance in the history of Uganda.

In several cases of significant political and constitutional nature, this Court has ordered each party to bear its own costs. This was done in the case of Prince J D C Mpuga Rukidi v Prince Solomon Iguru and Others. C.A. 18/94 (SC) where the right of the King of Bunyoro to succeed to the throne was unsuccessfully challenged. In the case of Attorney General V Major Gen. David Tinyefuza, Const. App. No.1 of 1997 (SC) the party agreed that each party bears their own costs. The position appears to be the same in India: see Charan Lal Sahu and Others v Singh (1985) LRC Const.31.

In Prince Mpuga Rukidi v Prince Salomon Iguru (supra) I said,

"In this case the learned fudge applied the general rule in exercising his discretion in favour of the successful party, the respondents. He did not consider the special nature of the case and the relationship between the parties before he came to his decision on costs. This was an important case, which settled the question of succession to the throne of Bunyoro-Kitara and therefore paved the way to the restoration of the institution of Traditional Ruler in Bunyoro-Kitara Kingdom. It was a matter of great public importance. The fact that the question has been settled also means that there is need for reconciliation among the contestants for the well being of the Kingdom. In those circumstances I agree that each party should bear its own costs here and in the court below."

What I said in the Iguru Case applies with equal force to this Petition.

Accordingly, it was my view that each party should bear the costs of litigation in this petition. For the above reasons, I dismissed the Petition and ordered that each party bears its own costs.

B. J. ODOKI
CHIEF JUSTICE

REASONS FOR JUDGMENT OF ODER - JSC

On 21-04-2001, by majority decision, the Court dismissed the petition and declared that the 1st Respondent had been validly elected President of the Republic of Uganda in the Presidential Election held on 12-03-2001. Reasons for the judgment were reserved to be given on a later date. The Court was unanimous about costs. It ordered that each party should bear its own costs, again reserving its reasons for doing so.

My own decision, however, was that the Petition should succeed, and that the election of the 1st Respondent on 12-03-2001 as President of the Republic of Uganda should be nullified, under article 104(6) of the Constitution.

I now give my reasons for doing so.

On 12-3-2001, the Electoral Commission (2nd respondent) held a Presidential Election in Uganda. The election was held under the provisions of the 1995 Constitution, the Presidential Election Act, 2000 (the Act), the Electoral Commission Act 1997 (Act 3/97), and the Presidential Election (Election Petition) Rules, 2001 (the Rules).

Six candidates contested the election. The result of the election as declared on 14-3-2001, was as follows:

(i) Awori Aggrey, 103,915, percentage of votes cast - 1.4%
(ii) Besigye Kizza, 2,055,795 - 27.8%
(iii) Bwengye Francis, 22,751 - 0.3%
(iv) Karuhanga Chapa, 10,080 - 0.1%
(v) Kibirige Mayanja Muhammad, 73,790 - 1 .0%
(vi) Museveni Yoweri Kaguta, 5,123,360, - 69.3%

Article 103(4) of the Constitution and section 56(4) of the Act both provide that a candidate shall not be declared elected as president unless the number of votes cast in favour of that candidate of the presidential election is more than fifty percent of valid votes cast at the election.

Museveni Yoweri Kaguta, (1st Respondent) was consequently declared the winner of the election, and, therefore, the elected President of Uganda.

The total number of valid votes cast were 7,576,144, amounting to 70.3% of the number of registered voters.

Col. (Retired) Dr. Besigye Kizza (the Petitioner), the runner-up did not accept the result of the election. He therefore, challenged it by filing this petition under article 104 of the Constitution and section 58(1) of the Act. The former provides that any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected president was not validly elected. The same provisions are repeated in section 58(1) of the Act.

In accordance with the provisions of rule 4 of the Rules, the petition contains a list of the grounds on which it is based. They are set out in numbered paragraphs: The list is a long one. The grounds of the petition are so numerous that I shall not set out all of them early in this judgment. They will be set out as I consider them.

As required by law, the petition concludes with a prayer in paragraph 4 as follows:

> ***4. Therefore your petitioner prays that this Honourable Court declares:***
> ***(a) That Museveni Yoweri Kaguta was not validly elected as President.***
> ***(b) That the election be annulled.***
> ***5. The petitioners prays for the costs of this election."***

Again, as required by law, the Petition is accompanied by an affidavit deponed to by the Petitioner together .with other documents and other affidavits on which the petitioner intended to rely.

Before considering the grounds of the petition I would like to deal with two important matters which are relevant to the petition throughout. Counsels for all three parties have made submissions on them.

Evidence By Affidavit

Subject to two exceptions it is mandatory under rule 14 of the Rules, that all evidence at the trial, in favour of or against the petition, should be by way of affidavit read in open court. One exception is that, with leave of the court, a person swearing an affidavit which is before the court may be cross-examined by the opposite party and be re-examined by the party on whose behalf the affidavit is sworn. The other is that the court may, of its own motion, examine a witness if the court is of the opinion that the witness is likely to assist the court to arrive at a just decision.

In the instant case only one of the 1st Respondent's witnesses was cross-examined by the petitioner's counsel, with leave of the court, and re-examined by the 1st Respondent's counsel. This was Dr. Diana Atwine. Save for that exception air the evidence in support or against the petition was by affidavit. The parties referred to their respective affidavits as they made submissions. The affidavits were not all read at the beginning of the hearing. This followed a ruling by the court that all the affidavits should be deemed to have been read. Altogether, the Petitioner filed 174 affidavits, both in support of the Petition and in reply to the affidavits of the 1st or 2nd Respondents, who in turn filed respectively 133 and 88 affidavits, a total of 395 affidavits.

The affidavit evidence filed in the Court by all parties to the petition is, therefore, too massive for all to be evaluated within the time available to me.

Many of the affidavits from the Petitioner's witnesses are rebutted by witnesses of the 1st and 2nd Respondents, but some are not. In a case where proof depends entirely on evidence by affidavit such as the instant Petition, it is absolutely essential to file an affidavit in rebuttal as it would assist the court in evaluation of evidence in order to decide which of two or more conflicting versions of events are credible or not credible, if the Court is to avoid the presumption that evidence not rebutted is deemed to be admitted. Many affidavits of the Petitioner's witnesses were indicated by the Respondent's Counsel as rebutted but it was not possible for me to trace all the rebuttal affidavits. I certainly had no time to flip through the many volumes of affidavits, without assistance from the parties, to trace some affidavits. The

Petitioner's counsel provided a list of deponents of affidavits under categories of topics contained in the grounds of the Petition.

The requirement for evidence by affidavit in this kind of case is understandable. It is to expedite the proceedings. Time has to be saved in view of the Constitutional requirement that judgment in the Petition must be rendered within 30 days from the time the Petition is filed in Court. However it has serious draw backs. The main one is that the veracity of all the witnesses who deponed to the affidavits cannot be tested by examination by the court or cross-examination by the opposite party as provided for in the exceptions or by any other way. If all the deponents were subjected to examination, or cross-examination, as the case may be, a Petition such as this one would never be completed within 30 days. This, therefore, calls into question, in my view, the wisdom of dependence entirely on affidavit evidence in an inquiry such as the present. It may also encourage involvement of far too many witnesses than would be the case in trial by oral evidence.

Another general observation I wish to make at this stage about the affidavit evidence in this case is that the deponents of nearly all the affidavits could not be described as independent because they were supporters of one party or another. The election was hotly contested. The necessity that the side of a deponent of an affidavit should win must have been a high motivation for testifying the way he or she did. There were, indeed, some apparently independent witnesses. These were few. The vast majority of witnesses may be described as partisan, because they supported the side for which they swore the affidavits. In this case, as nearly in all litigations in our jurisdiction, where the adversarial system of litigation is the norm, a person normally gives evidence favourable to the party which has called him or her as a witness and according to what is within the knowledge of the witness. His or her evidence may be honest and truthful but it is given to enable the party calling the witness to win in the dispute. A witness called by his or her employer or boss in an office, department or organization is far less likely to be an independent witness than the one not in a similar position. The witness has to protect his or her office. Similarly there is no way a witness who is alleged to have committed a criminal offence or malpractice in an official or personal position is going to own up such an accusation.

This kind of behaviour applies to all human beings. Accusations of wrong doing or criminal conduct are normally vehemently denied by the person accused unless there is absolutely no choice for not doing so. It becomes a question of evidence given in self-serving interest. This is common knowledge for which proof is unnecessary. It is on that basis that I shall consider the credibility or otherwise of the deponents of the affidavits in this case on individual basis.

The 1st Respondent's counsel, Mr. Didas Nkuruziza, criticized the affidavits filed in support of the petition on the grounds that they are bad in law and are insufficient for the purpose of proof required of affidavits. He said that the affidavits fall into three categories. In the first category are those which are in breach of specific provisions of the law. Those ones should be struck out. An example is the affidavit of Major (Rtd.) Okwir Rabwoni, M.R because, it offends the provisions of section 7(3) of Statutory Declaration Act, 2000, under which a statutory declaration deponed outside Uganda is inadmissible in evidence unless it is registered with the Registrar of Documents under the Registration of Documents Act. The learned counsel also contended that the affidavits of certain witnesses for the Petitioner are in breach of the proviso to section 5(1) of the Commissioners for Oaths (Advocate) Act. The proviso prohibits a Commissioner for Oaths exercising the powers given under the Act from acting as such in any proceedings or matter in which he or she is advocate for any of the parties to the proceedings or concerned in the matter. Learned Counsel submitted that where a Commissioner for Oaths contravenes the proviso to section 5(1) the document for which he purports to administer the oath is invalid as an affidavit. Learned Counsel contended that ii affidavits of the Petitioner's witnesses were in this category. This is because the oaths were administered by advocates, Wycliffe Birungi and Kiyemba Mutate, both of whom had been introduced by the Petitioner's lead counsel at the commencement of the hearing of the Petition as members of the Petitioner's team of Lawyers.

The affidavits in question are those of John Livingston Okello Okello, M.R, Mugulula Joseph, and Edith Byanyima, all commissioned by Wycliffe Birungi. As were the affidavits of Dr. Ssekasanvu Emmanuel, Mukasa David Buloge, David Frank Mukunzi, Henry Muhwezi and Major Rubaramira Ruranga. The affidavit of Luwemba Godfrey was commissioned by Kiyemba Mutate. Learned counsel contended that by reason of the breach of section 5(1) these are not affidavits, and ought to be struck out.

Learned counsel submitted that the Petitioner's affidavits also contravened 0.17 r. 3(1) of the Civil Procedure Rules, which states that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that grounds thereof are stated. The affidavits under consideration were filed in support of final proceedings not in an interlocutory application. Learned Counsel submitted, therefore, that, any affidavit not confined to facts which the deponent can prove from his own knowledge is in breach of Rule 3(1), Order 17. The Court should not rely on them. The affidavits should be rejected in their entirety.

The learned counsel cited certain authority's in support of his submission, namely: *Constitutional Petition No. 3/99 P K. Ssemogerere and Z. Olum* (unreported); *Charles Mubiru vs Attorney General C.C.U.* (unreported).

Learned counsel also submitted that an affidavit in breach of 0.17, r.3 is not severable. He referred to: *Aristella Kabwinuka vs. John Kasigwa [1978] HLB 251* and *Sirazali Goulamali Merali others HCQS No. 12/95* (unreported). In the latter case, Ntabgoba, PJ, said at page 8 of the judgment:

> ***"The plaintiff should have disclosed those reliable sources from which he learned the information, especially which refers to in paragraph 7 and 9.***
> ***I should state that it does not matter whether some parts of an affidavit are in order while other parts are defective. The defective ones cannot be separated from the proper ones so as to render part of the affidavit acceptable. A defective portion of an affidavit vitiates the whole document."***

The learned counsel indicated as examples of affidavits offending 0.17 r.3 (l) the affidavits of Winnie Byanyima M.P. and that of the Petitioner filed in support of the petition. These and others contain hearsay and have been rebutted by affidavits against the Petition.

The second category of affidavits, according to the learned counsel are those to which the petitioner's lead counsel referred in support of his submission. They made various allegations against individuals for committing illegal practices. Such affidavits have also been rebutted by denial of truthfulness of the allegations made by them. According to the learned counsel, the criteria of which witnesses to believe and which ones not to believe goes to the issue of burden of proof to the satisfaction of the court.

Mr. Peter Kabatsi, the Solicitor General, representing the 2uid Respondent, also criticized the affidavits filed in support of the petition. His arguments were similar to those advanced by Mr. Nkurunziza.

In reply to Mr. Nkurunziza's submission on affidavits Mr. Balikuddembe contended that the document deponed to by Major (Rtd.) Okwir Rabwoni is an affidavit for use in court under section 3 of the Statutory Declaration Act 2000 (Act 10/2000). It is not a statutory declaration. As such, and by virtue of the provisions of section 4(1) of Act 10/2000 registration with the Registrar of Documents under s. 7(3) is not required. Counsel urged us to admit the affidavit as valid.

S.3 of Act 10/2000 provides:

> ***"After the commencement of this Act, no affidavit shall be sworn for any purpose, except*** —
> ***where it relates to any proceedings, application or other matter commenced in any court or referable to a court; or***
> **(a)** ***where under any written law an affidavit is authorized to be sworn."***
> Section 4(1):
> ***"In every case to which section 3 does not apply, a person wishing to depone to any fact for any purpose may do so by means of a statutory declaration."***

With respect, I do not accept the learned counsel's contention that Major (Rtd.) Okwir Rabwoni's document is an affidavit. It appears to be a statutory declaration, although it is headed

"Affidavit." The document in my view, speaks for itself. After citing the parties to the petition, the document is headed ***'AFFIDAVIT'*** and gives the particulars of the deponent as:

"Name: Hon. Major (Rtd.) Okwir Rabwoni M.R
Age: 32 years
Occupation: Member of Parliament

The introductory paragraph reads:
"I am a Ugandan Citizen of the above mentioned particulars I would hereby solemnly and sincerely declare as follows:"
This is followed by numbered paragraphs of statements contained in the document. It ends thus:
"AND I MAKE THIS SOLEMN DECLARATION conscieflt10Y believing the same to be true and by virtue of the Statutory Declaration Act 135.
Declared by the said OKWIR RABWONI - M.R
At (name of place not legible).
This 23 day of March 2001
Before me: (Name illegible).
Solicitor/Commissioner for Oaths."

The expression ***"Commissioner for Oaths"*** is crossed off in the jurat, but it is apparent that the document was deponed to before a solicitor, not before a Commissioner for Oaths. Although the document is headed ***"Affidavit",*** it appears to be clear that it is a statutory declaration. It the circumstances, section 7(3) of Act 10/2000 would apply to it. It would therefore, not be admissible in evidence unless it was registered with the Registrar of Documents. Though not so registered it is obviously not an illegal document. The main purpose of the requirement for registration of such a document, in my view, appears to be for authentication of receipt of the document in Uganda and, must be also, for raising some revenue in addition, since fee is payable for registration. To me, the requirement is a technicality which should not vitiate the validity of the document. This is where substantive justice should be administered without undue regard to technicality as article 126(1) (e) of the Constitution requires. For these reasons, in my view, the document of Major (Rtd.) Okwir Rabwoni is admissible in evidence in these proceedings.

Mr. Balikuddembe next commented on the affidavits criticized for having been commissioned by advocates who were allegedly counsel for the Petitioner. He said that at the time the affidavits were commissioned by advocates, Wycliffe Birungi and Kiyemba Mutale, they had no instruction to represent the Petitioner as his counsel in this petition. However, on the day the hearing of the petition commenced, the tow advocates were robed and seated in a row of seats behind Mr. Balikuddembe That was when he introduced them to the Court as part of the Petitioner's team of Lawyers. When Mr. Balikuddembe subsequently consulted the Petitioner, the latter informed him that he had instructed ten Lawyers only, Mr. Wycliffe Birungi and Mr. Kiyemba Mutale not being amongst them. That was the reason Mr. Balikuddembe prayed for grant of a certificate for 10 counsel for the petitioner when he made his closing submission in the petition.

Mr. Balikuddembe further submitted in the alternative, that the prohibition in section 5(1) is against a Commissioner for Oaths commissioning a matter in which he is an advocate or has interest. The section is silent about the fate of such affidavit or document. Learned counsel contended that non compliance with section 5(1) of the Commissioners for Oaths (Advocates) Act does not render an affidavit deponed to by an innocent party invalid. The affidavit in question should remain valid. This argument is in the alternative if the Court holds that the two gentlemen were Lawyers representing the Petitioner and, therefore, should not have commissioned the affidavits.

In my view, the explanation by Mr. 8alikuddem that Mr. Wycliffe Birungi and Mr. Kiyemba Mutale were not the Petitioner's Lawyers when they commissioned the affidavits and that they, in fact, were not instructed by the Petitioner to represent him in the petition is sufficient explanation to leave the relevant affidavits unaffected by the provisions of section 5(1) of the Commissioner for Oaths (Advocates) Act. It is, therefore, not necessary to consider Mr. Balikuddembe's alternative argument about the affidavits.

With regard to affidavits which offend the provisions of Order 17, rule 3 of the C.P.R. Mr. Balikuddembe submitted that this Court has discretion on the evidence by the affidavits in

question. It can accept and act on parts of an affidavit which are valid and reject what it considers to be defective, just as it does with oral evidence from witnesses. I accept this argument.

I do not think that an affidavit should be rejected in its entirety because it is vitiated by a defective aspect of the document if there are parts of the affidavit which conform to O.17.r3 of the C.RR or the affidavit is otherwise valid. Defective parts of affidavits should be severed from valid ones. This in my view should be done in the interest of substantive justice without due regard to technicalities. Courts do accept and act on parts of oral evidence from witnesses who personally give testimony in Court, where some evidence is credible or otherwise conform to legal requirements and reject those which do not.

In my view, the same consideration should be given to evidence by affidavit.

To me, there would appear to be no proper reason for treating evidence by affidavit differently. A part or parts of an affidavit which are defective should be severed from the part or parts which is credible or conform to legal requirements. While the valid part should be admissible evidence, the defective part should be rejected. This should be done in the interest of 5drniniStering substantive justice without undue regard to technicalities. Some decided cases support the view that defective parts of affidavits may be severed from parts which are otherwise valid. See: *Motor Mart Application No. 6/99 (SCU)* (unreported). *Reamation Ltd vs. Uganda CP-operative Creameries Ltd., Civil Anneal 7/2000, (SCU)* (unreported); *Nandala v Father Lyding 1963 EA 706 Mayers and Another VS Akira Ranch 1969 E.A. 169*- and *ZoIa VS Ralli (1969) E.A.691*

In the instant case many of the affidavits to which the 1st Respondent's learned counsel objected are similar to those in: *Nandalas* case (supra). The respondents speak of what they saw or heard. In my view the defective parts of the affidavit should be severed from the valid ones. That is what I shall do in this case. The decided cases to the effect that affidavits are not severable and that any defect in an affidavit vitiates the entire document which the 1st Respondent's learned counsel cited should, I think, not apply to the affidavits in this case for the reason I have given in this judgment.

Another reason is that a short time of only ten days is the period within which under rule 5 of the Rules, like in the instant case, a petitioner in an election petition has to file his/her pleadings together with supporting affidavits and other documents. The affidavits, in effect, are part of the pleadings. It is doubtful, in my view, if this is sufficient time to collect all the evidence a petitioner may need to file affidavits together with the petition. This, of course, is no excuse for affidavits which do not comply with the law, but I think nevertheless that it is a good reason for severing such affidavits.

Burden and Standard of Proof

Section 58 of the Act provides:

(***6) The election of a candidate as president shall only be annulled on any of the following grounds — if proved to the satisfaction of the, Court —***

(a) non-compliance with the provisions of this Act if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result in a substantial manner;

(b) ……..

(c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval"

[The underlining is mine]

Sub — section 6(b) is not relevant to this case.

Mr. Bitangaro and Dr. John Khaminwa, both counsel for the 1st Respondent made similar submissions on this matter. Dr. Khaminwa submitted that the burden to prove that the election in this case should be nullified is on the petitioner and the burden does not shift. The standard to prove non compliance with the Act to the satisfaction of the court is very high. It is far above the balance of probability. It is near the standard of proof beyond reasonable doubt. For this submission, learned counsel relied on sections 100, 101, 102 and 103 of the Evidence Act and on many decided cases, including: *Bater v Bater [1950] 2 ALL E.R. 458, Mbowe vs Eliufoo [1967]*

*E.A 24O, Guru vs. Sharpe [1974] 1 QB 808 Margaret Zziwa vs C. Nava Nabagesera Civil Appeal No. 39/97 CAU (*unreported) *Odetta Henry John vs Omeda O'max Election Petition No. 1/96 (HCU)* (unreported). Dr. Khaminwa urged us to follow *Mbowe* (supra) which, according to him, had been followed in many election petition cases in Uganda. For instance, in: *Y. K. Bategana Vs Musherueza and others Election Petition No. 1/96 (HCU)* (unreported).

Mr. P. Kabatsi, the learned Solicitor General, associated himself with the submissions of the 1st Respondent's learned counsel in this regard.

In reply, Mr. Balikuddembe submitted that the cases on burden and standard of proof on which the Respondents' counsel have relied are only persuasive and not binding on this court, which is correct, in my view. In any case they make it clear that an election petition is not a criminal trial learned Counsel contended. It is, therefore, not correct to say that the standard of proof is that beyond reasonable doubt or that it is very high. Learned counsel submitted that the expression ***"if proved to the satisfaction of the Court"*** appearing in s.58 (6) of the Act imposes a standard of proof that is well below that which is required for conviction in a criminal trial. The standard of proof required under s.58 (6) is just above mere balance of probabilities. It is akin to the standard of proof for fraud in civil cases.

As I see it, ***Mbow'se*** **c**ase (supra) appears to have acted as an anchor for decisions in election petition cases in this Country during the last several years. It is the one case courts have invariably ***"followed"*** with regard to the meaning of the expression ***"if proved to the satisfaction of the court",*** which is a requirement in our electoral laws for setting aside the result of an election. The often quoted view of ***Georges, CJ.*** on the subject in that case runs like this:

> ***"There has been much argument as to the meaning of the term*** **"proved to the satisfaction of the court."** ***In my view, it is clear that the burden of proof must lie on the petitioner rather than on the respondent because it is he who wants this election declared void. And the standard of proof is one which involves proof "to the satisfaction of the court." In my view these words in fact mean the same as satisfying the court. There have been some authorities on this matter and in particular there is the case of:***

<u>Bater v Bater [1950] 2 ALL E.R. 458</u> That case dealt not with election petitions, but with divorce, but the statutory provisions are similar. i.e. the Court had to be satisfied that a matrimonial offence had been proved, in this case, in my view, that we have to be satisfied that one or more of the grounds set in s.99(2)(a) has been established. There DENNING, L.J, in his judgment took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exists then it is impossible to say that one is satisfied, and with that view I quite respectfully agree and say that the standard of proof in this case must be that one has no reasonable doubt that one or more of the grounds set out in s.99 have been established."

The view of ***Denning L.J.*** (as he then was) in ***Bater vs Bater*** (supra), to which *Georges — CJ* referred with approval in Mbowe's case (supra) was expressed in the following terms at page 459:

"The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be a mere matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases but this is subject to qualification that there is no absolute standard in either case.

In Criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that in proportion as the crime is enormous, so ought the proof to be clear. So also in Civil cases. The case may be proved by a preponderance of probability but there may be degrees of probability of that standard. The degree depends cm the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence was established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does not require a degree of probability which is commensurate with occasion, likewise a divorce court should require a degree of probability which is proportionate to the subject matter. I do not think the matter can be better put than SIR WILLIAM SCOTT put it in: Loveden vs Loveden (1810) 161 ER 648

"The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to conclude ……"

The degree of probability which a reasonable and just man would require to come to a conclusion — and likewise the degree of doubt which would prevent him from coming to it — depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case, what the charge was, and what the consequences might be, and if he was left in real and substantial doubt on the particular matter he would hold the charge not to be established. He would not be satisfied about it.

What is a real or substantial doubt? It is only another way of saying a reasonable doubt and a reasonable doubt gets one no further. It does not say that the degree of probability must be as high as ninety per cent, or as low as fifty-one percent. The degree required must depend on the mind of the reasonable and just a man who is considering the particular subject matter. In some cases fifty one percent would be enough but not in others. When this is realized, the phrase "reasonable doubt" can be used just as aptly in a Civil case or a divorce case as in a criminal case, and indeed it was so used by BACK WILL, L.J., in Davis VS Davis (1950) 1 All E.R 40 and Gower vs Gower (1950) 1 All E.R. 804 The only difference is that, because of our high regard for the liberty of the Individual a doubt may be regarded as reasonable in the Criminal Courts which would not be so in the Civil Courts."

As it is apparent from this passage of the judgment of Denning L.J., to which I have just referred in: ***Bater vs Bater*** (supra) he did not say that ***"proof to the satisfaction of the Court"*** meant the same as ***"proof beyond reasonable"*** as Georges CJ, apparently said in: ***Mbowe's*** case (supra), and as courts in many election petition cases in this Country have held.

In the instant case the learned counsel for both the l and 2 Respondents have suggested a standard proof which is higher than proof on a preponderance of probabilities but short of proof beyond reasonable doubt. I agree with them.

In my view the word ***"satisfied"*** is a clear and simple one and one that is well understood. I would have thought that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The Courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. Parliament has ordained that a court must be satisfied. Only Parliament can prescribe a lesser or more requirement. Parliament would have said in the Act that election offences should be proved on the balance of probability or beyond reasonable doubt if it wanted to do so. It did not, and left it to the discretion of the courts or judges what is meant by being ***"satisfied."***

All that is required, in my view, is that the Court must be satisfied that alleged grounds for annulment of an election have been proved, If it has reasonable doubt then the court is not ***"satisfied."*** This is different from saying that for a court to be satisfied, proof must be made beyond reasonable doubt. If in election petitions, illegal practices or non-compliance have to be proved beyond reasonable doubt, then there would appear to be no need for criminal proceedings to be instituted under section 58(9) of the Act.

With regard to the burden of proof, it is the respondent who has to prove to the satisfaction of court the grounds on which the election should be nullified. The burden does not shift.

I shall now proceed to consider the issues in this petition on the basis of my views expressed herein regarding affidavit evidence, burden and standard of proof.

At the commencement of hearing the Court, in consultation with the counsel for the parties, framed the following five issues for determination:

1. Whether during the 2001 election of the President there was non — compliance with provisions of the Presidential Elections Act, 2000.

2. ***Whether the said election was not conducted in accordance with the principles laid down in the provisions of the said Act.***

3. Whether, if the first and second issues are answered in the affirmative. Such non - compliance with the provisions and principles of the said Act, affected the result of the election in substantial manner.

4. Whether an illegal practice or any other offence under the said Act was committed, in connection with the said election, by the 1 respondent personally or with his knowledge and consent and approval.

5. What reliefs are available to the parties?

I shall consider the issues in the order in which they have been framed. Many paragraphs of the petition are relevant to the first issue, and I shall deal with them according to the order in which the Petitioner's learned counsel argued them. So with the other grounds. I shall also reproduce them as I consider them. It should be pointed out at the outset that some of the grounds of the Petition overlap or are repetitive in some parts. The Respondents made no objection on that ground. I shall, therefore, say no more in that regard except when it is necessary to say that a point in a ground of the Petition has been considered together with a similar point in another.

Paragraph 3(1)(d) and (e) - non-compliance regarding Voters' Register:

> ***(d). contrary to section 32(5) of the Act the 2nd respondent completed compiling a purported Final Voters' Register on Saturday 10—March 10, 2001, and failed when requested by the Petitioner to supply copies of the same to the Petitioner and his agents although the petitioner was ready and willing to pay for the same.***
>
> ***(e). That contrary to sub-section (e) and section 18 of the Electoral Commission Act the 2nd Respondent failed to compile, maintain and up-date the National Voters' Register, the Voters' Roll for each Constituency and Voters' Roll for each Polling Station within each Constituency and as a result the Voters' Register and the said Voters' Rolls contained many flaws such as dead people's names and names of those who ought not to vote in Uganda remaining on the Register while several persons who were eligible voters had their names omitted from the said Register and Rolls"***

There is an apparent contradiction between the two grounds, one saying that the Voters' Register was completed late; the other saying that there was a completed failure to do so.

The 2d Respondent countered these allegations by his Answer to the petition as follows:

> ***"3. In reply to paragraph 3(1) (d) of the petition the Second Respondent denies ever refusing any request by the Petitioner for copies of the final Voters' Register as alleged but non — delivery thereof was due to insufficient time to prepare the register.***
>
> ***4. In reply to paragraph 3(1)(e) of the Petition, the 2" Respondent avers:***
>
> ***(a) That it is not true that it (the 2" Respondent) failed to efficiently compile maintain and up-date the National Voters' Register or the Voters Rolls for Constituencies and Polling Stations and further that it has no knowledge of the allegations that dead people's names and names of the people who ought not to vote in Uganda remaining on the Register while several persons who were eligible voters had their names omitted from the Register and Rolls as alleged.***
>
> ***(b) That even if the said allegations were true which is not admitted, this could not and did not affect the results of the presidential elections substantially or at all.***
>
> ***(c) Further, even if the said allegations were true, which is not admitted, those allegations do not constitute a ground upon which the election of a candidate as president can be annulled"***

It is convenient here to set out the legal provisions concerning the functions and powers of the 2nd Respondent, the requirements for registration of Voters and Voters' Register. They are relevant to these grounds of the petition.

Under section 29(4) of the Act, only a person whose name appears in the Voters' Roll of a Polling Station and who holds a valid Voters' Card is entitled to vote at the Polling Station. Under section 1(1) of the Act a **"Voter"** means 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. ***"Voters' Register"*** means the ***"National Voters' Register"*** compiled under section 18 of Act

3/97. ***"Voters' Roll"*** means the Voters' Roll of any Constituency or Parish prepared and maintained under the Act 3/97.

The 2F,d Respondent is established by Article 60 of the Constitution and its functions are stated in article 61, as follows:

(a) to ensure that regular free and fair elections are held;
(b) to organize conduct and supervise elections and referenda in accordance with this Constitution;
(c) ***to ascertain publish and declare in writing under its seal the results of the elections and referenda;***
(d) to compile, maintain, revise and up-date the Voters' Register;
(e) to hear and determine election complaints;
(f) ……..
(g) to perform such other functions as may be prescribed by Parliament by law."

Act 3/97 gives the 2nd Respondent additional powers for purposes of carrying out its functions under the Constitutions. Section 12(1) provides:
"(a) ……..
(b) to design, print, distribute and control use of ballot papers;
(c) to provide, distribute, and collect ballot boxes;
(d) to establish and operate Polling Stations;
(a) to take measures for ensuring that the entire process is conducted under conditions of freedom and fairness;
(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this or any other law;
(g) …….
(h) to ensure that the candidates campaign in an orderly and organized manner;
(i) to ensure compliance by all election Officers and candidates with the provisions of this" Act or any other."

The 2nd Respondent's duty regarding National Register of Voters and Voters' Rolls are provided for in s. 18 of Act 3/97.

> ***"18(1) The Commission shall compile, maintain and up-date, on continuing basis, a National Voters' Register in this Act referred to as*** **the Voters' Register*****, which shall include the names of all persons entitled to vote in any National or Local Government Election.***
>
> ***(2) The Commission shall maintain as part of the Voters' Register, a Voters' Roll for each constituency under this Act.***
>
> ***(3) The Commission shall maintain as part of the Voters' Roll for Each constituency, a Voters' Roll for each Polling Station within the constituency, as prescribed by law."***

Section 32 (5) of the Act provides:

"(5) The Polling agents shall have an official copy of the Voters' Register of that Polling Station at the candidates cost."

Under section 19(7) of Act 3/97 when up-dating the Voters' Register, the 2 Respondent shall up-date it to such date as the Minister may, by Statutory Instrument, appoint as the date on which the up-dating shall end. In accordance with the provisions of this sub-section the Commission issued Statutory Instrument No. 2 of 2000, appointing 22-01-2001 as the date on which updating the National Voters' Register would be completed for purposes of the 2001 Presidential Election.

Section 1(2) of the Act provides that *"The Commission Act shall be construed* as *one with this Act" (**The underlining is mine).*** What does this mean? According to Craies on Statute Law, 7th Edition by S. G. G. Edgar, 1971, SEM (London) on page 138, the expression ***"Act to be construed as one with another"*** means that for purposes of construction certain Acts are to be read with another Act or Acts. The effect of enacting that an Act shall be construed as one with another Act is that the Court must construe every part of each of the Acts as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the Act has, to some extent, modified something found in the earlier Act, or that from internal evidence the reference of the latter to the earlier Act does not affect a complete incorporation of

the provisions of the two Acts. In the instant case, I think that, that is what section 1(2) of the Act means, with regard to the Act and Act 3/97. I do not see any manifest discrepancy making it necessary to conclude that the Act has modified Act 3/97. On the contrary, I think that section 1(2) of the Act links Act 3/97 with the Act. The Court should construe every part of each of the two Acts as if it has been contained in one Act.

Back to the grounds of the Petitioner in question.

In his affidavit filed together with the petition the Petitioner stated in paragraph 13 thereof that he applied through his National co-coordinator to be supplied with the Final Voters' Register for use by him and his polling agents on payment of the necessary charges by him but the 2nd Respondent did not do so.

In paragraph 12 of his affidavit filed in support of the 2nd Respondent's answer to the petition, Mr. Aziz Kasujja, the Chairperson of the 2nd Respondent, answered paragraph 13 of the petitioner's affidavit. The Chairperson said that the Petitioner's request for a copy of the Register was received on 11-03-2001, and that there was no sufficient time to print the Register for the Petitioner on the eve of Polling day, and he informed the Petitioner accordingly.

Mr. Aziz Kasujja said more on this in his supplementary affidavit in reply, dated 9-04-2001. In apparent contradiction to what he had said in his affidavit dated 27-03-2001 in support of the 2nd Respondent's answer to the Petition, Mr. Kasujja said in his later affidavit to the effect that for the Presidential Elections, the up-date of the Register was done at the village level from lithe January to 22 January 2001; that in February 2001, the National Voters' Register was printed and displayed at polling stations in the form of Voters' Rolls; and that the Constituency Rolls and Polling Station Rolls which make up the National Voters' Register had already been printed by 11-03-2001, and the numbers of registered voters was known.

In his submission Mr. Mbabazi contended that the Chairperson's answer could mean that the Voters' Register was available much earlier, except, that there 220 was no time to print a copy for the Petitioner. That was not so, learned counsel contended, because in a letter dated 08-03-2001 and headed ***"Flaws in the Presidential Election Process, 2001"*** addressed to three of the Presidential candidates including the Petitioner, Mr. Kasujja said:

"You have expressed concern over the delay in producing the Final Voters' Register. Please be assured that the Final Voters' Register will be ready in time for polling."

This letter is annexture P18 to the Petitioners' affidavit in support of the petition.

Learned counsel submitted that this letter indicates that by 08-03-2001 there was no Final Voters' Register. This inference is supported by the fact that display exercise for purposes of up-dating the Voters' Register and Voters' Rolls continued up to 28-02-2001. Learned counsel referred to the affidavit of Mukasa David Bulonge dated 1-4-2001, and its annextures. Annexture 3 conveyed guide lines by the 2d Respondent for display of the Voters' Register; Annexture 4 was issued under sections 25 and 38 of Act 3/97 saying that display period had been reduced from 21 to 3 days, from 26th to 28th February 2001. Annexture 5 was a letter from the 2 Respondent's Chairperson to Display Officers informing them of changes in the display guidelines. Instead of the Voters' Register being displayed, four other documents were to be displayed.

Mukasa David Bulonge, the deponent of the affidavit in question, was the Petitioner's witness. He was a registered voter, entitled to vote at Kabonera, Kibiba Parish, Kabonera Sub-County, Masaka District. During the 2001 Presidential Election, he was appointed to work in the National Task Force of the Petitioner as Head of Election Monitoring Desk and Electoral process from the time of nomination throughout until polling day and declaration of results. He said in his affidavit of 01-04-2001, that in the course of his work, he attended several consultative meetings with the 2nd Respondent's officials, representing the Petitioner, and his interest. That he knew the exercise of up-dating the National Voters' Register for purposes of the Presidential Elections which was set down for 22-01-2001.

He then gave details of what is involved in up-dating of Voters' Register and stated in Paragraphs: -

> ***"14. That throughout the electoral process up to polling date, the exact number of registered voters was not known as there was no National Voters' Register compiled, maintained and up-dated by the 2nd Respondent containing the names of all persons entitled to vote at the Presidential Election of 2001.***

15. That additionally, no Voters' Roll for each Constituency containing the names of voters entitled to vote in the Presidential Election 2001, held on March 2001, was ever printed, neither did the Commission publish a notice in the gazette declaring any printed Voters' Roll as one to be used for the purposes of identification of voters on the election day of 12th March 2001."

In the ***"Summary of Affidavits"*** (hereinafter referred to as ***"the Chart"),*** handed in by counsel for both the Respondents to assist the Court, Mukasa David is listed on page 1 3 of the chart. Against his name does not appear to be any affidavit in rebuttal. But the affidavit of Mr. Kasujja dated 09-04-2001 and of Kiganda Abdullah Musobya dated 02-04-2001 appears to be relevant. According to Mr. Mbabazi, another indication that the National Voters' Register was not available is the difference between the number of voters of 10,674,080, announced by the Chairperson of the 2 Respondent at a briefing by him on 11- 03-2001, (Annexture 8 to Bulonge's affidavit) as the number of voters on the Voters' Register as by the date of 10-03-2001, and the figure of 10,775,836, shown in annexture R.2 to Chairperson Kasujja's affidavit filed with the 2 Respondent's answer to the Petition as the number of voters who had voted. There is a difference of 101,756 between the two figures. Where did the difference come from? Learned counsel asked. This, he contended, showed that there was no National Voters' Register.

Learned counsel submitted that the next indication that there was no Voters' Register is the excess number of persons who voted in Makindye East Division and in Mawokota County South. The percentage of voters who voted was 105.34% and 109.86% respectively as shown in the Petitioner's affidavit from the two Constituencies. There were 2184 and 7797 votes cast respectively in excess of registered voters. Learned counsel contended that the excess was not the result of arithmetical error as it is alleged in paragraph 7 of Mr. Kasujja's affidavit in reply of 27-03-2001, which does not show how the error arose. No tally sheets are attached. Instead only a letter dated 20-03-2001 written by the Returning Officer, Kampala to the 2nd Respondent is attached, saying that the original tallying was faulty. To the letter was attached a summary of results prepared by the 2nd Respondent's officials, not tally sheets signed by the candidate's agents- This was falsification of results to match the register in Makindye East after the results had been declared.

In his reply on the issue of the Voters' Register, Mr. Kabatsi referred to the following paragraphs of Mr. Kasujja's supplementary affidavit in reply dated 09- 04-2001:

> ***"18. That I know that a National Voters' Register exists since 1983, when a National Voters' Register was first prepared for the purposes of the Constituent Assembly Elections.***
>
> ***19. That since then the National Voters' Register has been maintained up-dated to date.***
>
> ***20. That before the 1996 Presidential Elections the National Voters' register was cleared and up-dated and another up-dating and clearing exercise was carried out before the Referendum.***
>
> ***21. That for the 2001 Presidential Elections, the up-date of the Register was done at Village level from 11th January 2001, to 22nd January 2001.***
>
> ***22. That the said up-date of the National Register was carried out by up-date officers identified by Parish Councils, supervised by the Parish Chiefs and during the said update Tribunals were established to handle complaints.***
>
> ***23. That the staid up-date exercise involved three components: - Registration of Fresh Applicants, - Registration of transferred voters and clearing of existing Register by deleting dead people's names, non - qualified voters and non — Citizens.***
>
> ***24. That Returns of the said up-date exercise were received from all Districts and entered into computers at the 2" Respondent's Headquarters.***
>
> ***25. That in February, 2001, the National Voters' Register was printed and displayed at Polling Stations in the form of Voters Rolls, in four components i.e. previously registered voters, the newly registered voters, the transferred voters and voters recommended for deletion for ease of scrutinizing the register."***

Mr. Kabatsi submitted that the exercise of compiling and up-dating the Voters' Register is continuous. Mr. Kasujja's affidavit evidence to that effect is corroborated by the affidavits of Abdullah Musobya Kigonda dated 02-04-200 1 and the affidavit of Balaba Dunstan, dated 02-

04-2001, and Banabas Mutwe, un-dated, filed in support of the 2nd Respondent's answer to the Petition. Kiganda Abdallah Musobya was the Returning Officer of Kisoro District. Part of his affidavit reads:

> ***"5. That prior to the elections, village meetings were conducted throughout the District to afford the residents an opportunity to verify the Citizenships of all persons who registered to vote.***
>
> ***6. That during the verification exercise all non-Citizens were identified and removed from the register."***

The affidavit of Balaba Dunstan does not contain anything relevant to Voters' Register.

So far as it is relevant on the point Barnabas Mutwe's affidavit states:

> ***"4. That I remember one Nabachwa has a Registration Certificate but no Voter's Card and her name was not on the Register and disallowed her from voting.***
>
> ***5. That in all there were only four (4) people whose names did not appear in the Register and I did not allow them to vote."***

As section 18 of Act 3/97 provides, it is the responsibility of the 2nd Respondent to compile, maintain and up-date, on a continuing basis, a Voters' Register which should include the names and persons entitled to vote in any election. The Voters' Register consists of a Voters' Roll for each constituency which in turn consists of a Voters' Roll for each Polling Station within the Constituency. The display exercise mandated by section 25 must be intended to be an aspect of up-dating the Voters' Roll. If, as Mr. Kasujja said in paragraph 21 of his supplementary affidavit in reply dated 9-4-2001, the up-date of the Register was done at Village level from 11-01-2001 to 22-01-2001, why is it that a display exercise was still necessary to be done between 26th February 2001, and 28 February, 2001 as per Notice dated 23-02-2001, issued by the 2nd Respondent's Chairperson (Annex.4), to the affidavit dated 1-4-2001 of Mukasa David Bulonge, the Petitioner's witness? Further, according to the circular to all Display Officers from the 2u,d Respondent's Chairperson, Mr. Kasujja (Annex: 5 to Bulonge's affidavit) the documents to be

displayed from 26th to 28th February, 2001, at the polling Stations were not the Voters Rolls for the Polling Stations but four documents which appear to be different, namely:

"(i) Register for old voters (Doc. 1A)
(ii) Register for New Voters (Doc. 1B)
(iii) Register for New Voters (Doc 1C)
(iv) A list of persons recommended for election during the up-date exercise."

The circular then goes on to say:

> ***"2. Doc. 1A, Doc 18 and Doc. TC should be used to issue Voters Cards. Cards be issued to the OWNERS and signed for by them. No person should collect a Voters' Card on behalf of another person at the polling Station."***

According to s.26 (1) of Act 3/97, the 2nd Respondent may issue Voters' Cards only to Voters whose names appear in the Voters' Register. But in the Circular in question the 2nd Respondent's Chairperson instructed Display Officers to issue Cards according to the three documents listed in the circular. If there was a Voters' Roll at the Polling Stations why were the Voters Cards not issued to voters whose names were on the Voters' Rolls? Another point in this connection to which I have already referred is, if the Voters' Register, consisting of the Constituency and Polling Stations Voters Rolls was available, why did the 2nd Respondent not give it to the Petitioner and his Polling Agents when he requested a copy thereof? If the Voters' Register was available, surely, the Chairperson of the 2nd Respondent would have instructed the Display Officers to issue Voting Cards to persons whose names were in the Voters' Roll for Polling Stations instead of some three other documents; and the 2nd Respondent would have given the Petitioner a copy of the Register of voters when he requested for them.

In the circumstances regarding paragraphs 18 to 25 of the Supplementary affidavit in reply, by the 2nd Respondent, my view is that the affidavit is not of much assistance to the 2nd Respondent's case in this regard. It appears to state what, according to the Chairperson, was supposed to have happened; not what actually happened. The affidavits of the Petitioner and his witness Mukasa David Bulonge are more credible on this point. In the circumstances I am

satisfied that on the available credible evidence as a whole, the Petitioner has proved and I find that:

> ***(a) Contrary to section 32(5) of the Act, the 2nd Respondent failed when requested to give the Petitioner and his agents a copy of the Voters' Register.***
>
> ***(b) Contrary to sections 18(o) of Act 3/97 the 2nd Respondent failed to maintain and update the National Voters' Register, the Voters' Rolls for each Constituency and each polling station within each Constituency and as a result, the Voters' Register and the Voters' Rolls contained many flaws such as dead people's names and some of those who ought not to vote in Uganda - remaining on the Voters' Register, while many people who were eligible to vote had their names omitted from the Voters' Register and the Voters' Rolls."***

The 2nd Respondent clearly did a very poor job of carrying out its responsibility under s.18 of Act 3/97. The standard of incompetence was high. There is credible evidence that in consequence thereof, some names of dead people, of those who ought not to vote remained in the Voters' Register and some people who were eligible to vote had their names omitted from the Voters' Register and Rolls.

Paragraph 3(1) (f) Failure to display copies of the Voters' Rolls:

> ***"(f) Contrary to section 25 of the Electoral Commission Act the 2"" Respondent failed to display copies of the Voters' Roll for each Parish or Ward in a public place within each Parish or Ward for a period of not less than 21 days and as a result the Petitioner and his Agents and supporters were denied sufficient time to scrutinize and clean the Voters' Roll and exercise their rights under the law."***

The 2 Respondent's answer to this ground of the Petition is as follows:

> ***"(5) In reply to paragraph 3(1), the 2nd Respondent avers:***
> ***(a) that the Voters' Register was initially displayed Country wide for three days and everybody was free to scrutinize thee said Register;***

(b) that after consultations with and on request by agents of all Presidential Candidates including those of the Petitioner, the Second Respondent extended the time for display of the Voter's Register for another two days;

(C) ***that in any case the contents of paragraph 3(1) (f) of the Petition do not constitute a ground upon which the election of a candidate as President can be annulled."***

Sub-sections (1) and (2) of section 25 of Act 3/97 provides:

"(1) Before any election is held, the Commission shall, by notice in the Gazette, appoint a period of not less than twenty one days, during which a copy of the Voters' Roll for each Parish or Ward shall be displayed for public scrutiny and during which any objections or complaints in relation to the names included in the Voters' Roll or in relation to any corrections shall be raised or filed.

(2) The display of the Voters' Roll referred to in Sub-section (1) shall be carried out in a public place within each Parish or Ward."

Paragraph 11 of the Petitioner's affidavit filed with the petition said:

"14. The 2nd Respondent failed to display the Voters' Register and Rolls for each Parish or Ward in a public place within each Parish or Ward for a period of not less than 21 days stipulated by law, and as a result, my agents, supporters, and myself were denied sufficient time to scrutinize and clean the Voters' Rolls and exercise our rights under the law."

In his affidavit in reply, dated 6-4-2001, the Petitioner deponed

"48. That without the National Voters' Register the Voters' Rolls for each Constituency and polling Stations could not be displayed and instead the 2nd Respondent used a number of Registers (Sic) as per the letter of 4th February 2001.

49. The printed Voters' Rolls for each Constituency containing the names of voters entitled to vote in the Presidential Election 2001 were never published in the Gazette to

declare that such Roll was to be used for purposes of identifying voters at the 2001 Presidential Elections."

In support of its answer to the petition, the affidavit of Mr. Aziz Kasujja, Chairperson of the 2 Respondent, stated:

"13. That in answer to paragraph 14 of the Petitioner's affidavit, the Voters Register was displayed Country-wide for five days and given very wide publicity, and anybody who wished to scrutinize the same was free to do so. Scrutinizing of the Register was clear and the bulky Nation-wide returns were kept at the Electoral Commission Headquarters.

14. That the Voters' Register could not be displayed for 21 days or more because of time constraint and this was duly explained to candidates' agents during a consultative meeting, which was held at the Electoral Commission Offices."

Documentary evidence available, for instance annextures 4 and 5 to Mukasa David Bulonge's affidavit, to which I have already referred in this judgment, shows that what was purported to be the Voters' Register was displayed for three days. That was from 21st to 28t February 2001. The display period according to Mr. Kasujja's affidavit was extended for two more days, making five days altogether, but the effect would still be the same, whether the display was for 3 or 5 days.

Mr. Kabatsi conceded that the display of Voters' Register was for 5 days not 21 days. Mr. Kasujja explained this irregularity in paragraph 27 of his affidavit to the effect that the time for display and up-date of the Register was affected by a decision to have photographic Voters' Cards which required fresh registration. That exercise was commenced but due to unforeseen delays in delivery of all the necessary equipment which had not arrived by 31-12-2000 the 2nd Respondent was forced to revert to the old system of up-dating the existing Register, having lost a lot of time.

According to Mr. Kabatsi, the display exercise was successful although the period was shorter than what the law required. The success is reflected in the fact that as Mr. Kasujja said in paragraph 28 of his affidavit, after the display exercise, the number of voters on the Voters' Register reduced from 11 ,093,948 to 10,672,383. The learned Solicitor General also submitted

that the 2nd Respondent is empowered under section 38(1) of Act 3/97 to abridge the period of doing certain things in case of an emergency. Mr. Kabatsi further contended that in any case even if the 2nd Respondent did not comply with the provisions of s.25(1) of Act 3/97 the non — compliance did not affect the result of the election in a substantial manner.

With respect, I am unable to accept Mr. Kabatsi's argument that 2 Respondent validly reduced the display period. Section 38(1) gives the 2nd Respondent power to extend the time for doing any act where it appears to it that by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances any of the provisions of Act 3/97 or any law relating to election does not accord with the exigencies of the situation. The section gives express power to extend time, not to abridge it.

The language of section 25(1) of Act 3/97 is mandatory. It does not provide for any exception. The 2nd Respondent was under a duty to comply with it without any excuse. In view of the provisions of s.25(1) and the relevant evidence available, I am satisfied and find that the 2nd Respondent acted in breach of section 25(1) of Act 3/97. It did not comply with that law.

The rationale for the exercise of display of Voters' Rolls is all stated in section 25(2), (3), (4), (5), (6), (7) and (8) of Act 3/97. Briefly, it is to enable the local members of the public, voters, potential voter's and officials to object to names of persons not qualified to vote or to be registered as voters in the constituency, parish or ward or to complain that names of persons qualified to vote or to be registered have been omitted. Objections are made to the returning officer who subsequently appoints a tribunal of five members to determine the objections. Any decision of a tribunal is subject to review by the 2nd Respondent. In my view, the importance of a display for the period prescribed by Act 3/97 cannot be over emphasised. The exercise is bound to take some time. If Parliament thought that it needed less time, it would have expressly given the 2nd Respondent power to decrease the period. It did not do so. Regarding what effect this non — compliance had on the result of the elections, I shall discuss it with the effect of other incidences of non — compliance later in this judgment.

Paragraph 3(1) (a), (b) and (c) of the Petition failure to gazette Polling Stations within time.

"3(11(a) That on 10th March 2001, less than 48 hours before polling day, in addition to the Polling Stations duly published in the Uganda Gazettes of 22nd December **2000,** *19th February 2001, and 9th March 2007, the 2nd Respondent made and added new Polling Stations out of time contrary to the provisions of section 28(1) of the Act.*

(b) That contrary to section 28 of the Act the 2nd Respondent failed to publish a full list of Polling Stations in each Constituency 14 days before nomination day of 8th and 9th January, 2001.

(c) That as a result of what is stated in paragraph. 3(a) and (b) above, your Petitioner was disabled from appointing his Polling Agents to supervise all the Polling Stations and safeguard the interests of your Petitioner as he was entitled to do under section 32 of the Act."

In its answer, the 2nd Respondent pleaded:

"1. In reply to paragraph 3(1) (a) and (b) of the Petition the 2nd Respondent avers:

(a) That no new Polling Stations were created but rather some existing Polling Stations were split for purposes of easing the voting process due to the big numbers of voters in those stations and that it was within the 2nd Respondent's power to split the said Polling Stations as was done.

(b) In the alternative but without prejudice to the foregoing, the second Respondent avers that there is no evidence that the splitting of the said Polling Stations substantially affected the result of the election or at all.

2. In reply to paragraph 3(1) (c) of the Petition the second Respondent avers that the splitting of Polling Stations affected all the candidates equally and that the Petitioner like all other candidates were duly notified of the splitting of the Polling Stations. There is no evidence that the said splitting affected the result of the election or at all"

Section 28 of the Act provides:

"28(1). The Commission shall, by a notice in the Gazette publish —

(a) A list of the Polling Stations in each Constituency <u>at least fourteen day before nomination</u> and

(b) …….

(2). The Commission shall also forward each list referred to in sub-section

(1) to all Returning Officers; and the Returning Officers shall ensure that the lists relevant to each Constituency are published widely in that Constituency."

(The underlining is mine)

The Petitioner's own affidavit in support of the petition in paragraphs 11, 12 and 13, repeated some of the contents of paragraph 3(1)(a), (b) and (C) of the petition and added that following gazetting of the Polling Stations he appointed 2 Polling Agents for each of the Polling Stations to look after his interests. Copies of the relevant Uganda Gazettes were annexed as *"P5"*. ***"P6" and "P7" to*** the affidavit. He also said that on 11-3-2001, the 2nd Respondent supplied him with a list of gazetted Polling Stations with added new and ungazetted Polling Stations. As a result he failed at that 11th hour to appoint and deploy his polling agents to supervise all those new Polling Stations and to safeguard his interest. A copy of the letter and the list of the newly added Polling Stations were annexed to the affidavit as ***"P8"*** and ***"P9."***

What the Petitioner's affidavit said in this connection was replied to by the affidavit of the 2nd Respondent's Chairperson, Mr. Aziz Kasujja, to the effect that no new Polling Stations were created but existing ones were merely split to ease voter congestion and voter convenience as indicated to candidates' task forces in a circular dated 11-03-2001, annexture ***"P6"*** to Mr. Kasujja's affidavit. In his supplementary affidavit, Mr. Kasujja said that it was not necessary to display voters' Rolls for the parent stations which included list of voters for the split stations already been displayed. He admitted that some Polling Stations which had been gazatted were deleted from the list published on 11-03-2001, because voters had migrated elsewhere.

In his submission, Mr. Mbabazi referred to the affidavits of the Petitioner, Mukasa D. Bulonge, James Oluka and Vincent Ebulu. The evidence from affidavits, learned counsel submitted, proved how non-gazetted, Polling Stations were created. Also shown were Polling Stations

which did not appear on the list of 11-03- 2001. He mentioned certain Polling Stations for purposes of illustrating his point.

In his reply, Mr. Kabatsi said that Mr. Kasujja's supplementary affidavit explained the reason why certain Polling Stations did not appear on the gazetted list of 11 - 03-2001. It was migration of the population from the areas concerned. He argued that the Petitioner did not adduce evidence that because of reduction in numbers of polling Stations some voters did not vote or were dis-enfranchised. Mr. Kabatsi referred to the affidavits of Francis Bwengye, one of the six Presidential Candidates, which shows lack of evidence that the result was affected by the manner the 2' Respondent handled Polling Stations.

Notice by the 2 Respondent in the Uganda Gazette of 22-12-2000, listing Polling Stations, under section 28(1)(a) of the Act said:
"NOTICE is hereby given that in exercise of the powers conferred upon the Electoral Commission, by section 28(11(a) of the Presidential Elections Act No. 17 of 2000, the list of Polling Stations in the schedule attached to this notice is hereby published for purpose of the National Presidential Election."

This was annexture "P5" to the petitioner's affidavit.
On 19-02-2001, the 2 Respondent under special powers provided for in s.38 of Act 3/97, published a list of Polling Stations for Army Units. This was annexture ***P6"*** to the Petitioner's affidavit.

Then in the Uganda Gazette of 09-03-2001, the 2nd Respondent published a list of what was called ***"new Polling Stations for the Army Units."*** The Notice explained that the new Polling Stations were created as a result of transfers in the Army.

On 11 -03-2001, by a letter (annexture R8 to the Petitioner's affidavit and annexture R.6 to Mr. Kasujja's affidavit) addressed to all Task Forces of Presidential Candidates Mr. Kasujja, said:

"The Electoral Commission in forms all Presidential Candidates that the list of *all* ***Polling Stations Countrywide is herewith attached.***

NOTE: That some of the Polling Stations have been spilt for purposes of easing the voting process. For this purpose the Polling Agents for each candidate should be appointed in the split Polling Stations. Please note that the changes have already been alphabetically effected on the Registers.

It should also be noted that these are not new Polling Stations. A copy of this hereby in forming the Returning Officers and the respective Presiding Officers."

According to the affidavit of Mukasa David Bulonge of 01-04-2001, and annexture 13 to the affidavit the new list included 1176 new Polling Stations which were different from, and 303 missing from, the originally gazetted Polling Stations.

Following the Court's order that the 2nd Respondent should let the Petitioner have access to election documents in its possession or control, Mr. Mukasa David Bulonge obtained certified copies of tally sheets from various Districts of Uganda. He attached as samples those from the Districts of Gulu, Kitgum, and Kamwenge to his Supplementary affidavit of 07-04-2001. He deponed in the affidavit that from the tally sheets from Kitgum, for instance, he discovered records of new Polling Stations that were never gazetted originally, nor were on 2 Respondent's list of 11-03-2001. He named them. They were five. The results in those Polling Stations were tallied along with other results for Kitgum District appearing in Annex ***"B;"*** to the affidavit. In those new Polling Stations, the 1st Respondent's votes contrasted sharply with the Parten of results obtained from Polling Stations that had been gazetted in the list of 11-03-2001. They were much higher. The sharp contrast of results also happened in 5 Polling Stations at Kasubi, in Gulu District which were neither gazetted nor on the list of 11-03-2001; in one Polling Station outside Quarter Guard Station in Pagele Parish, Amuru Sub-County; and in two Polling Stations at Bibia outside the Quarter Guard in Pupwonyo Parish, Atiak Sub-County, Gulu District.

The sharp contrast in votes received by the 1st Respondent and the Petitioner is illustrated by Ngomoromo (A-E); Ngomoromo (F. N. and Ngomoromo (O.) Polling Stations Pawor Parish, Lukung Parish, Lamwo County where the 1st Respondent and the Petitioner got 292, 84, and 233

votes respectively while the Petitioner got 8, 3, 9 votes respectively. In Nkelikongo outside Quarter Guard, the Respondent received 263 and the Petitioner 13 votes.

In his supplementary affidavit of 10-04-2001, Mukasa David Bulonge said that he had looked at the tally sheets for Kamuli, Pader, Mbarara and Bushenyi Districts to identify Polling Stations that were not gazetted but were on the 2nd Respondent's list of 11-03-2001; and that the results demonstrated that the 1st Respondent received a far higher percentage of the votes cast in the newly created Polling Stations than he did nationwide.

Section 28(1)(a) of the Act enjoined the 2nd Respondent to publish in the gazette a list of Polling Stations in each Constituency at least 14 days before nomination. The Presidential Candidates were nominated on 8th and 9th of January, 2001. The list of Polling Stations therefore ought to have been gazetted on or before 25 December 2000. The list published in the gazette of 22-1 2-2000, was therefore, within the prescribed time, but the list of Polling Stations at Army Units gazetted on 19-02-2001, was not. Nor was the list forwarded to the Petitioner by the 2nd Respondent's letter of 11-03-2001. On 12-03-2001, as Mukasa Bulonge found new polling stations were created which had not been published even on 11-03-2001.

Although Mr. Kasujja in his affidavit and in that letter emphasized that the list includes split Polling Stations and not new Polling Stations, I accept the evidence adduced for the Petitioner that that list contained some new as well as split Polling Stations which had not been previously published in the gazette and that new polling stations appeared, so to speak, out of the blue, on 1 2-03-2001. A few examples may be given.

In the gazette of 22-12-2000, Kimabogo Parish of Buyende Sub-County, Kamuli, District, 4 Polling Stations were listed, namely, Bugogo Market, Buseete Primary School, Makenga T/C and Nambula Primary School. But in the list of 11-03- 2001, were shown 5 Polling Stations, namely Buseete Primary School, Nambula Leprosy Centre, Bugogo Market, Buseete Primary School and Makaya T/C. the new one was Makaya T/C. The new one was apparently a second Buseete Primary School, Nambula Leprosy Centre did not appear in the 22-12-2000; list.

The affidavit of James Oluka is one of those affidavits Mr. Mbabazi referred to. James Oluka said in his affidavit of 20-03-2001, that he was a Polling Assistant for the Petitioner at Akisim NRA Barracks A — D. He based his statement in the affidavit on his own knowledge and on belief. He does not state his grounds of belief. But I think it is severable. He deponed that in Akisim Ward, Soroti Municipality, where originally there were only two Polling Stations, namely Akisim NRA Barracks A — D, and Akisim NRA Barracks E —Z, on polling day two extra Polling Stations were created inside the Barracks while the first two were outside. Eventually the new un-designated Polling Stations were declared to be Polling Stations for wives of the Soldiers of Chum Barracks, which was outside Soroti Constituency. Apart from the designated Polling Stations of Akisim Barracks A — D and E — Z the other two extra Polling Stations had no Polling Agents and the Voters Register. Voters' Cards originated from sources unknown to the witness.

James Oluka's affidavit evidence was rebutted by affidavits of Omuge George William the Chief Administrative Officer who was the Returning Officer for Soroti Districts. He said that there were only three designated Polling Stations in Akisim Ward. These were Akisim Barracks A — D, Akisim Barracks F — Z and Akisim Barracks outside the Quarter Guard.

The affidavit of Omuge George William supports James Oluka that there were two Polling Stations in Akisim Ward designated as Akisim Barracks A — D and Akisim Barracks E — Z; and that, there were two others making a total of four. Oluka said that two of them were created on polling day. He was present in one of them as a Polling Agent and, therefore, was in position to know personally what happened on that day at Akisim Polling Stations. No doubt Omuge George William had the overall responsibility to supervise the election on polling day. A Returning Officer is unlikely to supervise a Polling Station closely.

Onen Francis was the Polling Agent for 1st Respondent at the Quarter Guard outside the Barracks Polling Station. He deponed in his affidavit in rebuttal of a date in April, 2001 that he had carefully read the affidavit of James Oluka. He did not refer to Oluka's allegations that two new Polling Stations were created on the Polling day. With regard to the allegation that the two new Polling Stations had no Polling Agents he said that at the Quarter Guard outside the

Barracks Polling Station, he was the 1st Respondent's Polling Agent and one Oyuki was the Petitioner's Polling Agent. The affidavit of Onen Francis does not in my view; properly answer the allegations in Oluka's affidavit.

In the circumstances, I would prefer Oluka's affidavit to those of Omuge George William and Onen Francis in this respect.

Another example of a new Polling Station was in Kagugube Parish, Kampala Central, Kampala District. In the gazetted list of 22-1 2-2000, there were six Polling Stations namely, Mr. Mukiibi's Home, Kagugube, Kitamany'angamba, Kivvulu I, Kivvulu II, and NHCC Flats. But in the 11-03-2001, list, five of them had the same names as before but two were designated as Mr. Mukiibi's Home (A — M) and Mr. Mukiibi's Home (N — Z). This appears to have been the result of splitting old Polling Stations.

Mbuya Division in Nakawa Division in Kampala District is another example. In the gazetted list of 22-1 2-2000, Mbuya I and Mbuya II had 6 and 8 Polling Stations respectively. In the 11-03-2001 list, they had 10 and 8 Polling Stations respectively. Vincent Ebulu, the Petitioner's Youth Co-ordinator for Nakawa Division proceeded to Mbuya Barracks with Polling Agents to over-see voting at the gazetted Polling Stations. He deponed in his affidavit of 23-03-2001, that while at Lower Mbuya at 7.30 a.m. he got to know that voting was being conducted inside the Barracks at 7 other Polling Stations at upper Mbuya. These were new polling stations inside the Barracks. He moved there and found that it was so. Consequently, he conducted the Petitioner's head office and 5 Polling Assistants were sent to him escorted by Dr. Mukasa. This was because one Captain Ondoga, the Political Commissar of 1st Division, had chased away Ebulu and other Polling Agents he had mobilized to handle the crisis situation. Ebulu based his affidavit on knowledge and belief, but it appears that he only spoke about what he saw and observed. The Respondent's chart does not indicate that Ebulu's affidavit was rebutted.

According to the two lists, I have referred to above, there were four more Polling Stations at Mbuya I in the list of 22-12-2000. The list at Mbuya II appears to have remained the same as in the earlier gazetted list. In paragraph 15 of his Supplementary affidavit dated 9-4-2001 Mr.

Kasujja said that the gazette indicated Mbuya Polling Stations outside the Quarter Guard. There were 12 Polling Stations for the soldiers outside the Quarter Guard due to the large number of soldiers. Annexture RB to the affidavit indicates 5 Polling Stations at Lower Mbuya and 7 at upper Mbuya which would still exceed the number in the list of 11-03-2001 at Mbuya I. That would tend to support the Petitioner's case that on Polling day, more Polling Stations were added at Mbuya Parish than had been listed on 11-03-2001.

Other evidence for the Petitioner regarding new Polling Stations created came from several other witnesses and rebutted by equally many affidavits from the Respondents' witnesses. For the Petitioner they included Hon. Winnie Byanyima, M/P/, Edson Bumeze, E. Bagenda Bwambale, Boniface Ruhindi, Ongee Mawino, and Perus Ogwok. Affidavits for the Respondents in rebuttal are from Rwakitavate, Hassan Galiwango, Zainabu Asiimwe, Mutabazi Pius, Hannington Byamukama, Nuwagaba, Geoffrey Okot, Ngomrom Presiding Officers, and Electoral Commission Presiding Officers. The evidence of the witnesses for the Petitioner as well as that in rebuttal from witnesses for the Respondents are not confined to matters of new Polling Stations. They are relevant to many topics, but for the present, I shall only look at the affidavits concerning new Polling Stations.

Hon. Winnie Byanyima M.P was a Member of the Elect Besigye Task Force. As such she traversed several parts of the Country to campaign for him as a candidate. In paragraph 11 of her affidavit dated 23-03-2001, she said that on 12-03-2001, she asked Ben Kavuya to check at the Barracks and he found that 4 new Polling Stations had been created in Mbarara Municipality. She found out that indeed new Polling Stations namely, Makenke I, Makenke II, Makenke Ill and Kabatereine had been created although the first three were actually located in Kashari County North of the border with Mbarara Municipality. This affidavit was deponed on the basis of knowledge of the deponent.

The Respondents' summary of affidavits Chart does not appear to indicate that the affidavit was rebutted on this issue. The Hon. M.P's evidence in this regard; therefore, remains un - controverted and accept it.

Edison Bumenze was a Monitor for the Petitioner for Bukonjo West Constituency for 8 Army Polling Stations in Kasese District. But instead of the 8 Polling Stations three more were added, to make a total of 11. The three extra Polling Stations were not disclosed to him as a Monitor till when the voting was coming to an end at 3.00 p.m., by which time most of the Army voters had cast their votes and left. There were no Polling Agents for the Petitioner at the three additional Polling Stations. Out of the 8 original Polling Stations, Kisebere Quarter Guard Polling Station in Kitholru Sub-County was shifted to Customs in Karombi Sub-County (where two of the new Polling Stations were created), and one Polling Station supposed to be at Karambi Gombolola Headquarters was shifted to Kanyabutumbi Quarter Guard. This affidavit was based on knowledge and belief, without disclosing the source of belief, but I have indicated above appears to be from knowledge. Zainabu Asiimwe, a Women's Councilor for Kasese District Council, swore an affidavit in rebuttal of the one of Edson Bumenze. She said that on 12-03-2001, he saw Edson Bumenze at the offices of the Sub- County Chief of Kitholru at the time when the election materials arrived at the Sub-County Headquarters.

Immediately thereafter she proceeded to Kithobira Primary School Polling Station where she was registered to vote and she never saw Edson Bumenze again. She did not refer to Bumenze's affidavit regarding new Polling Stations. It only denies as untrue Bumenze's allegation that she threatened him with death. Another witness who mentioned Edson Bumenze in his rebuttal affidavit was Mutabazi Pius, the District Police Commander, Kasese. He said that Bumenze's allegation in his affidavit that he was threatened with arrest and detention by one Major Muhindo Mawa it he did not stop campaigning for the Petitioner was not reported to the Police. In the circumstances Bumenze's evidence that three Polling Stations were created on Polling day is not controverted. It must, therefore, be accepted.

Bagenda Bwambale Enock was an election Monitor for the Petitioner for Kasese District dated 20-03-2001. He said that at Hima main gate M- Polling Station, he noticed that there were two ballot boxes marked M — Z. When he complained to the Presiding Officer, Bob Kalenzi, one of the boxes was opened and found to be the correct one. The other one was found with Hima Main Gate A — L Polling Station materials contrary to what the label said. When the witness checked the A — L Polling Station, he found that the correct ballot box was there and voting was already in progress. The C.A.O. Hannington Syaluka withdrew the queried ballot box. When at Hima

Main Gate U.P.D.F. Polling Station Bambwale noticed that instead of one ballot box, two were being used, he telephoned the C.A.O about the normally. The CAO informed him that Polling Stations had been increased from 6 to 11 on the morning of 1 2-03-200 1 by the 2nd Respondent. Due to the sudden change, the Petitioner did not have a Polling Agent for the second and additional ballot box at Hima Main Gate UPDF Polling Station. The Respondents' summary of affidavits in the Chart indicates that Hannington Syaluka swore an affidavit in rebuttal of Bagenda Bwambale Enock's affidavit but it does not indicate where it can be found.

Boniface Ruhindi Ngaruye, a Lawyer in private practice in Mbarara Municipality was a member of the Elect Besigye Task Force in Mbarara. He said in his affidavit dated 21-03-2001, that when he was on his way to Biharwe, he found a number of new Polling Stations at Makenke opposite 2nd Division UPDF Headquarters. They were Makenke A-J, Makenke A-N and Makenke O-Z, which had not been on the list handed over to him on 11-03-2001 by the Returning Officer, Mbarara, when candidates' agents held a meeting with the Returning Officer in his office. He found voting in progress and there was no single agent for the Petitioner as none had been deployed there because those were newly created Polling Stations which had never been brought to the attention of the Petitioner's Task Force. By the time he appointed the Petitioner's agents for those Makenke Polling Stations, polling was about to close and the Petitioner's Polling agents only witnessed the votes counting process. The deponent of this affidavit verily believed that the information regarding the newly created Polling Stations was concealed deliberately and not availed to the Petitioner's Task Force in bad faith in so far as there were no credible reasons why the parking list availed to it on the eve of the polling day did not include these Polling Stations. The Respondent's chart indicates that the affidavit of Boniface Ruhindi Ngaruye was rebutted by Asporo Kwesiga, but there is no indication where his affidavit can be found.

Ongee Marino's assignment as the Petitioner's monitoring agent in Kitgum District was to move around the District on polling day to ensure lawful voting and declaration of results. In the course of the day, at 2.00 p.m. he found that six new polling stations had been created and voting was conducted there, without the Petitioner's Polling Agents at Pajimo Barracks 4, Pajimo Barracks B, Ngomoromo, A — E, Ngomoromo, F — N, Ngomoromo, O — Z and Malimu Abondios Wem. He deponed on the basis of his knowledge and belief, without disclosing the

grounds of his belief. But all he spoke about appear to be what he saw and witnessed. The Chart indicates that Captain Nuwagaba, Geofrey Okot and Presiding Officers of Ngomoromo rebutted Ongee Marimo's affidavit, but it does not show where their affidavits can be found.

Denis Odwok was a campaign agent for the Petitioner in Kitgum District. He deponed to the effect that he moved on a motorcycle to monitor polling in Luking and Padibe Sub-Counties. On information received, he went to Ngomoromo and found there three Polling Stations about which Ongee Marino deponed. The Uganda gazette of 1 9-02-200 1 did not list the three Ngomoromo Polling Stations in question. The only two gazetted Polling Stations in Lukung Sub-County were Nkelikongo (outside Quarter Guard) and outside Quarter Guard (Lukung). In those Polling Stations UPDF Soldiers were the persons conducting the election instead of the 2td Respondents officials. The affidavit was based on knowledge. The Chart indicates that the 2id Respondent's Presiding Officers of Ngomoromo Polling Stations swore affidavits in rebuttal. But there is no indication where such affidavits can be found.
On the available evidence, there can be no doubt and I am satisfied that:

(a) ***The 2nd Respondent did not publish in the Gazette a list of Polling Stations in each Constituency 14 days before nomination of the Presidential Candidates in this election. This was non-compliance with section 28(1) of the Act. On the contrary the 2" Respondent's published lists of Polling Stations in the Gazette of 19-02-2001 and another list on 11-03-2001. Many new polling stations not on the list of 11-03-2001 were also created on 12-03-2001. This was well outside the period stipulated in s.28 (1) of the Act.***

(b) ***The 2" Respondent's gazetted list of 11-03-2001 contained new Polling Stations that had not been gazetted before totaling 1176. The Petitioner's. Case was that these were newly created Polling Stations. The 2nd Respondent's case was that no new Polling Stations were created by the list of I 103-2001 or on the morning of 1203-2001. Only old Polling Stations were spilt- In my view, whether they were old Stations which had been split or new ones, they ought to have been published within the time required by law because, as in Kasujja himself said in annexture R. 6 to his***

affidavit of 27-03-2001, "for this purpose Polling agents for each candidate should be appointed in the split Polling Stations-"

For all practical purposes split Polling Stations required to be treated as Polling Stations and required Voters Rolls for Polling Stations, polling agents1 ballot boxes, ballot papers, Voters' Cards, Polling Assistants or other necessary Polling Officials, counting of the ballot papers announcement and tallying of results etc.

As evidence shows the Petitioner did not have polling agents in such Polling Stations or had them appointed when it was too late to serve any useful purpose. Consequently the Petitioner's interest was not safeguarded in such Polling Stations with regard to the polling process.

(c) The Petitioner was not supplied with an official copy of the Voters Register, contrary to section 32(5) of the Act.

Paragraph 3(1) (q) of the Petition. Persons without Voters' Cards were allowed to vote.

*"**3(1) (q). That contrary to sections 29(4) and 34 of the Act the 2nd Respondent's agents/servants in the course of their duties allowed people with no valid Voters' Cards to vote."***

The 2' Respondent made a reply to this ground of the Petition as follows:

"15. In reply to paragraph 3(1)(q) of the Petition, the 2nd Respondent avers that it allowed people whose names appeared in the Voters' Register but had not been able to obtain Voters' Cards to vote after being properly identified, and that the number of such people was small and insignificant and the 2nd Respondent did this lawfully, in exercise of powers and functions given it by law."

The 2nd Respondent did not say in his reply what law entitled it to allow voters whose names were in the Register but without valid Voters' to vote. It was the 2nd Respondent's duty to cite the law which allowed it to do this.

This ground in my view, is related to the one concerning failure by the 2nd Respondent to compile and publish as required by law the Voters' Rolls iii the Constituencies and at the Polling Stations, because Voters' Cards could only be properly issued to Voters whose names were on the

Voters' Register and Voters' Rolls. If the exercise of compilation and publication of the same was messed up, as I have found was the case, then the exercise of issue of Voters' Cards was proportionately affected.

Section 29(4) of the Act provides:
"Any person registered as a voter and whose names appear in the Voters' Roll of a Polling Station and who holds a valid Voters' Card shall be entitled to vote at the Polling Station."
Section 34 of the Act:
"(1) A voter wishing to obtain a ballot paper for the purpose of voting, shall produce his or her Voters' Card to the Presiding Officer or Polling Assistant at the tale referred to in paragraph (a) of sub-section (6) of Section 30."

Section 2(1) of the Act says:
"Voters' Card" means a Voter's Card issued under section 27 of the Commission Act to a voter whose name appears in the Voters' Register."

It is the duty of the 2nd Respondent to design, print and control the issue of Voters' Cards whose names appear on the Voters' Register.

In his affidavit of 2303-2001 filed together with the Petition, the Petitioner said in paragraph 47 thereof that on 1 203-2001, he heard Mr. Aziz Kasujja the Chairperson of the 2 Respondent announce on the radio that voters who had no Voters' Cards were allowed to vote.

In his affidavit of 27-03-20o1 filed with the Respondents' answer, Mr. Kasujja said in paragraphs 1, 15 and 16 thereof that a Meeting was held on 11-03- 2001 with candidate's agents to discuss the issue of registered voters who had not obtained Voters' Cards in time and the meeting resolved that the second Respondent should take a decision on the matter. Thereafter, the 2nd Respondent made a decision that registered voters who had not obtained Voters' Cards be allowed to vote if they could be properly identified at the Polling Stations. He then made announcements, annexture R.7 to Mr. Kasujja's affidavit. The announcement was a press release to the effect that as the Constitution gives to every Ugandan Citizen of 18 years and more the

right to vote, all Citizens of that age and whose names appear on the Voters' Register but have no Voters' Cards should be allowed to vote if they can be identified by the Polling officials and Candidates agents at their respective Polling Stations.

In his affidavit in reply dated 6-4-2001, based on his own knowledge, the Petitioner deponed that the Voters' Rolls for each Constituency was never published in the Gazette by the 2 Respondent. For purposes of the 2001 Presidential election such Rolls were to be used for purposes of identifying voters at the election. On the basis of such Registers, the 2nd Respondent issued Voters' Cards to entitle voters to vote, but not all the people were issued with Voters' Cards although their names were on the Register. In the result, people eligible to vote as of right under the Constitution were denied the right to vote, while others not qualified voted in the 2001 Presidential election.
In his submission on this ground of the Petition Mr. Mbabazi referred to Mr. Kasujja's briefing to the media, representatives of the candidates and Ambassadors on 11-03-2001' (Annexture 6 to the affidavit of Mukasa David. Bulenge dated 1-4-2001), in which Mr. Kasujja said that issuing of Voters' Cards started on 1-3-2001 and ended on 1 003-2001. He also referred to Bulenge's affidavit and others.

In reply Mr. Kabatsi contended that the 2nd Respondent was merely giving affection to the article 59(1) of the Constitution when it allowed persons whose names were on the Voters' Register but had no Voters' Cards to vote. Those not registered did not vote even if they had Voters' Cards. That is the effect of the Chairperson's press release and paragraphs 15 and 16 of his affidavit, the learned Solicitor General contended. He then said that the Petitioner has not informed the Court the number of persons who did not vote, because they did not have Voters' Cards. It is necessary to know the numbers before the Court can decide that the result of the election was affected.

In my view, the right to vote under article 59(1) of the Constitution may be exercised by a Citizen of Uganda of the age of 18 years or more if his or her name appears in the Register of voters and has a Voter's Card. A Voter's Card is essential because it is a means of identifying the holder of the card as the person whose name appears in the Voters' Register. It is mandatory for a

voter to possess a Voter's Card before he or she can exercise the right to vote. It is a condition precedent. For that any other reasons Mr. Kasujja, the 2nd Respondent's Chairperson issued a statement dated 1 902-2001 (annexture 11 to the affidavit of Mukasa David Bulonge dated 1-4-2001). It was headed ***"Guide-lines for polling Presidential Elections, 2001."*** t stated, interalia

"2.0

1 …….

2. A voter wishing to obtain a ballot paper for the purpose of voting shall present his or her Voter's Card to the presiding *Officer* ***or polling assistant (section 34(1).***

3 ……..

4. A person who holds a Voter's Card but whose name does not appear on the Voters' Roll for that Polling Station shall not be allowed to vote.

5. Only those voters with valid Voter's Card will be allowed to vote if their names appear on the Voters' Roll for that Polling Station."

In the circumstances, it was illegal for the 2nd Respondent to allow persons without Voters' Cards to vote even if their names were on the Register of voters. The argument that by doing so, the 2nd Respondent thereby gave effect to article 59(1) of the Constitution is, with respect, not valid. A provision of the Constitution cannot be implemented by breaking other laws.

The Petitioner filed in Court a list of witnesses whose affidavit evidence is relevant to the matter at hand. The list contains 14 names. Since the 2nd Respondent concedes that it authorized voters without Voters' Cards to vote if their names were in the Voters' Register I shall took at some of the evidence to see what actually happened in practice and to gauge the extent of the noncompliance with sections 29(4) and 34 of the Act

Sulaiti Kalule of Habitat Village, Kasese Town Council, was a Monitor for the Petitioner in Kasese District. One Robert Kanunu went and handed to him 16 Voters' Cards which had been given to him (Kanunu) to hand over to other people to be used illegally. Kule noted the names on the Cards in his note book. The Chart indicates that Kule's affidavit was rebutted by Kugonza Charles but it is not shown where the rebuttal affidavit can be found.

Fazil Masinde's affidavit has already been referred to in another context. He was the Petitioner's Monitor for seven Polling Stations in Mayuge District, which he named. On polling day when he was moving to Bubali Polling Station, Masinde saw the LCI Chairman, Mr. Isa Bwana, distributing Voters' Cards to people who had not registered as voters and instructing then' to vote for the 1st Respondent.

The LC.I Chairman of Butangalo, Mrs. Kadiri Mukoda was also distributing cards to non registered voters. Isha Nabinye and Baina Nakagolo were two of them. The GISO, Ahmed Gesa, was also issuing Voters' Cards and directing people to vote for the 1 Respondent at Busakira B Polling Station and threatening them that if they did not vote for the 1st Respondent, they would see. Gesa Ahmed, Defence Secretary LC2 Kaluuba Parish and the Gombolola Internal Security Officer (GISO) rebutted Masinde's affidavit. In his affidavit of 2-4-2001, he said that what Masinde said was false. He was not an agent of the 1st Respondent; nor did he hold any official position in the electoral process. He did not issue any Voters' Cards. He was neutral during Presidential Election.

I do not find Gesa Ahmed's affidavit convincing. It was a blanket denial. He did not say why Masinde should have fabricated his story with such details. Mudaaki Emmanuel also rebutted Masinde's affidavit. He was the presiding Officer of Butongala Trading Centre Polling Station. He deponed that he did not know Fazil Masinde since he was not at Butongala as a candidate's agent. He denied having directed people to vote for the 1st Respondent. The voting exercise proceeded very smoothly and transparently according to him and at the end candidate's agents signed the declaration forms. Mudaaki's affidavit did not refer to Masinde's allegation about distribution of Voters' Cards. Masinde was not a Polling agent. He was a monitor moving around. Mudaaki did not say why Masinde should have fabricated this detailed story. As an electoral official, Mudaaki would be expected to deny any wrong — doing as a presiding Officer. He would be expected to say what he said namely that election exercise proceeded smoothly and transparently even if it did not.

Idd Kiryowa is from Lwebitakuta, Mawogola, Sembabule District. In his affidavit of 19-03-2001' he deponed that he and one Tafayo Haussein were Polling agents for the Petitioner at

Nabiseke Polling Station. At about 1.00 p.m. on information received, he went behind the building housing the Polling Station. He went there and found one Nabosi distributing Voters' Cards. Nabosi was the 1st Respondents campaigner. Nabosi sought to give Kiryowa money so that he would conceal what he had seen. He refused, and lodged a complaint with the presiding Officer but to no avail.

Kakuba Nathan rebutted Kiryowa's affidavit. He was the Respondent's Polling agent at the same Polling Station, where he also voted. He denied that he was requested as Kiryowa alleged, and that he was requested by Nabosi to approach Kiryowa for any reason what so ever. He could not have gone behind the building since Polling agents were supposed to keep at the presiding Officer's desk all the time during voting exercise. Kakuba did not refer to Kiryowa's allegation of distribution of Voters' Cards. I find that in the circumstances, the evidence to that effect is not rebutted and stands uncontroverted.

Guma Majid Awadson of Lumuga Parish, Yumbe District, in his affidavit of 9-3-2001, said that he was the Petitioner's election Monitor for several Polling Stations. When he went to Aleapi Parish, Ojinga Polling Station he saw one Mawa a member of the i Respondent's District Task Team and campaign Manager distributing Voters' Cards to people whose names were not on the Voters' Register and who did not have Voters' Cards.

Drasi Ali, LCIII Chairman of Kuru Sub-County, Yumbe, rebutted Guma's affidavit. His rebuttal affidavit IS relevant to multiple voting at Aliba Polling Station, not to Voters' Cards distribution at Ojungo Polling Station.

Maliki Bukoli is from Doko Cell, Namatata Ward, Mbale Municipality. In his affidavit of 2103-2001, he said that on 1 203-2001, at 11.00 a.m. he went to Namatata Polling Station and cast his vote. On his way back he found a crowd of people gathered around a man at the Catholic Church Polling Station. He noticed that one Mukonge a man he knew had been arrested with 5 Voters' Cards. He was arrested by the Police. Mukonge said that he was the Respondent's supporter and that he was going to vote for the 1st Respondent. Maluku Bukoli's affidavit is not rebutted.

Ojok David Livingston of Doko Cell, Namatota Ward, Mbale Municipality was the Namatata Task Force for the Petitioner on 12-03-2001. While on duty with Massa Musa, a fellow monitor for the Petitioner, they were sent to Doko, Nsambya Polling Station by Mr. Mayambala that there was a lady distribUtifl9 Voter's Cards. They went with a Policeman to the lady's home. She was Nakintu whom Ojok knew. The Police asked her. She admitted that she had received 50 Voters' Cards from Councilor Wafula Charles of the Industrial Area Division to distribute them to the Respondent's supporters. She had distributed 11 to her fellow supporters of the 1st Respondent. She produced the balance of 39 Voters' Cards and gave them to a Police Officer. She also handed over a bottle of Jik, Cussons Imperial Leather Soap and rug which were intended to wash and remove marking ink from thumbs of people who had voted so that they could vote again.

Wafula Charles, a Councilor of Industrial Area, Mbale rebutted Ojok's affidavit. In his affidavit of 24-2001, he deponed that it was not true as Ojok alleged that he gave Nakintu Margaret 50 Voters' Cards to distribute to supporters of the 1st Respondent.

He never received Voters' Cards from any person for distribution to the 1st Respondents' supporters. Wafula did not say why Ojok should have invented his detailed story. His is just blanket denial which is not credible I prefer Ojok's evidence to that of Wafula.

Wafidi Amir, of Nawuyo Village Bumutoto Parish, Bungokho Sub-County, Mbale District, was a Monitor for the Petitioner's Task Force. His work was to monitor election in Mutoto. On 12-03-2001, when he was at a taxi stage the motor vehicle of the RDC, Hassan Galiwango, parked at the stage. The County Chief for Nambale Mutoto ran to Galiwango who had alighted from the motor vehicle. The two talked and left. Wafidi proceeded to Museto. At the same time, the local Movement Chairman also passed by on a motor cycle driven by one Sonya David towards Musoto, where Wafidi was proceeding to. At the local railway crossing, Wafidi and his own driver noticed Sonya David carrying a Black Hand bag. Wafidi grabbed the bag to see its contents. This was because he and colleagues had got information that plans were afoot to rig the election. As he and David Senya struggled for the bag, it got torn. More than 50,000 Voters' Cards, official stamps, and Declaration Forms for Bungokho sub-County poured out of the bag.

Wafidi raised an alarm, which was answered by a crowd, who assisted Wafidi to hold Sonya and retained the bag. The Movement Chairman and the Sub- County Chief arrived at the scene and tried to rescue Sonya, but in vain. The crowd held Sonya until the Police arrived; and he and the bag were taken to Mbale Police Station. Wafidi's complaint at the Police Station was registered SD.1L8/12/03/2001. Two days later Wafidi saw Sonya at large, in their area. The affidavit was based on knowledge and belief. Belief is irrelevant since what Wafidi said was based on what he witnessed.

Geoffrey Wanda rebutted Wafidi's affidavit. He denied that on 12-03-2001, he was in the company of Sonya David as Wafidi alleged, or that he went to Musoto on that day. His Polling Station was Bukasa Kija Primary School where he cast his vote, and he did not engage in any electoral malpractice. Wanda did not say whether he was the local Movement Chairman as alleged by Wafidi. Wanda's rebuttal affidavit is blanket denial. He did not say why Wafidi should fabricate such a detailed account of what he said he witnessed, including Police reference of his report at Mbale Police Station. I accept Wafidi's evidence as true and reject Wando's denials.

Kakuru Sam of Karuhinda Village, Kijubwa, Kirima Sub-County, Kanungu District, was the Petitioner's Task Force Chairman for Kirima Sub-County. On l7-3-2001, when he went to collect his own Voter's Card from Karulinda Polling Station, he found there one Nshekanabo receiving Voters' Cards. He was given a stack of about 30 Voters' Cards. When Kakuru asked why, he was told that it was none of his business. The affidavit was based on knowledge and belief. Since what he said in the affidavit in this regard was what he saw, belief is irrelevant.

Kakuru's affidavit was rebutted by Capt. Atwoki B. Ndahura. Most contents of the Captain's affidavit related to evidence from many witnesses alleging harassment and intimidation by the Presidential Protection Unit (PPU) in Rukungiri. Regarding Voters' Cards, he said that he was not aware that Zikanga was found with Voters' Cards. He did not refer to Nshekanabo who Kakuru said he had found with a stack of Voters' Cards, which evidence consequently stands unrebutted.

Kako Medard of Kashambya, Ruhandagazi Parish, Kambuga Sub-County, Kanungu District was a registered voter at Komajune, and a Polling Monitor for the Petitioner. I have already referred to his evidence in another context. About Voters' Cards, he said that as soon as the Cards arrived at his Polling Station, officials including a Mrs. Busingye, initially refused to give him his Card, but did so later after a long quarrel. With others at that time he personally witnessed the LCI Chairman of Koko's Cell picked many Voters' Cards saying he would distribute them to the owners.

Koko Medard's affidavit was rebutted by Constain Atwoki B. Ndahura who was the Commander of the PPU in Rukungiri at the material time. He said in his rebuttal affidavit that he was not aware of the allegation that one Zikanga was found with Voters' Cards. This is irrelevant to Koko's allegation that it was LCI Chairman he found picking Voters' Cards, unless, of course, the LCI Chairman was Zikanga. The Captain does not say why he should have been aware of the incident. He does not say that he was at Kamajune when Koko was there or at all. Consequently, I do not find that Koko's evidence in this regard is rebutted. In the circumstances, I accept it as true.

It would take a lot of time to consider evidence from all the 14 witnesses listed by the Petitioner on this topic.

What I have referred to above are samples of the evidence which, in my view, illustrates the actual practice and the extent of the malpractices on the issue of Voters' Cards, which was widely spread throughout the Country.

In the Guidelines for Display of the Voters' Register for Presidential Election, 2001, issued by the 2 Respondent's Chairperson, Mr. Kasujja, which was undated, it was said:

> ***"IV ISSUANCE OF VOTERS' CARDS:***
>
> ***1. Voters' Cards are to be issued to all registered voters whose particulars appear on the Voters Register.***

2. Voters whose particulars have been crossed out from the Register during the display must not be issued with Voters' Cards.

3. All Cards must be signed (thumb print) for in the column marked "CHECKED" on the Register, by the OWNERS on receipt.

4. Voters' Cards which will not have been issued by the end of the display must be returned to the Commissioner along with the rest of the display materials"

These guidelines in my view were issued under section 26 of Act 3/97.

The evidence I have evaluated under the ground of the Petition under consideration obviously indicates that many Voters' Cards were not issued in accordance with the guidelines issued by the 2nd Respondent's Chairperson. Such Voters' Cards were ***not*** received by the owners in person. Under section 26(1) of Act 3/7 it is the 2nd Respondent who designs, controls and issues Voters' Cards to voters whose names appear in the Voters' Register. It follows that all Voters' Cards can be issued out only by the 2nd Respondent or its officials and/or servants mainly Presiding Officers or Polling assistants. The Voters' Cards which the evidence we have considered show were distributed by persons other than the 2nd Respondent's officials were in the possession of persons who were not the legal owners of the Cards and were issued out not in accordance with the law.

In the circumstances the 2nd Respondent was liable for the acts of its officials such as Presiding Officers or Polling assistants who issued such Voters' Cards.

The persons which the evidence shows were in possession of the Voters' Cards illegally committed offences under section 26(2) and section 28(3) (a) of Act 3/97.

In the circumstances, I am satisfied that the Petitioner has proved to the required standard, and I find that:

"Contrary to sections 29(4) and 34 of the Act the 2nd Respondent and its servants/agents, in the course of their duties, allowed people with no valid Voters' Cards to vote.

I shall consider the effect of this non-compliance on the election together with the effect of other non-compliance later in this judgment.

Paragraph 3(1) (g) and 3(1)(p) - Polling Agents chased away.

> ***"3(11(g) That contrary to the provisions of sections 32 and 47(4) and (5) of the Act on the Polling day during the polling exercise, the Petitioner's Polling Agents were chased away from many Polling Stations In many Districts of Uganda and as a result the Petitioner's interests at those Polling Stations could not be safeguarded."***
>
> ***"3(1) (p). Contrary to section 32 of the Act, the 2nd Respondent's agent/Servants the presiding Officers failed to prevent the Petitioner's Polling agents from being chased away from Polling Stations and as a result the Petitioner's agents were unable to observe and to monitor the voting progress."***

The 2 Respondent answered these allegations as follows

> ***"In reply to paragraph 3(1)(g) and (p) of the Petition, the second Respondent avers that he has knowledge that Polling Stations agents of the Presidential Candidates were chased away by servants or agents of the second Respondents or by any other person as alleged, and that the Petitioner's agents were free to observe and monitor the voting process."***

The provisions of section 32 of the Act are in the following sub-sections

> ***"(1) A candidate may be present in person or through his or her representatives or Polling Agents at each Polling Station for the purposes of safeguarding the interests of the candidate with regard to the polling process***
>
> ***(2) Not more than two representatives or Polling Agents shall be appointed by a candidate under sub-section (1) and the appointment shall be in writing and presented to the presiding Officers at each Polling Station.***
>
> ***(3) Representatives or Polling Agents appointed under sub-section (2) shall report to the Presiding Officer of the Polling Station on the polling day.***

(4) The Polling Agents shall be seated in such a place as to enable them observe and monitor clearly the voting process.

(5) The Polling Agents shall have an official copy of the Voter's Register of Polling Stations at the candidates cost."

Section 47(4), (5) and (6) of the Act provide:

"(4) Subject to this Act a candidate is entitled to be present in person or through his or her agents at the Polling Station throughout the voting and counting of votes and at the place of tallying of the votes and 8scertaining of the results of poll for the purposes of safeguarding the interest of the candidate with regard to all the stages of counting or tallying processes.

(5) The presiding Officer and the candidates or their agents if any shall sign and retain a copy of a declaration stating —

(a) the Polling Station;

(b) the number of votes cast in favour of each candidate; and the presiding Officer shall there and then, announce the results of the voting at that Polling Station before 0mmunicating them to the Returning Officer.

(6) Votes cast for each candidate shall be recorded in both figures and words and then counter signed by Polling Agents before the declaration of results."

These provisions of the Act have their origin in article 68 of the Constitution'

In his submission under this ground of the Petition, Mr. Mbabazi said that affidavits evidence adduced by the Petitioner shows that the Petitioner's agents were chased away from Polling Stations by the Army. He referred to the affidavits of Kizza Davis which is corroborated by Baringo Ozo. Other affidavits are from Kipala John, James Musinguzi, Sentongo Elias, Robert Kironde, Ongee Marino, Charles Owor, etc. Evidence also shows that such Polling agents neither signed nor retained the declaration forms, which they were entitled to do under s.47(5) of the Act. The Polling agents chased away were not present to sign the declaration forms. Some of the

declaration forms show that the votes cast exceeded the number of ballot papers issued at the Polling Stations.

In other cases, learned counsel submitted, candidates' agents retained declaration forms. These have been exhibited as samples, annexed to the petition. Others are annexed to the Petitioner's affidavit dated 6-4-2001. In reply to the 2 Respondent, learned counsel referred to the declaration forms as examples from Ishaka Adventist College in Bushenyi District and Makindye Division in Kampala. Declaration forms from such Polling Stations also proved falsification of results, Mr. Mbabazi contended.

In his counter submission under this ground of the Petition, Mr. Kabatsi said that affidavits supporting the Petition in this regard, i.e. chasing away of the Petitioner's agents from, and excess votes cast over ballot papers issued, at Polling Stations, have been rebutted by affidavits opposing the petition. For instance affidavits of Kirunda Mubarak, alleging chasing away from Mpungwe Polling Station is rebutted by the affidavit of Balaba Dunstan, Ag. Chief Administrative Officer of Mayuge District who was the Returning Officer at the material time. The affidavit of John Tumusiime is rebutted by that of Johnson Bitarabeho, the Returning Officer of Bushenyi. Hamman Rashid, rebutted by Major Jero Bwende; Charles Owor, rebutted by the 2nd Respondent's Deputy Chairperson, Flora Nkurukenda; Robert Kinende, rebutted by Joshua Wamala.

I shall now move to consider the evidence regarding the alleged chasing away of the Petitioner's Polling Agents from Polling Stations and the alleged falsification of results through declaration forms and tally sheets and the evidence in rebuttal.

Kizza Davis was a registered voter at Kamwenge Primary School, Block I in Kamwenge District and an appointed Polling agent of the Petitioner. In his affidavit dated 23-03-2001, he deponed that on 11-03-2001, at 9.00 a.m. he was in the company of Wasswa Peter, his brother, and Robert, a friend, in Kamwenge Town, when he was arrested by members of the Local Defence Force named Kenneth and Friday. He was then taken to a railway line where he found another agent i.e. Faida Charles, arrested. Lt. Richard came at about 10.00 a.m. and instructed Kenneth and Friday

to take away his identity card and continue to detain him. At 1 .00 p.m. he was transported in Katusabe's car to Kamwenge Army Detach Barracks and put in a ditch where two armed soldiers guarded him. On polling day, he was taken to the Polling Station at Kamwenge Primary School, where the same 2nd Lt. Richard ordered the Presiding Officer to tick the witness' ballot paper in favour of the 1st Respondent. Two armed soldiers escorted him to the ballot box where he cast the vote. There were two armed soldiers at the Polling Station. He was released at about 6.00 p.m. Due to the arrest and detention, he was unable to deliver letters appointing 5 other persons (whom he named) as the Petitioner's Polling agents. Nor was he able to do his work as the Petitioner's Polling agent. For the same reason the other 5 persons also failed to work as such.

Kizza Davis' evidence that Kahesi Slaya was one of the 5 persons whose letters of appointment as the Petitioner's Polling agent was taken away is corroborated by James Birungi Ozo in his affidavit of 22-03-2001. The affidavit of Kizza Davis is not rebutted.

James Birungi Ozo, a registered voter, was the Petitioner's District monitor and District coordinator for Kamwenge District. In his affidavit of 22-03-2001, he mentioned many election malpractices including the one that Kahesi Slaya's appointment letter as the Petitioner's Polling agent was confiscated by the Army and that he (Ozo) was on 8-3-2001 shot at by Captain Komkiriho, C.O. of Bihanga Barracks in order to prevent him from campaigning for the Petitioner. He was shot at in the presence of Peter Byomanyire, Engineer Dan Byamukama and LC.lll Movement Chairman of Ibanda.

He deponed the affidavit on the basis of his knowledge. According to the Respondents' Chart, Ozo's affidavit was not rebutted.

Ssentongo Elias a resident of Ntungamo Town Council, Ntungamo District, had the responsibility of overseeing Polling agents for the Petitioner in Ntungamo Town Council and Kalunga Sub-County. When he proceeded to Nyaburiza Parish and Kabuhome Polling Station, one Tom Muhoozi, the Chairman of the District Service Commission and a known supporter of the 1 Respondent chased away all the Polling agents of all candidates except the ones for the **1St** Respondent. Muhoozi Tom's affidavit of 3-4-2001 rebuts that of Ssentongo Elias. Muhoozi said

that he was a registered voter at Kabuhome Polling Station in Nyaburiza Parish. On Polling day, he went to the Polling Station at 10.00 a.m. and returned home immediately after casting his vote. Ssentongo Elias, whom he knew, was not at the Polling Station. Muhoozi denied that he chased away any candidates' agents. He further said that in the evening he returned to the Polling Station. Voting closed in his presence. The Petitioner's agents were all present and signed the declaration forms.

I have three brief comments on this rebuttal evidence. One is that Ssentongo's accusation is made directly against Muhoozi. As a result he would not be expected to admit the allegations. If he did so, he would be admitting having committed an election offence. For a Chairman of the District Service Commission, which Muhoozi was, such admission would be unthinkable. It might be said that a person in his position would not be expected to do what Ssentongo alleged against him. That may be so, but it is the kind of action which one could take without serious thought of the consequences.

Secondly, without Muhoozi having been at the Polling Station the whole day it is not possible to say that Ssentongo did not go to the Polling Station at all. Thirdly, since it is Muhoozi who intended to prove that the Petitioner's agents were not chased away by the fact that they signed the declaration form (if indeed they did) he ought to have annexed the form to his affidavit. He did not do so. Ssentongo's affidavit is so detailed that I do not think that he would have invented what he deponed therein.

Kipala John of Lubira Zone, Kyotera Town Council, Rakai District deponed in his affidavit of 19-03-2001, that he was deployed at Magabi Parish, Kibanda Sub- County Rakai District as an election Monitor for the Petitioner. He was at Gayaza Polling Station at 7.00 a.m. The ballot box and voting was opened in his presence. In the course of the day, he made many complaints against election malpractices at the Polling Stations, such as missing ballot papers from a ballot papers book, multiple voting and ticking ballot papers for others by the 1st Respondent's supporters. When Kipala demanded that the Presiding Officer should assert his authority a group of people armed with clubs charged at and threatened to kill him. He was chased away and was

only rescued by his colleague, one Kimera, who whisked him away in a motor vehicle. The Respondent's Chart does not show that Kipala's affidavit is rebutted.

Senyonga John of Lwebitakuli Village, Lwebitakuli Sub-County, Sembabule District, was appointed the Petitioner's Polling agent at Katutu Polling Station Lwebitakuli Parish. At Katuntu Polling Station he introduced himself to the presiding Officer Emmanuel. At first the Presiding Officer chased him away, saying that he was not a resident of that village. After explanation to, and argument with, the Presiding Officer, Senyonga was allowed and told to sit far away from the Presiding Officer's desk. He sat 30 meters away. The Presiding Officer prevented him from looking at the Voters' Register. At the end of voting, the Presiding Officer gave him documents to sign, but he refused to do so. Ssenyonga was threatened with arrest. His affidavit was based on knowledge and belief. Belief seems to be irrelevant because all that he spoke about was what happened in his presence.

Kiwanuka Fred was the Chairman of the 1st Respondent's Task Force and Movement Chairman for Lwebitakuli Sub-County. He deponed in his affidavit of 12th April 2001, rebutting Ssenyonga's affidavit. He said that he cast his vote at Kezinga Polling Station and returned home. He denied that he went to Katutu Polling Station and voted there as alleged by Senyonga because he was not registered as a voter there. Kiwanuka Fred's affidavit is not relevant to Senyonga having been chased away and having to sit 30 meters from the presiding Officer's desk. It is relevant to other election malpractices, which I shall consider later in this judgment.

Bernard Matsiko was a registered voter at Nyabitunda Polling Station in Ntungamo Parish and a campaign agent for the Petitioner in Kayonza Sub-County. He deponed that on Polling day, he reached the Polling Station at 6.30 a.m. with fellow agents and found that voting had already started. When he attempted to stop the 1st Respondent's agent, Rehema Biryomumaishoi from stuffing ticked ballot papers in the ballot box, he and other Petitioner's agents were forcefully chased away from the Polling Station by election officials, with the help of armed personnel and their appointment letters were confiscated. He further went to Kyeshero Polling Station and found similar election malpractice going on. He witnessed Canon Mungakazi and Rwamahe ticking ballot papers as they liked. He found this strange. Rwamahe who was armed with an AK

47 chased Matsiko away with the help of LDU's and some army men who were threatening voters. The affidavit was based on knowledge and belief but the grounds for belief were not shown. It is clear that belief was irrelevant because the deponent saw, experienced and witnessed what he said in his affidavit.

Bernard Matsiko's affidavit is rebutted by Mugisha Muhwezi, the Deputy Resident District Commissioner of Rukungiri District. He deponed that he had read Matsiko's affidavit. It contained falsehood. Muhwezi's affidavit did not refer to Matsiko's allegations about the Petitioner's Polling agents being chased away. It referred to other malpractices, which I shall consider later in this judgment.

James Musinguzi was a registered voter at Ntungamo, Kayonza Sub-County, Kanungu District. He was also in charge of the Petitioner's election campaign in the South - Western Region of Uganda. His affidavit dated 23-03-2001, speaks of many election malpractices. Regarding chasing away of the Petitioner's agents, he deponed that on Polling day, he visited Kashojwa, Nyarurembi, Kijumbwe, and Ntungamo Polling Stations in Kanungu District. At all of them he found that the Petitioner's Polling agents were chased away from Polling area, and there was no actual voting since ballot papers were being pre-ticked in favour of the 1st Respondent by Polling officials who would then direct the ***"voters"*** to put them in ballot boxes. He complained about this to the Presiding Officer, but he was disregarded. The GISO of Kiruma, in the presence of the Kiruma LC.lll Chairman, blatantly said to him that his complaints were a waste of time as it had already been decided that the Petitioner should be allowed not more than 4 votes in Kijumbwe Parish. The Petitioner ended up with 3 votes from that polling center comprising of three Polling Stations. At the Polling Station of Kijumbwe Polling Centre the Petitioner's agents who had been chased away were dragged back after the ***"vote count"*** and forced to sign the declaration forms in respect of voting they had not witnessed. The malpractices were being done in the presence of police personnel. In the circumstances the witness did not vote since it was meaningless to do so. The affidavit was based on knowledge and belief. Grounds of belief were not revealed but in essence, the affidavit was based on knowledge of what the deponent witnessed.

The affidavit of Captain Atwoki B. Ndahura rebuts the affidavit of James Musinguzi about allegations against the Presidential Protection Unit (PPU), but not about the Petitioner's Polling agents being chased away. I shall deal with the allegations about other malpractices later in this judgment.

Koko Medard of Kashambya Village Ruhandagazi Parish, Kambuga Sub-County, Kanungu District, was registered to vote at Komajume Polling Station. He was also a Polling Monitor for the Petitioner. When the Voter's Register was displayed at the said Polling Station, he went there to check the register but Mrs. Bushingye and other officials in control of the register refused to allow him to search the register although he tried several times to do so. Others, namely Mr. Kuliku, Kijana, Saturday, Rwamulanda and many others also tried to search but they were refused to do so because it was said that they were supporters of the Petitioner, but supporters of the 1st Respondent were allowed to search the register.

Soon after the voting cards were taken there, the said Mrs. Busingye initially refused to give Koko his card, and eventually did so after a long quarrel. Koko monitored other Polling Stations including Nyamuto. When he reached there at 2.00 p.m. he found that Peter Mugisha, a District Councillor and an avowed supporter of the 1s Respondent had chased away the Petitioner's agents from the Polling area and the agents had been forced to stand 50 meters away from the ballot boxes, where they could not see what was going on. At that time all other people except the 1 s Respondent's agents, had been chased away from the Polling Station which was deserted. He also visited Nyarugendo Polling Station. As soon as he and one Bakunzi arrived there, one Yoramu, son of Bakunzi pounced on Bakunzi and started boxing him. They took off on their motorcycle as a whole crowd of the 1 Respondent's supporters chased them away with stones. They lost their record book of voting in the process. Next he arrived at Ruhandazi at 11 .00 a.m. and found Arthur Mugisha Chairman L.C.III had just beaten Kwibwomanya Lawrence the Petitioner's agent, and whose supporters were scattered in disarray. Koko was not allowed at the Polling Station itself. He found that Kwibonyanga, Polling agent and other agents of the Petitioner had taken refuge 150 meters away from the Polling Station and could not be allowed any nearer. Koko was not allowed any closer and he could not vote at that Polling Station as he was entitled to do. So he never voted.

In the respondents' Chart, Captain Atwoki B. Ndahura is indicated as having rebutted the evidence of Koko Medard, but the Captain's affidavit does not refer to the allegation of chasing away the Petitioner's Polling agents made in Koko's affidavit.

Kiwume A. Ibrahim, of Indifakula Parish, Bugiri Town Council was the Petitioner's Polling Monitor for Bukoli South Constituency. On a date he did not mention in his affidavit of 20-03-2001, he said that he was from Bugiri and going to Namayengo. He met soldiers, Army/Civilians on a District Medical Officer's motor vehicle, carrying 11 soldiers and four civilians. It was a double cabin Pickup. Kiwume had a Card of a Polling Monitor displayed on him. The occupants of the Pick-up stopped and told him to go back to Bugiri. When he was going back, he met Police Officers, a Mr. Mafabi and Mrs. Oteba whom he knew. He reported to the Police Officers that soldiers had harassed him. They allowed him to proceed to Namayengo. The soldiers told him not to move anywhere else, but to remain at Namayengo. Thereafter every Polling Station he reached, the Petitioner's Polling agents had been chased away to eight meters, and told by the Presiding Officers to keep away.

The Petitioner's Chairman in charge of Bukooli South West Constituency had been arrested and put inside Namayengo Police Station. He was put in for no reason, nor was a statement recorded from him. There were 11 other supporters of the Petitioner who were detained at Namayengo Police Station. The Chairman was released from custody on the orders of the R.D.C. Ms. Nava Nabagesera, who also ordered the Petitioner's local office to close until further notice. In her affidavit of 03-04-2001, in rebuttal, Ms. Nava Nabagesera denied the allegation. There is no indication in the affidavit in rebuttal why Kimumwe A. Ibrahim should have fabricated lies against the R.D.C., if he did so. On the other hand, in my view, there is a good reason for her denial. An admission that a highly placed official like the R.D.C., Nava Nabagesera, had committed election offences as alleged against her would be unthinkable. I would therefore reject Ms. Nava Nabagesera's denial and accept Kiwume's evidence, and I do.

Suliman Miiro of Nkuusi Village, Naluwerere Parish Bugiri Town Council, Bugiri District, was the Petitioner's Monitoring agent for Bukuli North Constituency. He also visited Bus Park ***"A"***

Polling Station to ensure that voting there was free and fair. In his affidavit of 02-03-2001, he said that soldiers from R.D.C.'S Office came threatening and forced young children below 18 years old to vote. Miiro and others tried to refuse but they were overpowered since the soldiers were armed. The Petitioner's agents were chased away from the Polling Station by armed soldiers for about 4 hours. Soldiers started bringing small children to vote and they voted.

Ms. Nava Nabagesera, the RDC of Bugiri District also rebutted Suliman Miiro's allegations. She denied that soldiers from her office threatened people and forced children below 18 years to vote. She further said that at no time did she receive reports of soldiers' threats, harassment and intimidation of people throughout Bugiri District and that the election was free and fair in the District. The comment I made in respect of Ms. Nabagesera's affidavit in rebuttal of Kiwume's affidavit equally applies to her rebuttal of Miiro's affidavit.

Basajabalaba Jafari resides at Ishaka, Bushenyi Town Council. He said in his affidavit that he was Secretary to the Elect Busingye Task Force for Bushenyi District. On Polling day, he was in charge of Bunyaruguru Sub-District for overseeing operations of the Petitioner's Polling Agents. On that day, he witnessed at Katande Primary School Polling Station one 1st Respondent's agent chasing away the Petitioner's agents from the Polling Station and the presiding Officer allowed such incidence to take place. For about 3 hours voting went on in the absence of the Petitioner's Polling agents, until the Sub-County Chief, Katerera and the Police, intervened following Jafari's report to Katerera Police Post. The Respondent's Chart does not indicate that the affidavit of this witness is rebutted. His evidence, therefore, stands controverted, and I accept it as true.

I have already referred to the affidavit of Boniface Ruhindi Ngaruye in this judgment. He said in paragraph 8 thereof that on Polling day, he witnessed a case where the Presiding Officer at Biharwe Polling Station denied the Polling agent for the Petitioner to be present at the Polling Station until around mid-day when Ngaruye explained to the Presiding Officer that he had no such authority. In the Respondents' Chart, one Aspro Kwesiga is indicated as having rebutted Ngarunye's affidavit, but where Kwesiga's affidavit can be found is not shown.

Muhairwoha Godfrey, of Kijaaho Isingiro, Mbarara District was the Petitioner's Polling agent at Kajaaho 4 in Kajaaho Parish, Kikagate Sub-County, Isingiro South Constituency. He deponed in his affidavit of 21-03-2001, that there were numerous election malpractices at Kajaaho 4 Polling Station and massive rigging in favour of the 1st Respondent. At around 10.00 a.m. one Charles Rwabambari, the Respondent's supporter, went to the desk of the Presiding Officer accompanied by one Kanyahurwa Parish Chief of Kajaaho Parish, and took over the station from Katsimbazi, the Presiding Officer, and started issuing ballot papers and ticking them for voters. When Muhairwoha protested, the Parish Chief ordered that he be arrested tied and taken to the Parish Headquarters. One Paskali Katsigano a uniformed and armed UPDF reserve force tried to arrest him but Muhairwoha took off. He left together with his colleagues, equally chased away. The Respondents' Chart does not show that the affidavit of Muhairwoha was rebutted. His evidence, therefore, is uncontroverted and I accept it as true.

Alex Busingye, of Kakiika, Mbarara, was in charge of overseeing the operations and welfare of the Petitioner's agents in Kazo County. In his affidavit of 21-03-2001, he deponed that in the majority of Polling Stations he visited; he found that the Petitioner's Polling agents had been chased away. The deponent does not disclose the source of this information. That part of the affidavit is therefore, defective and inadmissible. However, he also said that at Nkungu Polling Station, he found that the Petitioner's Polling agent had been tied by UPDF Soldiers and bundled on a pick-up No. 114 UBS, in which they were traveling. The Respondents' Chart indicates that Busingye's affidavit is rebutted by Aspro Kwesiga, but where the rebuttal affidavit can be found is not indicated.

Kirunda Mubarak, of Misoli Village, Busuyi Parish, Bunya West Constituency, Mayuge District, was the Petitioner's Polling Monitor for the entire District of Mayuge. In his affidavit of 20-03-2001, he deponed that at Mpungwe Polling Station, the letters of the Polling agents were withdrawn from them on the grounds that their appointment letters were fake. The agents were sent away; the voting continued. When Kirunda asked the Presiding Officer why, the latter said that they were not sure of them, so they were told to sit far. They were not allowed to write anything. Kirunda reported the matter to the CAO but the complaint was ignored. The LC.I and LC.II got hold of Kirunda and forced him out of the Polling house because he had queried why

under age children were voting. In the same Polling Station Mrs. Wamulongo wife of the M.R for Bunya East constituency had Voters' Cards and Ballot Papers and was giving them to any voter willing to vote more than once. Kirunda and his colleagues tried to arrest Mrs. Wamulongo, but they were overpowered and chased away. They boarded their motor vehicle and took off to Mayuge Police Station where they reported and requested for a Policeman to arrest Mrs. Wamulongo, but the Police said that they had no manpower. The complainants waited until 6.00 p.m. The Police did not assist. The Chart indicates that Kirunda's affidavit is rebutted by Mrs. Kedres Wamulongo and that the rebuttal affidavit is on page 282. On checking page 282, in two volumes of the 1st Respondent's volume of affidavits, I found the affidavit of Emodingo Anthony instead, which is irrelevant to the allegations by Kironde.

Ronald Tusiime, of Mparo, Rwamucucu Subsequently, Kabale District was the Petitioner's Polling agent for Mparo Parish. He deponed his affidavit on 21-03- 2001. He said that he witnessed several election malpractices at Mparo and Kihanga Polling Stations. At Kihanga one of the malpractices was that the Petitioner's only remaining Polling agent when Tumusiime arrived there was forcefully removed from the Polling agents' seat and thrown out of the Polling Station. The Respondents' Chart does show that Ronald Tumusiime's affidavit was rebutted. It therefore, stands uncontroverted, and I accept it as true.

Charles Owor, an Advocate of the High Court and a registered voter in Nakawa Division, Kampala said in his affidavit of 22-03-2001, that on 13-03-2001, the National Elect Besigye Task Force appointed him and Architect Richard Turyahabe to witness the process of tallying election results at 2nd Respondent's offices on Jinja Road, Kampala. They went there and showed their letter of introduction. Mr. Wamala the 2nd Respondent's officer in charge of data processing tried many times to assist them to gain access to the offices concerned, but in vain. A man in plain clothes and seated at the entrance to the tallying center refused them entry into the center.

The man insisted that Owor and his colleague could enter the center only with express written permission of the 2nd Respondent's Chairman, Mr. Kasujja. Alexandra Nkonge, the Legal and Public Relations Officer of the 2nd Respondent tried to assist, but also failed. Between 4.30 p.m. and 5.30 p.m. they gave up the efforts to enter the 2d Respondent's tallying center. Unlike all other persons who appeared to be on duty at the center, the man who refused them entry had no

identification tag of the 2 Respondent. The affidavit was based on knowledge and belief, but belief is irrelevant since the witness spoke of what he witnessed and heard in person. The Respondents' Chart indicates that Charles Owor's affidavit is rebutted by Joshua Wamala and Mr. Kasujja. Wamala's affidavit of 6-4-2001, does not mention Owor's affidavit at all. Mr. Kasujja swore three affidavits in connection with this petition as the 2nd Respondent's Chairperson. They are dated 27-03-2001, 9-4-2001 and 12-03-2001. None of them mentioned Charles Owor's affidavit.

Ongee Marino, the Petitioner's witness, whose affidavit I have already referred to concerning new Polling Stations, also said in his affidavit of 23-03-2001, that when the results were being tallied, the exercise continued smoothly for the gazetted Polling Stations but when it came to the six newly created Stations, the Returning Officer refused to declare the results and said that the details would be known later when the actual Ballot Boxes and Declaration Forms had been submitted to him. Ongee objected and requested that the results of the newly created Polling Stations should also be declared. Instead the Returning Officer ordered that he should be forcefully removed from the place of tallying by the Police. He was ejected and he reported the matter to Hon. Okello Okello M.P. who was in charge of the Petitioner's Campaign in Kitgum District. The M.P wrote a letter annexture ***"A"*** to Ongee's affidavit, sending Ongee back to his duty and saying that all tallies must be checked by candidates' agents. Ongee returned to the tallying center but the Returning Officer refused him to see the election results of each Polling Station. Ongee refused to sign the tallying sheets.

He and other agents of the Petitioner and agents of candidate Francis Bwengye wrote a letter to the Returning Officer of Kitgum District dated 13-03-2001 complaining about a number of election malpractices. The letter is annexture ***"B"*** to Ongee's affidavit, listing six such malpractices.

Respondent's Chart indicates that Ongee Marino's affidavit is rebutted by Geoffrey Okot and Ngomoromo Presiding Officers, but it is not shown where their rebuttal affidavits can be found.

In his affidavit dated 23-03-2001, Hon. John Livingston Okello Okello, M.P. for Chua Constituency deponed that as Deputy Co-ordinator for the Petitioner, he held a rally at Palabek — Kal on 5-3-2001. Campaign agents for the Petitioner informed him that many voters on the Voters' Register did not have Voters' Cards especially those at Paula, which he visited personally. Some voters received cards but their names were not in the Voters' Register. Numerous soldiers and their wives in Kitgum District were issued with at least two Voters' Cards. For instance Onek John and Onono Kenneth. The former surrendered both his Cards to Okello Okello M.R He wrote letters to the District Registrar, of the Electoral Commission about such election malpractice and to Kitgum Returning Officer Mr. Alfred Ocen Lalur about exclusion of Ongee Marino from the tallying process.

The affidavit of John Okello Okello M.R is rebutted by one of Colonel Fred Tolit, Assistant Army Chief of Staff, dated 30-03-2001, with particular reference to the allegation that Colonel Fred Tolit was expected on 12-03-2001, to bring ticked ballot papers in favour of the 1st Respondent under cover of darkness, which is not relevant to the allegation of the Petitioner's Polling agent. Ongee Marino's allegation that he had been sent away from a tallying center or the allegations of soldiers being issued with two Voters' Cards were not adverted to in the Colonel's rebuttal affidavit.

The Respondents' Chart also indicates that the affidavit of Hon. J**.** L. Okello Okello, M.R is rebutted by Maj. Okot Wilit, but it is not shown where that affidavit can be found.

Robert Kironde, a Dentist, was asked by the Petitioner's Task Force to go with one Kawalya to witness counting and tallying of votes at the 2nd Respondent's Head Offices on 13-03-2001. In his affidavit of 19-02-2001, he said that the Deputy Chairperson Mrs. Flora Nkurukenda allowed them to enter. As Kironde wanted to make notes about the figures of the results being counted and tallied, Mr. Wamala No. 104 stopped him from taking any data and advised him to instead go to the International Conference Centre where the election results were being declared. On the first desk where election results were being received from the Communication room, the first person to receive results was Hon. Charles Bakkabulindi the workers' M.R who was a well known Chief Campaign Agent for the 1st Respondent.

In the Respondents' Chart, Kironde's affidavit is shown as rebutted by ***"EC"*** but where the rebuttal can be found is not shown.

Sulaiman Miiro's affidavit of 20-03-2001 has already been referred to in this judgment. He was the Petitioner's Monitor in Bukooli North Constituency. He deponed, inter alia, that some calculations on the declaration result forms were inflated and very inaccurate, to with Kamango Polling Station Nkavule Parish, Kapianai, Buwolya Makoova Mayuge Parish, Budhaya Polling Station to mention but a few. The affidavit of Ms. Nays Nabagesera, the Bungiri RDC, dated 3-4-2001 which rebutted Miiro's affidavit did not refer to his allegation of declaration of results being inflated.

The Petitioner's learned Counsel Mr. Mbabazi, linked alleged falsification of results to the grounds of the Petition under consideration. He gave examples of incidences where the number of votes cast exceeded the number of ballot papers issued. For instance the Petitioner in his affidavit supporting the Petition said that the declared election result indicates that 109.86% and 105.34% of voters' voted in Makindye East and Mawokota, respectively. From the two Constituencies a total of 991 votes were cast in excess if registered voters.

In his reply to the alleged falsification of results, Mr. Kabatsi submitted that if there were any errors in the declaration of results for Makindye and Mawokota, the two examples given by Mr. Mbabazi, it was human errors, not a deliberate act to falsify results. So with Makindye declaration of results, Mr. Kasujja said in his affidavit supporting the 2nd Respondent's Answer, in response to paragraphs 7 and 8 of the Petitioner's affidavit.

In his affidavit dated 27-03-2001 supporting the 2nd Respondent's answer, Mr. Azziz Kasujja Chairman of the 2' Respondent, denied that the number of votes cast in Makindye County East were more than the number of registered voters. What was shown in the table under paragraph 7 of the Petitioner's affidavit, he said, was an arithmetical error due to a faulty original tallying which was corrected as a letter of 20-03-2001 from the Kampala Returning Officer shows. Mr.

Mbabazi calls this election falsification done only by the 2nd Respondent's officials after the election was completed.

Regarding Mawokota County South, Mr. Kasujja said in his affidavit that the results tabulated in paragraph 7 of the Petitioner's affidavit were not correct. The correct results as shown by Mr. Kasujja's annexture 4 votes cast was 27,234 out of 40,887, registered voters.

As evidence shows, these figures in Mr. Kasujja's affidavit were not verified by any candidates polling agents. They were compiled by the 2nd Respondent's officials after 12-03-2001 and are, therefore one sided, just as the ones which are said to have been the result of arithmetical errors in tallying the figures.

Some declaration of result forms show that more votes were cast that the number of ballot papers issued. In Bukade Primary School Polling Centre, Buwologoma Parish, Bukanga Sub-County, Iganga District, total votes cast for candidates, total ballot papers rejected, and spoilt ballot papers, add up to 651 yet 650 ballot papers were issued. The name and signature of the agents of the Petitioner are missing on this declaration of results form. But the ones for the Respondent and another candidate are filled in.

87 declarations of results forms from 19 Districts are attached to the Petitioner's affidavit, dated 6-4-2001, in reply to the 2nd Respondent. The Petitioner's affidavit in question provides a detailed account of what appear to be falsification of results from 29 Districts. Such falsifications are evidence of ballot stuffing in ballot boxes. The affidavit is too long for a complete evaluation in this judgment. After I have scrutinizing the figures they show, I find that most of them contain excess numbers of votes cast over the numbers of ballot papers issued at the respective Polling Stations. This could be the result either of arithmetical errors by the officials who filed the forms, as Mr. Kasujja deponed, or that more votes were actually counted as having been cast in excess of the number of ballot papers issued to the Polling Stations, in which case it would be the outcome of falsified results. If there were no such discrepancies the total number of votes cast including spoilt or invalid ballot papers plus unused ballot papers should be equal to the number of ballot papers issued at the Polling Stations.

In his supplementary affidavit in reply, dated 9-4-2001, the 2nd Respondent's Chairman, Mr. Kasujja said that it is not true that in Polling Stations in 19 Districts the number of votes cast exceeded the number of ballot papers issued, but there were few and isolated cases of arithmetical errors, and the Petitioner has named a mere six stations in his affidavit of 6-4-2002. I find that the numb r is not so because in paragraph 19 of that affidavit, the Petitioner listed 19 Districts in which, he said, votes cast exceeded the number of ballot papers issued. In paragraphs 33 to 38 inclusive, he listed another 6, making a total of 25 Districts. He gave detailed figures in respect of Bukholi TCA Polling Station in Mbale District, Kamengo (M — Z) Polling Station in Masindi District; Mayembe Upper Prison C, in Mpigi District, Ishaka Adventist College in Bushenyi District; 2(L — Z) Polling Station in Mbarara Municipality, Mbarara District; and Buyego Trading Centre, Mayuge District.

If the discrepancies in the figures were arithmetical error,, I do not understand why they would be so many and spread in so many Districts. The only inference I draw from this is that many declaration of results forms falsified results.

After a careful consideration of all the affidavit evidence adduced by the Petitioner, by the 1st and 2nd Respondent's, I am satisfied and find that the Petitioner has proved to the required standard grounds 3(1) (g) and (p) that:

> ***(a) Contrary to sections 32 and 32 of the Act, on polling day during polling exercise, the Petitioner's polling agents were chased away from many Polling Stations in many Districts of Uganda, and as a result the Petitioner's interests at those Polling Stations could not be safe guarded.***
>
> ***(b) Contrary to section 32 of the Act, the 2nd Respondent's agents/servants the Presiding Officers failed to prevent the Petitioner's polling agents from being chased away from Polling Stations and as a result, the Petitioner's agents were unable to observe and to monitor the voting progress.***

I also find that in many polling stations the declaration of results forms compiled by the 2nd Respondent's servants/agents after the announcement of the result of the elections falsified the election results.
I shall consider the effect of this non-compliance in the result of the election later in this judgment.

This also disposes of ground 3(1) (y) (v) of the Petition.

Denial Of The Right To Vote:

Mr. Mbabazi submitted that some voters were denied the right to vote in various ways. He did not, however, relate such denial to any specific ground of the Petition or to any Provisions of the Act. However, the Constitution is clear on this. Article 59 provides:
"(1) Every Citizen of Uganda of eighteen years of age or above has a right to vote.
(2) It is the duty of every Citizen of Uganda of eighteen years of age or above, to register as a voter."

The provisions of Section 19 of Act 3/97 are also to the effect that every registered voter has a right to vote in the Parish or Ward where he or she is registered. To prevent any registered voter from voting is therefore a violation of his or her constitutional and statutory right. In his submission, Mr. Mbabazi gave examples of persons who were prevented from voting by being arrested and detained by the Military; being chased away from Polling Stations; their names in Voters' Register being ticked by other person or persons etc. He gave examples and named people prevented from voting. Hon. Okwir Rwaboni M.P (hereinafter referred to as ***"Rwaboni"*** for the sake of brevity) was a prominent example.

The Solicitor General Mr. Kabatsi did not submit in reply to the Petitioner's allegation that some registered voters were denied the right to vote. I have already found that Rwaboni's statutory declaration dated 23-03-2001, made in London, is admissible evidence in these proceedings. Part of his declaration relevant to the matter at hand reads as follows:

"(5) That on the 20th February 2001, 1 was unlawfully and violently arrested at Entebbe International Air Port, beaten and sat upon in a military Police Pickup, in the presence of Journalists. Diplomats and colleagues and illegally detained at the Chieftaincy of Military Intelligence (IMI), Headquarters in Kampala. During the arrest I sustained injuries to my legs and chest and I am still undergoing treatment for these injuries.

(6) That from 4.00 p.m. on the 20th February to 5.00 p.m. on 21st February 2001, I went through a grueling six hour interrogation session, conducted by seven officers of the Chieftaincy of Military Intelligence.

(7) On the 21st February 2001, I had a telephone conversation with H.E. Museveni when he was in Gulu where he tried to convince me to leave what he called "the wrong group" and promised to allow me to leave the Country and to take some of my interests while abroad.

(8) That on the 21st February 2001, I was again forced to make a statement disassociating myself from the Presidential Candidate Dr. Besigye Task Force, this time the presence of Ma). Gene. Elly Tumwine. Maj. Gen. Tinyefuza, Ma). Mayombo; a statement I later read to press at Parliament building that same evening.

(9) That between the 21st of February 2001, I was under virtual house arrest at my residence in Bunga, guarded by officers and men of the UPDF under the guises of "State Protection" against my own candidate and his supporters.

(10) That on 27th I had to leave the Country as I felt my life was in danger and presently living in the United Kingdom with my family.

(11) Consequently I did not vote in the 12th March 2001, Presidential elections which is a denial of many constitutional right."

Lt. Col. Noble Mayombo is the Ag. Chief Military Intelligence and Member of Parliament (hereinafter referred to as ***"Mayombo"*** for the sake of brevity). He swore an affidavit in rebuttal of Rwaboni's statutory declaration. He said that Rwaboni was arrested on 20-02-2001, at Entebbe Airport on his (Mayombo's) instruction. He was arrested for his own safety. Following the arrest, arrangements were made, at Rwaboni's request and on the 1st Respondent's directive, for Rwaboni to travel to the United Kingdom.

There is no doubt that, Rwaboni's arrest led to his having to go out of the Country and being unable to vote in the 12-03-2001 Presidential Election.

Evidence was adduced to show that other people were also denied the right to vote.

Fazil Masinde, of Butongala Village Kityerera, Mayuge District, was the Petitioner's Monitor in 7 Polling Stations (which he named). At Butangala Polling Station the Presiding Officer, one Mudaki was directing people openly to vote for the 1st Respondent at the time voters were being issued with ballot papers. Saina Mukade and Zaibo Hambo did not vote because they found that others had received ballot papers and cast votes in their names.
Fazil Masinde's affidavit was rebutted by Gesa Ahmed, in his affidavit of 2-4- 2001. Gesa of Kuluuba Village, Mayuge District is the GISO of Kityetera Sub- County and the L.C.2 Kaluuba Parish. He said that Fazil Masinde's affidavit is false. While Gesa's affidavit is relevant to other malpractices, he did not refer to voters who did not vote because their names in the Voters' Register had already been ticked.

Mudaaki Emmanuel also rebutted Fazil Masinde's affidavit. In his rebuttal affidavit of 4-4-2001, he said that he was the Presiding Officer of Butangala Polling Station. He did not know Masinde because the latter was not at that place as a Polling agent for any of the candidates.

Mudaaki denied that he directed voters to vote for the 1s Respondent because he was faithfully exercising his duty as the Presiding Officer. He also said that he did not receive any complaint that Saina Makade and Zaibu Gimbo did not vote. I have three comments on Mudaaki's rebuttal affidavit. First Masinde did not say that he was a Polling Assistant at Butangala. He was a monitor for seven Polling Stations, of which Butangala was only one of them. Secondly, the fact that Mudaki did not receive any complaint does not mean that Mukade and Gimbo voted. Thirdly, I would not expect Mudaki, a Presiding Officer, to admit that he committed the various election offences which Masinde alleged against him. In my view it is not in the least surprising when Mudaaki said: ***"The voting exercise proceeded very smoothly and transparently."***

In the circumstances, I reject Mudaaki's denial, and I accept Masinde's affidavit as true.

I have already referred to the affidavit of Ronald Tumusiime in another context. He swore in his affidavit that one of the many election malpractices he saw at Mparo Polling Station was that voting was not secret. Shortly after 8.00 a.m. the Presiding Officer announced that voting was not going to be secret, and that all ballot papers should be ticked at the Presiding officer's desk. The Respondent's supporters were being allowed to vote for the dead such as V. Konyenda and for the absent such as Allen Asiimwe. On the other hand some of the Petitioner's supporters such as Ivan Byamukama found their names already ticked as having voted. The Respondent's Chart does not indicate that Ronald Tumusiime's affidavit was rebutted. His evidence is not controverted. I accept it as true.

Tumwebaze Arthur of Kiyoora Nisakyera, Ntungamo District, was the Petitioner's Polling agent at Kataraka Primary School Polling Station. In his affidavit of 21- 03-2001, he said that persons who never appeared at the Polling Station for voting such as Bangirana Livingstone and Tukahiirwa Arthur had their names ticked in the Voter's Register as having voted when they never voted because their cards were used by other persons who impersonated them.

Kanyima Nilson of Kishoreno Village, Nyakyera, Ntungamo District, rebutted Tumwebaze's affidavit. In his affidavit of 4-4-2001, Kanyima said that he was an Election Constable at Katakaka Primary School Polling Station, where he was also a registered voter. He knew Tumwebaze Arthur. The latter's allegation that he asked him to sit 20 meters away from the Polling Station was false. The allegation that he was giving out Voters' Cards was also false. Kanyima did not refer to Tumwebaze's allegations that two voters did not vote because others had impersonated them and used their voting cards which, therefore, remains uncontroverted I accept it as true.

Tukahirwa David, of Nsambya Village, Busujju parish, Kakindu, Mubende District, and his wife Nabacwa were registered as voters and received their Registration Certificates on 2201-2001. In his affidavit of 19-03-2001, he said that on 26-02-2001, they went back to collect their Voters' Cards. They were told by the officials concerned that their cards had not yet been brought. On 11-03-2001, the officer issuing cards, one Kirumira informed them that the cards had not yet arrived from Mityana. On 12-03-2001, Tukahirwa and his wife went to the Polling Station and

found Kirumira acting as the 1st Respondent's agent. The Voters' Cards were being issued by the Presiding Officer, one Mutwe. They joined the queue. When it was his turn to receive the Voter's Card he and his wife were told to stand aside. The presiding Officer retained their Registration Certificates. The exercise of issuing cards and voting continued together. Tukahirwa, his wife and two other people, continued to wait for their Voters' Cards. At 5.00 p.m. voting closed. Tukahirwa and his wife complained to the presiding Officer and requested to be given their Certificates but the presiding Officer refused consequently they never voted.

Kirumira Edward rebutted Tinkahirwa's affidavit. In his affidavit of 4-4-2001, he said that he was the 1st Respondent's Polling agent at Nsambya Village Polling Station. He denied that he acted as an official who issued cards. As a candidate's agent that was not his role. The voting process was conducted in an. orderly manner, and he did not hear or see anybody complaining to the Presiding Officer Bernabas Mutwe. This affidavit does not refer to Tukahirwa's complaint that he and his wife were never issued with Voters' Cards. Kirumira did not say why he should have known if Tukahirwa or anybody else had complained to the Returning Officer.

Barnabas Mutwe also rebutted the affidavit of Tukahirwa. In his affidavit, which has no date, except the year 2001, he said that he was the presiding Officer at Nsambya Polling Station. He remembers that one Nabachwa had a Registration Certificate, but no Voter's Card, and her name was not on the Voters' Register so he disallowed her from voting. In all there were 4 people whose names did not appear in the Register of voters and he did not allow them to vote.

I find that Barnabas Mutwe's affidavit corroborates Tukahirwa's evidence that they did not vote, but for different reasons. Mutwe said that they did not vote because their names did not appear in the Voters' Register, but Tukahirwa's reason .is that because they were not issued with Voters' Cards. Whatever the reason, it is evident that Tukahirwa, his wife and two unnamed other voters were denied the right to vote by the 2nd Respondent.

Mulindwa Abas, of Kobolwa Zone, Kibuku Parish, Pallisa District was the Petitioner's monitoring agent for Kibuku Parish. In his affidavit of 21-03-2001, he said that at all Polling Stations he went to, there were voters who could not vote, because they were told that their

names had been ticked and that they were not supposed to vote. His affidavit is based on knowledge and belief. Belief is irrelevant because all he talked about was what he had observed.

Malik Kitente rebutted the affidavit evidence of Mulindwa Abasi. The rebuttal affidavit of 5-4-2001 is not relevant to the allegation that voters did not vote because their names in the Voters' Register had already been ticked. Mulindwa's evidence that some people were denied the right to vote was, therefore, not controverted. I accept it as true.

Ekadu Sam of Soroti Senior Quarters, was registered as a voter at Golf Course Polling Station B. In his affidavit of 20-03-2001, he said that on 9-3-2001, he found that his name was in the Voters' Register, but his Voters' Card was not there. He was told that since his name was in the register he could vote using the pink form he was given when he registered. But on Polling day, his name had disappeared from the Voters' Register. He was thus denied the right to vote. 169 other persons did not vote at that polling Station alone. The affidavit was based on knowledge and belief, but since all he said was what he saw, belief is irrelevant.

Omuge George William was the Returning Officer for Soroti District. In his affidavit of 1-4-2001, rebutting the affidavit of Ekudu Sam, he said that he did not receive any complaint, verbal or written from any agent of a Presidential Agent or an aggrieved person of Golf Course Polling Station B that about 169 people were denied opportunity to vote because their names were missing on the Voters' Register. In my view there would appear to be no good reason why Ekudu Sam should have fabricated what he said in his affidavit. Further the fact that Omuge George William as the Returning Officer did not receive any complaint about 169 persons not having voted because their names were not in the Voters' Register does not necessarily mean that the incident did not happen. A Returning Officer's electoral function covers a whole District. Omuge George William did not say in his affidavit that he visited the Polling Station in question. In the circumstances I believe Ekudu Sam's evidence and reject Omuge's denial in this regard.

Bukenya Samuel of Kinawataka Village, Mbuya, Kampala, was a registered voter at Mbuya Lower (A-C), Mbuya Parish, Nakawa Kampala District. He said in his affidavit of 23-03-2001, that he was appointed the Petitioner's National Election Task Force and was campaign agent. On

11-03-2001, at 6.30 p.m. he was arrested at Kinawataka Trading Centre by armed soldiers in a car covered with the 1st Respondent's election posters. He was detained at Mbuya Military Barracks, where he was asked which candidate he supported and intended to vote for. He replied that it was the Petitioner. Thereafter he was detained until 21 -03-2001, when he was released at 11 .00 a.m. On the Election Day he did not vote. During his arrest, he was beaten, tortured and bundled into a car, which torture and beating continued while he was in detention in the Barracks.

In the Respondent's Chart the name of Bukenya Samuel does not appear; nor is it indicated therein whether his affidavit evidence was rebutted.

Ogule Nicholas of Soroti, registered as a voter at Kichinjaji Polling Station. In his affidavit dated 20-03-2001, which he swore because he was a registered voter, he said that his name did not appear in the register. He kept on checking up to 11-03-2001. On Polling day he and 40 other people were denied the right to vote because their names did not appear in the Voters' Register although they had Voters' Cards. He also said that on Polling day, the Aide of Hon. George Michael Mukula, MP, came driving a motor vehicle No. UDE 745 to Kichinjaji Polling Station, campaigning and giving people, especially women, soap and salt and enticing them with the symbol of thumps up. This was a well- known election symbol for the 1St Respondent. Richard George Onyait, an Aide to Mukula MP, rebutted Ogule's affidavit, denying that he went to Kichinjaji Polling Station driving motor vehicle No. UDE 745. He also denied that he campaigned using the ***"thumps-up"*** symbol or that he gave out salt and soap. He said that he was a registered voter at Golf Club ***"A"*** Polling Station. At no time did he go too Kichinjaji Polling Station. Onyait did not say why Ogule should have made up such detailed allegations. He was only a voter. There is no apparent reason why he should have fabricated all that he said. I find his evidence truthful. I believe it. I do not believe Onyait's evidence in rebuttal.

Ogule's affidavit was also rebutted by Omuge George William, who was the Returning Officer for Soroti District. He said in his affidavit in rebuttal that voters whose names were not in the register were not allowed to vote although they had Voter's Cards. This corroborates Ogule's affidavit that he and 40 others did not vote because their names were not in the Register. Omuge also said that he did not receive any report from any person in Kichinjaji about his or her failure

to vote. Nor did he receive any report that the Aide of Mukula MP campaigned at Kichinjaji by a ***"thumps up"*** symbol. I do not find that Omuge's affidavit makes Ogule's affidavit any less credible. As a Presiding Officer responsible for the election for the whole of Soroti District, it is doubtful if he would attend to individual Polling Stations. In any case even if he did not receive reports of malpractices from Kichinjaji Polling Station, it does not necessarily mean that what Ogule said in his affidavit in that regard did not happen. It was the duty of the 2nd Respondent to compile Voters' Register including all the names of persons who registered as voters if their names were not on the register on polling day or before the 2nd Respondent was responsible for that omission.

> ***I have considered the evidence as a whole on the issue regarding denial of the right to vote. I am satisfied that the Petitioner has proved to the required standard, and I find that many voters were denied the right to vote. The effect of this denial on the election result shall be considered with the effect of other malpractices and noncompliance later in this judgment.***

Paragraph 3(1)(i) of the Petition: Multiple voting.

"That contrary to section 31 of the Act the 2nd Respondent's agents/servants/Presiding Officers in the course of their duties and with full knowledge that some people had already voted allowed the same people to vote more than once."

In its reply, the 2nd Respondent averred:

"9 In reply to paragraph 3(1) (j) of the Petition, the second Respondent denies that it allowed anybody to vote more than once."

Section 31 of the Act provides:

(1) No person shall vote or attempt to vote more than once at any election.

(2) For the purpose of ensuring that no voter casts a vote more than once, a Presiding Officer or a Polling assistant shall before issuing a ballot paper, inspect the fingers of voters in order to ascertain whether or not the voter has been marked with indelible ink in accordance with section 30; and the Presiding Officer or Polling assistant, as the case may be, shall refuse to

issue a ballot paper to that voter if the Presiding Officer or Polling assistant has reasonable grounds to believe that the voter has already voted or if the voter refuses to be inspected.

Counsel for the Petitioner did not submit on this ground but supplied a list of deponents of affidavits in support of the ground. I think that the Court is bound to consider the affidavits and their corresponding rebuttals provided by the 2nd Respondent's Counsel.

In his submission in reply on this ground, Mr. Kabatsi referred the 2nd Respondent's answer, which denied the allegation. He then referred to affidavits in rebuttal which, he said, supported the denials.
The Petitioner tiled a list of 17 witnesses who deponed affidavits in support of this ground of the Petition. It is not possible, in the time available, to consider all the affidavits in question and the corresponding rebuttal affidavits. I shall deal with samples to see what happened in practice and to gauge the extent of the problem.

Kirunda Mubarak, whose affidavit I have already referred to in another context was the Petitioner's Polling monitor in the entire District of Mayuge. He said in his affidavit that the wife of Wamulongo, MP for Bunya East Constituency had Voters' Cards and ballot papers and was giving them to any willing voter to cast even more that once and there were many who voted more than once. This was at Mpungwe Polling Station. As I said before, Kedres Wamulongo's affidavit in rebuttal is shown in the Chart as being on page 282 of the Respondents' volume of affidavits. I checked there and found the affidavit of Emoding Anthony instead. The 2nd Respondent's Volume of affidavit does not reach page 282. In short, I am unable to trace Kedres Wamulongo's rebuttal affidavit.

I have considered the evidence of Ssentongo Elias in another context. Regarding multiple voting, he said that he went to Karegeya Polling Station and found that armed Soldiers who had camped at Ireenga, the home of the wife of the 1st Respondent, were supervising the Polling process. The soldiers allowed supporters of the 1st Respondent to vote more than once. Complaints by Polling agents were ignored by the Presiding Officer.

Muhoozi Tom rebutted Ssentongo's affidavit. He said that on Polling day, he voted at Kabuhowe Polling Station and returned to his home immediately thereafter. He never saw Ssentongo at the Polling Station. In the evening he returned to the Polling Station. Voting closed in his presence. The Petitioner's agents were present and signed the declaration form. In my view, what Ssentongo said he saw happened at Karegeya Polling Station, was not at Kabuhowe, where Muhoozi Tom voted. Secondly Muhoozi's affidavit does not refer to Ssentongo's allegation of multiple voting.

Mugizi Frank of Rubone Cell, Rubone Trading Centre, Rusheyi, Ntungamo District was the Petitioner's Polling agent for Rubanga Polling Station. In his affidavit of 21-03-2001, he said that at Rubanga Polling Station, he witnessed massive rigging by which people were allowed to vote more than once. When he protested, the 1st Respondent's supporters namely Simon, Twahirwa Sura, Kanyagira, Siriri, Kakyota Muyambi threatened to assault him and he was chased away from the Polling Station. Musinguzi Siriri, of Rubanga, Rubane, Ntungamo District, rebutted the affidavit of Mugizi Frank. In his affidavit of 4-4-2001, he said that there was no massive rigging, or even any rigging at all as falsely alleged by Mugizi Frank at Rubanga Polling Station. On Polling day as he (Siriri) lined up to vote, one Kapere approached the Presiding Officer's table. Mugizi Frank then falsely referred to Kapere as ***"Bateyo"*** who had already voted. Mr. Simon Twahirwa, the LCI, Chairman objected as they knew the Kapere's identity. Siriri and others identified Kapere and he duly cast his vote. After the incident Mugizi Frank left for his Village, saying that he was going for lunch. Nobody chased him away from the Polling Station. What Siriri said in his affidavit tends to corroborate Mugizi Frank's evidence that he complained about people having voted more than once and that Siriri and Twahirwa were persons whom he accused to have been amongst those who chased him away. Siriri's rebuttal is a blanket denial of Mugizi's allegation. He did not indicate why Mugizi should have fabricated his detailed allegation. In the circumstances, I would accept Mugizi's evidence and reject Siriri's denial.

Kasigazi Noel, of Rwenamira, Kitashekwa, Ruhama, Ntungamo District was the Petitioner's polling agent for Rwenamira Polling Station. In his affidavit of 21-03-2001, he said that at the Polling Station, one Sibomaana Amos, who was the 1st Respondent's Campaign agent in Kitashekwa, colluded with the Presiding Officer and was seen casting a bundle of ballot papers.

Kasigazi lodged a written complaint to the Presiding Officer who rejected it and refused to initial it or annex it as part of the official record of the Polling Station. When he cross- checked with the Voters' Register, Kasigazi found out the names of people who had migrated to Rwanda in 1 994, such as Rugaruka John, Bazubagira, Kaitita and Tinkasimire E. were all ticked as having voted.

When Kasigazi and Kikwekije Augustine questioned why Sibomaana was allowed to cast a bundle of ballot papers, they were threatened with beating by LCI Chairman, one Kananura George, Sibomaana Amos, and the LC3 Chairman Karuhanga Denis Muvara. In the middle of the scuffle one Turyakira, a known 1st Respondent's supporter was given all the remaining ballot papers by the Presiding Officer, which he ticked and put in the ballot box. Kasigazi refused to sign the Declaration of Results Forms.

Sibomaana Amos of Rwenanura, Rwekiniro, Ruhoma, Ntungamo, rebutted Kasigazi Noel's affidavit. In his affidavit of 4-4-2001, Sibomaana said that he was just an ordinary voter, registered as such at Rwenanura. He was at no time the 1st Respondent's Campaign agent as falsely alleged by Kasigazi. At no time did he cast more than one vote let alone, a bundle as Kasigazi falsely alleged. Nor did he at any time threaten to beat anybody as falsely alleged by Kasigazi. I find this a blanket denial of Kasigazi's evidence. There would appear to be, and Sibomaana did not suggest, any sensible reason why Kasigazi should have fabricated the detailed allegations he made in his affidavit. In the circumstances, I reject Sibomaana's evidence in rebuttal and accept Kasigazi's evidence, given in his affidavit based on his own knowledge.

Ssali Mukasa of Rubone cell, Rubone Trading Centre, Rushenyi, Ntungamo. On 12-03-2001, he was at Rubone Moslem, Primary School L — Z Polling Station when the Presiding Officer and the Polling assistant counted votes at 5.00 p.m. He witnessed 10 ballot papers, folded together and ticked for the 1st Respondent. When he complained to the Presiding Officer, the latter said that it was allowed. On 9-3-2001, one Daudi Kahurutuka, the 1st Respondent's Campaign agents found him at 8.00 p.m. at Ali Mutebi's Hotel and told him to mention any amount of money he wanted from the 1st Respondent Task Force "in order to allow them steal votes." The affidavit was based on knowledge and belief. Belief is irrelevant since what Mukago said occurred was

what he saw. The Chart does not show that the affidavit of Ssali Mukago is rebutted. The evidence therefore, remains uncontroverted. I accept it.

I have already dealt with the affidavit of Idd Kiryowa in another context. In paragraph 7 of his affidavit he said, that Kakuba, the 1st Respondent's agent at Nabiseke Polling Station where Kiryowa was also the Petitioner's polling agent, who had earlier cast his vote came back and stuffed a heap of ballot papers in the ballot box. Robert, a security official, also pushed into the ballot box a heap of ballot papers. This time Kiryowa and his colleague, Toferyo Hussein kept quiet because they had already been threatened once before. The earlier threat had been made to Kiryowa and his colleague at 1 .00 p.m. when they complained because one Elias and his wife, Balekye cast their votes but did not dip their thumbs in the indelible ink. Robert told them not to be too critical because they risked being arrested.

Kakuba Nathan was the Respondent's Polling agent at Nabiseke A — L where he also cast his vote. In his rebuttal affidavit of 1-4-2001, he denied that he stuffed heaps of ballot papers in the ballot box; nor did he see anyone else doing the same, contrary to Kiryowa's allegations. Voting was done in the presence of Polling agents law and order officials and the public, thus ruling out the possibility of stuffing heaps of ballot papers in the ballot box. Kabuba's rebuttal is a bare denial. There would appear to be no sensible reason, and Kakuba does not indicate any, why Kiryowa should have fabricated this detailed allegation. Moreover it would be unthinkable that Kakuba would admit having committed an electoral offence which is what Kiryowa's allegations amounted to. In the circumstances I would reject Kakuba's rebuttal evidence and accept Kiryowa's evidence.

Kana Harward, a registered voter at Kochi Parish, Romogi, Yumbe District was a Polling agent for the Petitioner at Kochi B Polling Station. At that Polling Station, he saw a ballot box without code number, a Voters' Register containing names of 171 army men and 17 women. He again saw Betty Angudu, the daughter of his cousin, Silver Opidio, born in 1985, on the queue with other soldiers, where upon Kana complained to the Presiding Officer about the girl and the number of 15 women in the queue when all the 17 women on the Register had already voted. When the Presiding Officer called her, Betty Angudu was found to be holding a Voter's Card of a

50 year old woman. The Chart does not show that Kana's affidavit is rebutted. His evidence is, therefore, not controverted. I accept it as true.

I have already referred to the affidavit of Guma Majid Awodson in another context. He said that on 12-03-2001, he saw LC3 Vice Chairman of Kuru Division and members of the 1st Respondent's Task Force, Achaga Safi, cast a ballot paper at Bura B Polling Station where he was registered with Voter's Card No. 0027587. He again cast a ballot paper at Bura A Polling Station, where his Voter's Card was No. 00267715. Guma complained to a Prisons Constable deployed to take charge of the Polling Station and the Presiding Officer, but the two told Guma that they could not arrest Achaga Safi as he was a member of the 1st Respondent's Task force. At Alibi A polling station, Guma saw the Presiding Officer, Abale Young Majid, giving six ballot papers to the LC.lll Chairman of Kuru sub-county Drasi All a member of the 1st Respondent's Task Force. He got the register and saw that 23 people had voted. When he checked the serial numbers of the ballot papers issued to 23 voters he found that the serial numbers ran from 531 to 560, which was in excess by six. He directed one Olenga, his colleague, to arrest Drasi All while he (Guma) went to the police. When Guma returned to the polling station he found Olenga absent and he (Gum a) was threatened with arrest. Drasi All rebutted Guma's affidavit saying that he never saw Guma at Alibi polling station. He denied that he was given six ballot papers by Abele as Guma alleged. This is a blanket denial by Drasi Au of Guma's detailed evidence. He does not say, nor there appears to be any sensible reason, why Guma should have fabricated such allegations with such details, which should be the case in view of Drasi's blanket denial. Guma took the trouble to check the Register of voters to compare with the number of votes cast, and he found that six extra ballot papers had been issued which tallies with the six ballot papers which Guma said was given to Drasi by the presiding Officer, Abele Young Majid. It would also be unthinkable for Drasi, an LC 1ll Chairman to admit that he committed an electoral offence. In the circumstances, I believe Guma's evidence and reject Drasi's as a lie.

Kassim Seganvi of Kibuku village, Kibuku sub-County, Pallisa District was the Petitioner's polling agent at Kobolwa polling station, where he was also registered voter, and voted. One Haji Bubakali Nangeje, not a voter at the polling station, came and campaigned that all women should vote for the Respondent. Seganyi appealed to the Presiding Officer and the polling constable in

vain. One Naulo, who had cast his vote in the morning returned at 2.00p.m., was given a ballot paper and again voted at about 3.00p.m. Another man, not a resident of the area came, holding a voter's card from that polling station. His thumb showed that he had already voted. Seganvi appealed to the presiding Officer to investigate the matter, but the presiding Officer allowed the man to vote the second time. The presiding Officer and polling constable told Seganyi that he was wasting his time because whatever he did his candidate, the (Petitioner), would not succeed.

The rebuttal affidavit of Haji Abubakali Nangeje said that he was at Kabolwa polling station only for the purpose of assisting his mother Mary Garrett Kyagala, aged 85 years to vote. He did not campaign there for the 1st Respondent. Nangeje's affidavit does not refer to Seganyi's allegation that one Naulo voted twice. To that extent therefore he did not rebut Seganyi's affidavit regarding multiple voting, which remains uncontroverted I accept it as true.

Byaruhanga Yahaya of Customs Road, Busia Town Council, Busia District was the petitioner's polling agent at March "D" polling station. On polling day at 6.00 a.m. before voting began he noticed that 100 ballot papers meant for the polling station were missing with serial numbers 3596381.3596400 and 35972013597300. He also noticed that one Birungi voted twice at March "D" polling station with voters card No.0872813

A Kenyan called Muhamed, and known to Byaruhanga very well, crossed into Uganda to vote at March "D" with voters card 084100 bearing the name of Hassan All. He was arrested and handed over to the police.

The affidavit was based on knowledge and belief. Belief appears to be irrelevant because what Byaruhanga deponed was what he witnessed. Byaruhanga's affidavit was not rebutted. i accept his evidence as true.

Patrick Matsiko wa Mucoori is a senior reporter with ***"Monitor"*** Newspapers. He was not an agent of the Petitioner. To that extent he should be regarded as one of the few truly independent witnesses for the Petitioner. He registered to vote at his home village Bihanga. He was there from 1st March to 13th March 2001. After voting on 12th March, 2001 he proceeded to Kanyarugiri, Nyamarebe sub-county, Ibanda Sub-District to cover the electoral process there in his duties as a journalist. On his way to Kanyarugiri Polling Station for the army he was intercepted by a soldier

in civilian clothes, who told him that nobody was allowed at that polling station, because it was a special area. All the same Mucoori managed to reach the polling station.

The presiding Officer, Charles Muchuguzi, was a soldier and teacher in Bihanga Barracks. When he asked the presiding Officer whether all the six candidates had their polling agents there, he replied that only the 1st Respondent's agents were present.

A man who was the 1st Respondent agent was standing near the basin, where voters ticked their ballot papers. The 1st Respondent's polling agent was carefully observing which of the six candidates' voters ticked. As voting progressed Matsiko noticed that people who had already voted did vote again. At this same polling station, many voters voted multiple times.

The chart does not show that the affidavit of Patrick Matsiko wa Mucoori is rebutted. I therefore accept his evidence as truthful. What happened in this polling station and others was in contravention of the instruction by the 2nd Respondent's Chairman Mr. Aziz Kasujja, contained in his circular letter of 22nd February 2001 addressed to all Returning Officers, to the effect that presiding Officers and Polling Assistants for each polling stations should be civilians.

The circular is headed ***"Polling stations for the Army"*** and attached as annex "A" to Lauis Otika's affidavit of 23rd March 2001 who was the National Coordinator for the Petitioner with overall supervision monitoring and coordinating the electoral process on behalf of the Petitioner.

Zeyi Patrick of Makuttu sub-county Bugweli Constituency, Iganga District, was the Petitioner's monitoring agent for Nonchwe Makondhwa and Busiro A and B polling stations amongest others. At 12.00 p.m. (the date not stated) he met the Presiding Officer and LC 1 Chairman distributing ballot papers to people whose names were not in the Register of Voters to cast votes and he saw them cast votes.

He also met a Cadre fl the area ordering the presiding Officer to allow all people whose names were not in the Register to vote without any restriction from anybody. Zeyi questioned why, because some had already voted. They stopped for about ten minutes but when the sub-county Chief arrived with the second Register, he ordered them to use both the old and the new Registers. They were used and voting continued with both Registers. Zeyi went to Busiro A and

B and Makandwa Polling Stations in Makandwa Parish. He found the same thing happening at those Polling Stations.

The Chart does not show that the affidavit of Zeyi Patrick was rebutted. His evidence therefore remains un- controverted. I accept it as true.

Mrs. Odong Margaret of Layibi Anywer, Pece Division, Gulu Municipality was the Petitioner's Polling agent at Barracks (O— O) Polling Station. In her affidavit, she said that an Army Major came and chased away the Polling assistants sent from the office of the 2nd Respondent. Soldiers voted without identification. The names in the Voters' Cards did not rhyme with the tribe and real age of the persons written on the Voters' Cards. When Mrs. Odong and another Polling agent tried to report about the abnormality in the voting process the Army Polling assistants reported to their Senior Officers in the Barracks who, as a result, harassed the Polling agents. The affidavit was based on knowledge and belief. Belief is irrelevant since the deponent spoke only of what she witnessed. The Chart indicates that Mrs. Odong's affidavit was rebutted by Pius Margaret Obol. However, Pius M. Obol's affidavit dated 1-4-2001, is relevant only to what one Joyce Bangomu alleged in her affidavit of 22-03-2O01. In any case Pius M. Obol deponed about what apparently happened at Pece Polling Station, another place, where she stayed as the 1st Respondent's throughout the day on 12-03-2001. Mrs. Odongo's evidence therefore remains uncontroverted, and I accept it.

Kedega Michael of Kabedo Opong Village, Bar Dege Division, Gulu Municipality was working as the Petitioner's Monitor in Nwoya County, which took him to Alero Polling Station outside the Barracks. He found about 50 soldiers who had Voters' Cards but their names were not on the Register of voters. When he tried to intervene, the soldiers told him that they had got orders from their superior who was a Major. Later he went to Paraa Polling Station where voting ended at 5.00 p.m. but started again at 7.30 p.m. and continued to 10.00 p.m. He discovered that the same soldiers he had found in Alero Polling Station were the same soldiers voting at Paraa Polling Station, led by a Lieutenant Peter. The affidavit was based on knowledge and belief, but belief is irrelevant since the deponent only spoke about what he saw. The Chart indicates that Kedega's affidavit is rebutted by the ***"Electoral Commission,"*** but it does not say by who in the Electoral Commission and where the rebuttal affidavit can be found. I accept Kedega's evidence.

On the evidence as a whole from all parties to the Petition, which evidence I have carefully considered I am satisfied and find that the Petitioner has proved paragraph 3(1)(J) of the Petition to the required standard. The* 2nd *Respondent's agents/servants, namely, presiding Officers and Polling assistants, with full knowledge that the voters concerned had already voted allowed them to vote more than once. This was an act of non — compliance with section 31 of the Act. The* 2nd *Respondent is accountable for the acts or omission of its agents/servants done in the course of their duty, which happened in this case. I shall consider the effect on the election of this non-compliance together with the effect of the other incidences of noncompliance.

Paragraph 3(1)(h) of the Petition

Voting before or beyond time allowed.

"3(1)(h) That contrary to section 29(2) and (5) of the Act the 2nd Respondent's agents/servants allowed voting before the official Polling time and allowed people to vote beyond the Polling time by people who were neither present at the Polling Stations nor in line of voters at the official hour of closing."

The 2nd Respondent's answer to this allegation is that:

"7. In reply to paragraph 3(1) (h) of the Petition, the 2" Respondent avers that neither itself nor its agents or servants allowed people to vote before or after official Polling time. Only people present at Polling Stations or those in the line of voters at the official closing time were allowed to vote out of time."

Section 29(2) of the Act provides:

"(2) At every Polling Station, Polling time shall commence at seven O'clock in the morning and close at five O'clock in the afternoon."

Sub-secti0n (5):

"(5) If at the official hour of closing the Polling in subsection (2) there are any voters In the Polling Station in the line of voters under sub-Section" (3) of section 30 who are qualified to vote and have not been able to close, the Polling Station shall be kept open to enable them to vote, but no person who is not actually present at the polling Station or in the line of voters at the official hour of closing shall be allowed to vote even if the Polling Station is still open when he or she arrives."

The Petitioner's learned Counsel did not make any submission on this ground of the Petition but merely filed a list of deponents who swore affidavits to support the allegation.

In his reply, Mr. Kabatsi also said little apart from referring to certain affidavits in support of, and in opposition to, this ground of the Petition. Musisi Francis, of Lugolole, Baitabongwe Sub-County, Mayuge District, was the Petitioner's Polling agent at Baitabongwe Sub-County Headquarters Polling Station. In his affidavit of 20-03-2001, he said that he arrived at the Polling Station at 6.00 a.m. only to discover that the voting exercise had already started in the absence of all other Polling agents for the different candidates. When the first booklet of ballot papers containing 100 leaves got finished, the Presiding Officer produced a second booklet which had only 23 ballot papers. The rest were missing. Only 23 ballot papers were displayed to the Polling agents from that booklet. When Musisi enquired, the presiding Officer told him that they had been removed and taken to another Polling Station.

The affidavit was based on knowledge and belief, but belief is irrelevant since the deponent related only what he saw. The Chart does not show that Musisi's affidavit is rebutted.

Tumusiime Enock said in his affidavit that he was the Petitioner's agent overseeing the operation of Polling agent for him in Kajara County, Ntungamo District. He was also a tallying agent. At 7.30 p.m. after the tallying exercise was completed one Moses Rinyerere brought information that at Polling Station Kayenre in Rwikiniro, voting was still going on. At about 11.30 p.m. the Returning Officer of Ntungamo District, Mr. Nshemereize, Tumusiime and six Police Officers proceeded to Ntungamo Social Centre following information that voting was still in progress. Reaching there, they found people still casting votes. They were casting votes for the 1st Respondent only although the Catholic Centre was not a Polling Station. At the center, the team

also found nine ballot boxes had been delivered from Ngoma, Rugarama, Kasugu, Kayonze, Kikoni, Kalungyere, Kabuigo, Rwebirizi and Rusinga.

When the Returning Officer asked the presiding Officer why he allowed voting at an ungazetted place, and beyond official time the latter responded that the Chairperson of the 2nd Respondent had extended the voting time to mid-night. Consequently, only the 1st Respondent's tallying agents signed the declaration of results form. Those of the other candidates did not. The affidavit was based on knowledge. The Chart indicates that the affidavit of Tumusiime Enock is rebutted by Nshemereza Topher, but there is no indication where the rebuttal affidavit can be found.

Moses Babikinamu, of Lwebitakuli, Mawogola, Sembabule District was Chairman of the Petitioner's Lwebitakuli campaign Task Force. Together with Kafero Anthony, he was also the Petitioner's Polling agent at Lwebitakuli Polling Station. He arrived at the Polling Station at 6.30 a.m. and found that people had already started voting. The presiding Officer who was also the 1st Respondent's campaigner, Oliver Karinkiza, wondered why Babikinamu was querying the voting before time. She simply told him to sit down and concentrate on what he was supposed to be doing. She showed him where to sit which was 5 meters away from the desk at which he should have sat. So Babikinamu was prevented from scrutinising Voters' Cards vis-à-vis the Register.

The affidavit was based on knowledge and belief, but belief IS irrelevant since the deponent said what he saw.

Babikinamu's affidavit was rebutted by Oliver Karinkiza. In her affidavit dated 2-4-2001, she said that she was the presiding Officer of Lwebitakuli Polling Station on 12-03-2001. She denied that she was a campaigner for the Respondent. At that Polling Station, voting started at 7.00 a.m. not 6.30 a.m. as Babikinamu alleged. Voting started in the presence of Byaruhanga Fredrick, Polling agent for the 1st Respondent and many others including Bakinga Monica. Babikinamu arrived at the Polling Station after 7.00 a.m- and introduced himself as the Petitioner's Polling agent, and Karinkiza showed him where to sit with other Polling agents, not 5 meters away. The effect of her affidavit is that Babikinamu fabricated what he said in his affidavit. It was, therefore, a pack of lies. There would appear to be no sensible reason, and Karinkiza does not suggest any, why Babikinamu should tell lies against her. On the other hand; it would be

unthinkable for her to admit having committed electoral malpractice as a presiding Officer which Babikinamu's allegations amounted too. In the circumstances, I would accept Babikinamu's evidence and reject that of Karinkiza.

I have already referred to the affidavit of Kedega Michael in another context. One of the things he said therein is that after voting ended at 5.00 p.m. voting was restarted at 7.30 p.m. and continued until 10.00 p.m.

As I have said before fl this judgment, the Chart indicates that Kedega's affidavit was rebutted by the "Electoral Commission." it does identify who in the Electoral Commission and where the rebuttal affidavit can be found. Kedega's evidence, therefore, remains uncontroverted.

I have considered the evidence from all sides of the Petition regarding this ground of the Petition. I am satisfied that the Petitioner has proved it to the required standard, and I find that in some Polling Stations, presiding Officers and/or Polling assistants, as agents/servants of the 2nd Respondent commenced polling before the stipulated time and closed polling beyond the official time, in contravention of section 29(2) and (5) of the Act. The effect of this noncompliance on the result of the election shall be considered together with the effect of other incidences of noncompliance.

Paragraph 3(3) (i) of the petition stuffing ballot boxes with ticked ballot papers.

"3(3) (i) That contrary to section 30(7) of the Act, the 2nd Respondent's agents/Servants' in the course of their duties, allowed commencement of the Poll with ballot boxes already stuffed with ballot papers and said boxes in full view of all present to ensure that they are devoid of any contents."

The 2 Respondent's reply to this ground of Petition that:

"8. In reply to paragraph 3(1)(i) of the Petition, the 2nd Respondent avers that it never allowed commencement of the poll, with ballot boxes already stuffed with ballot papers in full View of all presents as alleged."

The provisions of section 30(7) of the Act are that:

"30(7) The presiding Officer at each polling Station shall, at the commencement of the Poll and in the full View of all present open the first ballot box, turn it upside down with the open top facing down to ensure to the satisfaction of every one presents that the ballot box is devoid of any contents and after that place the ballot box on the table referred to in paragraph (c) of sub-section (j)."

The Petitioner's learned Counsel did not make submissions under this ground of the Petition, but they filed in Court a list of witnesses and their affidavits for purposes of proving the ground.

In his submission, Mr. Kabatsi said that he had not seen any affidavits in support of this ground, proving when and where the provisions of section 30(7) of the Act were not followed. Alternatively, if there were such affidavits they were rebutted by affidavits opposing the Petition. He then criticized some of the affidavits filed to support this ground of the Petition.

Abdurahman Mwanja's affidavit is indicated as one of those filed in support of this ground of the Petition. I have already referred to the affidavit in another context. He said in his affidavit of 2-3-2001, that as Chairman of the Petitioner's Task Force for Kigulu South Constituency and Bulamogi Sub-/County he visited Iganga Town Council Polling Station to ensure that voting was free and fair. He saw a motor vehicle Hilux Double Cabin No. UG. 0095B bring ballot boxes and ***"plant"*** them at Iganga Hospital. The ballot boxes already had ballot papers in them. Mwanja approached the people who brought the ballot boxes and they were forced to leave the area. The boxes were shifted to Kagekobo Primary School which had two Polling Stations, A and B. He followed them with his motor cycle, and he insisted to check the ballot boxes but they refused. Since they were armed, they overpowered Mwanja and his colleagues and took the boxes away with one of the Petitioner's agents, who later jumped off the vehicle. At 3.30 p.m. they returned, picked up the Petitioner's agent under arrest, and took him to Iganga Police Station. The arrested agent was released on Police bond of Shs. 50,000 =, and was bound to report back on 29-03-2001.

Ismail Kyeyago rebutted Mwanja's affidavit. In his affidavit of 4-4-2001, Kyeyago said that he was the Chairman of LC lll, Iganga Town Council and of the Movement in Iganga Town Council. He was also Chairman of the 1 Respondent's Task Force in Iganga Town Council. He

said that Mwanja's affidavit was false because he never ordered any persons to vote as alleged by Mwanja. Ismail Kyeyogo's affidavit did not refer to Mwanja's allegation about stuffed ballot boxes, which evidence, therefore, stands uncontroverted.

Ndifuna Wilber of Busia Town Council, Busia District, was an Electoral Monitor for the petitioner in Busia Town. In his undated affidavit, he said that in the course of his movements he met a man called Bazilio, a beer seller at Marach ***"b"*** area, with two girls in his bar. On information that he had bundles of ballot paper he was issuing to people Ndifuna went to him with two plain clothes Police Officers, and asked Bazilio that he (Ndifuna) was a voter and wanted to go and vote for the 1st Respondent. This was a trick, which worked. Bazilio came out with a bundle of ballot papers marked Voters' Cards and Voters' Register. Bazilio gave Ndifuna one Voter's Card in the name of Jogo Joseph and ticked that in the Register. The two girls were also going out with ballot papers they had obtained from Bazilio. Police Officers, whom Ndifuna had tipped, came and arrested all of them, including Ndifuna. Later the same day, the suspects were released from Police custody, allegedly on orders of Busia District Officials. The affidavit was based on knowledge and belief, but since what Ndifuna said was what he witnessed, belief was irrelevant. The affidavit appears to be undated but the date of 22-03-2001, is written above the stamp of the Chief Magistrate of Tororo, before whom the affidavit was apparently sworn. That date appears to be adequate for the validity of the affidavit.

The Chart does not show that Ndifuna's affidavit is rebutted. It therefore, remains uncontroverted I accept the evidence.

I have already referred to the affidavit of Moses Babikinamu in another context. He said, inter alia, that when Hon. Sam Kutesa, MP appeared at Lwebitakuli Polling Station, at 10.00 a.m. the M.P. asked the presiding Officer, the number of people who had by then voted. The presiding Officer, Oliver Karunkiza replied, 300, but Babikinamu had counted only 52 to have voted. Between 7.00 a.m. and 5.00 p.m. he recorded the number of people who had cast their votes. They were 160. After counting the cast ballot paper at the end of the Poll, the Presiding Officers declared that the votes were 510. Babikinamu disputed that figure, but the 1st Respondent's agents threatened him and his colleagues saying that they were going to be arrested. The

presiding Officer got annoyed with Babikinamu and told him to sign the documents without reading through. He signed and left immediately for fear of his life.

Oliver Karunkiza, the presiding Officer at Lwebitakuli rebutted Babikinamu's affidavit. She denied that she was the 1**st** Respondent's campaigner during the Presidential Election. She said that Polling started at 7.00 a.m., not at 6.30 a.m. as Babikinamu alleged, in the presence of Byaruhanga Fred Olwick, Polling agent for the 1st Respondent and many others. On that day Babikinamu arrived after 7.00 a.m. and introduced himself, and she did not make him sit at a distance as he alleged. The M.P. for Mawogola, Hon Sam Kutesa came to the polling Station in the afternoon; not at 10.00 a.m. as alleged. The total number of votes cast was 510. This was counted in the presence of Polling agents for both candidates. Babikinamu willingly signed the declaration of results and tally sheets together with Kafero Anthony, Byaruhanga Fredrick, Polling agents' and Nabakoza Joyce and Bekinga Munica, Polling assistants. She did not threaten Babikinamu with arrest. The rebuttal was therefore, a complete denial of what Babikinamu alleged Oliver Karinkiza as the presiding Officer did. She did not say why he should have made up such serious lies against her if the allegation were lies. It would be difficult to imagine credible reasons for such a complete fabrication of what did not happen. Further, Karinkiza would not be expected to admit to have committed such electoral malpractices as a Presiding Officer. In the circumstances my view is that it is Karinkiza's denials which were false, not Babikinamu's account of what happened. I accept the latter's evidence as true.

Imoni Steven, of Mella Village, Kwasa Sub-County, Tororo District was a campaign agent for the Petitioner for Mella Parish. In his affidavit of 22-03-2001, he said that, while he was at Mella Primary School Polling Station, he saw the presiding Officer Arthur Etyang Osilo issuing more than one ballot papers to some voters especially members of the clan of the MP — Tororo County, Hon. Paul Etyang, whom Imoni knows very well since they are his relatives. He pointed this out to the polling officials and Polling agents, but the presiding Officer ignored his concerns. Before voting started, the LC3 Chairman Kwapa sub-County, arrived at the Polling Station, called aside the presiding Officer and the Polling agents of the 1st Respondent and had a long discussion with them. At the close of poll, the presiding Officer convinced all the Polling agents to sign declaration forms before the votes were tallied. Before the votes could be counted, the LC3 Chairman, Mr. Alfred Obore returned to the Polling Station at 6.00 p.m. with a gun, cocked

it and ordered everybody to disappear. All ran away except the Polling officials. After about 30 minutes Imoni and some other people gained courage and returned to the Polling Station, and found that the votes were not tallying, because 750 ballot papers were recorded when the poll began and 525 voters cast their votes, 160 ballot papers had not been used, leaving 65 ballot papers unaccounted for. The ballot papers unaccounted for had been ticked in favour of the 1st Respondent. Thereafter a disagreement ensued between the Polling agents. The Petitioner's Polling agents wanted the 65 votes destroyed. The CID Officer of Malaba present held on to the 65 ballot papers. The O.C., CID, Malaba was called. He purported to arrest the presiding Officer. The following morning Imoni found the presiding Officer in Malaba Town, out of custody.

The affidavit was based on knowledge and belief. Belief appeared to be irrelevant since what Imoni said in it was what he witnessed.

Alfred Obore, Chairman LC3, Kwapa Sub-County was also the Chairman of the 1st Respondent's Task Force for Kwapa. In his rebuttal affidavit dated 3-4-2001, he said that what Imoni Steven said in his affidavit was false. On 12-03-2001, he visited Mella at about 7.30 a.m. where voting had already started, not before as alleged. While there, he called his agents aside to find out if they had any problem and to give them lunch allowance. I think what Obore called ***"my agents"*** were the 1st Respondent's agents. He said that he did not call the presiding Officer aside for a discussion or at all, because voting was already in progress, and he was issuing ballot papers to voters in the line. On his way back to Malaba, he passed by Mella Polling Station at 7.00 p.m., where he found a group of people arguing. The O.C. Police Malaba came by and advised that due to darkness, the ballot box should be carried to Malaba Police Station for purposes of counting and tallying the ballots because of insufficient light. He did not follow the ballot boxes; nor did he participate in the counting of votes, or tallying as alleged. He did not have a gun, nor order anybody to disappear as alleged.

I find that Obore's affidavit is consistent with that of Imoni in certain particulars for instance presence of the O.C. Malaba Police Station. Imoni called him O.C, CID. The two affidavits differ with regard to what Obore allegedly did, which he says was false. Obore says nothing about the excess 65 ballot papers, about which Imoni went on details. There would appear to be no sensible reason, and Obore does not suggest any, why Imoni would make up all he said in his

affidavit. On the other hand it would be unthinkable for Obore to admit the criminal acts which Imoni alleged against him. I would therefore, believe Imoni's evidence and reject Obore's, which I do.

Tukahebwa Kenneth was from Kyenzaza, Kichwamba, Bunyaruguru, Bushenyi District. In his affidavit of 21-03-2001, he deponed that he was a Polling agent for the Petitioner at Kyenzaza Trading Centre Polling Station. At about 2.00 p.m. on Polling day the driver of Watuwa Sikola alias Maama Chama, by the names of Ntare Banyenzaki Abdu, arrived at the Polling Station. Watuwa Sikola is employed in State House and was a vigorous Campaign Manager for the **1st** Respondent. At about 2.00 p.m. the said Banyenzaki tried to stuff several ballot papers into the ballot box. Tukahebwa and his colleague protested. A home guard was called and he arrested Banyenzaki with the ballot papers. Within five minutes Watuwa Sikola alias Mama Chama arrived and took away her driver and the home guard. The latter returned, disarmed.

Kyomuhangi Allen, sister in law of Sikola was caught red handed with 13 ballot papers all ticked in favour of the 1st Respondent at the same Polling Station, while trying to stuff them into the ballot box. The same were removed from her and handed over to the Monitor who in turn handed it over to the coordinat0r, and they were taken to Bushenyi Police Station, where a case was opened vide SD 39/12/3/2001, CRB. 107/2001. The affidavit was based on knowledge.

Watuwa Sikola, of Kyambura Bunyaruguru Bushenyi District, rebutted Tinkahebwa's affidavit. In her rebuttal affidavit of 3-4-1001, she said that she served on the District Task Force of the **1st** Respondent. On Polling day she was coming from Monitoring election in Kichwamba and arrived at Kyenzaza Trading Centre in the late afternoon. She got information that her driver Abdu Banyenzaki had had a scuffle with a vigilante. At the Polling Station she and LC3 Chairman Frank Mubangazi found the vigilante drunk and armed, near the Polling Station. The Chairman disarmed the vigilante and summoned the LDU Commander to deal with the vigilante for being drunk and carrying a gun near the Polling Station. It is not true, as Tukahebwa alleged, that she rescued Abdu from arrest or that she disarmed a home guard. Nor is true that Allen Kyomuhangi is her sister — in — law. Her late husband was from Mbale and could not have had a sister with that name, which is a name indigenous to Western Uganda. I find that the affidavit of Watuwa and that of Tukahebwa agree in certain particulars except with regard to the alleged

possession by Watuwa's driver and Kyomuhangi of ticked ballot papers, about which Watuwa did not refer to in her affidavit. She does not mention anything about ballot papers at all. There would appear to be no sensible reason for Tukahebwa to fabricate the detailed account of what he said happened. His evidence is preferable to that of Watuwa.

Abdu Ntare Banyenzaki also rebutted Tukahebwa's affidavit. In his affidavit of 3-4-2001, he said that on Polling day, his task was to transport the sick after they had voted at Kyenzaza to their respective homes. He did not stuff or attempt to stuff ballot papers into a ballot box as alleged by Tukahebwa. It is not true that he was arrested by a home guard with ballot papers. On the contrary, he was accosted by a drunk and armed vigilante near the Polling Station, who wanted to know who he was and what he was doing there. As a result he went home where Mrs. Watuwa Sikola his employer, found him. She proceeded to the polling Station. It is not true that he was arrested by a home guard with ballot papers or that Mrs. Watuwa rescued him (Banyenzaki) as alleged by Tukahebwa. Banyenzaki's evidence is simply a denial of Tukahebwa's evidence. If the denial is true, then Tukahebwa must have invented what he said in his affidavit. It would appear to be unlikely that such detailed evidence would be invented. I do not accept Banyenzaki's denial. I accept Tukahebwa's evidence as true.

Bangirana James, Asp. and O.C., CID. in Bushenyi District also rebutted Tukahebwa's affidavit. In his rebuttal affidavit of 1-4-2001, he said that in preparation for the election Police Mobile Units comprising officers and men were deployed in every route in Bushenyi District, well equipped with transport and communication which made frequent checks at all Police Posts and polling Stations. All election related offences were reported to Police Posts and transmitted to the mother Police Station at the District level. A tabulated Chart of such reports was annexture ***"A"*** to Bangirana's affidavit. This evidence in my view does not rebut Tukahebwa's affidavit. The police mobile units were not stationed at Kyenzaza Polling Station at all times. On the contrary the tabulated Police Chart reported electoral offences corroborates .Tukahebwa's evidence. The Chart shows No. 15, SD 39/12/3/2001. CRB 107/2001 (the Police reference mentioned by Tukahebwa) as reported by Rev. Fr. Birungi. Tukahebwa said that the ballot papers were handed over to a Monitor who handed them over to a co-ordinator. He did not say whether Rev. Fr. Birungi was any of these. It is well known that election was monitored by a Christian Coalition.

Presumably Rev. Fr. Birungi was a member of that group. Tukahebwa's evidence, therefore, still remains credible.

On the evidence available on this ground as a whole, which I have carefully considered, I am satisfied that the Petitioner has proved to the required standard, and I find that at the commencement and during the course of polling, the 2' Respondent's agents/servants1 namely the Presiding Officers allowed ticked ballot papers to be stuffed into ballot boxes, contrary to section 30(7) of the Act.

Paragraph 3(1) (o) of the Petition — under-age voting.

*"**3(1)(o) That contrary to section 19(1)(b) of the Electoral Commission Act, the 2nd Respondent's agents/servants in the course of their duties allowed people under 18 years of age to vote."***

The 2nd Respondent's reply to this allegation was pleaded as follows:

"14. In reply to paragraph 3(1)(o)of the Petition the second Respondent denies that people below the age of 18 years voted."

Section 19(1) (b) of Act 3/97 provides:

"19(1). Any person who
(a) …….
(b) is eighteen years of age or above, shall apply to be registered as a voter in a parish or ward where that person
(i) Originates from;
(ii) Resides;
(iii) Works in gainful employment."

The Petitioner's learned Counsel did not make any, submission on this ground of the Petition, but filed a list of relevant witnesses and their affidavits.

In his submission on this ground0 Mr. Kabatsi criticized the affidavit of Kirunda Mubarak, one of the Petitioner's witnesses, saying that the affidavit is useless, because Kirunda does not say how many such voters were and the criteria he used for assessing their age. There was no proof that they were under age. Mr. Kabatsi further said that Kirunda's affidavit has been rebutted by Balaba Dunstan, who was the Ag. Returning Officer of Mayuge District. I shall return to this rebuttal affidavit shortly.

I have already referred to the affidavit of Sulaiman Miiro in another context as the Petitioner's monitoring agent in Bukooli North constituency, he went to Bus Park ***"A"*** Polling Station. Soldiers from the Bugiri RDC'S Office came, threatening and forcing young children below 18 years of age to vote. Miiro and others tried to object but they were-over powered by the soldiers, who were armed. Miro's affidavit is rebutted by that of Ms. Nava Nabagesera, the RDC of Bugiri District. I have already evaluated this rebuttal evidence and rejected it.

I have already referred to the affidavit of Patrick Matsiko Wa Mucoori in another context. He was a Senior Reporter with ***"The Monitor News Paper."*** He is one of the few witnesses for the Petitioner who was not his agent. He may, therefore, be regarded as an independent witness. In the present context, he said that he saw a young girl of about 12 years of age with a Voter's Card coming to vote. Mucoori asked the presiding Officer about this. The reply was that the girl was voting for her father, who was reported to be sick in the Barracks. This was a special area Army Polling Station, Kanyarugiri 07 Polling Station. The Chart does not show that Mucoori's affidavit is rebutted. His evidence, therefore, remains uncontr0vert

Kirunda Mubarak is one of the Petitioner's witnesses to whose affidavit I have already referred in another context. He said that at Mpugwe Polling Station in Mavuge District he found young children below the age of 18 years voting. When he asked why, he was told that the children were of age1 yet according to Kirunda, they were only 14 years old. The LC1 & II Chairman got hold of him and forced him out of the Polling Station because he was asking questions. The Chart indicates that Kirunda's affidavit is rebutted by Kedres Wamulongo, on page 282, but page 282 of the 1st Respondent's volume of affidavits has the affidavit of one Emoding Anthony and

the 2nd Respondent's volume does not reach page 282. I am therefore, unable to lay my hands on Kedres Wamuolongo's rebuttal affidavit.

As Mr. Kabatsi correctly pointed that Kirunda's affidavit was also rebutted by Balaba Dunstan, the Ag. Chief Administrative Secretary and the Returning Officer, of Mayuge District. In his rebuttal affidavit of 2-4-2001, he said that he never received any report about under age persons voting at Mpugwe Polling Station. This means that the GAO was not at Mpugwe Polling Station. This is to be expected, because as the Returning Officer his function covered the whole of Mayuge District. He would not expect to supervise closely what happened at this or any other Polling Station. The fact that he did not receive any report does not necessarily mean, in my view, that Kirunda's allegation about voting by under age children did not happen. Kirunda said that the children being allowed to vote were either 14 years or below. Kirunda was not cross-examined on this. So, his evidence must be regarded to have been admitted by the opposite party not withstanding Mr. Kabatsi's contention, which is not evidence.

Ssentongo Elias is another one of the Petitioner's witnesses to whom I have already referred. In his affidavit of 21-03-2001, he said that on 12-03-2001, he went to Karegyeya Polling Station in Ntungamo District. Soldiers allowed children who were clearly under the age of 18 years to vote for the 1st Respondent. Ssentongo's affidavit is rebutted by Muhoozi Tom, but the rebuttal affidavit does not refer to Ssentongo's allegation of voting by under age children. Accordingly his evidence in that regard remains uncontroverted.

Byaruhanga Yahaya, to whose affidavit I have considered in another context, said that at March ***"D"*** Polling Station in Busia Town Council area, 6 under age children were allowed to vote. His attempts to stop them were ignored by the presiding Officer. Byaruhanga'5 affidavit IS not indicated in the Chart to have been rebutted. Accordingly his evidence stands uncontroverted

> ***After considering available evidence on this ground as a whole, I am satisfied that the petitioner has proved to the required standard, and I find, that in some Polling Stations, the 2nd Respondent's presiding Officers allowed persons under the age of 18 years to vote and did vote, contrary to section 19(1)(b) Act 3/97.***

I shall consider the effect of this noncompliance together with the effect of other incidences of non-compliance.

P***aragraph 3(1) (q) of the Petition - Allowing people without Voters' Cards to***

> ***"3(1) (q) That contrary to sections 29(4) and 34 of the Act, the* 2nd *Respondent and its agents/Servants the presiding Officers in the course of their duties allowed people with no valid Voters' Cards to vote-"***

The 2nd Respondent made a reply to this ground of the Petition **fl** its Answer as follows:

> ***"15. In reply to paragraph 3(1) (q) of the Petition, the 2nd Respondent avers that it allowed people whose names appeared in the Voters' Register but had not been able to obtain Voters' Cards to vote after being properly identified, and that the number of such people was small and insignificant and the 2nd Respondent did this lawfully in exercise of powers and functions given it by law-"***

The 2nd Respondent did not state in his reply what law permitted it to allow voters with their names on the Voters' Register but without valid Voters' Cards to vote.

Section 29(4) of the Act provides:

> ***"29(4) Any Person registered as a Voter and whose name appears in the Voters' Roll of Polling Station and who holds a valid Voter's Card shall be entitled to vote at a Polling Station."***

Section 34(1) of the Act provides:

"A voter wishing to obtain a ballot paper for the purpose of voting, shall produce his or her Voter's Card to the Presiding Officer or Polling assistant at the table referred to in paragraph (a) of sub-section (5) of section 30."

As far as my notes of the Proceedings show, the Petitioner's learned Counsel did not specifically submit on this ground. Nor did Mr. Kabatsi in reply, unfortunately, because if he made a submission in reply, he would have referred to the relevant law (if any) on which the 2nd Respondent allegedly relied.

The Petitioner's learned Counsel filed a list of deponents and their affidavits relevant to this ground of the Petition.

Zeeyi Patrick, of Mukutu Sub-County, Iganga District said in his affidavit of 20-03-2001 that he was the Petitioner's monitoring agent for Nondoe, Makandwa and Busimo A and B Polling Stations. At 12.00 noon, he met the Presiding Officer (he does not say of which Polling Station) and the LCI Chairman distributing ballot papers to people whose names were not on the Register of Voters to cast votes and he saw them cast votes. He met a Cadre in the area also ordering the Presiding Officer to allow all people whose names were not on the Register to vote without restriction from anybody. When Zeeyi questioned why this was happening, they stopped for about ten minutes, but when the Sub-County Chief arrived with the second Register, he ordered them to use both the old and the new Registers and voting continued with both Registers. When he went to Polling Stations in Busimo A and B, he found the same problems. I find contradictions in this witness' evidence. If people whose names were not in the Register were being allowed to vote, why was a Register necessary and used when the Sub-County Chief arrived with a second Register? In the circumstances, I do not accept Zeeyi's evidence in this regard.

Bwambale Solomon Kisaka, of Habitat Kamaiba, Kasese Town, was a Polling agent for the Petitioner at Kamaiba Primary School Polling Station. He saw a person calling himself Karuhanga John, holding a card in those names, was allowed to vote although his name did not appear on the Voters' Register. Maate Joseph, also holding a Voter's Card also voted although his

name did not appear on the Voters' Register. The Chart shows that Bwambale's affidavit is rebutted by Grace Maiso, but it is not shown where the rebuttal affidavit can be found. This evidence shows that people with valid Voters' Cards but whose names were not in the Register were allowed to vote, which the 2nd Respondent has said it was authorized to do by law.

I have already referred to Lucia Naggayi's affidavit in another context. At Budimbo Polling Station, Rwansama and Naggayi were informed by the Petitioner's agent that many soldiers, whose names were not on the Voters' Roll, were allowed to vote and did vote. David Kkeeya, of Kateera Parish, Bukomero, Kiboga District, was the presiding Officer at Bukomero A — M Polling Station. In his rebuttal affidavit of 4-4-2001, he said that Lucia Naggayi, was the Petitioner's election Monitor where he was presiding Officer. He denied that the several electoral malpractices alleged by Naggayi occurred at the Polling Station. Lucia Naggayi did not give the source of her information. Her evidence was therefore hearsay, and inadmissible.

Baguma John Henry was the petitioner's electoral Monitor for Bukonjo County, Kasese District. In his affidavit of 20-03-2001, he said that on 12-03-2001, the RDC in charge of Bukonjo County, one Aggrey Mbomi went with a lorry full of armed soldiers to Munsana Polling Station and ordered the Presiding Officer to allow all the soldiers to vote. He handed to the presiding Officer a parcel allegedly containing names of the soldiers. Presiding Officer already had his Voters' Register before the RDC brought his. Baguma protested but he was overpowered after he had been threatened with death by a soldier in charge of operations at Nyabirongo Army Battalion headquarters. He noted that army men who were voting at Nyabirongo Army Barracks were transported to Rwenghuyo and Kisinga Trading Centre Polling Station A, where they voted again. When Baguma pointed this out to the presiding Officer at those two polling stations, he was chased away by one Major Mawa, who threatened to kill Baguma if he continued with his ***"nuisance about the soldiers voting from many polling stations".***

The Chart shows that the affidavit of Baguma is rebutted by Mumywami Johnson on page 270, but page 270 contains the affidavit of Achaga Safi which is irrelevant to Baguma's affidavit. Aggrey Mwami the Deputy Resident District Commissioner of Kasese, based at Bwera, rebutted Baguma's affidavit. In his rebuttal affidavit of 2-4-2001, he said that the affidavit of Baguma

contains false allegations against him Mwami e denied that he went with a lorry full of armed soldiers and ordered the presiding officer to allow them to vote. Nor it is true that he handed over a list to the presiding officer as alleged by Baguma. On Polling day he moved around to ensure that security was alright. He was not traveling in a lorry and he had no soldier's in his company. He never entered any polling stations. It is therefore false allegation that he ferried soldiers to the polling stations and ordered the presiding Officer to allow them to vote. He never saw any lorry carrying soldiers.

According to what Mwami's rebuttal affidavit means, all that Baguma said in his affidavit was fabricated. But he does not suggest why Baguma should invent such serious and detailed lies against him. Due to his office, Mwami would not be expected to admit that as a Deputy R.D.C he committed such electoral offences or malpractice. In the circumstances, it is his denial that I find to be false. I accept Baguma's evidence as true.

Major Mawa Muhindo also rebutted the affidavit of Baguma. He was stationed at the 13th Battalion in Bwera. He said that he did not go to Rwenjuhya and Kisinga Trading Centre as Baguma alleged. The allegation by Baguma that he (Muhindo) chased away and threatened to kill Baguma never took place and it is completely false. Again, according to Muhindo's affidavit in rebuttal, all that Baguma said in his own affidavit is a fabrication. But he did not say why Baguma should have invented such false stories against him. Major Muhindo would not be expected to admit having committed the electoral and other offences which Baguma alleged against him. It is to be expected that he old deny them. In my view, it is the Major's evidence which is false, not Baguma's evidence, which I believe to be true.

Bwambale Kasinini, of Kirembo Village, Kagando, Kisinga, Kasese District, was a Polling agent for the Petitioner at Kirembo polling Station. He said in his affidavit that the ballot box arrived at 12.00 noon instead of 7.00 a.m. Soldiers came looking for their Register of Voters, but it was not there. The Soldiers left on a hired motor vehicle and returned with a Register upon which 62 of them voted. It was a separate Register from the one civilians used at the Polling Centre. The affidavit is based on knowledge and belief. Belief is irrelevant because Bwambale spoke of what

he saw. The Chart does not show that Bwambale's affidavit is rebutted. The evidence therefore, stands uncontroverted.

Magumba Abdu was the Petitioner's Polling agent at Munyonyo Muslim School Polling Station. He deponed in his affidavit that out of nine ballot paper booklets one of them had only 10 ballot papers. He was informed by the Presiding Officer that the booklet had been handed over to him in that form. Thereafter people whom Magumba knew and whose names he listed in his affidavit did not have their names in the Voters' Register and had no Voters' Cards but they were allowed to vote on the instructions of the area LC5 Chairman, one Abubaker Ikoba. Magumba and other Polling agents, except the ones for the 1st Respondent, resisted the malpractice in vain. They were forced to sign the declaration of results form by army men who had been summoned by the said LC5 Chairman.

Mainogovu Jowali rebutted Magumba's affidavit. In his rebuttal affidavit of 2-4-2001, he said that he was the 1st Respondent's Polling agent at Mioni Muslim School, which he said Magumba must have meant when he referred to Munyonyo Muslim School. The Polling agents, including Mugumba verified the ballot papers and found that only one out of 9 booklets had less than 100 ballot papers. All this tallied with the Packing list in the ballot box. At no time did any army man come to the Polling Station and no person whose names were not on the Voters' Register or who had no valid Voter's Card was allowed to vote. The whole voting exercise went on freely and fairly and was endorsed by all Polling agents by willful signing of the declaration forms. Mainogovu does not mention Abubaker Ikoba, the LC5 Chairman whom Mugumba accused of giving instructions to allow thirteen people whose names were not on the Voters' Register to vote. Nor did he suggest any reason why Mugumba should have fabricated what he said in his affidavit, including inventing names of thirteen people out of the blue. In the circumstances, I do not believe Mainogovu's denials. In my view, they are false. I find Magumba's evidence preferable and I accept it.

I have already referred to the evidence of Musisi Francis in another context. He said further that at Baitambogwe Sub-County Headquarters Polling Station, Yasin Muyinda, Mbowa, Richard Basi, Waiswa John, and others whose names Musisi could not be ascertained, were allowed to

vote when their names were not on the Register. The affidavit was based on knowledge and belief. Belief is irrelevant since Musisi spoke of what he witnessed.

The Chart does not show that Musisi's affidavit was rebutted. His evidence, therefore, stands uncontroverted, and I accept it.

I have already referred to the affidavit of Abdurahaman Mwanja in another context. He further said that at around 4.00 p.m. the Health Council Medical Officers and the Mayor of Iganga, Ismail Kyeyago, ordered those who had old Voters' Cards to vote and those who had cards but whose names did not appear on the list of Voters' Register to vote and they voted. He further saw that in Bulamogi Sub-County, at Kasolo Mosque Polling Station one Councilor called Adam Wambuzi gave children (below 18 years) Cards to go and vote and told them that ***"go and vote Museveni or the one who has got the hat."*** The 1st Respondent election poster pictured him with a hat. At Walugogo Primary School Polling Station, students-teachers who had registered in 1 996, when they were at Iganga Teachers' College and Iganga Technical and whose names came back in the Register yet they had completed their studies and gone away, their Cards were given to other people who used them to vote and voted. At Budwege Primary School Polling Station, the area of the Vice President of Uganda, "soldiers in her company were allowed to vote yet they were not registered voters at that Polling Station."

Ismail Kyeyago rebutted the affidavit of Abdurahaman Mwanja in another context. He is the LCIII Chairman — Iganga Town Council, the Chairman of the Movement in Iganga Town Council and Chairman of the 1st Respondent's Task Force in Iganga Town Council. In his rebuttal affidavit he said that Mwanja's affidavit was false. He denied that he ever ordered any person to vote as Mwanja alleged or at all. It was not part of his duties and he had no power to do as it was alleged. He said that he monitored all the Polling Stations in Iganga Town Council, and he confirmed that the election in his area of jurisdiction was freely and fairly conducted. The same reasons I gave for rejecting Kyeyago's rebuttal evidence earlier in this judgment apply to the instant denial of what Mwanja said Kyeyago did in this connection. I also accept Mwanja's evidence in this regard.

The affidavit of Mrs. Odong Margaret has already been considered earlier in this judgment. It is also relevant to this ground of the Petition. In the Chart it is indicated as rebutted by Pious Margaret Obol, but Obol's rebuttal affidavit is not relevant to Odong's affidavit. It rebuts what one Joyce Bongomu had alleged against Obol that she distributed money to voters. In the circumstances, Odong's affidavit in this regard, stands uncontroverted, and I accept it as true. What I have said about the affidavit of Mrs. Odong Margaret equally applies to the affidavit of Kedega Michael under this ground of the Petition.

The 2nd Respondent's answer to the ground of Petition under consideration, admitted that it allowed people whose names appeared in the Voters' Register but had no Voters' Cards to vote after proper identification. The 2nd Respondent contends that it did this because it was authorized by law to do so.
However, it did not indicate what law it was. My view is that the 2nd Respondent is under a duty to cite the law which justifies its action in this regard.

In a ***"Press Release"*** dated 11-03-2001, the 2nd Respondent stated:

> ***"Although the Commission has been issuing Voters' Cards since the lst March, 2001, complaints are still being received that some Voters have not received their cards and yet their names appear on the Voters' Register.***
> ***The Constitution gives a right to every Ugandan Citizen of 18 years or above to be registered and vote. The Commission therefore wishes all to note that all Citizens of 18 years or above whose names appear on the Register but have not received their Cards but can be identified by the Polling Officials and Candidates' agents at their respective Polling Stations, should be allowed to vote."***

As I understand them the effect of the combination of sections 29(4) and 34(1) of the Act, is that a Citizen of Uganda wishing to vote and whose name is in the Register of Voters, must produce his or her Voter's Card to the presiding Officer of the Polling Station at which he or she wishes to vote. The requirement for a valid Voter's Card is mandatory. That is the only way in which a person can exercise his or her right to vote under article 59 of the Constitution. The 2nd

Respondent by its press release, I have referred assumed that it was thereby implementing the Constitution. With due respect, I think that it was mistaken. It was acting in contravention of sections 29(f) and 34 of the Act.

> ***The evidence I have evaluated under this ground of the Petition has proved that the 2nd Respondent contravened the law in theory as well as in practice. In the circumstances, I am satisfied that the Petitioner has proved to the required standard and I find that contrary to sections 29(4) and 34 of the Act, the 2nd Respondent allowed some people with no valid Voters' Cards to vote and they voted.***

Paragraph 3(1) (k) of the Petition: Intruders into 2nd Respondent's offices.

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> ***"(k). That Contrary to the provisions of section 12(1)(f) and section 18 of the Electoral Commission Act, the 2nd Respondent failed in its Statutory duty of properly compiling and securely maintaining the integrity of the National Voters' Register and Rolls when it (the 2nd Respondent) failed to take steps to ensure that intruders were prevented from tampering with the Voters' Register and Rolls and voting materials in its possession as it happened a few days before the 2nd Respondent completed compiling the Final Voters' Register on 10th March, 2001."***

In its answer to the Petition, the 2nd Respondent's reply to this ground of Petition is that:

"10. In reply to paragraph 3(1)(k) of the Petition, the 2nd Respondent avers that no intruders ever tempered with the Voters' Register and Rolls or with voting materials in its procession for compiling of the Final Voters' Register as alleged or at all"

Section 12(1) (f):

"12(1) The Commission shall, subject to, and for the purposes of carrying out its functions under Chapter Five of the Constitution and this Act have the following powers

(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this Act or any other law."

Section 18 of Act 3/97 has already been reproduced earlier in this judgment.
The Petitioner's learned Counsel did not make any submission on this ground of the Petition. Nor did the 2nd Respondent submit in reply. The ground was not proved by any affidavit evidence. Nor did the 2nd Respondent adduce any evidence in opposition.

In the circumstances, I find that this ground of the Petition was not proved at all. It must therefore, fail.

Paragraph 3(1) (I) of the Petition — Arrest of Hajati Miiro:
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> ***"(1) That Hajati Miiro a Member of the Respondent failed to live up to the Oath of Office as a result of which she was arrested in connection with electoral offences. Hajati Miiro, a Member of the 2nd Respondent was arrested and detained by the Police and charged in Court with two other Seminar Officers in charge of the Data Centre of the 2nd Respondent for being found to have indulged In practices amounting to electoral offences contrary to section 70 of the Act. Thus seriously undermining the whole electoral process."***

The 2nd Respondent's answer to this ground of the Petition is that:

> *"**11. In reply to paragraph 3(1) (l) of the Petition, the Respondent avers that Hajati Miiro and two other employees of the 2nd Respondent were arrested and charged in Court and their cases have not been finalized. Furthermore, there is no evidence that the Commission of the alleged offences if any, affected the results of the election substantially as alleged or at all and in any event this matter is subjudice.***

Section 70 of the Act creates a long list of offences under the Act. It is not necessary to reproduce the long list of offences in this judgment. Only some examples may be given. These include forging, counterfeiting or destruction of ballot paper; without authority, supplying ballot paper to anybody etc.

In his submission, Mr. Balikuddembe mentioned Hajati Miiro's case as an example of the 2nd Respondent's failure to organize a free and fair election. Mr. Kabatsi said in his reply that the case is still in Court. Until proved guilty she is still innocent of the offence with which she has been charged.

In his affidavit filed with the Petition, the Petitioner said:

> ***"49. That* I *know that Hajati Miiro* a *Member of the Electoral Commission was arrested together with two other Senior Officers in the Data Centre of the Electoral Commission the Polling day and were charged in Buganda Road Chief Magistrate's Court with electoral offences and I herewith attach a copy of the Charge Sheet and is marked "P20."***

The affidavit of Mr. Kasujja, supporting the 2nd Respondent's Answer to the Petition said:

> ***"17. That in response to paragraph 49 of the Petitioner's affidavit while It is true that Commissioner Miiro and two other officers were arrested and charged in Buganda Road Court they are not yet tried or convicted and one therefore, presumed innocent and their cases are subjudice."***

The charge in question is dated 14-03-2001 and was prepared at the CID Headquarters, as reference ***E/71/2001.*** It cites Mrs. Miiro Nassanga Hadija, a Member of the Electoral Commission; Timothy Wakabi, a Statistician, working with the Electoral Commission; Ibrahim Lutalo Acting Head of Voter Registration Department, Electoral Commission as co-accused. They are charged jointly on two counts. The offence in Count I is abuse of Office, contrary to Section 83 of the Penal Code Act, the particulars of which are that between February and March, 2001, at Plot No. 53/56 Jinja Road in Kampala District being persons employed by the Electoral Commission as Members of the Commission, Acting Head, Data Processing Department and Acting Head — Voter Registration Department respectively, did for purposes of rigging the Presidential Election 2001, and in abuse of authority of that office, arbitrary acts prejudicial to the rights of the Electoral Commission in that they printed excess Voters' Cards in various names and for various electoral areas.

The offence charged in Count 2 is Neglect of duty, contrary to section 108 of the Penal Code Act. The particulars are that all the three accused persons on the same date and place, being persons employed by the 2nd Respondent, neglected to print the correct number of Voters' Cards thereby resulting in printing of excess Voters' Cards.

The Director of Public Prosecution gave written consent to the charge.

Under section 83 of the Penal Code Act, on conviction, the maximum sentence is seven years imprisonment and under section 108, the maximum sentence is five years imprisonment. These may be contrasted with the punishments for offences under section 70 of the Act, which is a fine not exceeding Shs. 100,000= or imprisonment not exceeding five years or both under the Penal Sections there is no alternative of a fine.

By charging the accused persons in question under the Penal Code Act the prosecuting authority, in my view, appears to have considered that the offences the accused persons are accused of are more serious than the offences under the Act.
Be that as it may, the accused persons are no more than that. They are innocent until they are proved guilty. However, their being suspected and charged in Court with electoral offences does not speak very well of the image of the 2nd Respondent as a respectable Electoral Commission which should organize and conduct a clean election, a free and fair election. This is because the accused persons are very high officials of the 2nd Respondent, not minor officials whose misdemeanours could not have serious consequences. They are charged with offences of dishonesty in the process of election, allegedly committed in the course of their duties.

Although they are still innocent, an adverse interference to a limited extent about the 2nd Respondent is in, my opinion, inevitable.

As the officials in question of the 2d Respondent are not convicted of the electoral offences they are charged with there is no evidence that this ground has been proved by the Petitioner. Ground 3(1) (l) of the Petition must, therefore, fail.

Paragraph 3(1) (m) of the Petition:

"(m) That contrary to section 12(b) and (c) of the Electoral Commission Act, 1997, the 2nd Respondent failed to control the distribution and use of ballot boxes and papers resulting in the Commission of numerous election offences under part X of the Act as hereunder:

- **(i)** ***Unauthorised persons got possession of ballot papers and other ballot documents relating to an election and used them during the election.***
- **(ii)** ***(Unauthorised persons and/or officials of the 2nd Respondent used the ballot documents acquired to stuff ballot boxes, tick ballot papers on behalf of the voters, voted more than once, and/or docter figures in the Voters' Register and Rolls.***
  In the result, a Commissioner and other officials of the Electoral Commission were arrested on the Election Day and charged on 14-03-2001."

In its Answer, the 2nd Respondent replied to this ground of the Petition as follows:

"12. In reply to paragraph 3(1) (m) of the Petition the 2nd Respondent avers that:

(a) It never allowed any unauthorized persons to use ballot boxes and papers or any election materials contrary to the law as alleged.

(b) If there was unauthorized use of ballot boxes and papers, knowledge of which is denied by the 2nd Respondent this never affected the results of the election in a substantial manner or at all"

The complaints made in this ground of the Petition are similar to those I have already dealt with in this judgment under paragraphs 3(1)(j), 3(1)(i) and 3(1)(l), which also disposes of paragraph 3(1)(m), except for the issue of the effects of the incidences of non-compliance on the result of the election. So I shall not consider 3(1) (m) separately. It would be unnecessary repetition.

Paragraph 3(1)(s) of the Petition:

"(s) That contrary to section 47 of the Act, the 2nd Respondent's agent/servants in the course of their duties, denied the Petitioner's Polling agents information concerning counting and tallying process."

The 2nd Respondent answered this ground of the Petition as follows:

"17. In reply to paragraphs 3(1)(s) and (t) of the Petition, the 2nd Respondent avers that it freely allowed Polling agents of all candidates access to information concerning the counting and tallying process and there was no forced absence of the Petitioner's agents as alleged."

The complaints raised in this ground of the Petition are similar to those in paragraphs 3(1)(g) and (p) of the Petition, which I have already dealt with in this judgment, save for the issue of the effect of those paragraphs on the result of the election, which I shall consider later in this judgment. It would therefore, be unnecessary repetition to consider paragraph 3(l)(s) separately.

Paragraph 3(1) (t) of the Petition:

"(t) Contrary to section 47 of the Act the 2nd Respondent's agents/servants allowed the voting and carried out the counting and tallying of votes in the forced absence of the Petitioner's agents whose duty was to safeguard the Petitioner's interests by observing the voting, counting and tallying process and ascertain the results."

The 2nd Respondent made one reply to this and ground 3(1) (s) of the Petition. The reply has been reproduced underground 3(1) (s) above.

This ground of the Petition makes complaints similar to those in ground 3(1) (g) and (p), which I have already considered in this judgment, except the effect of the non — compliance on the results of the election, which I shall deal with later in the judgment.

Paragraph 3(1) (u) of the Petition:

"(u) That contrary to section 56(2) of the Act, the 2nd Respondent declared the results of the Presidential Election when all Electoral Commissioners had not signed the Declaration Form B."

The 2nd Respondent's Answer to the Petition replied to this ground of the Petition as follows:

"18. In reply to paragraph 3(u) of the Petition, the 2nd Respondent avers that the results of the Presidential election were declared in compliance with the law and in particular s.* 56(2) *of the Presidential Elections Act."

Ascertainment, publication and declaration of the Presidential Election results are governed by section 56 of the Act.

"56(1). The Commission shall ascertain, publish and declare each in writing under its seal, the results of the Presidential Election within forty-eight hours from the close of polling.

(2). The declaration under subsection (1) shall be in Form B or C as specified in the Seventh Schedule to this Act as the case may be."

Form B is used when there is a winning Candidate as there was in the instant case. However, not all the seven Member of the 2nd Respondent (including the Chairman and the Deputy Chairperson) signed the declaration of results form, annexture R. 1. to Mr. Aziz Kasujja's affidavit, filed with and in support of the 2nd Respondent's Answer to the Petition. All, except one member, signed it.

Mrs. Miiro Nassanga Hadija is the 2nd Respondent's Member who did not sign the results declaration Form. This may be because she was already involved with the Criminal Charge referred to earlier in this judgment.

The 2nd Respondent declared the results under its power provided by article 103(7) of the Constitution, which is repeated in section 56(1) of the Act, which I have reproduced above. The Constitution and Act 3/97 are silent on how the seal of the 2nd Respondent may be applied. Section 10 of Act 3/97 simply says:

"10. The Commission shall have a seal which shall be in such a form as the Commission may determine and shall, subject to the provisions of any law be applied in such circumstances as the Commission may determine."

Under section 8 of Act 3/97, the quorum of the 2nd Respondent is five and its decision should, as far as possible, be by consensus. If a consensus cannot be obtained decision is by majority. By

article 60(1) of the Constitution, its composition is seven Members, including the Chairperson and the Deputy Chairperson. Consequently a majority may consist of four Members. The declaration of results under consideration was signed, and presumably sealed, by six Members, more than the required majority. This was not contrary to the law.

> ***Consequently there was not any non-compliance with the Act by the 2nd Respondent in this connection. Ground 3(1) (u) of the Petition must therefore, fail.***

The grounds of the Petition Which I have so far dealt with in this judgment do not include those which allege that the 2nd Respondent did not comply with provisions of the Act with regard to alleged violence intimidation, harassment and threats against the supporters and/or agents of the Petitioner by the military in general and the PPU in particular. Evidence adduced indicates that violence; harassment, intimidation and threats were also perpetrated by others, such as RDC's, Deputy RDC's, LDUs, vigilantes, GISO, L.C. officials and the 1st Respondent's agents or supporters. Certain grounds of the Petition also allege that the 1st Respondent used the army, the PPU and others to perpetrate such threats, harassment and intimidation to interfere with the Petitioner's electioneering activities. Such allegations against the 2nd and 1st Respondents are supported by the same pieces of evidence and have been argued together by the respective learned counsel of the three parties.

I shall, therefore, set out the grounds in question together. They are:

> ***"3(1) (n). That contrary to section 25 of the Act, the 1st Respondent's agents/ supporters interfered with the electioneering activities of the Petitioner."***

> ***"3(1) (r). That contrary to section 42 of the Act the 2nd Respondent and its agents/ servants in the course of their duties allowed people with deadly weapons to wit soldiers and para military personnel at polling stations, a presence which intimidated many voters to vote for the soldier's boss and candidate Museveni while many of those who disliked to be forced to vote for that candidate stayed away and refrained from voting at all"***

"3(1) (v). Contrary to section 12(1) (e) and (f) of the Electoral Commission Act, the 2nd Respondent failed to ensure that the entire Presidential electoral process was conducted under conditions of freedom and fairness and as a result your Petitioner's and his agent's campaign were interfered with by the unit and the para Military personnel such as that led by Major Kakooza Mutale.

(w). That the Petitioner's agents and supporters were abducted and some were arrested by the Army to prevail upon them to vote for the First Respondent or to refrain from voting, contrary to section 74(b) of the Act."

"3(1) (y). In the results such non-compliance with the provisions of the Presidential Elections Act, 2000, and the Electoral Commission Act aforesaid affected results in a substantial manner as hereunder:

(vi). The Petitioner was unduly hindered from freely canvassing the support by the presence of Military and paramilitary personnel who intimidated the voters."
"3(2) (c). Contrary to section 12(1) (e) and (f) of the Electoral Commission Act the* 1st *Respondent appointed Major General Jeje Odong and other partisan senior military officers to take charge of security of the Presidential Election process and thereafter a partisan section of the army was deployed all over the country with the result that very many voters either voted for the 1st respondent under coercion and fear or abstained from voting altogether.

(d) That contrary to section 25 (b) of the Act the Respondent organized groups under the Presidential Protection Unit and his senior Presidential Advisor one Major Kakooza Mutale with his Kalangala Action Plan paramilitary Personnel to use force and violence against persons suspected of not supporting candidate Museveni thereby causing a breach of peace, disharmony and disturbance of public tranquility and induce others to vote against their conscience in order to gain unfair advantage for candidate Museveni in the Presidential Election."

(e) …….

(2)(f). The aforesaid illegal practices and offences were committed by the 1st Respondent personally or and his agents and supporters with his knowledge and consent or approval through the military, Presidential Protection Unit and other organs of the state attached to his office and under his command as the President, commander in Chief of the Armed Forces, Minister of Defence, Chairman of the Military Council, and High Command and chairman of Movement Organization."

In his answer to the Petition, the 1st Respondent replied to some of grounds targeted at him, which I have just reproduced, as follows:

"2. **it** ***came to the 1st Respondent's knowledge that Hajati Miiro was arrested and charged in Court with two others but it is specifically denied that the 1st Respondent's agents/supporters did interfere*** **"with the electioneering activities of the Petitioner and his agents"** ***as alleged and the 1st Respondent contends that the entire Presidential Election process was conducted under conditions of freedom and fairness and that the 1st Respondent obtained a lot*** **more than 50% of valid votes of those entitled to vote."** ***The 1st Respondent therefore, states that he has no personal knowledge of and does not admit the contents of paragraph 3(i) of the Petition."***

The numbering ***"3(1)"*** appearing in the immediately foregoing paragraph of the 1st Respondent's Answer must be an error, because paragraph *3(I)* does not exist in the Petition.

"5. The contents of paragraph 3(2)(c) and (dl of the Petition are denied and the 1st Respondent will say that the entire electoral process was conducted under conditions of freedom and fairness and secure conditions necessary for the conduct of the election in accordance with the Act and other laws."

In its Answer to the Petition the 2nd Respondent replied to the grounds of the Petition which concern it and which I have reproduced above. Some of its replies tend to repeat what the 1st Respondent pleaded in his Answer.

"19. In reply to paragraph 3(1) (v), of the Petition, the 2nd Respondent avers that the Presidential Election process was conducted under conditions of freedom and fairness and the 2nd Respondent denies any knowledge of any interference with the Petitioner's or his agents' campaigns, and that if there was any interference, which is not admitted, there is no proof that it affected the campaigns the electoral process or the result of the election in a substantial manner or at all.

20. In reply to paragraph 3(1) (w) of the Petition, the 2nd Respondent denies any knowledge of abduction or arrests of the Petitioner's agents and supporters to prevail upon them to vote for the 1st Respondent or for any other candidate.

21 ……

22. In reply to paragraph 3(1) (y) of the Petition, the second Respondent avers as follows:

(g) The Second Respondent did not hinder the Petitioner from freely canvassing for support but on the contrary the Petitioner traversed the whole Country during the campaign period.

23. In reply to paragraph 2 of the Petition, the Second Respondent denies any knowledge of the allegations imputed against the first Respondent and it is not aware of an illegal practices or offences committed by the First Respondents his agents and/or supporters with his knowledge and consent or approval as alleged or at all

24. That the Second Respondent avers that there is no evidence that there was non — compliance with the Presidential Act 2000 which affected the results of the Presidential Elections in a substantial manner or at all and that there is no evidence of any illegal practices or offences committed by the First Respondent, his agents and/or supporters with his knowledge and consent or approval as alleged.

25. The 2nd Respondent avers that the elections were free and fair as it reflected the wishes of the majority of Ugandans and international observers who monitored the elections throughout the Country confirmed this position."

Section 12(1) of Act 3/97 provides:

"12(1). The Commission shall, subject to and for the purposes of carrying its functions under Chapter Five of the Constitution and this Act, have the following powers:

(e) To take measures for ensuring that entire electoral process is conducted under conditions of freedom and fairness;

(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this Act or any other law."

Section 25(c) of the Act provides:

"25. a person who, before or during an election for the purpose of preventing the election of a candidate either directly or indirectly –

(a) ……..

(b) ……

(c) Obstructs or interferes or attempts to obstruct or interfere with the free exercise of the franchise of a voter or compels or attempts to compel a voter to vote or refrains from voting;

Commits an offence and is liable to conviction to a fine not exceeding eight currency points or imprisonment not exceeding two years or both."

Section 42 of the Act provides:

> ***"42(1). No person shall arm himself or herself during any part of polling day, with any deadly weapon or approach within one kilometer of a polling station, with deadly weapon unless called upon to do so by lawful authority or where he or she is ordinarily entitled by virtue of his or her office to carry arms.***
>
> ***(2) Any person who contravenes sub-section (1) commits an offence."***

Section 74 of the Act states:

"74. A person commits the offence of influence –

(a) if that person directly or indirectly in person or through any other person:

(I) makes use of, or threatens to make use of, any force or violence;

(ii) Inflicts or threatens to inflict in person or through any other person any temporal or spiritual Injury, damage, harm or loss upon or against any person, in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting.

(c) if by abduction, duress, Of any other fraudulent device or contrivance, impedes or prevails upon a voter either to vote or to refrain from voting."

Mr. Walubiri the petitioner's learned Counsel who made submissions on the Petition's complaints against activities of the military and the PPU, directed his arguments at allegations that the 1st Respondent, by deployment of the Army, committed illegal practices or other offences under the Act personally or with his knowledge and consent or approval. Commission of illegal practices or other offences in relation to the Presidential Elections is relevant to issue number four of the Petition.

In his reply, Dr. Byamugisha the 1st Respondent's learned Counsel, also concentrated his counter arguments on the 1st Respondent's alleged commission of illegal practices or offences through the Army.

In my view, the same arguments as have been made by the respective learned Counsel of the petitioner, the 1st and 2nd Respofldeflts1 and evidence adduced by all the three parties concerning the activities of the military and PPU whether in respect of allegations against the 1st Respondent or the 2nd Respondent also applies to the grounds in question of the Petition. I shall deal with the grounds of the petition concerned on that basis.

In his submission under the foregoing grounds Mr. Walubiri contended that evidence adduced by the Petitioner proves that contrary to section 25 of the Act, the 1st Respondent personally or by his agents interfered with the Petitioner's electioneering activities and committed an offence. The first limb of this Criminal interference, Counsel contended, was constituted by the 1st Respondent's deployment of the Presidential Protection Unit (PPU) in Rukungiri and other Districts throughout the campaign period. This is pleaded in paragraphs 3(1) (v) and 3(2) (C) and (f) of the Petition.

Learned Counsel referred to paragraphs 16, 18, 25, 26, 28 and 29 of the Petitioner's affidavit in support of the Petition, giving details of PPU's activities and how it was interfering with the

Petitioner's electioneering activities; it was shooting around and threatening voters. It killed one of the Petitioner's supporters.

In paragraphs 18, 19 and 20 of the Petitioner's Reply to the 1st Respondent's affidavit the Petitioner showed how the PPU, a facility attached to the 1st Respondent's office as an incumbent, assaulted, intimidated and threatened voters to vote for the 1st Respondent and caused disharmony and breach of the peace throughout the campaign period in the entire Rukungiri and other Districts. So intense was the intimidation that one Baronda Johnson was shot and killed. Baronda's Uganda Government Death Certificate, attached to the Petitioner's affidavit, showed that he died of bleeding following gunshot wounds on 3-3-2001. The havoc wreaked by PPU a facility attached to and enjoyed by the 1st Respondent at the time, was reported by the Petitioner to the 2nd Respondent. The Chairman of the 2nd Respondent was also gravely concerned about the activities of the PPU and the Military that was threatening to wreck the election process. Consequently, the Chairman wrote passionately to the 1st Respondent, requesting him to intervene and save the democratic process. The letter of the 2nd Respondent's Chairman dated 24-02-2001 is annexed as ***"P.9"*** to the Petitioner's affidavit in reply. There is no evidence that the 1st Respondent replied to that letter. On the contrary, there is evidence that the PPU remained in Rukungiri to continue to terrorise the population in that District up to 12-03-2001.

Learned Counsel said that there are a number of affidavits about the continued intimidation by the PPU. He referred to some of them as examples, such as those from Bernard Matsiko, Kakuru Sam, Koko Medard. Learned Counsel submitted further that the PPU also operated in Kanungu District, as indicated by the affidavit of John Hassy Kasamyamunyu, Mawa Bwooba Callist, Bashaija Richard, Owembabazi — who was so traumatised that he could not vote. All this was long after Mr. Kasujja's letter to the 1 Respondent. Another witness about the PPU is Byomuhangi Kaguta. These are only examples of what was happening in Rukungiri which, learned Counsel contended, became a fortified area. What happened there clearly interfered with the Petitioner's electioneering; he said

Mr. Walubiri submitted that another limb of interference was the arrest, abduction and torture of Rwaboni by the Military Intelligence at Entebbe International Airport. In his affidavit in reply, the Petitioner gives in details the back ground to how Rwaboni came to be arrested and abducted at Entebbe Airport from where he was due to fly with Rwaboni to Adjumani to address a campaign rally. The affidavit of Hon. Winnie Byanyima, MP also gives an eye - witness account how Rwaboni was abducted. She recognized Captain Moses Rwakirate of the PPU as the person who was in charge of the operation. This was on 20-03-2001. The abduction made it impossible for the Petitioner to travel to Adjumani, because he had to find out why the Chairman of Youths of his campaign, Rwaboni, had been abducted. After his abduction, Rwaboni was never charged with any offence or produced in Court. So he was the victim of the illegal activities of the Military unleashed by the 1st Respondent to intimidate the Petitioner's supporters and to interfere with the Petitioners electioneering activities.

Learned Counsel submitted that paragraph 15 of the 1st Respondent's affidavit in support of his Answer shows that he had knowledge of Rwaboni's abduction and detention. Counsel submitted that as a result of what happened to him, Rwaboni had to flee to exile and he abandoned his campaign for the Petitioner. An account of how Rwaboni was arrested, tortured and detained is also narrated in his own affidavit. Because of Rwaboni's torture at the hands of Military, the Petitioner lost a useful campaign agent.

The third limb of interference, Mr. Walubiri submitted, was the general deployment of the Military throughout the Country. This forms the basis of grounds 3(1) (n), (r), (v), (w), and (y), (v) and (vi) and 3(2) (c), (d) and (f) of the Petition.

Mr. Walubiri contends that the 1st Respondent does not deny deployment of the army. In his affidavit in support of his Answer to the Petition, the 1st Respondent said that the army was deployed because the Police was inadequate, but he claims in his Answer and the affidavit in support thereof that the elections were conducted under conditions of freedom and fairness and under secure conditions as a result of sufficient deployment of security Forces throughout the Country by the Government. The Army Commander, Major General Jeje Odong also deponed an

affidavit in support of the 1st Respondent. The essence of that affidavit is that the army was deployed because the Police was not adequate to deal with the election process.

The learned Counsel said that the Petitioner had two arguments on army deployment. First, on the evidence available, the Army did not provide security. Evidence on record shows that the Army arrested, tortured people and made it impossible for the Petitioner to campaign. For instance, in Rwaboni's case, it could not have been the Army providing security, but insecurity. Learned Counsel then referred to the affidavits of Kimumwe A. Ibrahim, and Sulaiman Miiro of Bugiri, proving arrest and harassment by soldiers; the affidavit of Baguma John Henry, who was threatened with death by a soldier, when he protested against Kasese RDC's allowing soldiers to vote more than once. John Kijumba of Kasese deponed that a soldier by the name of Kilindiro William told them that he had been sent by State House to arrest those campaigning for the Petitioner and that he had a list of the Petitioner's campaign agents and supporters including him (John Kijumba). Examples from Mbarara District are found in the affidavits of Mary Francis Ssemambo, Boniface Ruhindi Ngaruye, and Alex Busingye. In Mbale District, an example is Masiro Stephen. In Kabale District, examples are Anteli Twahirwa, to whose affidavits are annexed copies of correspondences he wrote to the 2nd Respondent, complaining about intimidation and electoral malpractices. Sande Wilson, James Musinguzi who filed a complaint with the 2nd Respondent and the Police but there was no action in return. Patrick Matsiko Wa Mucoori from Ibanda a Sub — District. Orikiriza Livingston from Rukungiri District. Mr. Walubiri contended that these individual experiences showed that the Army was not deployed to provide security, but to harass the Petitioner's agents and supporters.

Learned Counsel submitted that there was a claim for legal basis for this Army deployment. The 1st Respondent, the Army Commander, and the Inspector General of Police, in their respective affidavits, claimed that the Army was deployed as part of the security team just as it had been done during the 1987 Currency Reform; 1989 expansion of the Constitution Assembly; 1992 Local Council elections and the 1999 Referendum. Counsel contended that Army deployment during those occasions was illegal. There were no legal provisions allowing it in the Currency Reform Statute No. 2 of 1987; in Legal Notice No. 1 of 1986 and Legal notice No. 1 of 1989, all

were silent on army deployment. So was the R.C. Statute of 1987 as amended by Statute No. 5/92.

The Presidential Election Statute, 1996 provided in section 7(1) thereof that the Electoral Commission shall provide security for protection of candidates. Under article 209 of the Constitution, the function of the Army does not include internal policing. That is the role of the Police under article 212 of the Constitution. Counsel further submitted that the makers of the Act were alive to those Constitutional provisions because in section 41(1) of the Act it is provided that where there is no Police Officer to maintain order in a rural Polling Station and the necessity to maintain such order arises, the Presiding Officer shall appoint a person present to be an Election constable to maintain order in the Polling Station throughout the day. This function of maintenance of order at Polling Stations is normally the duty of the Police. Counsel contended that if the Army had to be deployed to do internal policing, it must have been presumed that there was a state of emergency under Article 209 of the Constitution. There was no state of emergency declared by the President, which would have legalized deployment of the Army. Deployment of the Army and the PPU by the 1st Respondent personally involving harassment and intimidation, as the evidence shows, constituted the offence of undue influence under section 74 of the Act.
The learned Counsel further submitted that deployment of Major Kakooza Mutale and his Paramilitary Kalangala Action Plan resulted in harassment, intimidation of the Petitioner's supporters. It also interfered with his electioneering activities. Major Kakooza Mutale doubled as a Presidential Advisor. Learned Counsel said that this is the subject of ground 3(2) (d) of the Petition and is supported by paragraph 15 of the Petitioner's affidavit in support of the Petition.
Dr. Byamugisha, the 1st Respondent's lead Counsel replied to Mr. Walubiri's submission regarding ground 3(2), starting with ground 3(2) (c), which alleged contravention of section 1 2(e) and (f) of the Electoral Commission Act.

Section 12(1) (e) and (f) has already been reproduced in this judgment.

Dr. Byamugisha referred to the affidavit in reply of Major General Jeje Odong, the Army Commander (referred to hereafter as ***"Jeje"*** for the sake of brevity), which replied to the Petitioner's affidavit The learned Counsel contended that according to the affidavit in reply, the

purpose of deployment of the army was not to coerce voters but to improve security. A letter dated 8-3-2001, written by Mr. Kasujja to the Petitioner and two other candidates in reply to their letter of 7-3-2001, raising issues of violence, intimidation, and other electoral flaws, said that the 2nd Respondent had written to the Head of State as the Commander in Chief of the Armed Forces to contain the army and to the Inspector General of Police, to ensure that the Police carried out their mandate under article 212 of the Constitution. The learned counsel submitted that following those communications, Mr. Kasujja's letter said, that reports from the Police indicated that the security situation during the campaign had improved and acts of violence and intimidation had reduced considerably countrywide.

The learned Counsel contended that this is supported by the affidavit of the Inspector General of Police (I.G.R) Mr. Kisembo. Learned Counsel also referred to the affidavit of Mayombo and of Major General Tinyefuza concerning the arrest of Rwabwoni. The affidavits in question, learned Counsel contended indicated that Rwaboni was arrested for his own safety because he was going to be killed in Adjumani. Not to force him to leave the Petitioner's camp.

Regarding the military and PPU in Rukungiri, the learned Counsel referred to the affidavit of Captain Atwoki B. Ndahura, the Commander of the PPU in Rukungiri at the material time. Learned Counsel contended that the witnesses to whose affidavits he has referred exonerate the 1 Respondent to the effect that he was not personally involved in intimidation. Counsel said that he would provide authorities relevant to the separation of the President and presidency. He referred to article 98(4) of the Constitution which provides that while holding office, the President shall not be liable to proceedings in any court, but article 104(8) provides that article 98(4) shall not apply to article 104, which is about challenging Presidential election. Regarding ground 3(2) (c) of the Petition, Dr. Byamugisha contended that there is no evidence of how many voters were coerced, how many feared or abstained. The same argument applies to ground 3(2) (d) of the Petition.

Learned Counsel also submitted that the ingredients of section 25(c) of the Act must be proved. The Petitioner advanced no evidence on this. Regarding allegations about Major Kakooza Mutale's activities, Dr. Byamugisha referred to Mutale's affidavit, which shows who he is and

what he does. The convention forming the Kalangala Action Plan group was held before the Presidential Elections candidates had been nominated. The group is not paramilitary as the affidavit shows and did not do things it is alleged to have done. In the circumstances, Counsel contended, the allegations in ground 3(2) (d) have been proved false.

Regarding ground 3(2)(e) of the Petition Dr. Byamugisha referred to paragraph 12 of the 1st Respondent's affidavit supporting his Answer to the Petition, which says that he never threatened to put the Petitioner six feet deep, nor stated as alleged in paragraph 3(2)(e) that prior to the election process, he made a statement on 27-11-2000, in his capacity as President and Commander In Chief, warning that any person who interfered with the army would be put six feet deep. The Statement was not made for the purposes stated in ground 3(2) (f) of the Petition.
Regarding ground 3(2) (1) of the Petition, Dr. Byamugisha submitted that the military or PPU were not the 1st Respondent's agents under the Act, and that no illegal practices or offences were committed by the 1st Respondent personally or through his agents with his knowledge and consent or approval. He concluded that the 1st Respondent has shown that the Petitioner lacks evidence and that the former has gone to demolish the little evidence that there shall now turn to consider the evidence relevant to these grounds of the Petition.
Certain paragraphs of the Petitioner's affidavit filed in support of the Petition state:

"15. That during the whole period of the Presidential Election Campaigns the 1st Respondent deployed the Army and Major Kakooza Mutale's Pare Military Personnel of Kalangala Action Plan all over the Country and directed the Army Commander, Major General Jeje Odong and other Senior Military Officers to be in charge of Security during the whole Presidential Election process and subsequent to this, my supporters campaign agents and myself were harassed and intimidated and a number of my supporters and campaign agents were assaulted and arrested.

16. That the Respondent deployed the Presidential Protection Unit soldiers in Rukungiri District as soon as the Presidential Election Campaigns started to protect his supporters and these PPU Soldiers intimidated and harassed my supporters and campaign agents all the time.

17. That on 16th February, when I went to address a Campaign Rally at Kamwenge Town in Kamwenge District, we found that agents and supporters of the 1st Respondent had organized themselves along the streets of Kamwenge Town carrying posters of the l' Respondent, singing their campaign slogans and throwing stones at our vehicles and this interfered; with my campaign and my supporters were intimidated and assaulted. As the programme of Presidential Campaign shows the 1st Respondent was supposed to be doing his campaigns in Gulu on that day. A copy of this programme is attached and marked "P 10." I also attach a copy of the Resolution of 6th February, 2001, by the Candidates' agents regarding the Presidential Campaigns and it is marked "P11. "

18. That on 2nd March 2001, at about 20.30 hours, I arrived in Rukungiri Town in a convoy of motor vehicles of my supporters who had met me at the Kahengye Bridge about 20 Km. From Rukungiri Town. As the convoy came into town, many Town residents who were my supporters came to the road side, clapping as a sign of welcome. I then saw many soldiers of the Presidential Protection Unit come from all directions wielding truncheons and sub-machine guns and started beating the people on the road side furiously causing them to run, screaming in all directions. The soldiers then attacked the people in the vehicles of our convoy and some came to the vehicle in which I was seated. The Policemen, who were detailed to me as my body guards, **had to threaten** ***to open fire in order to stave off this attack.***

19. That our convoy continued slowly under the protection of the Police guards to my Village home, Rwakabengo. Many of the supporters who had been attacked by the presidential Protection Unit in the Town ran to my compound and spent the night there for fear of being attacked if they dared go back home that night.

20. That at about 23.30 hours, I went back to Rukungiri to Rondavels Hotel, where I found the Regional Police Commander Okwalinga and reported what happened that evening. I reported to him that I had information from them that the PPU soldiers planned to stop people from attending my rallies the following day. The Regional Police Commander assured me that he would effect deployments to ensure that our planned campaign rally would not be disrupted

and that he was going to stay in the District personally to supervise the security for the period the presidential Election.

21. That on the 3rd March, I addressed rallies in Nyarushanje, Nyakishenvi, Kanungu, Kihihi, and at all places I observed that all my supporters were in terrible fear for their personal security because of the heavy deployment of the Presidential Protection Unit and Local Defence Unit in their respective areas by reason of intimidation and harassment.

22. *That because of the said heavy deployment of PPU and LDUs in the whole District of Rukungiri and the resultant tension, I was forced to cut out rallies organized for me at Bwambara and Bubangari in Rujumbwa County In order to get to the main campaign rally at Rukungiri Town early.*

23. That I arrived at the main rally in Rukungiri Town at about 17.00 hours and in my address to the people I informed them that I was aware of the state of terror created by the PPU soldiers and that for that sake / had to be very brief so that they could return home before dark, and I appealed to all my supporters to refrain from violence even in the face of extreme provocation.

24. That the main Rally in Rukungiri Town ended at about 18.10 hours and the people moved out of the play ground venue of the Rally peacefully.

25. That I then went back home to collect my luggage and proceed to Kampala and shortly after getting home I heard gun-shots from the direction of Rukungiri Town Centre, which continued for about 20 minutes; and then I saw some people running from town to my home for safety.

26. That I went back to town at about 19OO hours and we found the Town absolutely deserted, except for the PPU soldiers and a few people wearing campaign T-Shirts of the Pt Respondent and I saw next to Ejumo Hotel a white truck surrounded by about 10 to 12 PPU soldiers who were throwing people on to this white truck.

27. That then I stopped by Mr. Charles Chakuru's residence where I found people having taken refuge in his compound, left for Mbarara where we spent the night.

28. That when I reached Mbarara Town I telephoned Mr. Charles Makuru to find out the Situation In Rukungiri Town and he told me that the situation was still tense and that he tried to get in touch with the Regional Police Commander and discovered that he had been called to Police Headquarters early that afternoon. That I subsequently went back to Rukungiri and I was shown the grave of Berondera who had been shot dead in that incident.

29. That I now know one person died, 15 were seriously Injured and were hospitalized and many others sustained minor injuries as a result of the attack by the PPU soldiers on that day in Rukungiri Town and all this was reported in the Sunday Monitor of 4th March, 2001, a copy of which Is attached and marked "**P12*****" and all this time when Presidential Protection Unit soldiers were deployed in Rukungiri District, President Museveni was not physically present In that District.***

30. That on 19th February, 2001, while on my way from Bundibugyo, I received a telephone call from Hon. Okwir Rwaboni the Chairperson of our Youth and Students Committee, who informed me that his life was in danger, and that he had tried to seek protection from the U. S. Embassy unsuccessfully. I advised him that I was on my way to Kampala and that he should look for a place to stay safely until I would arrive in Kampala and we discuss the details.

31. 1 got to my home in Kampala at about 19.00 hours that evening and Hon. Okwir was at my home with his wife Solonge and Ms. Anne Mugisha. He narrated to me the story of how he had been for two days intimidated and even threatened with death by Major General David Tinyefuza and Lt. Colonel Noble Mayombo He informed me that on the morning of February, 2001, Lt. Col. Noble Mayombo, Acting Chief of Military Intelligence went to his house and took him to the International Conference Centre where he found other Senior Military Officers including Major General D. Tinyefuza, the Special Presidential Advisor and Col Kasirye Gwanga Campaign agent of lit Respondent in Mubende District and was told that for

his own safety he had to sign a document to the effect that he had resigned from our task force and that we were getting funds from Countries hostile to Uganda.

32. He told me that he signed the document, after which he was taken to Nile Hotel for lunch where he was joined by his wife. He said that after lunch he requested to take a sick child to a clinic and then return to join the officers in Nile Hotel. He left with his wife and headed for the American Embassy to seek for protection because he left that his life was in danger following the threats he had been given and thereafter he actually signed the documents.

33. After discussing with Hon. Okwir, it was agreed that he should inform the public through the press about what had happened and that we should continue with our campaigns normally. We invited Pressmen and gave them his story. We decided that he should spend a night at my residence.

34. The following day on 20th February, 2001, I was scheduled to address a rally in Adjumani and Moyo Districts. I had planned to travel by a chartered Aircraft from Entebbe Airport at 09.30 hours together with some members of my Task Force including Hon. Okwir. We arrived at Entebbe VIP Lounge at 09.30 hours. As we proceeded to the Aircraft at about 10.00 hours, an official of the Airport informed us that the Aircraft had been refused clearance to take off, and that we should return to the lounge while the clearance problem was being sorted out.

35. As we arrived back in the lounge, an official of Civil Aviation named B. Monday came where I was seated with Hon. Okwir and others and informed him that he had instructions to take Hon. Okwir. Hon. Okwir told Mr. Manday that he could not go with him as he had no authority in law to do what he was trying to do. Mr. Monday left, but shortly afterwards, an officer from the known to me as Captain Rwakirate Moses came with some armed men who were putting on civilian clothes, and they instructed Hon. Okwir to get up and go with them. Hon. Okwir refused to comply informing them that they were not authorized under the law to arrest him.

36. About 15.00 hours, Col. Kasirye Gwanga arrived and at the same time a large group of armed soldiers arrived and forcefully arrested Hon. 0kwir and dumped him on a Pick-up truck and armed soldiers sat on his head, on his chest and on his legs. The vehicle drove off as other soldiers were kicking him.

37. I have since talked to him on telephone and listened to him speak on radio programmes where he has described what happened to him since the violent arrest at Entebbe. He told me that he was taken to offices of Military intelligence on Kikante Road and interrogated for eight hours. He was only asked questions about our campaigns and the statement he had made to the press the previous evening while at my home. He also informed me that President Museveni telephoned and talked to him while he was at the headquarters of Military Intelligence and asked him what led him to support me, and what he thought of the team I was within the campaigns.

38. That President Museveni then proposed to Hon. Okwir that he would offer a job to him at the Uganda High Commission in London and sponsor him to take further studies provided he cooperated and left my campaign immediately and continued to cooperate with him. Major Okwir informed me that he accepted this offer as a way to safety, and was then required to write a statement disassociating himself from my campaign team and reaffirming the earlier statement which he had signed at the International Conference Centre. He said he was taken to Parliament where he read out the statement then driven to his residence where he stayed under close guard while arrangements to move him and his wife to London were being finalized. He rang me while at his house to give me the above story, and I have also talked to him since his arrival in London.

39. That I verily believe Hon. Qkwir was particularly tortured by my opponents because Hon. Okwir was heading the Youth Task Force and it was well known that I enjoyed tremendous popular support among the youth and students countrywide.

40. That the 1st Respondent had made repeated statements justifying the actions of the Military including PPU including the Presidential Election Process.

41. Following all these events, I cancelled my schedule campaign trip to Adjumani and other Districts in West Nile and I lost 3 days of campaign and meanwhile I sought audience with the Electoral Commission to complain about the escalating level of violence, intimidation and harassment of my agents and supporters and I did so when I met the Electoral Commission on 22nd February, 2001.

42. That following this meeting with the Electoral Commission, the Electoral Commission reported to the 1st Respondent Commander in Chief of the Armed Forces appealing to him to restrain the army from interfering with the Presidential Election process and not to deploy the PPU where the President of Uganda Is not persona fly present. A copy of this letter is dated 24th February 2001, is herewith attached and marked "P. 13***."***

43. That before this, on 20th February 2001, Deputy Chairperson of the Electoral Commission wrote to the Army Commander and the Inspector General of Police appealing to them to ensure that candidates' campaigns continue without unnecessary interference. A copy of this letter is attached and marked "P.14."

44. That contrary to the pleas of the Electoral commission the Army Commander addressed a press conference and issued a press statement 0n firming the Army's involvement in the security of the Presidential Election process. A copy of this press statement dated 9th March, 2001, is herewith attached and marked "**R 15.*****" Involvement in the security of the Presidential Election process. A copy of this press statement dated 9" March, 2002, is herewith attached and marked*** "R16."

45. That the beginning of March 2001, the Inspector General of Police assured the public of security during and after the Presidential Election and this was reported in the Monitor News paper of 2nd March 2001, a copy of which is attached and marked "R 16."

46. That on 7th March, 2001, 4 Presidential Candidates, Including myself wrote to the 2nd Respondent complaining about flaws In the Presidential Election process and this letter IS

attached and marked, "*P.1** *7, and the 2nd Respondent's reply dated 9th March, 2001, is attached and marked "R 18."** ***On March 9th 2001, the candidates again wrote to the 2nd Respondent and this letter is attached and marked "***R 19."

In reply to the 1st Respondent's affidavit, the Petitioner said in his affidavit in reply dated 5-4-2001:

"18. In reply to paragraphs 4 and 5 of the Respondent's affidavit, the 1st Respondent used the Presidential Protection Unit a facility attached to and utilized by his office as the President to assault, intimidate, threaten, and to consedisharmdry on a breach of the peace throughout the campaign period in the entire Rukungiri District and thereby interfere with my campaign and electioneering activities in the District of Rukungiri to the prejudice of my candidature. The* 1st *Respondent during the Presidential campaigns retained the use of security facilities including attached to the President as per Statutory Instrument dated 29-12-2000 herewith attached as

19. That in Rukungiri my home district where I had massive supports the armed Presidential Protection Unit was deployed there by the 1st Respondent during the campaign period to unduly influence my supporters through intimidation, force and threats of force of violence to support and vote for the l' Respondent against me, resulting in one incident, in the death of one Baronda Johnson my supporter and injuring up to 15 of my supporters and many others injured over the campaign periods a copy of the Death Certificate is herewith attached and marked "P.29.)

The paragraphs of the Petitioner's affidavit I have just reproduced relate to the role of the army and the PPU in the Presidential Election under consideration. The affidavit relates to other matters as well, which I shall defer for the moment for consideration later in this judgment.

The Petitioner's affidavit is based on his knowledge information, and belief. Where deponed on information he disclosed the source of his Information, and where it is based on belief, he gave the grounds of his belief, otherwise most of what he said was based on knowledge. I find the affidavit admissible.

The Chart indicates that the Petitioner's affidavit is rebutted by the affidavits of several witnesses, filed in opposition to the Petition. Some of the rebuttal affidavits relate to the role of the Army and PPU. Others relate to other matters; while others partly concern the Army and PPU and partly concern other matters. For now, I shall first consider those rebutting parts of the Petitioner's affidavit concerned with the Army and PPU.

In his affidavit supporting his Answer to the Petition, the 1st Respondent denied all the allegations made against him in the Petition. His affidavit then went on to say:

"3. That I instructed my campaign agents to mobilize for my election on the basis of my election manifesto entitled "Consolidating the Achievements of the Movement" ***only and I have no knowledge of their having acted contrary to the law, conduct I did not consent to or approve of on the part of any person.***

4. That because the Police were inadequate and the security situation so required, the Government decided to and did deploy, security forces throughout the Country to keep peace and order, but I have no personal knowledge of, nor did I, in my capacity as President of the Republic of Uganda, receive any reports of intimidation of voters by soldiers and paramilitary personnel at Polling Stations.

5. The elections were conducted under conditions of freedom and fairness and under secure conditions as a result of sufficient deployment of security forces throughout the Country by the Government.

9. That the deployment of security forces was done by the Government for the purposes of securing law and order throughout the Country. I did not appoint any military officers to take charge of security of the Presidential Election process as stated in paragraph 3(2) (c) of the Petition. I know that Government deployed security forces throughout the Country for security and preservation of law and order.

10. That I did not directly or indirectly organize groups of persons under the Presidential Protection Unit or Major Kakooza Mutale with his Kalangala Action Plan personnel and whatever such persons are stated to have done in paragraph 3(2)(d) of the Petition was without my knowledge and consent or approval

11. That I never threatened to put the Petitioner six feet deep as stated in paragraph **3(2)(e)** *of the Petition, prior to the election process in my capacity as President and Commander In Chief, I warned that any person who interfered with the army would be put six feet deep.*

12. That I made this statement at the National Conference of the Movement on the **27th** *November, 2000, and I made It for security, good governance and order of the Country and to deter subversion in the army. I did not make this statement for the purposes stated in paragraph* **3(2) (e)** *of the Petition.*

13. That no illegal practices or offences were committed by myself personally or through my agents and sympathizers or through any person whatsoever with my knowledge and consent or approval.

14. That concerning Hon. Major (Rtd.) Okwir Rwaboni M.P, I state that 1 have perused and understand the affidavit of Hon. Major (Rtd.) Okwir Rwaboni dated 23rd March 2001, in support of the Petition. It is not true that on 21st February, 2001, I had a telephone conversation with Hon. Major (Rtd.) Okwir Rwaboni where I tried to convince him to leave **"that wrong group."**

15. That on 21st February, 2001, I had a telephone conversation with Hon. Major (Rtd.) Okwir Rwaboni where I asked him whether it was Major General Tinyefuza or Hon. (Rtd) Okwir Rwaboni himself who was telling the truth about the voluntariness of the statement he had signed stating that he had withdrawn from the Petitioner's Task Force.

16. That Hon. Major (Rtd) Okwir Rwaboni told me that the Monitor News Papers report which alleged that he had stated he was forced to withdraw from the Petitioner's Task Force

was false. I asked him what he intended to do and he replied that he wanted to go abroad for medical treatment and rest. I asked him how he would be able to maintain himself abroad as a Member of Parliament of Uganda. I advised him to notify the Speaker of Parliament so that he continues to draw his salary until he returned home."

I have already reproduced paragraphs 5 to 11 of Rwaboni's affidavit in connection with denial of his right to vote. The whole of the affidavit is, in fact, relevant to denial of his right to vote and to the role of the military and PPU in the elections under consideration. It will be recalled that the affidavit, was made as a Statutory Declaration in London, to which Rwaboni had fled. The remaining part of his affidavit reads:

"1. I was illegally arrested, detained, tortured and intimidated during the Presidential campaigns in Uganda that ran from the 8th January 2001, and 12th March, 2001 and at this time I was In the National Campaign Team.

2. ***That on* 19th *January 2001, I was confronted by members of the Presidential Protection Unit in Rukungiri District, (Kanungu Trading Centre) and prevented from consulting with our supporters. I was there to meet the supporters of the Presidential Candidate Dr. Kizza Besigye between 10.00 a.m. and 12.00 noon. I was surrounded together with my colleagues and our supporters. We were then held hostage by members of the Presidential Protection Unit (PPU) who were under the command of one Captain Ndahura. I managed to leave the scene but the PPU and Police kept the people hostage for the next two hours. They later followed me to the venue of my next meeting — Rugyeyo Sub-County, Kinkizi County, Rukungiri District.***

3. That on the same day members of the said force — PPU surrounded me and other supporters of Col. (Rtd.) Dr. Kizza Besigye In Rugyeyo Sub County, Kinkizi County, Rukungiri District immediately. About 12 soldiers ruled out their guns, cocked them ready to shoot, pointed them at me and ordered me to leave the District. The same soldiers under the command of the said Capt. Ndahura assaulted Dr. Besigye's supporters and arrested others as they forcefully dispersed the gathering.

4. On l9th of February 2001, I was made against my will to sign a document announcing my withdrawal from the Elect Besigye Task Force (EBTF). I was made to sign this document by two Senior UPDF Officers, Maj. General David Tinyefuza and Lt. Col. Noble Mayombo at Nile Hotel, Kampala."

The affidavit of Hon. Winnie Byanyima M.R shows that Rwaboni informed her that he had been coerced to withdraw from the Petitioner's Task Force. It also corroborates the Petitioner's account of how Rwaboni was arrested at Entebbe Airport. The affidavit is also relevant to allegations of harassment and intimidation of the Petitioner's supporters by supporters of the 1 Respondent and UPDF soldiers. She starts by saying what she was informed, giving sources of her information. She said in her affidavit dated 23-03-2001:

"3. That in my travels through the Country I encountered reports from our agents of harassment and intimidation by Resident District Commissioners, District Internal Security Officers, UPDF soldiers, para-military personnel and other armed personnel organized by candidate Museveni and his agents and that in particular:

a) I was informed by Mr. Wagyega, Mbale District Task Force Chairman that two days prior to our campaign in Mbale Municipality candidate Besigye Kiiza's posters were torn down by gangs organized and led by the Resident District Commissioner and Hon. James Wapakhabulo and further that several of our supporters were beaten up and intimidated by Major kakooza Mutale and his band of armed men and by the time of the rally the entire municipality was gripped by fear.

b) I was informed by Dr. Ekure one of candidate Besigye's supporters that Haji Okodel the L.C 5 Chairman and agent of candidate Museveni moved around Kumi Town intimidating people not to attend candidate Besigye's rally.

c) I was informed by one of our agents that Hon. Grace Akello together with L. C. Ill officials of Amuria accompanied by armed personnel tore down all candidate Besigye's posters before our rally in Amuria and at the time of the rally I did not see a single poster in Amuria Town.

d) In Kiboga Town I arrived to find the Town gripped by fear and witnessed a heavy presence of UPDF soldiers and this had the effect of scaring away some voters from attending our campaign rally and instead they miserably watched us from the shop verandas.

e) In Sembabule candidate Besigye's campaign agents informed me about the intimidation and threats meted out to them by the Resident District Commissioner Ms. Margaret Baryehuki together with the District Internal Security Officer.

f) In Kyenjonjo, I was informed by candidate Kizza Besigye 's campaign coordinator for Toro Region Mr. Sam Kawamara that there was heavy shooting at night by UPDF soldiers to scare people and that in the morning a pick-up with candidate Museveni's posters went ahead warning people not to attend candidate Besigye's rally. I saw the pick-up moving around the Town after we had arrived.

g) In Kamwenge, I and other task force members who had gone to address a rally were confronted by a crowd of people who shouted at us and tried to block our way. I was told by the Kamwenge team that this was the work of Hon. Capt. Byaruhanga.

h) When I addressed a women meeting in Kabale Municipality, the women confided in me that they feared for their lives as they had been intimidated by the Resident District Commissioner and requested me to have the R.D.C. transferred.

i) At Ishongoro, our local teams told me that the night before the rally Hon. Capt. Guma Gumisiriza led a gang of people who tore down candidate Besigye's posters and warned people of trouble if they dared to attend Besigye's rally the following day.

4. That sometime on 18th February, 2001, I received a telephone call from Hon. Major Okwir Rwaboni, the Chairman of the National Youth Desk of the elect Besigye Task Force requesting me to provide him with transport to come from Kampala and meet candidate Besigye in Fort Portal.

5. That I told Major Okwir to waft in Kampala since I and candidate Besigye were traveling back to Kampala the next day but he insisted that the issues he wanted to discuss were very urgent and I promised to send him a vehicle but failed to do so.

6. The following day (19 February 2001), 1 was shocked to receive reports that Major Okwir Rwaboni had resigned from the Elect Kizza Task Force.

7. That very day in the evening Hon. Major Okwir turned up at our home in Port Bell, Kampala where he narrated how he had been pressurized and coerced by Maj. Gen. Tinyefuza, Lt. Col. Mayombo, Col. Kasirye Gwanga and other Senior army Officers to make a statement of withdrawal from EBTF but he stated that since he had escaped from them he was back into the EBTF although he feared for his life.

8. The following day (20th February, 2001), candidate Besigye, Hon. Major Rwaboni, myself and other members of EBTF went to Entebbe International Airport to board a plane to Adjumani where we were scheduled to address a campaign rally.

9. That while at Entebbe International Airport Hon. Major Rwaboni Okwir was in my presence forcefully abducted from the VIP by a big number of soldiers. I noticed that Capt. Moses Rwakitarate of the PPU seemed to be in charge of the whole operation which lasted about 5 hours.

10. That Hon. Major Rwaboni Okwir was never charged with any offence or produced in any Court but has since fled into exile. I have talked to him several times since."

The affidavit of Maj. Gen. Odong (Jeje), the Army Commander is indicated in the Chart to have rebutted the Petitioner's affidavit. He deponed in his affidavit dated 28-03-2001 that as the Army Commander, his duty included overall command and direction of the UPDF. As such he is a member of the National Security Council (NSC), which is enjoined by the Constitution to oversee and advise the President on matters relating to National security.

Sometime in January, 2001, at one of its routine meetings, the NSC noted that there were indications that election related crimes were on the increase. Intelligence Reports he received from various parts of the Country pointed to the same trend. On that basis, he briefed the Commander in Chief (President of the Country) and indicated to him the need to put a mechanism to handle the situation. About the same time, the Minister of Internal Affairs pointed out to him the inadequacies of the Police Force in relation to the task ahead and requested that Police be augmented by the UPDF. He further briefed the Commander — in — Chief and suggested the formation of a joint security task force to oversee, handle, and ensure peace and security during the electoral process.

Such a joint task force was formed, comprising of the Police, the Army, the LDUs and the Intelligence agencies under the Chairmanship of the Army Commander, deputised by the Inspector General of Police and the Director General of Internal Security Organization. The joint security task force constituted a joint command structure whereby in each District, the District Police Commander was the overall in charge of security in the District, and armed forces were put on alert for assistance as and when need arose. The formation of such a joint security task force was not a new phenomena in this Country as the same course of action had always been resorted to whenever need arose. For examples, are the 1987, currency exchange exercise; the 1989 expansion of the NRC elections; the 1992 Local Council elections; the 1996 Presidential elections; the 200 Referendum exercise; and the visit of the United States President, Bill Clinton.

For the foregoing reasons, Maj. Gen. Odong said, it was not true to state in paragraph 3(20(c) of the Petition that the 1st Respondent appointed the deponent and other Senior Officers to take charge of the election process for partisan purposes. It was also not true that the army was deployed all over the country and that such deployment resulted into many voters voting the 1st Respondent under coercion or fear or that abstained from voting. To the best of his knowledge, save where they were registered to vote, members of the Armed Forces never went to any Polling Station for the alleged purposes or at all. It was not true that the 1st Respondent organized groups under the PPU to use force or violence against the Petitioner as alleged fl paragraph 3(2) of the Petition. He wished to state that members of the PPU which was a specialised unit for the

protection of the President were deployed in Rukungiri in advance to his visit to the area sometime in January 2001 and their stay was necessitated by his planned return to the area, having taken into consideration the safety of the person of the President and the general peace and security in the area. The allegations about members of the PPU harassing, intimidating, or in any way misbehaving against the Petitioner and/or his supporters contained in paragraphs 16, 18, 19, 21, 22, 23, 25, 26, 29 and 40 of the Petitioner's affidavit are not true.

In response to paragraphs 18 — 29 of the Petitioner's affidavit, Jeje stated that there was a clash between groups of people in Rukungiri after the Petitioner had addressed a public rally and in the process, some members of the groups pelted stones, bottles and sticks at the soldiers and in the process of self- defence, one person was fatally wounded by a stray bullet.

Jeje further deponed that is not true that he or any other official of the UPDF was partisan or that he or any official of the UPDF carried out their duties in such a manner as to promote the candidature of the 1st Respondent as alleged or at all. Regarding Rwaboni's affidavit Jeje said that it was not true that Rwaboni had ever been forced by anybody to make or write any statement denouncing the Petitioner in his presence.

Without saying so, the affidavit of John Kisembo dated 28-03-2001, in effect, rebutted the Petitioner's affidavit. His affidavit is similar to that of Odongo Jeje in matters concerning the Joint Security Task Force. Repetition of what he said is, therefore, unnecessary except, what he said differently.

He said that it was the requirement of the law that the Electoral Commission ensured that the Police and other relevant organs of the State provided adequate security for the conduct of the elections and the protection of the candidates. Given the magnitude of the electoral process of the Presidential Elections of 2001, it was found that the Uganda Police which comprises about 15,000 personnel were not going to be adequate to Police about 18,000 Polling Stations and the related election activities in addition to its ordinary day to day duties.

Although there was a joint security task force at District level under the command of the District Police Commander, policing of the Polling Stations and tallying Centres during the electoral process was only under the Uganda Police, save for the army barracks for which the Electoral Commission had made other arrangements. It was not true that the Uganda Police abdicated its duties or that the policing of the electoral process was taken over by the UPDF.

There were no security related incidents reported during the whole period of the electoral process save for a few electoral malpractices which are under investigations or in the courts of law and he has not received any reports involving the 1st Respondent.

The affidavit of Major Gen. David Tinyefuza dated 4-4-2001, rebuts the affidavits of the Petitioner, Rwaboni and Hon. Winnie Byanyima, M.R, about Rwaboni's arrest in considerable detail. This is what he said:

"1. THAT I am a male adult Ugandan of sound mind serving at the rank of Major General in the Uganda Peoples Defence Forces.
2. THAT I am a Senior Advisor to the Commander — in —Chief of the Uganda Armed Forces.
3. THAT I have perused the petition of Col. (Rtd.) Dr. Kizza Besigye and the Affidavits of Hon.* "Major (Rtd.)"** ***Okwir Rwabwoni and of Hon. Winnie Byanyima both dated 23d March 2001 in support of the said Petition and I wish to reply thereto as hereunder.
***4. THAT it is not true as stated in the Petition, paragraph 4 of the affidavit Hon.* "Major (Rtd)"** ***Okwir Rwabwoni (hereinafter called* "Hon. Okwir") *and paragraph 7 of Hon. Winnie Byanyima, that on the 19th February 2001, he was made by Lt. Col. Noble Mayombo and myself to sign a document at Nile Hotel, Kampala announcing his withdrawal from the Elect Besigye Task Force (hereinafter referred to as* "EBTF")**
5. THAT it is not true that on 21st February, 2001, Hon. Okwir was forced to make a statement disassociating himself from EBTF in my presence as stated in paragraph 8 of the said affidavit of Hon. Okwir.

6. THAT in the ordinary course of my duties as Senior Advisor to the Commander-in-Chief, I detail and receive from various persons acting under lawful covert circumstances, reports concerning security matters within Uganda.

7. THAT on numerous occasions Hon. Okwir was assigned by me the task of covertly gathering information and reporting to me matters of highly sensitive nature relating to the security of and in Uganda.

8. THAT on numerous occasions Hon. Okwir did report to me on matters of a highly sensitive nature relating to the security of and in Uganda.

9. ***THAT at about 5.00 p.m. 15th February 2001, Hon. Okwir telephoned me and requested for a meeting. I agreed to meet him on 17th February 2001. on the evening of 17th February 2001, Hon. Okwir and I met at Okapi Gallery Bunga, where we held a long discussion concerning National security matters in which the Petitioner was named.***

10. THAT I called Lt. Col. Noble Mayombo the Acting Chief of Military Intelligence and informed him that I had received information from Hon. Okwir on important national security matters to discuss. The three of us agreed to meet at Sheraton Hotel, a venue selected by Hon. Okwir.

11. THAT a meeting was held at the Sheraton where Hon. Okwir repeated the information pertaining to the Petitioner's involvement in subversive activities against the state of Uganda.

12. THAT on the 18th February 2001, Hon. Okwir offered to escort me to Sembabule where I was to attend the funeral of a relative. At Sembabule Hon. Okwir told me that he had decided to withdraw from EBTF. Hon. Okwir then addressed the mourners and told them he had withdrawn from EBTF. We later returned to Kampala where we had dinner together.

13. THAT on the morning of the 19th February, 2001, 1 proceeded to the International Conference Centre where I found Hon. Okwir had already written a Statement which was being typed announcing his withdrawal from the EBTF. In the room were other officers namely Lt. Col. Mayombo and Lt. Col Gowa. The room where we were is ordinarily used by the Army for the Kisangani Probe Committee of which Lt. Col. Gowa is a member.

14. THAT after the statement was typed, Hon. Okwir voluntarily signed it in my presence and we shook hands. He promised to put in writing the reports he had given us verbally relating to security matters. He requested for three (3) days to make his report. He (Okwir) telephoned his wife Solange who came and we had lunch together at Nile Hotel

15. THAT before lunch we considered inviting the members of the Press for a Press Conference but on a second thought Hon Okwir suggested that being a Youth M.R, he would prefer briefing members of his constituency (the Youth) first. He asked whether Government could arrange for him facilities at Ranch on the Lake to enable him meet his constituents. He also requested for security in view of the information he had divulged to us. Lt. Col Noble Mayombo then rang Military Intelligence whose personnel then brought a pistol and two guards with rifles. Lt. Col. Mayombo gave Hon. Okwir the pistol and the guards were assigned to him. I asked him to prepare details of his requirements for Ranch on the Lake and asked Lt. Cal. Mayombo to handle, and then I left.

16. THAT in the evening, I received a telephone call from Lt. Col. Mayombo who told me that he could not trace the whereabouts of Hon. Major Okwir Rwaboni. Fearing that he could have been harmed by the EBTF after hearing his statements over the radio. We decided to trace his whereabouts but to no avail

17. THAT on the 20th February 2001, I received information that Hon. Okwir was apprehended at the Entebbe Airport and taken to the Headquarters of Military Intelligence. I proceeded to the said offices where I met Lt. Col Mayombo and Hon. Okwir. He informed us that the Monitor story of that morning alleging that he had stated that he had been forced to make a statement withdrawing from EBTF was not true.

18. THAT Hon. Okwir talked to the* 1st *Respondent on telephone in our presence and again denied the truth of the Monitor story. He told the 1st Respondent that he wanted to go abroad for treatment and rest. The 1st Respondent Lt. Col. Mayombo to facilitate him to go.

19. THAT Hon. Okwir then personally voluntarily wrote a statement announcing his withdrawal from the EBTF in my presence. I later learnt from the media that he read the same statement to the Press at Parliamentary Buildings.

20. THAT I visited Hon. Okwir at his home two days later where he appeared to me to be in good spirits and health.

21. THAT I know Hon. Okwir voluntarily decided to withdraw from ETBF.

22. THAT at no time what so ever did I force Hon. Okwir to sign a statement withdrawing from EBTF nor was Hon. Okwir forced to sign such a statement by any other person in my presence as alleged."

The affidavit of Lt. Col. Noble Mayombo also rebutted the affidavits concerning the arrest of Rwaboni. The rebuttal affidavit is also set out below:

"3. THAT I AM a Member of Parliament representing the Uganda People's Defence Force (UPDF) and also the Ag. Chief of Military Intelligence and Security of the UPDE

4. THAT my job involves collection, analysis and dissemination of intelligence reports on matters of security and distribution of such information to the President, Army Commander, Commanders of various units and other Security Organisation of the Country.

5. THAT I have perused the Petition of Col (Rtd) Dr. Kizza Besigye and the Affidavits of Hon. "Major (Rtd)" Okwir Rwabwoni and of Hon. Winnie Byanyima both dated 23rd March 2001, in support of the said Petition and I wish to reply thereto as hereunder.

6. THAT it is not true as stated in the Petition, paragraph 4 of the affidavit Hon. "Major (Rtd)" Okwir Rwabwoni (hereinafter called "Hon. Okwir") and paragraph 7 of Hon. Winnie Byanyima, that on the 19th February, 2001, he was made by myself and Maj. Gen. David Tinyefuza to sign a document at Nile Hotel, Kampala an announcing his withdrawal from the Elect Besigye Task Force (hereinafter referred to as "EBTF").

7. THAT ft is not true that on 21 February 2001 I forced Hon. Okwir to make a statement disassociating himself from EBTF as stated in paragraph 8 of the said affidavit of Hon. 0kw!,.

8. THAT on 1st January 2001, Hon. 0kwir my younger brother and very close friend, came to my house for the New Year Celebrations and in the course of a political debate told me of his intentions to support the Petitioner.

9. THAT from the time Hon. Okwir returned from Rwanda, I have been using him to collect intelligence on security matters in Uganda.

10. THAT Hon. Okwir often gave me very good intelligence on security matters in Uganda.

11. THAT in my capacity as Ag. Chief of Military Intelligence I encouraged him to join the Elect Besigye Task Force (EBTF) so that he gives me information about security related plans of that group and he agreed to do so.

12. THAT on many occasions between that date and 17th February, 2001, Hon. Okwir gave me in formation of a security nature and received remuneration from me for that purpose

13. THAT on the 17th February 2001, at 11.30 I received a telephone call from Maj. Gen. Tinyefuza who informed me that he had been meeting Hon. 0kwir, for three hours and that it was in the interest of national security that I go to Okapi Gallery Bunga and join them.

14. THAT I suggested that we meet elsewhere. Hon. 0kwir suggested that we meet at the Sheraton Hotel. I went ahead and booked room 1006 for $202 and paid Mr. Isingoma who is known to both myself and Hon. 0kwir

15. THAT Maj. Gen. Tinyefuza and Hon. Okwir came and we had a meeting till 4.00 a.m. While meeting we were served with food and drink including Champagne.

16. THAT in the meeting Hon. Okwir informed us that the Petitioner and Nasser Ssebagala were planning to start insurgency in the event that the Petitioner lost the elections. That they had linked up with people who were throwing bombs in the City, they were hatching plots to kidnap their own members and blame it on the Government and had hired assassins to kill prominent politicians and leaders in Government. Further that they had imported guns and were receiving money from neighbouring countries, which were interested in destabilizing Uganda.

17. THAT on Sunday 18 February 2001, at 7.30 a.m. I went to the house of Hon. 0kwir in Bunga, had breakfast with him and traveled with him to Maj. Gen. Tinyefuza's residence at Kyangera where he repeated these allegations. I left him with Maj. Gen. Tinyefuza and went to meet the Army Commander over the said intelligence reports.

18. THAT on Monday 19th February 2001, 1 went to Hon. Okwir's residence, found many people including my brothers, had breakfast with them and traveled with him in the same car

to International Conference Centre Room 328. Hon. Okwir Rabwoni wanted typing services for his statement withdrawing from EBTF and my Secretary Aida provided the services. While at I.C.C. 0kwir met and discussed with officers like Lt. Col. Gowa, Lt. Cal. Mugisha, Col. Kasirye Gwanga about his decision to abandon EBTF because it was involved in planning subversive activities.

19. THAT Hon. Okwir signed the document withdrawing from EBTF and Hon. Okwir, Maj. Gen. Tinyefuza and I proceeded to the Nile Hotel and booked a Room No. 220 and we had lunch together with his wife Solange as the document was being faxed.

20. THAT in view of the intelligence he had given Hon. Okwir asked for security from me and 1 gave him a pistol for his personal protection and two armed escorts, one uniformed to guard his house and the other in civilian attire to travel with him.

21. THAT Hon. Okwir asked for facilitation to call his youth supporters to Ranch on the Lake on the Wednesday 21 February 2001, to explain his decision that he was leaving the EBTF.

22. THAT after leaving the hotel, my attempts to contact Hon. Okwir were fruitless as his phone was switched off. I got worried.

23. *THAT on the 20th February 2001. I approached Maj. Gen. Tinyefuza and we decided to start looking for Hon. Okwir I was convinced that the EBTF had seen him with us and heard the statement on the radio and had kidnapped or killed him.*

24. THAT at 9.30 a.m., I received a telephone call from one of my intelligence contacts in EBTF that Hon. Okwir was going to be killed in Adjumani by the EBTF members.

25. THAT I telephoned the Director of CID and the Inspector General of Police and we decided to stop him from traveling.

26. THAT I am the one who deployed Lt. (flow Capt.) Monday and Capt. Rwakitarate to stop Hon. Okwir Rabwoni from travelling.

27. THAT I gave the orders in my capacity as Ag. Chief of Military Intelligence. By virtue of my office, I can give orders to any intelligence officer in the Military regardless of whether he is in Presidential Protection Unit or other unit of the Military.

28. THAT Capt. Rwakitarate informed me that he was at Entebbe Barracks at the time and I ordered him in his capacity as an Intelligence Officer of the UPDF being the highest ranking officer in the Entebbe area at the time to take charge of the events at Entebbe Airport.

29. THAT when the officers were obstructed by the Petitioner and others. I informed the Director CID who instructed his officers at Entebbe to effect the arrest.

30. THAT I kept being informed by my officers that the Petitioner obstructed the Police and Military Intelligence and Military Police from 10.00 a.m. to 3.00 p.m. and all attempts to persuade him to release Hon. Okwir were futile.

31. THAT Hon. Okwir was subsequently arrested and brought to my office at Kitante because the Petitioner's camp was mobilizing their supporters in Kampala to interfere with the arrest and remove him from any Police Station forcefully.

32. THAT while at my office Hon. Okwir said that he was not feeling well. I called Dr. Karongo of Mbuya Military Hospital who checked him and reported to me no particular, complaint, no evidence of bodily injury and no necessity for medication.

33. THAT while in Kitante Hon. Okwir received a bed, blanket and bed Sheets, took a bath, received food and cigarettes supplied by his wife.

34. THAT his sister Gertrude Katuramu, brothers David Olimi, Dan Itwara, nieces Dorothy and Rachael, nephews Job and Paul came and visited Hon. Okwir for three hours.

35. THAT Hon. 0kwir asked me to avail him an opportunity to talk to H. E. the President, which I provided. That he talked to the 1st Respondent in my presence and he told the Respondent that he wished to travel abroad for treatment rest and adequate security as the said arrangements were being made.

36. THAT upon the 1st Respondent's directive I requested the British Government to issue Hon. Okwir and his wife with Visas and I obtained them tickets and money to use while abroad.

37. THAT Hon. Okwir was escorted to his residence in Bunga where he stayed with his father and relatives for one week before traveling abroad. That while at home he did not disclose to me or to anybody that I know he had been tortured while at my office by any of my officers.

38. THAT I know Hon. Okwir was escorted by members of the family to the Airport and that he was received by Uganda High Commission staff in London and is still in contact with me by phone.

39. THAT I have never tortured or ordered the torture of anybody in my 16 years of Military service.

40. THAT it is not true as alleged in paragraph 8 of the affidavit of Hon. 0kwir that he was forced to make a statement disassociating himself from the EBTF in my presence or by me. He made the statement voluntarily in the presence of his wife Solange and Brother Dan."

Captain Moses Rwakitarate the Intelligence Officer of the PPU was apparently the Officer who supervised Rwaboni's arrest at Entebbe Air Port. In his affidavit of 12-4-2001, he said that on 20-02-2001, he was at the Entebbe Barracks for the PPU when Mayombo instructed him by telephone to oversee the Rabwoni's arrest at Entebbe International Airport. He went to the Airport and found the arrest in progress. The Petitioner, Hon. Winnie Byanyima and Rwaboni were in the VIP Lounge. He (Rwakitarate) asked Rwaboni to go with him to Kampala. Although Rwaboni was willing to go to Kampala, the Petitioner and other members of his group urged Rwaboni not to go and threatened to use force to stop him. The Divisional Police Commander, Entebbe, and other Police Officers arrived at the scene to effect Rwaboni's arrest. Police Officers in plain clothes proceeded to the lounge but returned and informed the DPC that Rwaboni had resisted arrest and physical force was necessary to effect the arrest.

Rwakitarate returned to the lounge to attempt to convince Rwaboni, but Rwakitarate was threatened with physical harm by the Petitioner and Edith Byanyima. The Petitioner and his wife,

Hon. Winnie Byanyima deliberately encouraged Rwaboni to resist arrest. He (Rwakitarate) reported the matter to Mayombo. Rwakitarate's group was later joined by Captain Kayanja Mulenga who had been requested to reinforce the Police with Military Police who subsequently effected the arrest.

I accept the evidence of Rwaboni, the Petitioner and Hon. Winnie Byanyima that Rwaboni was a member of the Task Force for the election of the Petitioner. He was the Chairman of the Petitioner's Youth and Student's Campaign Committee. I also believe their evidence that on 20-02-2001, Rwaboni was brutally arrested at Entebbe International Airport by the PPU, tortured and detained at the Officers of the Chieftaincy of Military Intelligence on Kitante Road, Kampala. In my considered opinion, the purpose of Rwaboni's arrest was to force him to abandon the Petitioner's team. This was successfully accomplished by all concerned. It must also have had the effect of intimidating and discouraging other people from supporting1 the Petitioner as the incident had wide publicity in the media throughout the Country.

I do not accept the evidence in rebuttal that Rwaboni was a spy planted in the Petitioner's election campaign team and that he was working as an undercover agent for the Chieftaincy of Militant Intelligence and that he was arrested to save his own life because there was a plot to kill him (Rwaboni) by the Petitioner's team in Adjumani. There are several reasons for this. First, Rwaboni resisted the arrest.

Second, because it is absolutely incredible that the Petitioner would want to have the campaign Chairman of his Youth and Student's Committee killed during the campaign. What would the Petitioner and his campaign team achieve by committing murder of the head of its Youths and Students Committee, Rwaboni? Would the purpose be: to enhance or to destroy his chances of being elected President? What would be the purpose? It is self-evident that the suggestion that the Petitioner would kill an important member of his campaign team is completely devoid of any sense.

Third, Rwaboni was not informed of the reason for his arrest at the time or at all. Nor was he produced or charged in court. Only a person who had committed a heinous crime would have been arrested with so much brutality as Rwaboni was arrested.

Fourth, if Rwaboni was a spy as it was claimed, why was he arrested with so much brutality and torture? He was forcefully arrested, bundled on to a pick-up truck by armed soldiers. On the truck the soldiers sat on his head, his chest and his legs. When the motor vehicle drove off, other soldiers were kicking him. In my view that is not the manner in which a person would be handled by his colleagues with whom he or she is working for the same cause. That is not how to treat an ally for whatever cause the allies are working.

Fifth, arrangements were made to send Rwaboni, though at his request, out of the Country where he would be unable to be physically involved in the Petitioner's electoral campaign any more. That was the best way to make sure that Rwaboni was completely removed away from the Petitioner's campaign efforts. Exiled overseas, he would be physically of no use to the Petitioner any longer. Rwaboni's request for a trip and treatment abroad was the direct outcome of the torture he had received. In that sense his trip abroad was not entirely voluntary. It was the result of coercion for him to flee overseas.

Sixth, prior to his arrest on 20-02-2001, Rwaboni had been twice prevented by the PPU from consulting with the Petitioner's supporters in Kanungu Trading Centre, Rukungiri District. Rwaboni himself and many other witnesses have testified to that effect. This, in my view, reinforces the view that the Military and other authorities did not want him to campaign for the Petitioner's election. He had to be removed at all costs.

I also find that in view of paragraphs 15 and 16 of his affidavit, the 1st Respondent had knowledge of the circumstances regarding Rwaboni's arrest.

I shall now move on to consider other evidence regarding involvement of the Military, and other government and L.C. officials, organizations and others in harassment, threats and intimidation of the Petitioner's supporters and agents. There are over one hundred such witnesses from all the sides in the Petition. It is impossible to evaluate all their evidence within the time available. Consequently, I shall consider only samples of such evidence, sufficient to give an overall view of the size of the complaints and the denials.

Bernard Masiko was a registered voter at Nyabitunda Polling Station — Ntungamo Parish, Rukungiri. He was also the Petitioner's campaign agent at Kayonza Sub- County. In his affidavit

dated 20-03-2001, he deponed that on 9-2-2001, at 3.00 p.m. he saw Deputy RDC Mugisha Muhwezi Nyindombi, accompanied by Gommbolola Internal Security Officer (GISO), one Paul Bagorogoza who went to their office with army men from PPU and ordered their office attendant to remove their candidate's (the Petitioner's) posters and the sign post to their office and keep it inside, which the office attendant did for fear of being harmed.

Four days to polling day Mrs. Jackline Mbabazi went and held a meeting with Sergeant Nankunda, Paulo Bagorogoza and ordered the 1st Respondent's supporters to beat up all the Petitioner's supporters. Masiko personally heard her giving that order. Sam Karibwende, Chairman LC III also threatened to shoot Masiko and others if they did not close the Petitioner's District Campaign Office. When Masiko returned the following day, he found another lock had been fixed on the office door. From then on they gave up the office.

On Polling day, he arrived at the Polling Station at 6.30 a.m. He and their other agents found that polling had already started earlier. All the voting was done by the 1st Respondent's agents. One Biryomuhaisho had about 200 ballot papers. He ticked all of them and put them in the ballot box. Masiko found that the same thing was done in all other Polling Stations of that area by Sulait Mugaye and Ismail, all of them the 1 Respondent's agents. When Masiko and other Petitioner's agents tried to stop the practice1 they were forcefully chased away from the Polling Station by Polling officials with the help of armed men and their appointment letters confiscated. By 3.00 p.m. voting had already ended. Many of the Petitioner's supporters1 especially the youths found that their names had already been ticked and their ballot papers cast by the 1 Respondent's agents. Masiko went to a nearby polling station called Kyeshero and found there the same procedure. He witnessed Camen Muryakazi and Rwamahe also ticking ballot papers as they wished. Masiko found this strange and Rwamahe who was armed with an A1C47 chased him away with the help of LDUs and some army men who were threatening voters. Incidents similar to those ones were widespread in their area and the surrounding Sub Counties and Masiko personally witnessed many of them. In the circumstances it became impossible for them to hold free and fair elections, he said. The affidavit is based on knowledge and belief. Belief is irrelevant since Masiko deponed to what he witnessed.

Masiko's affidavit was rebutted by Mugisha Muwhezi. In his rebuttal affidavit of 2-4-2001, he said that he was the Deputy RDC for Rukungiri District. He had read Masiko's affidavit. It was not true that on 9-2-2001, he went with PPU, GISO and Sub-County Chief of Kayonza to the Petitioner's campaign office and ordered the office attendant to remove the Petitioner's sign post and posters and keep them inside the office. Throughout the campaign period, he never entered that office at all. The LCIII Chairman of Kayonza Sub-County is not called Karihwende, but called Baikirize. Muhwezi did not say why Masiko should have fabricated such allegations against him if they were lies. On the other hand as the Deputy RDC, Muwhezi would not be expected to admit that he committed electoral Offences, which Masiko's allegations amounted to if they were true, I would expect the Deputy RDC to deny them, as he did. In the circumstances, I would accept what Masiko said and reject Masiko's denials, and I do.

Bernard Matsiko's affidavit was also rebutted by Captain Atwooki B. Ndahura, the Commander of the deployed in Rukungiri. In his rebuttal affidavit of 4- 4-2001, he said that it is not true that men from the PPU accompanied the Deputy RDC, Mugisha Muhweze to Kayonza Sub-County when he allegedly ordered the removal of the Petitioner's posters from his offices as alleged by Bernard Matsiko. The Captain did not say that he was present at the scene, nor why Matsiko invented such an accusation if he did. On the other hand, the Captain had every reason for denying the PPU of which he was the Commander, did such criminal acts. He would be expected to deny what Matsiko said. For those reasons, I would accept Matsiko's evidence as true and reject the Captain Ndahura's denial as false.

The affidavit of Sam Kakuru, of Karuhinda Village, Kijububwa Kirima, Kanungu District has already been referred to in another context in this judgment. In his affidavit of 2003-2001, he said that he was registered to vote at Karuhinda Polling Station. He was also the Petitioner's Task force Chairman for Kirima sub-County.

In early January, 2001, the task force held a meeting at James Musinguzi's placer in Kiragiro. Suddenly, they were surrounded by PPU soldiers, numbering about 14. They went in the vehicle of the Deputy RDC, Mugisha Muwhezi. The PPU soldiers just stayed around, staring at the people in the meeting until the meeting was abandoned to let the participants go home early.

About two weeks later, Kakuru went to Kambuga to meet Rwaboni. He found PPU personnel beating up Kanyabitabo and Chappa Bakunzi because they had been mobilizing people to meet Rwaboni. As soon as the PPU soldiers saw Kakuru, they hit him with a stick, but he was able to turn his motor cycle round and he drove off. They chased him with their double cabin pick-Up but failed to catch up with him.

Around mid February, Kakuru's campaign Task Force went to meet the Petitioner's Kirima Task Force. As soon as they stopped at Modern Hotel, Kanungu GISO and his group smashed the task force's vehicle, breaking its windscreen and headlights. On 10-02-2001, two days before polling the same GISO's Kihanda group found Kakuru's Task Force meeting. The task force members at the meeting apprehended one of their assailants and took him to Kihihi Police Station. L.C.lll Chairman, one Beshesya Charles who was also the Chairman of the 1st Respondent's Task Force, with GISO, soldiers, and Deputy RDC, Muwhezi, stormed the police station and forcefully released the said assailant, alleging that he had been abducted. On 11O3-2OO1, the group of the Deputy RDC, GISO and PPU returned to Kihinda and rounded up all of the Petitioner's agents in that Parish and detained them until after the elections. As a result, the Petitioner had no polling agents in Kihinda Parish on the polling day. Kakuru said that PPU was heavily deployed all over the District. Member of the Petitioner's Task Force and agents were finally released without being taken to court. Kihinda had been the Petitioner's strong hold. Kakurku further said that on polling day he got up at 5.00 a.m. On the way, he was intercepted by people unknown to him singing ***"No change, Kaguta."*** They chased him back to his home. He later managed to reach the polling station at 7.00 a.m., and he voted. Kakuru noticed that all the Policemen who voted at the stadium were ordered to tick their ballot papers at an open table, in the presence of the GISO ***"boys."*** When Kakuru identified himself, the Presiding Officer, one Tindyebwa Eugino, ordered him to sit far from the polling agents' table, saying that the table was for government people, not for *"**rebels**"* like Kakuru and his colleagues. Tindyebwa and other officials started ticking ballots for people on the table. Kakuru objected and was manhandled and beaten up. Policemen looked on helplessly for they had earlier on been warned that they were known to be ***"anti — Museveni'"*** Kakuru was chased away from the polling station. He stayed at home until about 4.00 p.m. eventually, he said, all the Petitioner's other agents were also chased away. At about 5.00 p.m. stone wielding thugs led by Stephen Rujaga, Rubondo and other

1st Respondent's task force members went on two pickups and surrounded Kakuru's home, demanding that he should go and meet the RDC. He refused and he entered his house. They threatened to demolish his house, and that forced Kakuru to go with them. They took him to the polling station, where he was ordered to sign the declaration of results forms. He refused, and he was taken to the ROC, the Deputy RDC, the GISO and others. Kakuru said that he told all of them that he would not sign because he had not witnessed the balloting. They insisted and threatened him until he signed.

The Petitioner was allocated only one ballot paper per ballot box, from that cluster of polling stations. All other ballot papers ticked for the Petitioner were destroyed and the Petitioner ended up with only three voters in his favour, only after Kakuru and his colleagues had signed the declaration results forms were they allowed to go home.

The Chart shows that the affidavit of Sam Kakuru is rebutted by Captain Ndahura, but a scrutiny of Captain Ndahura's rebuttal affidavit, dated 4-4-2001, shows that paragraph 4 thereof refers to Sam Kakuru, as follows.

"4. That I have read the affidavits of Bernard Matsiko, Kakuru Sam, Frank Byaruhanga and found them to certain falsehood."

That is all that Captain Ndahura's rebuttal affidavit says about Sam Kakuru's affidavit. It says nothing else about it.

This implies that, according to Captain Ndahura, all that detailed evidence Kakuru said in his affidavit is made up. It is all false. I do not believe that denial any more than I have believed the Captain's denial in respect of the other witnesses he has referred to in his affidavit. In my view, Kakuru's affidavit evidence is credible as against Captain Ndahura's rebuttal for the reasons I have given for believing, for instance, the affidavit of evidence of Bernard Matsiko, whose evidence I have just considered in this judgment.

Byaruhanga Frank was an Administrator of the Elect Besigye Task Force. In his affidavit dated 23-03-2001, he deponed that on 3-3-2001, the Petitioner was scheduled to address a rally at Bikurungu in Bwambora Sub-County, Muhingi, but he could not do so due lack of time.

Consequently, Byaruhanga and Hon. Robert Sebunya were sent to address the rally. On their arrival, Byaruhanga's driver called Batuma was called aside by four soldiers of the PPU. The soldiers started beating the driver Oil the pretext that no one else was supposed to campaign that day except the Petitioner. Thereafter, the Area Chairman of the Petitioner's Task Force, one Doma, was caned and his shirt stripped off by the PPU soldiers, who said that it was punishment for mobilizing and welcoming Byaruhanga, and his colleagues for the day's campaign. The task force's Sub- County agent was similarly called aside by the PPU and beaten for getting involved with the Petitioner's group, ***"yet he was working with the Government."***

In such circumstances, the PPU started beating and Harassing people and ordering them to disperse. In the result, the rally was abandoned by the people, Sebunya and Byaruhanga. On 17-03-2001, at Rwerere, Rusoroza I, in Rujumbura, Byaruhanga was informed by one Erika Mukuru, the Petitioner's agent1 that the presiding Officer, one Twinomatsiko Robert, who also acted as the 1st Respondent's agent during the registration of voters and display of register exercise, had issued out many Voters' Cards to persons not being the registered voters shown on the cards. The agents in the area kept an eye on Twinomatsiko until his shamba boy called Zikanga was caught with 20 Voters' Cards in his pockets and was arrested by the local people. Byaruhanga tried to put Kikanga in his car to take him to the police but the presiding Officer refused on the ground that Byaruhanga was not an arresting Officer. Byaruhanga then rushed to Rukungiri District headquarters informed the DPC who gave him a car a Sergeant and a Prisons Officer. They then proceeded to the scene of the incident. On reaching there, they found that the L.C. Ill Chairman, one Turahimbise had ordered that the said Zikanga be released and that he had received order from Captain Ndahura of the PPU to release the man.

Byaruhanga further said that he was informed by one Gifuti Turinawe, the Petitioner's agent at Kigugu I that the presiding Officer, one Kamutoro, of the neighbouring polling station Kagugu I and the Headmaster of Rwerere Primary School had been seen with Voters' Cards and giving them to children. Byaruhanga proceeded to Kagugu I with Counselor James Bwete and Kamutoro who accepted cards at home where the said James and Byaruhanga then went. At home they got seven Voters' Cards that were in his (Kamutoro's) custody and another 20 cards from his daughter's school uniform. The uniform and cards were retained by the police. In the meantime an observer from the American Embassy appeared. Byaruhanga and his colleagues

briefed her about everything. She also interviewed the presiding Officer, about the anomalies. The presiding Officer admitted that there were under-aged voters and that he was forced to accept them to vote.

Captain Ndahura rebutted Frank Byaruhanga's affidavit. In his rebuttal affidavit of 4-4-2001, Captain Ndahura deponed that on 3-3-2001, the Petitioner addressed a rally at Rukungiri Town. On that day, no PPU soldiers moved to Bwambara sub-County. It is not true that the PPU moved to Bwambara on 3-3-2001, beat up people or dispersed Sebunya's rally as alleged by Byaruhanga, but it remained in camp until late in the evening when he (Capt. Ndahura) moved to town with his escorts in response to the shooting which he heard coming from town, to find out what was happening. Capt. Ndahura said that he never participated in the shooting. He further said that he was not aware of the allegation that one Zikanga was found with Voters' Cards Capt. Ndahura also said that he never instructed Seezi or anybody else to release anybody in connection with election malpractices as alleged by the Petitioner's witnesses.

I do not believe Captain Ndahura's denials of the allegations made against him by Frank Byaruhanga in his affidavit. My reasons for doing so are the same as those I gave for disbelieving Capt. Ndahura's denial of the allegations made against him by Bernard Matsiko. Another reason for not accepting Capt. Ndahura's denial with regard to Byaruhanga's affidavit evidence is that on the one hand the Captain said in paragraph 9 of his affidavit that on 3-3-200L the day the Petitioner addressed a rally in Rukungiri, the PPU remained in camp until late in the evening when he (the Captain) moved to town with escorts in response to the shooting which he had heard in town to find out. As all available evidence shows, that shooting was by the PPU. This means that the PPU could not have been in camp throughout until late in the evening when the Captain moved to the town in response to the shooting. The PPU could not have been contained in camp and at the same time shoot in town before the Captain moved out in response to the shooting.

I have already referred to the affidavit of Koko Medard in another context. In the present context, he said that throughout the District of Rukungiri, generally, army men whom he learnt were from the PPU were deployed and were prominently present throughout Kambuga, Kihihi, Kayonza and other places. He was traveling a lot and saw them every day for about three months. They

used to move with Mugisha Muwhezi (Deputy RDC) who used to point out to them whom to harass. During the period they tore up the petitioner's posters1 dispersed any group of three or more people, saying that they were the Petitioner's supporters. When Rwaboni went to address people, they chased him away. They beat U a lot of the Petitioner's supporters including Henry Kanyabitabo, Kalisti and many others. They rounded up the Petitioner's supporters and put them in jail at Kambuga, such as the said Kanyabitabo who was eventually released but whose motor cycle was retained.

Incidents similar to the ones Kakoko has described, he said, were wide-spread in their area and the surrounding Counties and he personally witnessed many of them. In the circumstances it became impossible to hold a free and fair election. Since what he deponed to was mostly what he witnessed, belief is irrelevant. Koko's affidavit was based on knowledge and belief. Kakoko's affidavit was also rebutted by Mugisha Muwhezi, who said that he never traveled with the PPU to point out the Petitioner's supporters to be harassed. He did not know who supported the Petitioner or any other candidate. He never harassed anybody or used PPU to do so. What I have said about Muwhezi's rebuttal of Masiko's affidavit, applies equally to his rebuttal of Koko's affidavit.

The affidavit of Koko Medard was also rebutted by Captain Ndahura in his rebuttal affidavit of 4-4-2001. He said that it is not true that PPU soldiers in Rukungiri District were deployed and were prominently present in Kambuga, Kihihi, Kanyonza and other places as alleged in Koko Medard's affidavit. He further said that he and the soldiers were based in Rukungiri at the State House Lodge. The PPU also scouted the routes which the President was likely to use in his visit to the District for purposes of reconnaissance; this did not include surrounding and entering people's houses. It is not true that he chased Rwaboni when the latter in Rukungiri or dispersed away his rallies. He only assisted the Kanungu Police with transport to disperse what the O/C deemed an illegal rally which "Rwaboni was addressing at Rugyeyo." He also ordered his soldiers to arrest Rwaboni's unauthorized escort who was a UPDF soldier in active service. The police also arrested two people over uttering abusive words against the President.

I do not believe Capt. Ndahura's denial of what Koko Medard had said in his affidavit. The reasons are the same as those I gave for rejecting the Captain's denial of Bernard Matsiko's

contents of his affidavit; believe that Koko Medard spoke the truth. It is incredible that so many witnesses whose evidence about the PPU is similar and tend to corroborate each other made up their evidence and that only Capt. Ndahura spoke the truth. I do not believe it. I believe that the PPU did what those witnesses said they did.

I have already referred to the affidavit of John Hassy Kasamunyu in another context in this judgment. He said that on 17-02-2001, he was accompanying Mbabazi David, a Maakerere University Student, who was going to meet his fellow students at Kanungu. When they reached Ishugu, they found that the students had been molested by the 1st Respondent's supporters and the students had gone to report the incident to the Police, to where Kasamunyu and colleague followed them. About 300 meters from the Police Station a gang of people rushed on to the road with a Pole and stopped them. As soon, Kasamunyu halted, they seized and manhandled him, throwing him off his motor cycle. One member of the gang, Stephen Rujaga, drove off on the motor cycle as Kasamunyu and companions went back to the Police to report. After they had finished reporting a different man arrived on the motor cycle, carrying a Policeman. The Policeman said that he would not return the motor cycle to Kasamunyu until the man who had it returned to the police station.

Kasamunyu waited until 6.00 p.m., when the officer in charge told Kasamunyu that the GISO who had seized the motor cycle had said that it was a Government motor cycle. Kasamunyu left and went home and never recovered the motor cycle.

On 9-3-2001, Kasamunyu and others were holding a meeting of the Petitioner's Task Force for Kihanda Parish when 15 vigilantes of the 1st Respondent went and attacked them. They were half naked and carried sticks, whistles and stones. They started beating up the Petitioner's supporters. When the victims of the attack made an alarm, other people answered the alarm and the vigilantes ran away. They got hold of one of them, who said that they and other vigilantes were on a mission to terrorise the Petitioner's supporters. Kasamunyu and colleagues took the arrested vigilante to Police Station and the victims of the beatings to Kihihi Health Centre. Next, day the Police and PPU started hunting them. Some of them were arrested and taken to Kanungu Police Station. Those arrested were: Tukahirwa Sam, Mugisha Geoffrey, Kwesiga, Kwiragira, Robert Hashaka Kimama, Ntare, Richard Bikamya, Tusingwire Kalima. They were remanded at

Kanungu Police Station until 16-03-2001. They were the Petitioner's supporters. They never voted. Kasamunyu ended that as he was being hunted, he never voted, nor worked as the Petitioner's agent. Up to 20-03-2001, when he swore the affidavit he was still in hiding and could not go to his home.

The Chart shows that Kasamunyu's affidavit was rebutted by Jamil Kakombe, but Kakombe's rebuttal affidavit evidence is not relevant to Kasamunyu's affidavit. It is relevant to Koko Medard's affidavit in connection with stuffing ballot papers into ballot boxes and forcing voters to vote for the 1st Respondent. Accordingly Kasamunyu's evidence regarding harassment by GISO, PPU and the 1st Respondent's agents remains uncontroverted and I accept it.

The affidavit of John Hassy Kasamunyu was also rebutted by Captain Ndahura in his rebuttal affidavit of 4-4-2001. He said that the allegation in the affidavit of John Hassy Kasamunyu that the police and hunted the Petitioner's agents for beating harassment by vigilantes in Kihinda Parish Kirima Sub-County is not true. Captain Ndahura said that he did not deploy PPU in Kihinda Parish for the purpose or at all. I do not believe Captain Ndahura's denial of Kasamunyu's evidence for the same reason I gave in respect of the other witnesses.

The affidavit of Mpwabwooba Callist has already been referred to in another context in this judgment. He was a registered voter at Murara Village, Kashoijwa Parish Rugyeyo Sub-County, Kanungu District. He was also a coordinator for the Petitioner's Task Force for Rugyeyo. In his affidavit of 2003-2001, he said that in early January, 2001, they held a meeting at the place of James Musinguzi in Kiragiro. Suddenly they were surrounded by soldier's numbering about 14. They went in the vehicle of Deputy RDC Mugisha Muwhezi.

They deployed all around, staring at them, until they had to abandon the meeting to let people go home early. Two weeks later he went to Kambuga to meet Rwaboni. There Mpwabwooba found PPU soldiers who had gone with Captain Ndahura's vehicle beating UP Henry Kanyabitabo and Chappa Bakunzi because those had been mobilizing people to meet Rwaboni. As soon as the soldiers saw Mpwabwooba they attacked and hit him with a stick, but he was able to turn his motor cycle and drove off. They chased him with their double cabin pick-up but failed to catch up with him.

At Rugyeyo where Rwaboni was to address the people, the PPU soldiers went and ordered people to disperse, although Mpwabwooba had informed the Police and the Gombolola authorities of the rally. The GISO of Rukungiri, one Twagira was with them. People dispersed amid beatings. In particular they apprehended two of the Petitioner's supporters namely Isaac Katente and Kyarikora, put them on a pick-UP1 roughed them up and took them away. They were released the following day. The O.C. sent a verbal message to Mpwabwooba that if he did not resign from the Petitioner's Task Force, he would be taken next.

On 3-3-2001, when the Petitioner was going to Kanungu, the GISO, Baguma John and Edson Safari, LCIII Chairman, Kayonza Elias, went around telling people that if they went to the rally, they would be ***"dealt with-"*** Throughout the two weeks to the elections, some people used to go around directing people to turn UP and vote for the 1st Respondent, and that if they did not, their houses would be burned down.

On Election Day, the PPU soldiers were deployed throughout Mpwabwooba's village and neighbouring villages and the Gombolola headquarters to ***"monitor elections."*** The night before the elections, some soldiers were distributed at the homes of known supporters of the Petitioner, such as James Musinguzi and Byaruhanga Benon. That night Mpwabwooba's found them there and what he called the whole area. In the evening as he and others were listening to the radio, one Mugisha Peter, Councilor went near them and shot two bullets in the air. On voting day the Petitioner's agents were ordered to remain 50 meters from the Polling desk. The PPU soldiers were distributed in parishes where the Petitioner was known to have strong support and they kept chasing after them wherever they went.

At Kifunjo the Petitioner's monitor was seriously beaten and thrown into a road side trench with his motor cycle. At that Polling Station, Mpwabwooba found the presiding Officer, Korutookye Gandioza personally ticking the ballot papers for the 1st Respondent before handing them over to voters to cast them in the ballot box. The Petitioner's agents counted about 500 votes before they lost count and gave up. At Katojo, Mpwabwooba found the same thing being done by the presiding Officer, Kabarashera.

At Kashojwa, the presiding Officer Mwebesa Michael did the same. There one Kazahura Gervase insisted on ticking his own ballot paper only to find that it was already ticked for the 1st Respondent. He insisted, and he was given another one. At Nyarurambi; Ndyomujuni was the Petitioner's monitor, but the GISO took away his Monitor's badge, arrested and kept the monitor in his car until polling closed.

Apollo Arinaitwe, the presiding Officer, was also actively ticking ballot papers with his other polling officials. On Mpwabwooba's way from one Polling Station to another, the said Mugisha Muwhezi met Mpwabwooba. The former was in a car. He pointed a gun at Mpwabwooba and continued with his journey. At Kifunjo, the 1st Respondent's agents threw stones at MpwabwOOba'5 car, but an International observer arrived at the scene and the stone throwers feared to carry on. Then after the elections the GISO called Mpwabwooba showed him a bullet and told him: ***"This was meant for you but you survived."*** The same day Mugisha, a Councilor, met Mpwabwooba in the presence of Kinyata, M.P., and the RDC and introduced him to them as the rebel who was trying to overthrow them so as to become RDC in the petitioner's Government. In the circumstances, Mpwabwooba said, it became impossible to hold free and fair elections. The affidavit was based on knowledge and belief, but as the witness deponed to what he saw, belief is irrelevant.

Captain Atwooki Ndahura also rebutted the affidavit of Mpwabwooba Kallist. The Captain deponed in his affidavit of 4-4-2001 that it is not true that was distributed at the homes of the Petitioner's supporters; nor was PPU present at any polling station. The PPU remained encamped at their station and never moved out on polling day. I do not accept the denials by Captain Ndahura's of Mpwabwooba's evidence about the PPU for the same reasons I gave in respect of the other witnesses. I believe that Mpwabwoobwa s evidence is credible.

Bashaija Richard was a Rukungiri District Coordinator on the Petitioner's Task Force. In his affidavit of 2O032001, he said that on 27-01-200, at 3.00 p.m. when they were in their candidate's meeting at Kyeijanga Kirima, four Policemen from Rukungiri, went to the venue and arrested them saying that their meeting was illegal. The people attending the meeting were rounded up and detained at Rukungiri Police Station for three days, and released on Police Bond.

When the victims returned to honour the bond, the bond papers were torn up and they were told that the case was closed.

On 20-32-2001, at Kanungu Bashaija and one Owembabazi were arrested by the GISO of Kirima at a road — block, set UP by him. They were beaten UP, thrown on a pick-UP and taken to Karegye where Bashaija was thrown in a pit and buried under soil/mud, leaving only his head above ground. After the GISO and his group had left Owembabazi rescued Bashaija. As he was trying to go to Rukungiri Police Station to report the incident the same day, Police fired tear gas at him, preventing him from making the report. A day later, the GISO and Police demanded that he should take them to the scene. They found there the owner of the land in which Bashaija had been buried. The former corroborated the latter's statement. Bashaija was told to report to the Police Station the next day. When he did so he was locked up for three days, taken to Court and charged with holding a demonstration. He was released on bail.

On 23-03-2001, as the Petitioner's supporters were waiting for him in front of their District Campaign Office, PPU soldiers attacked them and beat them U dispersing and preventing them from waiting for their candidate. That evening PPU found Bashaija in Ijimo Hotel, arrested him and dragged him to the streets, removed his shoes, kicked him over thirty minutes and released him. On 3-3- 2001, when Bashaija and others were arranging to hold a rally with the Petitioner, Bashaija found Captain Ndahura of the PPU in Hotel Holiday. The latter called the former to his table, pulled out his pistol held it at Bashaija's head and warned him that he would shoot him if anything happened to PPU personnel in Rukungiri. After the Petitioner's rally the same day PPU soldiers went on the rampage in Town, shooting many bullets in the air and at the Petitioner's supporters killing one Beronda in the process. The Petitioner's supporters had not provoked the PPU in any way. They had not breached the peace nor were they demonstrating. They were just walking back from the venue of the rally. From then on PPU soldiers started actively looking for Bashaija. He went into hiding until the morning of the Polling day, when he sneaked out to the Polling Station and cast his vote. Bashaija said that what he said in his affidavit were mere examples of the kind of harassment he and his colleagues on the Petitioner's campaign team in Rukungiri went through, especially from the time the PPU and Senior District administrators actively started a deliberate process to prevent any form of support for the Petitioner in

Rukungiri and Kanungu Districts. The affidavit was based on information and belief. Knowledge was derived from what Bashaija witnessed and the grounds of belief were what he saw.

In his affidavit rebutting what Bashaija said in his affidavit, Captain Atwoki B. Ndahura, the Commander of the PPU in Rukungiri at the material time, denied that he met Bashaija in Hotel Holiday on 3-3-2001, or that he drew a pistol on him.

He said that he never met Bashaija on that day at Hotel Holiday or anywhere else. This was a blanket denial. Captain Ndahura did not say why Bashaija should invent such an allegation against him. Captain Ndahura would not be expected to admit having committed a criminal offence as alleged by Bashaija, if the allegations were true. He would be expected to deny it, given his official position. I would believe Bashaija's evidence as true and reject Ndahura's denial as false, and I do.

Owembabazi Placidia, of Kakabada, Northern Ward, Rukungiri Town Council said in his affidavit of 20-03-2001, that he was a member of the District Task Force f or the Petitioner. On 11-03-2001, with the apparent intent to intimidate and scare him not to vote for the Petitioner, two armed Policemen and one plain — clothes Policeman and some other unidentified persons, without a search warrant surrounded his premises and said that they were searching for Military equipment in his possession, to wit, guns uniforms and others. Nothing was found in his possession. The affidavit is based on knowledge and belief, but belief is irrelevant since the witness depend to what he saw.

The Chart does not show that the affidavit of Owembabazi is rebutted. His evidence therefore stands uncontroverted, and I accept it.

Byomuhangi Kaguta, of Bwambara Village, Bwambara Sub-County, Rukungiri District was a polling agent for the Petitioner. In his affidavit of 20-03-2001, he said that on 11-03-2001, he was arrested by three armed soldiers of the PPU who had been deployed all over the District. He was thrown into a pit (Ndaki) in the; barracks, and suffered a lot. The following night Buterere and Tukahiirwa, two of the Petitioner's agents were also brought in to join Kaguta. They spent the whole of Polling day in the pit. Accordingly, they did not vote. Kaguta said that these are mere examples of the kind of harassment he and other members of the Petitioner's

campaign team in Rukungiri went through, especially from the time the PPU and Senior District administrators actively started on a deliberate process to prevent any form of support for the Petitioner in Rukungiri and Kanungu Districts. The affidavit was based on knowledge and belief, but belief is irrelevant, since what the witness deponed to was what he saw. The chart does not show that Kaguta's affidavit was rebutted. His evidence therefore, remains uncontroverted, and I accept it.

John Kisumba of Kasenge I Village, Bwera Sub-County, Kasese District was the Petitioner's Monitor for Bukonjo West Constituency. In his affidavit of 20-03-2001, he said that prior to Polling day, a soldier by the name of Kihindiro William went to Kisumba's area of control and said that he had been sent by State House to arrest those campaigning for the Petitioner, and that he had a list of the Petitioner's agents, including Kisumba, whom he intended to arrest.

On 12-03-2001, Kisumba was monitoring the election when he found at Kasika Nyakimasa Polling Station that six under-aged. Children tried to vote. The Polling officials ignored Kijumba, and the 1st Respondent's agents threatened to stone him if he continued to question voting by the under-aged children. He reported the incident at Bwera Police Station. At Rusese, Kyampala Polling Station, he saw two under-aged children lined up to vote. The Presiding Officer said that since the children had Voters' Cards, they were free to vote and they voted. At Katojo Polling Station, Kisumba noticed that there were 10 armed army men guarding the Polling Station. The Chart indicates that Kijumba's affidavit was rebutted by Boniface Mupaghasya but it does not show where the rebuttal evidence can be found.

Edison Gumenze was a Monitor for the Petitioner at 8 Army Polling Stations in Rukonjo West Constituency. In his affidavit of 20-03-2001, he deponed that three new Polling Stations were created to make 10. At Isango and Kisabu in Kitholhu Sub-County, he noticed that armed soldiers were guarding the Polling Stations. He was threatened by the GISO, Sibaligana and Zainabu a woman Councilor for Kitholhu — Ihandiro Sub-Counties, who told him that he, would die if he continued to monitor the area. Earlier on 25-02-2001, during his campaign exercise, he was arrested by Sgt. Kalindiro William attached to Nakasongola D.M.I. who said that he had been sent by State House to stop those campaigning for the Petitioner against the 1st Respondent, like Bumenze.

During the voting he noticed that lorry loads of armed soldiers from the Congo were ferried from there, shouting ***"No change"*** as they passed near Polling Station. After voting in one Polling Station, the same soldiers were ferried to vote in another.

Sgt. William Kilindiro threatened to kill Bumenze as Kihindiro said he had killed one Jacob the brother of George Kayiwa or arrest him and detain him at Luzira Prison, as he had done to a Martin Bwambale. In February, 2001, in Mpondwe — Bwera, Township, Gumenze was threatened with arrest and detention by Major Muhindo for campaigning for the Petitioner. The affidavit is based on knowledge and belief. Belief is irrelevant since the deponent spoke of what he saw.

Zainabu Asiimwe who rebutted Bumenze's affidavit said in her rebuttal affidavit of 4-4-2001, that she was a woman Councilor for Kasese District Council. On 12-03-2001, she saw Kamenze but the allegations made by him against her were false. She was not met at Kisabu and Isango Polling Stations as alleged by Bumenze. Zainabu did not say why Bumenze should have told lies against her. I would not believe that Bumenze invented her name out of the blue. On the other hand, I would not expect that Zainabu, a Councilor would admit that together with the GISO she threatened a Polling agent at a Polling Station Zainabu would not be expected to admit that what Bumenze said was true. I would therefore reject Zainabu's denial and accept Bumenze's evidence as true, and I do.

Mutabazi Pius was a Superintendent of Police and Kasese District Police Commander. In his affidavit of 2-4-2001, he rebutted paragraph 15 of the affidavits of Edison Bumenze. Mutabazi said that the complaint raised therein was not reported to the Police. Bumenze did not say that he reported the incident at the Police Station. If it was not reported, it does not in my view, necessarily mean that it did not happen. Mutabazi, SR also said that he was not aware that soldiers were ferried on lorries and voted at several Polling Stations as alleged by Baguma John Henry and Bumenze, as no reports thereof were made to the Police, nor was a report received of what John Kajumbe said had happened at Bwera Police Post. I find that the rebuttal affidavit of Mutabazi S.R not helpful, because he was not at the Polling Stations where these witnesses alleged the malpractices happened. Secondly, the fact that no reports were not made at Police Posts does not necessarily mean that they did not happen.

Mutabazi SP also said that Sulait Kule dumped 16 Voters' Cards at the Police Station without disclosing where he has got them from, and never returned to follow up the report. Again, this does not mean, in my view, that Kule's allegation about those Voters' Cards was false.

Mary Frances Ssemambo was the Chairperson of the Elect Besigye Task Force, Mbarara District. In her affidavit dated 21-03-2001, she said, inter alia, that in many Polling Stations, particularly in Nyabushozi, and Isingiro Counties, Polling agents for the Petitioner were harassed, arrested, beaten, tied up and detained or threatened with violence and chased away from the Polling Stations by heavily armed UPDF soldiers, LDUs and the 1 Respondent's agents. The interests of the Petitioners in numerous Polling Stations were, therefore, not safeguarded. The affidavit was based on knowledge. The Chart shows that the affidavit of Ssemambo is rebutted by Samuel Epodoi, the District Police Commander of Mbarara District. In his rebuttal affidavit of 3-4-2001, Epodoi said that paragraph 6 of Ssemambo's affidavit was false. On 12-03-2001, both Nyabushozi and Isingiro South Counties were policed by Mobile crews, constituted both by Policemen and UPDF soldiers under the leadership of Police Officers. That the incidents alleged to have taken place in Nyabushozi County and Isingiro County South, never occurred and the allegations of harassment of the Petitioner's Polling agents were false. Epodoi did not say why Ssemambo should have fabricated a lie if that was what her allegations were. Presumably what he said came from reports he had received, if he did, because he himself did not visit the Polling Stations. But he did not say so. On the other hand as the District Police Commander, he would be the last person to admit that such incidents occurred, if indeed they occurred. For it would not reflect very well on him. I would, therefore, prefer what Ssemambo said to Epodoi's denial, and I do. The Chart indicates that the affidavit of Ssemambo is also rebutted by Kafureka (CAO) but it does not indicate where Kafureka's rebuttal affidavit can be found.

The affidavit of Boniface Ruhindi Ngaruye a practicing Lawyer, in Mbarara, has already been referred to in another context. In his affidavit he deponed that he was a member of the Elect Besigye Task Force, Mbarara. His consultative meetings on behalf of the Petitioner in Ishongerero Sub-County were gravely interfered with to the extent that on 21-02-2001, he was harassed and chased away from Ishongorero by an armed LDU Commander of Ishongerero Sub-County who threatened to shoot him and fired a gun he was wielding. The case is pending before the Chief Magistrate's Court as IB CRB. 66/2001, Criminal Case No. 1 92/2001. As a result of

the threat to his life, he was denied the opportunity to hold consultative meetings on behalf of his candidate and to canvass support for him freely.

Ngaruye said that he was not only a leader, but also very popular. On the eve of the Election Day at about 7.30 p.m., there was heavy deployment of heavily armed UPDF soldiers in Mbarara Municipality and the Petitioner's Task Force had planned a meeting to begin at 8.00 p.m. and end at 11.00 p.m. The meeting aborted as freedom of movement in the Municipality was that night interfered with. The affidavit is based on knowledge save one paragraph (which is irrelevant here) which is based on belief and reason thereof is given.

Epodoi, S.R, also rebutted Ngaruye's affidavit. He said that the Criminal Case referred to by Ngaruye was a result of the LDU Commander, Saad Gumisiriza's effort to apprehend suspected criminals in Ishongerero Sub-County. The allegation of heavy troop deployment interfering with the Petitioner's Task Force meeting on 11-03-2001 was completely false because the joint security teams were in charge of security in Mbarara Municipality and their presence did not affect the residents' freedom of movement. The comments I made above about Epodo's rebuttal of Ssemambo's affidavit equally applies to his rebuttal of Ngaruye's affidavit. I therefore, reject Epodoi's rebuttal and accept Ngaruye's evidence as true.

Alex Busingye, of Kakiika, Mbarara, was a registered voter and during the 2001 Presidential Elections, he was in charge of overseeing the operations and welfare of the Petitioner's Polling agents for Kazo County, Mbarara District. In his affidavit of 21-03-2001, he said that at the majority of Polling Stations he visited, he found the Polling agents for the Petitioner not present; they had been chased away by armed UPDF soldiers. At Nkungu Polling Station he found the monitor for that station had been tied by the UPDF soldiers and bundled on Motor vehicle No. 114 UBS in which they were traveling. The Chart indicates that Busingye's affidavit has been rebutted by Aspro Kwesiga, but it does not show where Kwesiga's affidavit may be found.

Masasiro Stephen of Bukabalyenda Village, Jewa Parish Bungokho, Mbale District was a Polling agent for the Petitioner at Nkusi Primary School. In his affidavit of 21-03-2001, he deponed that he arrived at the Polling Station at 6.30 a.m. Later there was a disturbance started by the Area Sub-County Chief Abdu Mudema, the Chairman of the 1st Respondent's Task Force Ali

Mukholi, the Sub-County Councilor, Michael Namudi, who went to the Polling Station with four armed soldiers. All the soldiers shot in the air. Masasiro and Wafula, the Petitioner's Polling agents were severely assaulted. After they were assaulted, the Sub-County Chief, the Sub-County Councilor, and the Chairman of the 1st Respondent's Task Force put into the ballot box ballot papers on which the 1st Respondent's name was ticked. Masasiro and his colleague tried to intervene but they were further assaulted; but he insisted that the ballot papers put in by the three be removed, but the three men continued to put more ballot papers into the ballot box. Masasiro struggled with the 1st Respondent's Task Force Chairman from whom he removed five ballot papers, already ticked for the 1st Respondent. Masasiro ran to Mbale Police Station and handed over to the Police the five ballot papers. His statement to the Police was received, with reference SD1 5/12/3/2001. Up to the day Masasiro deponed to the affidavit, the Police had not yet called him back for further action. The affidavit was based on knowledge and belief, but since the deponent related only what he witnessed, belief is irrelevant.

Masasiro's affidavit was rebutted by Michael Namundi, a District Councilor, Mbale District. In his rebuttal affidavit of 2-4-2001, he said that he was a member of the Respondent's Mbale District Task Force. On 12-03-2001, he went to Nkusi Primary School Polling Station at 8.00 am. to cast his vote. On arrival there, he noticed a scuffle between some women voters and Masasiro, who was blocking those women to vote by grabbing their ballot papers because they were going to vote for the 1st Respondent. Namundi went to make a report to the Bufumbo Sub-County Chief, Abdu Mudema. As a result, Mudoma, Ali Bulobe s/o Mukholi Chairman of the Bufumbo Task Force for the 1st Respondent and Namundi returned to the scene. They found Masasiro seated on the ballot box and preventing everybody from voting. The Presiding Officer was looking on helplessly. Abdu Mudema cautioned Masasiro about his behaviour. With the help of a Police Constable the ballot box was wrested away from him. Thereafter, Masasiro ran away and voting continued smoothly. According to Namundi's account of what happened, Masasiro was the person who committed crimes at the Polling Station. As there was a polling Police Constable present, according to Namundi, why was Masasiro not arrested? Instead it was the culprit (if Masasiro was one) who reported the matter to Mbale Police Station, a report given a reference number. It would have been helpful if the Police explained this by affidavit evidence. As it is, I do not believe that it was normal for the accused person who went to the Police Station

instead of his accusers if Namundi's account is true. As it was Masasiro who made a report to the Police I do not think that he was the culprit as Namundi painted him to be. In the circumstances, I prefer Masasiro's version of events to that of Namundi.

Antelli Twahirwa, of Kingengi, Kabale Municipality, was the Kabale District Chairman of the Petitioner's Task Force. In his affidavit of 21-03-2001, he said that during the campaign, the RDC, Mwesigye, with LDUs Parish Chiefs, and GISOs kept the Petitioner's Task Force under constant harassment. The harassment was wide spread and occurred in almost every part of the District which Members of the Task Force attempted to visit. The Petitioner's Kabale District Task Force had a wide range of complaints about the conduct of the pre-election process which they found to be fundamentally flawed. They forwarded their complaints to the 2 Respondent, but nothing was done to redress the situation. A copy of the written complaints, detailing the irregularities was annexed to Twahirwa's affidavit as annexture ***"A."*** On election day itself, Twahura said, their agents gave him reports of widespread intimidation by Government officials, forcing them to vote for the 1 Respondent and many other electoral malpractices, ranging from allowing people to vote when they were not entitled to do so; forcing voters to tick their votes in the open and for the 1 Respondent; forcing the Petitioner's agents to sign declaration forms when they had been prevented from witnessing the Polling exercise; and many others to the extent that the District Task Force, of which Twahirwa was Chairman also forwarded their complaints to the 2nd Respondent. They also forwarded similar complaints to the NGO Monitoring group (NEMGROUP) and Polling officials at all levels, but nothing was done to regularize the elections. A copy of their complaint with details of malpractices was annexed to Twahirwa's affidavit as annexture ***"B."***

The contents of the annextures are too long and numerous to be reflected in this judgment. Only a brief summary may be given here.

Annexture A, dated 5-3-2001 was addressed to the Chairman of the 2nd Respondent and the Kabale District Returning Officer. It said, inter alia that the RDC, Kabale, James Mwesigye, on his campaign tour for the 1st Respondent urged voters to tick a candidate of their choice, but further urged people to punish or report whoever would vote for the petitioner. The problem was rampant in Bufundi, Kamwezi, and Rubaya sub-counties. The deputy RDC, Coax Nyakairu, and

his Assistant RDC, Dan Kaguta, were touring the district spreading the same message. The whole group told voters that even if the Petitioner won the elections he would not be allowed to lead Uganda. The document then said under a sub-heading "PETITION":

"I would like to lodge my petition for the removal of the following persons from the list of polling officials. They campaign for the presidential candidate Yoweri Kaguta Museveni"

This is followed by a long list of election officials sub-county by sub-county, and the reason why they should be removed. For instance being on the first Respondent's sub-county Task Force; attending his agents meetings at Parish or other levels; or for tearing out the petitioner's posters or for being the 1st Respondent's mobiliser, for being LDUs; for dispersing rallies of the Petitioner's supporters, etc. The list contains 233 names of election officials for removal, from the sub-counties of Bubare, Kabale Northern Division, Rubaya, Maziba Hamurwa, Kitumba, Kamunganguzi, Bifindi, Nyamihyango and Nyabikoni.

Between sections of the list of names there were statements like: ***"Rubaya sub-county has one of the most notorious LDUs in the District".*** This particular one is followed by names of 18 LDUs who were indicated to be the 1st Respondent's agents.

Another was: ***"We would also call for the removal of the Polling Officials whose names are listed below because they campaign for Presidential candidate Museveni'*** this was followed by numerous names

The chart shows that the affidavit of Twahirwa was rebutted by James Mwesigye, the RDC of Kabale District. In his rebuttal affidavit he said that the allegations by Twahirwa that the RDC, (Mwesigye), LDUs, GISO's and Parish Chiefs kept harassing the Petitioner's agents or supporters were totally false because none of the Government officials referred to, including himself, the RDC, was involved in electoral malpractices before, during and after the Presidential Elections. The letter of complaints referred to by Twahirwa was neither copied to him nor brought to his attention by the Returning Officer of Kabale. Mwesigye did not, in his rebuttal affidavit, say why Twahirwa should have invented such big and serious lies against him and other Government officials in his affidavit if the allegations were totally false as Mwesigye said. On the other hand if the allegations were not false Mwesigye would not be expected to admit

them. A whole RDC would not be expected to admit having committed such electoral malpractices. In the circumstances I would prefer Twahirwa's evidence to Mwesigye's denials and I do.

Sande Wilson, of Kitohwa Kaharo, Ndorwa, Kabale District was a mobiliser for the Petitioner's Kabale District Task Force. In his affidavit of 21.3.2001 he said that during elections campaigns, the RDC, Mwesigye kept that Task Force under constant harassment. In early March, for example, he mobilized LC Officials and the 1st Respondent's supporters and used them to violently stop the Petitioner's supporters from a rally at Ryakarimira Trading Centre in Rubaya. There were many other similar acts.

The said RDC kept threatening the Petitioner's Supporters with arrest if they did not abandon the petitioner's camp. At several rallies, he publicly and openly directed that the people should compile lists of the Petitioner's supporters and send them to him. The said RDC also directed that ballots should be ticked in the open. On Polling day, this is what Sande found was being done at virtually every polling station he visited. Towards voting day, Sande found out that many 1st Respondents' mobilisers were also appointed as polling officials. Those included Muhazi Maziba, Charles Byasigehraho Kaharo and Kwarikunda of Rwesasi. On the Polling day Sande monitored Polling Stations at Bufundi and Muko sub-counties. At almost every Polling station he visited, he found people being made to tick ballots in the full view of the polling officials and the rest of the public. In Bufundi, the Vice-chairperson, L.C.5, Kabale moved from station to Station directing Polling officials not to allow any agent of the Petitioner at the polling stations. That order was widely complied with as Sande found out that all the Petitioner's agents had been chased away from their stations or arrested and jailed. Sande and colleagues complained to the Chief Administrative Officer, but he advised them to go to the Police. They did, but the police was powerless. They then decided to compile a report and send it to the said 2nd Respondent. This was the report annexed to Twahirwa's affidavit, to which I have just referred, in this judgment. Sande said that the incidents he mentioned in his affidavit were mere examples of the irregularities which were glaringly manifest throughout the area of his operation aforementioned. In the circumstances, Sande said, the elections in their area were manifestly rigged in favour of the 1st Respondent and were not free and fair.

Sande's affidavit was rebutted by James Mwesigye to whose rebuttal I have already referred in connection with Antelli Twahirwa's affidavit. He said that all of the contents of Sande's affidavit were false because the events alleged therein never occurred. My comments about Mwesigye's rebuttal of Twahirwa's affidavit equally apply to his rebuttal of Sande's affidavit. I therefore reject Mwesigye's denials as not true and accept Sande's evidence true. Sande's affidavit was also rebutted by Didas Kanyesigye. In his short rebuttal affidavit Kanyesigye deponed that what Sande alleged against him was completely false. He was the Vice-chairman L.C.5 of Kabale to whom Sande referred in his affidavit. Kanyesigye did not say why Sande should make up such serious allegations if the allegations were completely false. On the other hand, Kanyesigye would be expected to deny them because of the serious implications. A deputy chairman of a whole L.C.5 of a District would not admit that he had been involved in electoral offences. He would be expected to deny such allegations. In my view that is what happened here. In the circumstances, it is Kanyesigye's denials which I find false. I accept Sande's evidence as true.

James Musinguzi, of Ngungamo, Kayonza Sub-County, Kanungu District was in — charge of Petitioner's elections campaigns in the South — Western Region of Uganda. In his affidavit of 23-03-2001, he said that in the course of discharging his responsibility, the team which he led was exposed to enormous intimidation, harassment and violence throughout the Region. Shortly after the Petitioner announced his intention to stand as a Presidential candidate, soldiers of the PPU were heavily deployed in the Districts of Rukungiri and Kanungu. The PPU soldiers unleashed terror and suffering on the local people believed to be the Petitioner's supporters. These included Richard Bashaija, Sam Kaguliro, Henry Kanyabitabo and many others who complained to Musinguzi about the harassment, and he forwarded the complaints to the 2nd Respondent and Police, but no action was taken. The said soldiers were deployed and continued to harass suspected Petitioner's supporters up to the elections. During the entire period of campaigns, Gad Buturo, GISO of Kihihi Sub-County, Peter Mugisha, a Councilor for Kambuga, Stephen Rijaga, Godfrey Karabanda, and many other Civilians on the 1st Respondent's Task Force regularly went around with guns threatening the Petitioner's supporters to compel them to support the 1st Respondent. Musinguzi's team reported their activities to the 2nd Respondent to the Police and the Regional Police Commander, Stephen Okwalinga, who promised to handle the issue, and sent a Mobile Police Unit to Kanungu to arrest the said Rujagu, without success. The

following day the said Regional Police Commander was ordered out of the Region on the very day the Petitioner was to address a rally in Rukungiri Town. The District Police Commander for Rukungiri had also earlier been withdrawn in the absence of any Senior Police Officer in Rukungiri Town, the PPU soldiers unleashed even more terror and in the process they shot dead one of the Petitioner's supporters and injured 14 others without provocation whatsoever. As a result of that terror, the Petitioner's agents feared to canvass for him as a candidate.

The affidavit was based on knowledge and belief. Belief is irrelevant since what the witness deponed to, appears to be from his knowledge. The Chart indicates that Musinguzi's affidavit is rebutted by Captain Ndahura. My comments and finding on Captain Ndahura's rebuttal affidavit concerning Musinguzi's evidence are the same as what I have said in respect of other witnesses. I do not believe the Captain's denial.

Dr. Muhumuza Julius is a Medical Officer attached to Bundibugyo Hospital. On 12-03-2001, he received four Polling agents of the Petitioner from Bubandi Sub-County and one from Bubukwanga Sub-County. According to their appointment letter and they also informed the Doctor that, they had been beaten by UPDF soldiers and chased away from their respective Polling Stations. He examined and treated them. They all had bruises and haematona on their limbs and trunks of variable length, and some had multiple soft tissues which according to the doctor, were inflicted as a result of repeated stroking of the cane. A copy of the medical examination report was attached to the doctor's affidavit as annexture ***"A"*** I have seen the medical report. The injuries therein are consistent with assault and beating.

The affidavit of Patrick Matsiko Wamucoori has already been considered in another context in this judgment. He further said that at the special area of Kanyarugiri 07 Polling Station for the Army in Nyamarebe Sub-County, Ibanda Sub-District, he noticed multiple voting by Battalion Intelligence Officer and others. He pointed out this irregularity too the Presiding Officer, who asked him why he was observing voters and he replied that it was part of his job as a Journalist. The Presiding Officer confiscated Mucoori's mobile phone, documents, identity card, money, belt, note book, and a pen, and instructed the Regimental Police (RP) to take him to the Quarter Guard and thereafter to the barracks for detention. The R.R did that and Mucoori was locked up in an abandoned house inside the barracks. There were broken sticks and clubs inside the house.

He was released by a soldier who took him back to the army Polling Station. On the way, Mucoori met the Battalion Commanding Officer, Capt. Kankiriho, who threatened to beat him if he dared go near the Polling Station or if he revealed anything he had seen. He later recovered his property. That very night Mucoori boarded a bus to Kampala.

The Chart indicates that Mucoori's affidavit is rebutted by Captain Nuwagaba, but it does not show where the rebuttal affidavit may be found. Orikiriza Livingston was a Campaign and Polling agent for the Petitioner for Nyarushanje, Rubabo Sub-County, Rukungiri District. In his affidavit of 23-03-2001, he deponed that in the course of campaigns Sebagenzi, the Chairman LC3 and Dezi Rwabonahe Treasurer — L.C.3 of Nyamishanje, restricted him from campaigning for the Petitioner and threatened to arrest him, until he left the Village, which he did and took refuge in Kabale Town for a week. Later, he returned to his village to continue with the campaigns in Bureno and did so secretly throughout January, 2001. Around 7-2-2001, a group of armed men moved around Orikiriza's village at night targeting homes of the Petitioner's supporters and ordering them to desist from supporting, and campaigning for, him. As a result of the threats, his campaign in the area became difficult to the extent that the clean up exercise of Voter's Register was not conducted at all. The Chairman of the Movement Committee of the Sub-County, one Tushembelire Tofa, took away and kept in his custody Voters' Cards for the dead, and those who were not picked. On polling day names of such people in the Register of Voters were ticked. On 10-03-2001, when the Petitioner's Agents from Kampala visited the area to conduct campaigns — including Jovinta Kinaheirwe and Anne — they were denied the right to campaign by the said Dezi Rwabonahe and the PPU soldiers despite Police clearance. The Petitioner's agents went into hiding throughout Sunday, 11-03-2001, up to 12-03-2001, the Polling day. On the Polling day, the Presiding Officials allowed people to vote using Voters' Cards which did not bear their names and Orikiriza strongly protested, but to no avail. Thereafter Deezi Rwabonahe instructed the Presiding Officer that, whoever objected should be handed over to the PPU or Police. During that time, Orikiriza many people voting more than once without any hindrance from the Presiding Officer. These included Tofa Tushembelire, Banjo Bakuda, Mwesigwa Ronald, Tusingwire Josam, Ruzoora Julius Agaba, a Muluka Chief called Mgabe, and Gakyalo, from 3.00 p.m. to 5.00 p.m. The Presiding Officer waived the requirement for secret ballot and voters were told to tick in favour of the 1st Respondent at the desk of the Presiding

Officer. A voter called Kacururu, son of Matayo, of Buneno Village, and who was under-aged, presented the Voter's Card of Orikiriza's brother, Davis Mashango residing in Kampala. He protested but the Presiding Officer ignored him. The Petitioner's defeat of 47 votes to the 1st Respondent's 299 votes was due to intimidation and the aforesaid malpractices, because the former had tremendous support in Orikiriza's village.

The affidavit was based on knowledge and belief. Ground of belief that the Petitioner obtained 47 votes due to intimidation was given. The Chart does not show that Orikiriza's affidavit was rebutted. His evidence therefore, remains uncontroverted. I believe it as true.

Mubangizi Denis, of Kikongi, Rukungiri District was Vice Chairman of the Petitioner's Task Force in Bwambara Sub-County. In his affidavit of 20-03- 2001, he deponed that on 5-2-2001, the local GISO, Kajuma Warren, went to arrest him, saying that Captain Ndahura Commander of the PPU troops deployed in the District wanted him. Mubangizi went to Rukungiri Police Station to report the incident. He was allowed to return home. On 3-3-2001, three PPU soldiers arrested him at the Rukungiri rally before the Petitioner arrived. They led him to Nyabubare Barracks and beat him up. Hs spent the night there and he was released after another thorough beating. The soldiers threatened him that if he reported the assault or went to any hospital, they would kill him. For fear of rearrest, he sent one Geoffrey Byaruhanga to the Petitioner's District Task force who reported his plight, and sent a vehicle which took him to Nyakibale Hospital. Captain Atwooki B. Ndahura, who was the Commander of the PPU deployed in Rukungiri, rebutted the affidavit of Mubangizi Dennis. In his rebuttal affidavit, dated 4-4-2001, he said that he never sent Kajuma Warren to arrest Mubangizi Dennis as the latter alleged in his affidavit. The allegations by Mubangizi that he was arrested by PPU, taken and beaten at Nyabubare Barracks, on 3-3-2001, was false, as no PPU personnel ever left their camp in Rukungiri, on that day. The Captain did not say why Mubangizi should invent the detailed allegations he made if they were false. On the other hand it is the Captain who would have reasons for denying that PPU soldiers under his command perpetrated what so many witnesses testified by affidavit that they did.

In my view, it is Captain Ndahura's denials which are false and the evidence of Mubangizi and many other witnesses like, him would be credible. I so find.

Ediba Justine Emokol is from Kapokin Parish, Atutur Sub-County, Kumi district. In his affidavit of 20-03-2001, he said that he was a Polling agent at Kapokin "A" Polling Station. He did not say whose Polling agent he was, but the context indicates that he was the Petitioner's Polling agent. He said that during polling, it was the 1st Respondent's agents guiding the elderly and the illiterate to do polling. When he protested, the Presiding Officer told him to leave things as they were as ***"I know the place."*** When Haji Okodel arrived and the Presiding Officer introduced Emokol to him, Okodel asked him to leave the Polling Station. He resisted. Okodel then warned him that if the Petitioner lost in the elections, Emokol would have to leave the area. Okodel ordered one Iporut, the Petitioner's agent, to remove his shoes and sent him away from the Polling Station which Iporut obliged. Up to the date of the affidavit, Iporut's whereabouts were not known.

Haji Umari Okodel is the L.C.5 Chairman, Kumi District. In his rebuttal affidavit of 2-4-2001, he said that he did not know any person by the name of Ediba Justine Emokol. He had never met or interacted with him. What Emokol had said in his affidavit was false. It was not true that he ordered Iporut to remove his shoes, nor sent him away from a Polling Station. Nor did he monitor ticking of votes in the basin. On 12-03-2001, he did not visit any Polling Station in which Emokol was a Polling agent. Okodel did not say why Emokol should have invented the allegations he had made out of the blue if they were all false. On the other hand, Okodel would have every reason for denying having done what was alleged against him.

I think that his denials are not true. I would accept Emokol's evidence as true, and I do.

Dan Okello from Lira District was an aspiring candidate in the Parliamentary elections due in a few months' time. During the 2001 Presidential elections, he was campaigning for the Petitioner. On the evening of 11-03-2001, while he was in Lira Town, he was informed by one Okello, son of Ojok that Lt. Col. Tony Otoa, M.P, had instructed the Commandant of Aromo UPDF detach to arrest him and other people who did not support the 1st Respondent. That night he slept in Lira. On the morning of 12-03-2001, as Dan Okello and one Saul Okor were approaching Aromo Sub County Headquarters where his Polling Station was located, they met the Commandant Aromo UPDF detach, Sgt. Sempijja who was a passenger on the motor cycle of Aromo Sub-County Chief. The UPDF Commandant waved Okello Dan to stop. He begged the Commandant to first

let him drop Okor at his home. He agreed and Okello rode ahead of him and the Sub-County Chief. As Okello slowed down in Aromo Trading Centre, many people warned him that he was being hunted to be arrested. He turned round and rode straight back to Lira, where he reported his intended arrest to the District Police Commander.

He made and recorded a statement. He also informed the Lira RDC about the incident. When Dan Okello and Okor were returning to Aromo, they met the UPDF Commandant at 3.30 p.m. They were taken to Walela Polling Station, where Okello was locked inside the double Cabin Pick-up, guarded by one soldier and Okor on the back of the vehicle guarded by 4 UPDF soldiers. They were kept at Walela Polling Station up to 6.00 p.m. after which they were driven to Ayile P.7 School Polling Station, three kilometers from Walela. They were next taken to Aromo UPDF detach. Okello was released at 10.00 p.m. leaving his friend Okor detained with Okello's motor cycle. On 1 3-03-2001, Okello again reported about his arrest and detention to the Lira District Police Commander.

Emoding Anthony SP is the DPC of Lira. He rebutted Dan Okello's affidavit. In his rebuttal affidavit dated 1 4-2001, he said that Okello went to Lira Police Station and reported to him about an alleged impending arrest by one Sempijja, Commandant of Aromo UPDF Detach. He wrote to the Commandant to allow Okello to vote. It was not true that Okello recorded a statement with Emoding or that Okello returned to the Police Station on 13-03-2001.

Sgt. Sempijja Gerald also rebutted Dan Okello's affidavit. In his rebuttal affidavit of 15-04-2001, he deponed that he was the Commandant of Aromo UPDF detatch. On 11-03-2001, he received intelligence report that Okello was mobilizing voters to create insecurity during the elections. He reported the matter to the Commanding Officer Major Byuma of Aromo UPDF detach. On 11-03-2001, at about 5.00 p.m. Okello Dan went with a note from the DPC Lira requesting him to allow Okello to vote. He did not refuse Okello to vote. He did not arrest Okello at any time and did not visit Walela Polling Station. He voted at Otala Polling Station, about ten miles from Walela Polling Station, and returned to Aromo detach. Sempijja's blanket denial of what Okello said in his affidavit means that Okello invented the detailed story he narrated in his affidavit, including making reports to the Police twice.

Further, Sempijja did not say what happened to the report he made (if he did) to Major Byuma that Okello had been mobilizing voters to create insecurity, which was a serious criminal conduct on Okello's part, if that was true. I do not believe that a person engaged in criminal activities, which Sempijja alleged Okello was doing, would seek assistance from the Police in order to go and cast his vote, which Okello did twice. On the other hand, if what Okello alleged against Sempijja was true, the latter would be keen to deny it, because it amounted to a criminal conduct from which a UPDF Sergeant would want to disassociate himself.

Emodong Anthony's affidavit evidence corroborates Dan Okello in material particulars, except the one to the effect that Okello again reported at Lira Police Station on 13-03-2001. Emodong did not refer to the allegation of mobilizing voters to cause insecurity by Okello, made against him by Sempijja. If there was any truth in that allegation, Sempijja or his boss, would have reported it to Police in Lira, and Emodong would have known. In the circumstances I believe Okello's evidence and reject that of Sempijja as false.

Oshale Edmond of Kebu Zone, Kulait, Kwapa Sub-County, Tororo District, was the Petitioner's election monitor for Kwapa Sub-County. On 12-03-2001, he went to Kwapa Sub-County Headquarters Polling Station. He found there the GISO of Kwapa Sub-County, amongst others, who were later joined by the Chairman of LC.3 of Kwapa. The LC3 briefly talked to the GISO and went away. Shortly thereafter the O.C. Police, Malaba arrived in a Patrol vehicle, called the GISO aside and talked to him. The GISO called Oshale to the vehicle and he was ordered to enter it. When Oshale asked why, he was bundled on the vehicle and driven to Tororo Police Station, where he was released on Police bond on alleged charges of preventing people from voting vide Police reference No. SD2O/1213/2001. Subsequently when he went back to the Police, as he was required to do, he was told that he had been cleared and that he had no case at the Police. Oshale said that he swore his affidavit because he was unduly arrested by security operatives and the L.C.3 Kwapa, prevented him from carrying out his task of monitoring elections on Polling day, detained in Police cell and released without being charged.

Gidoi Andrew A.S.P. is the 0.C. — Malaba Police Station. He rebutted Oshale's affidavit. In his rebuttal affidavit of 3-4-2001, he said that on 12-03-2001, he was on his routine checkup of Polling Stations in Tororo County, Tororo District. At 11 .30 a.m. he went to Kwapa Sub-County

Headquarters Polling Station, where the GISO in charge of security informed him that Oshale was preventing some people from voting, especially the elderly by saying that polling on 12-03-2001, was for the Petitioner only. The polling for 1st Respondent was on 13-03-2001, so, they should go back. Thereafter, Gidoi arrested him and put him on the vehicle and took him to Tororo Central Police Station. He left him at the reception desk to make a statement for investigation. I find Gidoi's a very unlikely story. Normally in Criminal investigation, it is not the suspect who makes the First Statement to the police, it is usually a witness or the complainant who makes the first statement to the Police stating what crime the suspect is alleged to have committed.

In the case under consideration, it is the GISO or somebody who witnessed what Oshale was allegedly to have done who should have accompanied Oshale to Tororo Police Station and laid a complaint against Oshale. As it is nothing of the sort happened. Gidoi dumped Oshale at the counter without apparently writing a statement. He was not a witness to the alleged incident. In the circumstances, I do not believe Gidoi's affidavit evidence. I prefer that of Oshale which I accept to be the true version of events on the occasion in question.

Oketcho Yusuf of Central Parish Tororo Municipality in Tororo District was a supporter of the Petitioner. On 2602-2001, when the 1st Respondent went to Tororo on his campaign trail, Oketcho was around Bata Shoe Shop in Tororo Town. He was standing under one of the small trees there. A procession led by a Band came from Mbale Road marching towards the main round-about. A man in civilian clothes stopped where Oketcho was and ordered him to pull down the Petitioner's poster pasted on a box hanging up nearby. Oketcho refused, telling the person that he did not know who put the poster up, so he could not pull it down. The same man grabbed Oketcho by his trousers on the waist and pulled him up to Gloria Hotel where there was a yellow Movement Bus. The man pushed Oketcho into the bus where he found men in army uniform, one of who right away hit him on the head and he began bleeding. The driver drove the bus around town with Oketcho inside and finally went to Rock View Primary School. At that school Oketcho with many persons who had also been arrested were tortured and some were released. Oketcho and another person who had sustained serious cuts on the head with blood stains were taken to Tororo police station. While at the police station strange people went in the company of DPC Tororo, called Oketcho and the other man and took their statements. They were released after 8

hours in police cell without being charged with any offence. Due to the incident Oketcho and other supporters of the Petitioner felt threatened and intimidated and could not continue canvassing for support for their candidate any more. Oketcho then said that he swore his affidavit due to the fact that he was arrested, tortured and detained by armed men moving with the 1st Respondent during his campaign trial. The affidavit is based on knowledge and belief. Since the witness deponed to only what happened to him and what he witnessed, belief is irrelevant. The Chart does not show that Oketcho's affidavit is rebutted. His evidence therefore, stands uncontroverted and I accept it as true.

The affidavit of Imoni Steven has already been considered in another context. It is also relevant to the issue of threats and intimidation of the Petitioner's supporters and agents. He said, inter alia, that the LC 3 chairman Alfred Obore returned to Mella Polling Station and cocked his gun and ordered everybody to disappear. All ran away except the Polling officials. I also considered Obore's rebuttal affidavit. I accepted Imoni's affidavit evidence and rejected Obore's, giving my reason for doing so.

Okware Steven of Amagoro "A" village, Amoni parish, Kwapa, Tororo said in his affidavit of 22-03-2001 that he was the Petitioner's polling agent at Amoni Primary School polling station. On 12-03-2001 at 2.30 p.m. Alfred Obore, the LC3 chairman for Kwapa went to the polling station and ordered everybody at the Polling Station to disappear. When some people tried to resist his orders he went to his car parked nearby, picked a gun and shot twice in the air. By that time most voters had ran away in fear except the polling officials. The agents of the various candidates including Okware took cover within the polling station. The LC3 chairman then got a bundle of ballot papers from his car and stuffed them in the ballot box. After Okware and his colleague informed their task force in Tororo, the chairman LC5 Eric Nabala arrived with Kwapa LC5 Councilor Jane Emokol and some Police Officers at the Polling Station and Okware and his colleague explained what had happened. The ballot papers were counted and tallied and 40 extra ballot papers were found to be for the 1st Respondent. Okware and other candidates' agents asked the Presiding Officer to disregard the extra ballot papers but Nabala and the LC3 chairman, Obore, refused and the ballot papers in question were counted with the rest. At the end of the day 140 ballot papers remained unused. The Polling agents asked the Presiding Officer to record their serial numbers but Nabala and Obore said categorically that it was not their business.

The affidavit was based on knowledge and belief but since the deponent said wholly what he had witnessed, belief was irrelevant.

Nabala Mudanye Eric rebutted Okware's affidavit. In his rebuttal affidavit dated 3-4-2001 Nabala said that he was the LC5 chairperson of Tororo District and the Chairman of the 1st Respondent's task force for Tororo District. The sub- county task force Chairman informed him on the telephone that some unruly youths were trying to vote more than once at Amoni Primary School polling station. He went to the Polling Station with the some Policemen. He found that the youths detested the continued presence of Obore the 1st Respondent's sub- County Task Force Chairman, who was monitoring agent for the 1st Respondent. He asked Obore to leave the Polling Station. He did not see any of the youths vote. From the time he arrived at the polling station the voting and counting of votes went on transparently, and all the polling agents of the candidates signed the declaration forms without any mention of the anomalies laid out in Okware's affidavit.

Nabala said nothing about Okware's allegation that Obore ordered everybody at the polling station to disappear and that Obore tired his gun in the air and stuffed the ballot box. This is not surprising because Nabala arrived after the incident had already happened. His affidavit states what happened after his arrival. It does not therefore rebut Okware's evidence of threat and intimidation by Obore. Nabala did not mention whether he found Okware at the Polling Station which he should have done in view of what Okware said happened after Nabala's arrival. Nabala denied Okware's allegations about a dispute over 40 extra ballot papers. It would be unthinkable for Nabala to admit that he and the LC3 Chairman were involved in such an electoral malpractice. I do not therefore, accept his denials. I would prefer Okware's version of events to Nabala's and I do so.

Harman Rashid of Wobulenzi Trading Centre, Luwero District was the Petitioner's Polling agents at Kilangazi, a Polling Station in Ngoma, Nakaseke County. He said in his affidavit that on 12-03-2001, Major Bwende a member of the UPDF arrived at Kilangazi Polling Station, threatened Rashid and ordered him to go away. He did so for his personal safety. Consequently, Rashid was unable to witness the counting of votes,

Major Jero Bwende rebutted Rashid's affidavit. He denied that he threatened and ordered Rashid out of Kilanguzi ***"A"*** Polling Station, because he did not go to that Polling Station that day. Bwende said that he cast his vote at Ngoma *'A — M"* Polling Station, after which he went to the Trading Centre. He left Ngoma Town at 20.00 hours and returned home. He did not know Harman Rashid.

I have already discussed Rashid's affidavit and Bwende's rebuttal affidavit in another context in this judgment. What I said there equally applies here. Briefly I do not see why Rashid invented such a serious accusation against Bwende Out of the blue.

Secondly, Bwende would not be expected to admit Rashid's allegation against him if it was true. In the circumstances, I prefer Rashid's version of the event to Bwende's denial.

In this judgment, I have already referred to the affidavit of Kimumwe Ibrahim, in which he alleged that he was harassed by eleven soldiers when he was going to Namayengo Polling Station in Bukoli South Constituency, Bugiri District.

Another witness whose affidavit I have already dealt with is Suliman Niiro, of Bukooli North Constituency. He said that soldiers from the office of the Bugiri RDC's office went threatening and forced under-aged children to vote at Bus Park ***"A"*** Polling Station. Members of the armed forces also chased away the Petitioner's Polling agents for about four hours. The affidavits of these two witnesses were rebutted by Ms. Nava Nabaagesera. I considered the rebuttal affidavit and found it not credible, giving my reasons for doing so.

The affidavit of Baguma John Henry has also been dealt with. He was the Petitioner's monitor for Bukonjo County in Kasese District. He went to Musasa Polling Station on 12-03-2001. When he protested against electoral malpractices, he was overpowered after he had been threatened with death by a soldier in charge of operations at Nyabirengo Army Battalion Headquarters. Major Muhindo Mawa also threatened to kill him if he continued with his ***"nuisance"*** about soldiers voting at more than one polling station.

Aggrey Mwami, Kasese Deputy RDC based in Bwera, rebutted Baguma's affidavit, but his rebuttal affidavit did not refer to Baguma's statement that he was threatened with death by a

soldier and Major Muhindo. The Chart also shows that the affidavit of Baguma is rebutted by Munywami Johnson and Maj. Mawa Muhindo on pages 270 and 53 respectively of the 1st Respondent's volume of affidavit. Those pages, in fact, contain affidavits sworn by other witnesses and are irrelevant to Baguma's affidavit. Page 270 contains the affidavit of Achaga Safi, and page 53, the affidavit of Livingston Tenywa. So, I have been unable to trace the rebuttal affidavits of Munywani Johnson and Maj. Mawa Muhindo.

Peter Byomanyire of Bugarama Bisheeshe, Ibanda, was the Petitioner's campaign agent coordinating Mbarara and Kamwenge Districts. In his affidavit dated 21- 03-2001, he deponed that on 16-02-2001, at about 5.00 p.m., after the Petitioner had finished addressing a campaign rally at Kamwenge, the Petitioner's supporters met a mob of the 1st Respondent's supporters armed with stones, bricks and sticks who started beating the Petitioner's supporters. They were shouting ***"Kill Besigye's supporters"*** The victims were pursued until they reached Kamwenge Police Station, where they took refuge and reported the incident. The Police went to the town to rescue others. On that day Byomanyire was very badly beaten and had to go for medical treatment. A copy of his medical treatment note is attached to his affidavit. The injuries described therein are consistent with assault. Byomanyire went on to say that on 8-3-2001, he and James Birungiozo went to Mahyoroto to consult with the Petitioner's agents. While they were there, they were surrounded by five armed and uniformed UPDF soldiers, who ordered them to leave the area. They were forced to leave without consulting their agents. On the same day Byomanyire and Ozo found Captain Kenkiriho, the Commanding Officer of Bihanga, with two escort soldiers. Ozo was dressed in a T-Shirt for the Petitioner's campaign. When the Captain sighted them, he asked whether he was the James Birungi Ozo, the campaign agent for the Petitioner. When Ozo answered in the affirmative, Kankiriho ordered him to leave the place. As Ozo was leaving, the Captain pulled his pistol and fired at Ozo, but, fortunately, the bullet missed him. Byomanyire and Ozo ran to the Police Station to report the incident. They met a Policeman on the way, to whom they reported what had happened. Thereafter the Captain moved around in Town, tearing down the Petitioner's posters where-ever he saw them. That very night, Byomanyire said, he heard six gun shots. The following day, he went to Mbarara to inform the Petitioner's Task Force of what had happened. On 12-03-2001, Byamanyire was over-seeing operations of the Petitioner's Polling agents in Bukanga. In Busheka, I and Busheka II Polling

Stations in Rugaaga, he found that the Petitioner's Polling agents had been chased away from the enclosed place for the polling stations and were allowed to see from a distance of 30 meters. Byomanyire was confronted by one Barnabas Tinkamanyire, who was armed, and told Byomanyire that he was a security officer. When Byomanyire asked him why the Petitioner's agents were seated where they could not observe what was going on at the tables, Tinkamanyire ordered Byomanyire to leave the place. When he reached Kamwema in Endizi Sub-County, they saw that the LCII Chairman of the area was the one ticking for voters on the first table, and the voters were only told to take the ticked ballot papers to the ballot box. Byomanyire proceeded to various Polling Stations in Ngaroma Sub-County, where he found people complaining that they had found their names already ticked as having voted, when, in fact, they had not.

The affidavit was based on knowledge and belief. As the deponent spoke of what he witnessed, belief is irrelevant. The Chart does not show that Byomanyire's affidavit was rebutted. His evidence, therefore, stands uncontroverted. I accept it.

The affidavit of Fazil Masinde has already been referred to in another context in this judgment. He was the Petitioner's monitor for seven polling stations in Mayuge District. He said that at Busakira ***"B"*** Polling Stations one Ahmed Gesa, a GISO was issuing Voters' Cards and directing people to vote for the 1st Respondent and threatening that if they did not do so, they would see.

At Kaluba Polling Station, fifteen (15) voters who were not on the Voters' Register were allowed to vote. The affidavit was based on knowledge and belief. Since Masinde deponed to what he witnessed, belief was irrelevant.

Gesa Ahmed and Mudaaki Emmanuel rebutted the affidavit of Fazil Masinde. I have already considered their rebuttal affidavits in this judgment and rejected their affidavit evidence, giving my reason for doing so. I accept Masinde's evidence that Ahmed Gesa, GISO, threatened voters that if they did not vote for the 1st Respondent, they would see an expression which means that if the person to whom it is directed does not do as he/she is told the consequences would not be good for the person.

Tukahirwa David is another witness to whose affidavit I have already referred in this judgment. He further said in his affidavit, dated 19-03-2001, that when he complained about the irregular

manner in which the Presiding Officer was counting votes at Nsambya Polling Station, Busujju Parish, Kakindo Mubende District, the Presiding Officer said that the laws which he had on his desk did not allow him to show the ballot papers to the crowd assembled as he counted them. When Tukahirwa talked to other people who were visibly dissatisfied. One Makumbi said that people should keep quiet or else they would be arrested. Two uniformed soldiers with a walkie-talkie, one Magambo Anthony, an LCIII Chairman, and another security operative called Kasirye James, threatened to arrest anybody who challenged how the ballot papers were being counted. There was a pick-up parked nearby on which people arrested would be dumped. Thereafter, the Presiding Officer alone, counted the votes and the 1st Respondent's agents got 303 votes, the Petitioner got 101 votes, Mayanja, 2 and the other candidates, nil.

Kirumira Edward rebutted Tukahirwa's affidavit. Kirumira was the Polling agent for the 1**st** Respondent at the same polling station where Tukahirwa was. In his rebuttal affidavit, Kirumira denied that he saw any one called Makumbi, nor did he hear Makumbi threaten people with arrest. He said that it was not true that there were soldiers with a walkie talkie at the polling station. Nor did Kasirye threaten anyone; because Kasirye went to the polling station after 6.00 p.m. Kirumira further said that Anthony Magambo the Sub-County representative at the District Council did not threaten anybody with arrest. He cast his vote and went away. Kirumira said that his evidence could be confirmed by Bernabas Mutwe, the Presiding Officer and Nsubuga Joseph, the Polling Constable. The Chart does not show that Mutwe and Nsubuga swore any rebuttal affidavit. I have considered the affidavit evidence of Tukahirwa and Kirumira. As I have said before about the said affidavits, I prefer the version of events as deponed to by Tukahirwa to that said by Kirumira. The same reasons I gave then are equally valid on this occasion.

Byekwaso Francis, of Ntete Village Nakasenyi, Lwebitakuli, Mawogola, Sembabule District was a polling agent for the Petitioner at Ntete Polling Station. In his affidavit of 19-03-2001, he said that the Presiding Officer, Betty Twine, who was also the Vice Chairperson for the 1st Respondent's Task Force in Lwebitakuli Sub-County, ordered Byekwaso and Nakiganda Pellagia, who was also the Petitioner's Polling agent, to sit at about 10 meters away from her desk, which prevented them from scrutinizing Voters' Cards and names in the Voters' Register. When Byekwaso complained, the Presiding Officer said that she had powers to order them to sit at any distance. The Presiding Officer would expressly ask each voter in the queue the candidate

he or she wanted to vote for and would call the 1st Respondent's agents to guide the voters on how to vote. Byekwaso was called once to guide a voter who wanted to vote for the Petitioner. Byekwaso said that in several instances agents for the 1st Respondent would tick ballot papers on behalf of the voters. When Byekwaso again complained, the Presiding Officer said that since no civic education had been conducted in the area prior to polling day, agents were supposed to guide their supporters, how to vote.

When one Bettina Kugumikiriza, Byekwaso's colleague, arrived at the polling station and complained about being seated at a distance, the Nakasenyi Parish Chief, Byabarema Patrick, intervened and told Byekwaso and his colleague to move closer towards the Presiding Officer's desk. Hon. Sam Kutesa, M.R, for Mawogola and a member of the 1st Respondent's National Task Force arrived. He said that it was not allowed for polling agents to sit near the Presiding Officer. Byekwaso and Nakiganda went back. Immediately thereafter the DISC for Sembabule District, one Aliganyira Joseph, arrived with four other armed men, and ordered people who had already cast their votes to return to their homes. Some wondered why they were being chased away, but the DISC ordered for the arrest of those who were defying his orders. As a result, two people Kato of Katongo, Lwebitakuli, and Danson of Ntete were arrested. The rest disappeared. The GISO wanted to arrest Bettina Kugumikiriza because of the complaint the latter had made earlier, but he had already left. Byekwaso said that the conduct of the said DISC left him in a state of panic and he felt greatly insecure. Thereafter, the Presiding Officer started giving two or more ballot papers to some people from a heap she had already ticked and placed on her desk. The Chart does not show that Byekwaso's affidavit was rebutted. His evidence therefore, stands uncontroverted. I accept it.

Robina Nadunga was registered to vote at Bugema ***"A"*** Centre, in Bungokho Sub-County, Mbale District. On 12-03-2001, before she cast her vote, she first left for home to take lunch to and check on, her children who were staying with her mother at Nauyo. On the way, she met the Bungokho Sub-County Chief, one Mutoto. He was in the company of one Masaba, a resident of Nauyo. The two men stopped her, Masaba then said ***"These are the people who disturb us with Kizza Besigye."*** He severely assaulted Nadunga, using a hippo whip. Masaba caned her until the polythene bag containing milk and bread she was carrying fell down and he stepped on it. He also caned her hand which was holding a small booklet containing her Voter's Card. The booklet

dropped on the ground and the Voter's Card came out. Masaba picked up the Voter's Card declaring that Nadunga was not going to vote for the Petitioner. She was rescued by one Watira, who rebuked Masaba for assaulting her. Masaba refused to return her Voter's Card. So, she left the scene. She reported the matter to the area LC.I Chairman, who gave her a letter to report to Mbale Police Station. She went there and made a statement. She was given Police Medical Forms for medical examination. She was examined and treated at Masaba Wing, Mbale Hospital. The Police Officer who handled her case gave a chit to the Presiding Officer, Bugema ***"A"*** Polling Station. Before Nadunga left the police station, Masaba was brought in by two men in plain clothes, who ordered that he be detained. Before she left the Police Station, two army men came and ordered for the release of Masaba, Nadunga's assailant. Nadunga left the Police station for the polling station where she voted using the chit from the police. The Presiding Officer checked and found her name in the Voters' Register. She voted. On her way home, she met Masaba who was in a motor vehicle. He stopped, alighted out and warned Nadunga that she should not stay in the village. He was then armed with a gun. Because of fear, she returned to Mbale Police Station and again recorded a report, and made additional statement.

The O.C. C.I.D. confirmed to her that Masaba had signed for a gun from Mbale Police Barracks. Nadunga then said:

"The O.C., C.I.D. warned me to take care of myself as it was a very bad time."

Because of fear for her life, she had to stay away from her home. She rented a room in Mbale Municipality. Next morning, 13-03-2001, when Nadunga was going to meet her friend, one Nambuya, at West End Inn, she met Masaba in a group. He stopped and warned her that ***"we shall meet."*** From the West End Inn, she went to Kampala and returned to Mbale on 1 9-03-2001. The affidavit is based on knowledge and belief. Since all she said in the affidavit was what she saw, belief was irrelevant.

Muhamad Masaba rebutted Nadunga's affidavit. In his rebuttal affidavit of 2-4-2001, he denied everything Nadunga said about and against him in her affidavit. He added, however, that Nadunga is his neighbour and that she was a member of the Petitioner's Task Force in Bungokho South Constituency. He also said that he was not a member of security forces and that he had

never held a gun. It was true that he went to Mbale Police Station, but it was in respect of a case of attempted arson against his house and vehicle the night before, not in respect of Nadunga's case. Masaba did not say why Nadunga should have made such serious accusations against him falsely without foundation. In my view, these are not the kind of allegations which one invents completely out of the blue without any grain of truth. In any case, no person would admit having committed the crimes Nadunga accused Masaba of committing, if he could get away with it. Masaba apparently, had ***'God fathers"*** who spirited him out of police detention. So, he must have been confident that he would get away with what Nadunga alleged against him. In the circumstances, I would reject Masaba's denials and accept as true Nadunga's affidavit.

This was not a direct case of harassment or intimidation by the military. But, it shows, that some civilians who were against the Petitioner's election were just as ferocious and active in their activities against his supporters, as it is apparent from the evidence on record, as some members of the military, LDU, PPU, L.C.s, were.

In any event army men were involved in Nadunga's case because two of them rescued Masaba from Mbale Police detention.

Mubaje Sulaiti, of Bunewooze Village, Bubyangu Parish, Bufumbo, Bungokho County Mbale District was the Petitioner's supporter. In his affidavit of 21-03-2001, he deponed that he was entitled to vote at Bukwanga Store Polling Station. He went there with his Voter's Card, arriving at 12.00 noon. On reaching the polling station, he saw the person in charge of dipping thumbs in ineligible ink holding ten Voters' Cards, with which she moved towards the ballot box. Mubaje held her and sought assistance from the Presiding Officer as he removed the ballot papers from the lady. Before he could be assisted, two armed LDUs present at the scene intervened and assaulted Mubaje severely, removing the ballot papers away from him. One of the LDUs then put all the ten ballot papers in the ballot box. Mubaje was not allowed to vote and his Voter's Card was forcefully removed away from him. He was chased away from the polling station by one of the LDUs, who threatened to shoot him if he did not leave.

From the polling station, he went and made a report at Mbale Police Station, referenced SD20112/312001. He was given a police medical form, which he took to Mbale Hospital, where

he was examined and given medical treatment. The affidavit was based on Mubaje's own knowledge and belief. Belief was irrelevant, since all he said in the affidavit was what he witnessed.

Arajabu Mugomba rebutted Mubaje's affidavit. In his rebuttal affidavit of 3-4- 2001, he said that he was an LDU Constable stationed at Bufumbo Sub-County.

On polling day, he was deployed at Bukwanga ***"C"*** Polling Station as a Polling Constable and he was not armed with a gun. Mubaje Sulaiti was personally known to him. At 10.00 a.m. Mubaje arrived with one Issa Kibwiti and went to the Presiding Officer's table. While at the table, they attempted to grab ballot papers from the Presiding Officer, one Kasakya Hakim. Mugomba said that he intervened and pushed them away. Both of them grabbed Mugomba and started assaulting him severely, thereafter they ran away. When the Chief Administrative Officer called at the polling station at 2.00 p.m. Magumba made a report to him. Mugumba denied that he assaulted Mubaje, removed ballot papers from him and put them in the ballot box. It was not true that Mubaje was not allowed to vote and that his Voter's Card was forcefully removed from him. Mugumba also denied that he attempted to shoot at any one. I do not accept Mugumba's affidavit for the following reasons.

Firstly, Magumba's version of the story about a struggle for ballot papers is only slightly different from the account of events given by Mubaje.

The main difference is that Mubaje said that he tried to grab the ballot papers from a lady responsible for marking thumbs of voters who had voted, but Mugamba said that Mubaje was grabbing the ballot papers from the Presiding Officer.

Secondly, if Mubaje attempted to grab ballot papers from the Presiding Officer, it was a serious electoral offence of causing disturbance at a polling station, and the Presiding Officer, would and should have taken it seriously and have Mubaje dealt with according to the law.

Thirdly, it is Mubaje who reported the incident to Mbale Police Station if his version is true. The accused became the accuser.

Fourthly, Mubaje was apparently injured and obtained treatment at Mbale Hospital, which would be consistent with his story that he was the one assaulted.

Fifthly, if it was Mugamba who was assaulted by Mubaje and Issa, he would have been expected to report the assault to the police and go for medical treatment if it was necessary to do so. He did not. Mubaje's story is too detailed to have been a total invention as Mugamba's affidavit evidence implies.

Seventhly, and finally, Mugamba would not be expected to admit the kind of criminal acts Mubaje alleged to have been committed by the LDUs at the polling station. In the circumstances, I accept Mubaje's affidavit evidence as true and reject Mugamba's denial.

Mulindwa Abasi, of Kobolwa Zone L.C.l, Kubuku Parish, Pallisa District, deponed in his affidavit dated 21-03-2001, that he was a monitor for the Petitioner in Kibuku Parish. After casting his vote at Kobolwa Polling Station at 7.00 a.m. he started his work of monitoring within Kibuku Parish. His affidavit then continues:

"(a) When I was at Kibuku Trading Centre, I detected that Mrs. Mujwi, the Sub-County Chief, Kibuku Parish, was issuing out some Voters' Cards to the crowd which was around her at the Trading Centre. I was with Gideon Kalaja who was the Sub-County Monitor for Colonel Dr. Kizza Besigye. We went and challenged Mrs. Mujwi, but we were roughed up by the Local Defence Unit personnel who were heavily armed. They told us that they together with Museveni, are in power and we cannot do anything. They told us to keep quiet.

(b) There were motor vehicles which were bringing voters from villages and they were all told to vote for Candidate Yoweri Museveni. Some soldiers were traveling in a mini bus all around the Trading Centre where the Sub-County Chief, Mrs. Mujwi, Haji Nangeje Abubakali, Sub-County Councilor Maiiki Kitente, and Nyaigolo Peter L.C.II Chairman, were telling the people that if they vote for Besigye, the soldiers will kill them. There were three polling stations within the Trading Centre, namely, Kobolwa, Kibuku Secondary School and Ginnery Polling Station. Mrs. Mujwi and her group were going round these polling stations giving Voters' Cards even to those who had already voted. I complained to the Presiding Officers in the 3 polling stations, but in vain. Instead I was being laughed at.

(c) All the Polling Stations I went to, there were voters who could not vote because on reporting they were told that their names had been ticked and they were told they were not supposed to vote. When they complained they were chased away.

(d) Because of the complaints I raised during the elections, my life is under threat as a result and confined to my residence all the time. I am being told by Museveni's supporters that I am a rebel. I am under great fear for my life.

(e) The contents hereinabove are true and correct to the best of my own knowledge and belief."

Since what Mulindwa said in his affidavit was what he saw and heard, belief is irrelevant.

The affidavit of Mulindwa Abasi is rebutted by three witnesses for the 1st Respondent. The Chart indicates that they are Malik Kitente, Teopista Mujwi and Haji Nangeje. In his rebuttal affidavit, Kitente did not say that he was a Sub-County Councilor as Muhindwa had described him. He denied that on polling day, he in the company of Mujwi, Nangeje and Nyaisolo, went around telling people that if they did not vote for the 1st Respondent soldiers would kill them. Nor did he go to the polling station giving Voters' Cards to those who had already voted. He further said that he cast his vote at 9.00 a.m. at Ginnery Polling Station and returned home to make arrangements for the burial of his late grandfather. Thereafter he left with his family for the burial in Nasanga Village, seventeen miles away.

In her rebuttal affidavit, Teopista Mujwi said that she was the Sub-County Chief of Kibuku Sub-County, and was an election supervisor during the Presidential elections. She denied that Mulindwa challenged her for issuing cards to a crowd at Kibuku Trading Centre. She was not an officer for issuing cards. Nor did she tell Mulindwa that she was with the 1 Respondent who was in power and there was nothing he could do about it. On polling day she was extremely busy supervising all the 24 polling stations in her Sub-County. She did not meet with Nangeje, Kitente or Nyaigolo on that day. Nor did she tell people that if they did not vote for the 1st Respondent, soldiers would kill them.

In his rebuttal affidavit of 5-4-2001, Haji Abubakali Nangeje said that Mulindwa Abasi was mentally unstable. On polling day, Nangeje said, he cast his vote at 8.00 a.m. at Kibuku Senior Secondary School Polling Station. He denied that together with Mujwi, Kitente and Nyaigolo they went around Kibuku Trading Centre telling people that if they did not vote the 1st Respondent, soldiers would kill them. It was not true that they went around polling stations distributing Voters' Cards to people who had already voted. These three witnesses denied what Mulindwa said in his affidavit in a similar manner. The only difference is Nangeje's allegation that Mulindwa was mentally unstable. This appears to be a suggestion that Mulindwa made the allegations due to his mental condition. The other two witnesses, who said they knew Mulindwa well, said nothing about his mental health. Muhindwa made serious allegations of electoral malpractices against the three rebutting witnesses. They have not said why Muhindwa should have picked on them if what he deponed in his affidavit was a fabrication. On the other hand the three of them being officials of one kind or another, would certainly not wish to be associated with electoral malpractices. They would therefore, be expected to deny that they played any role in such malpractices. Their denials are normal. In the circumstances, I would prefer Mulindwa's affidavit evidence to the denials by Kitente, Mujwi, and Nangeje, and I do.

Arinaitwe Wilcen was the Petitioner's coordinator for Bufundi Sub-County, Ndorwa, Kabale District. In his affidavit of 21-03-2001, he deponed that during the week before polling day, they tried to hold a rally at Kyevu in Nyamirango parish, but they were chased away by the L.C.I Chairman, Barangirana, acting with the assistance of L.C.l officials from the village and the neighbourhood.

On 11-03-2001, as he returned from distributing appointment letters to the Petitioner's Polling agents, he found many road blocks had been set up all the way. He was able to dodge three, but at the fourth one near the lake shore, where Arinaitwe had left his boat, he found the L.C.I Councilors manning the road block. Bangirana and Inyahureba were among them. They had already arrested Arinaitwe's boat ***"driver."*** He was also arrested on sight, severely beaten, stripped naked and taken to the home of the L.C.II Chairman. Arinaitwe's money and documents were also removed from his pockets. At the L.C.II Chairman's home, he was tortured to reveal the names of the Petitioner's agents, so that they would also be arrested. They got the names from the documents removed from him, anyway. Arinaitwe was then taken to the home of David

Mirasanyi, MP of the area. The M.P directed people who had brought Arinaitwe to share his money, and then take him to the Sub-County Headquarters. He gave them a motor vehicle to carry Arinaitwe. On the way, one Nyangire, an L.C.I Defence Secretary who had by then joined the group, suggested that they should kill Arinaitwe and throw his body in Lake Bunyonyi. They instead decided to break up into two groups. One group to take him to the home of Local GISO, and the other to hunt down the Petitioner's agents, using the list they had obtained from Arinaitwe. From the GISO's home, he was taken to the Sub-County Headquarters. At the headquarters, he was beaten up all the way, and he was directed to make a statement and thrown into jail.

On 12-03-2001, he was moved to a cell in Kabale Police Station, where he was held until 14-03-2001. He was released on Police Bond. He was not charged with any offence. At Kabale Police Station, he found a number of the Petitioner's agents in detention, including the Student's Guild President of the African College of Commerce. In the circumstances, Arinaitwe never voted. The affidavit is based on knowledge and belief. Since the deponent said only what he witnessed, belief is irrelevant. The Chart indicates that Arinaitwe's affidavit is rebutted by David Mulasanyi, but it does not indicated where the rebuttal affidavit may be found.

Matsiko Armstrong was the Petitioner's Polling agent at Omurakoko and campaign agent for Kabale. In his affidavit of 21-03-2001, he deponed that whenever he and other Petitioner's agents went to campaign in Kabale District, L.C. officials constantly harassed them, mobilized people to throw stones at them, dispersed their rallies, making it virtually impossible to campaign in places, such as Rubaya and others. On polling day, he voted and proceeded to Rurembo for his duty as a Polling agent. As he entered the polling station within a school fence, a group of men led by one Kugaga, who knew Matsiko as a supporter of the Petitioner, confronted him and demanded that he (Matsiko) should go far away. When he explained that he was a Polling agent, they replied that they were self sufficient and did not need any ***"visitor."*** At this polling station when Matsiko refused to leave, they started kicking, boxing and trampling on him. They wounded him on the eye and hand, and tore his jacket. He managed to go away as they called a crowd to arrest him for being a Petitioner's agent. They shouted that if the Petitioner's agents went to the polling station, they should be killed. On the way, he met other agents of the Petitioner, whom he warned not to step in Rurembo Polling Station. He reported the matter to the

Police Station, where he recorded a statement and got a Police Medical Form. The Police said that they could not go to Rurembo because they had no fuel. The Chart does not show that the affidavit of Matsiko Armstong is rebutted. His evidence, therefore, remains uncontroverted. I accept it.

James Birungi Ozo was a District Monitor for the Petitioner, Kamwenge District. His affidavit dated 22-03-2001 has already been referred to in this judgment. He said that on 8-3-2001, he was shot at by Captain Kankiriho, the C.O. of Behanga Barracks to prevent him from campaigning for the Petitioner. The shooting was in the presence of Byonduyire (whose evidence to the same effect I have already referred to), Engineer Dan Byamukama, and L.C.lll, Movement Chairman. The L.C.lll Movement Chairperson is the one who identified Ozo to captain Kankiriho, who had prior knowledge of Ozo's campaign for the Petitioner. Fortunately the bullet did not hit Ozo, but passed between his legs as he entered his car. He drove off. He reported the incident to Ibanda Police Station. A file was opened and he was told that the police would investigate the matter.

Earlier on the same day, Ozo was stopped from campaigning for the Petitioner by armed UPDF soldiers at Matsyono Trading Centre. Ozo's team of seven people were arrested and ordered to leave at gun point. The Petitioner's supporters were sent away and the rally stopped. On the same clay, five members of the Petitioner's Ntara Sub-County Task Force, were arrested by a GISO, and detained at Ntara Police Post and later released without any charges against them.

Ozo said that the Petitioner's Chairman of Kamugye Sub-County Task Force, one Gervazio, was attacked at his home by UPDF soldiers and L.C.'s and his house was burned and, thereafter, went into hiding. Gervazio could not thereafter perform his duty, especially identifying ghost voters on the Voters' Roll, which exercise was going on at the time. Nor did he monitor elections on polling day.

The Petitioner's Publicity Secretary, one Muhwezi Henry was picked up from Kamwenge Town by escorts of the MP for Kibale County, Captain Byaruhanga and taken outside town, where he was beaten and asked to denounce the Petitioner. Thereafter he was attacked at his home in Kakinga Parish by Abdalla and the Parish Chief and Presiding Officer of Kakinga. His house was shot at, but he escaped. He left the District and took refuge in Fort Portal. The affidavit is based

on knowledge and belief. Some parts also appear to be based on information without the source thereof being disclosed. Only what is based on knowledge of the deponent is valid. What appears to be based on information is not. The Chart does not show that Ozo's affidavit is rebutted. So, his acceptable evidence stands uncontroverted. I accept it.

Patrick Kikamberwa, of Kanyegaramire, Kanyenda Parish, Kamwenge District, was a polling agent for the Petitioner at Kanyegaramire Polling Station. He deponed in his affidavit that he and other fellow agents, of the Petitioner were threatened two days before polling by the Parish Chief one Ganyenda and son of Byabagambi that they would be burnt to death if they appeared for the Petitioner as his agents on polling day. He said that they feared and did not work as polling agents but went to vote. At Kanyegaramire Polling Station where Kikamberwa went to vote, he was told by one lady, Kasiime, the NEM Group Polling Monitor to tick the 1ST Respondent. The Presiding Officer, Kyampi, asked him to do so in front of him. He refused, but they followed him up to the basin to see whether he would vote for the Petitioner. Due to fear and threat, he voted for the 1st Respondent against his will. Mugisha, a voter at the same polling station was also forced to vote for the 1st Respondent, but he got angry and left the polling station without casting his vote. Whoever was suspected to be a supporter of the Petitioner would be forced to tick the ballot paper in front of them or the person was being followed to the basin. Kikomberwa's wife, Prossy, did not vote because her Voter's Card was confiscated by L.C. officials who knew that she was the Petitioner's supporter. One Mulefu later returned her card and informed her that he had ticked for the 1st Respondent. The affidavit was based on knowledge and belief, but belief is irrelevant since the deponent said what he witnessed. The Chart does not show that the affidavit is rebutted.

The evidence of Kikomberwa therefore, stands uncontroverted and I accept it.

Moses Tibanyendera of Kyakarata parish, Kahuge Sub-County, Kamwenge District, was the head of the mobilization desk and polling agent for the Petitioner in Burembo. In his affidavit of 22-03-2001, he deponed that on 28-02-2001, Hon. Capt. Byaruhanga, MP and his escorts, one of whom was Noah Kassim, went to Kyakarata and threatened him with death if he did not denounce the Petitioner. They tore down all the Petitioner's posters which had been hang up in Kyakarata Parish. Tibanyendera reported about the incident to Ntabona in the office of their Sub-

County Task Force for the Petitioner at Kahuge Trading Centre. While he was there, Mutegeki, Capt. Byaruhanga's driver arrived wielding a gun and picked them up, saying that they were wanted by the L.C.lll Chairman for Kahuge, Mukidadi Hajji. On arrival where Mukidadi was, he told them that he was arresting them because they had abused him and had reported Capt. Byaruhanga to have torn down the Petitioner's posters at Kyakarata. Byaruhanga's car immediately arrived with one Kassim Noah who beat Tibanyendera and his colleagues badly. They were repeatedly told to denounce the Petitioner. Thereafter they were driven to Kahunge Sub-County cell for detention but the Sub-County Chief refused to detain them, because G. Turwanwe the Sub-County Task Force Chairman for the Petitioner had just been detained there and released thirty days previously. The affidavit was based on knowledge and belief, but since the deponent gave account of what he witnessed, belief is irrelevant. The Chart shows that Tibanyendera's affidavit is rebutted by Silver Mugeriyi but it does not show where the rebuttal affidavit may be found.

Evelyne Nzige's affidavit has already been referred to in this judgment. She deponed that she received an anonymous letter on 11-03-2001, threatening her to go with the Petitioner or die if she ever appeared at Kaburaisoke Polling Station as the Petitioner's polling agent. She sent her son to one of Kamwenge Streets, and he confirmed the threat to be real. She was aware that 5 of the Petitioners Polling agents had been arrested and detained by the Army in Kamwenge Sub-County. She feared to work as a Polling agent at the Polling Station. Geoffrey Byamukama, L.C.lll Chairman, demanded that she crossed to the 1st Respondent's camp or hand over her Voter's Card to him or serious action would be taken against her. She chose to hand over her Voter's Card to Byamukama through her son. She received a message from him that he was happy and that nothing would subsequently happen to Nzige. The affidavit is based on knowledge and belief only what she is based on her knowledge is admissible. She did not give the source of her information about arrest of five polling agents. That part of the affidavit is inadmissible. The Chart indicates that Nzige's affidavit is rebutted by Silver Mugenyi but it does not show where the rebuttal affidavit may be found.

Kiiza Davis of Bukundere, Busingye, Kamwenge, was the Petitioner's Polling agent. On 11-03-2001, he was in Kamwenge Town with his brother, Peter Wasswa and Robert, a friend, when he was arrested by Kenneth and Friday, LDUs. He was taken to a railway line, where he found

another Polling agent Faida Charles arrested. At 10.00 p.m. 2nd Lt. Richard, instructed the LDU to remove their identity cards. At 1 .00 am., they were taken in Katusabe's car to Kamwenge Army Barracks. There, Kiiza and his colleagues were put in a ditch/trench and guarded by two soldiers. On the Polling day, at 10.00 a.m., Kizza was taken to the Polling Station at Kamwenge Primary School, Block I where the same Lt. Richard ordered the Presiding Officer to tick Kiiza's ballot paper in favour of the 1 Respondent. He was then given the ballot paper and two armed soldiers escorted Kiiza to the ballot box to cast his vote. Thereafter, he was taken back to the barracks for detention. After polling, he was released at about 6.00 p.m. As a result Kiiza did not do his work as a Polling and monitoring agent for the Petitioner. He also tailed to deliver, as he was supposed to do, letters of appointment as the Petitioner's Polling agents to Manyindo Robert, Herbert Vincent Kagonyera, Fede Kagonyera, and Kahesi. Faida Charles with whom Kiiza had been arrested also had his ballot paper ticked for him in favour of the l Respondent.

The affidavit was based on knowledge. It is admissible. The Chart does not show that Kiiza's affidavit is rebutted. His evidence therefore, stands uncontroverted, and I believe it as true.

Betty Kyampaire of Kamwenge Town, Kamwenge District, was the District Monitor for the Petitioner. In her affidavit dated 22-03-2001, she deponed that while monitoring with colleagues, James Birungi and two others, she discovered that at Bushinge Primary School Polling Station, one Bwengye, L.C.IIl Vice Chairman had stuffed 300 ballot papers in a ballot box. She saw destroyed ballot papers at the same polling station. Some were stained with ink. Ticking of ballot papers was done in front of the Presiding Officer, Mwesigye.

At Kitonzi Primary School Polling Station, where the Petitioner's agents had been detained, rigging was rampant. Kyampaire saw some people voting ten times without dipping fingers in ink. Kyampaire further said that one Rugirinyangi Eric, Movement L.C.I Chairperson for Kamwenge, went around at every polling station warning the officials, where the Petitioner's agents were monitoring, so that they should be careful when they rigged. The same Rugirinyangi rode on a bicycle to all polling stations in Kibale County harassing all the Petitioner's Polling agents. At Kyabondara, Kanyegaraire Polling Station where the Petitioner had much support, Kyampaire found the Presiding Officer and Polling officials maliciously spoiling ballots cast for the Petitioner by adding a small tick on the 1st Respondent's picture. As a result, most of the

Petitioner's ballots became invalid. The same thing happened at Nkongero Primary School Polling Station, where the Petitioner had 40 votes, 38 were made invalid and only two remained. Kyampaire saw stuffing of ballot boxes by L.C. officials and members of the 1 Respondent's Task Force, and ticking from the table was common at most polling stations in Kamwenge Sub-County where she monitored the elections. Her fellow agents, Kiiza Davis, Faida, Wasswa and Manzi had been arrested and detained the night of 11-03-2001.

She had just handed over to them their appointment letters and others, which they had to distribute to their colleagues. This corroborates what Kizza Davis said about his own arrest together with colleagues of his. Kyampaire said that she had to appoint fresh polling agents for Kitonzi and Kaburaisoke Polling Stations at around 10.00 a.m. At Kanyegaranure Polling Station, she saw one Mrs. Peace Tusingwire being forced to tick for the 1st Respondent at the Presiding Officer's table. At the same polling station, Hope Tukahirwa was forced to tick for the 1st Respondent at the table, but she refused, and she was followed up to the basin, to see whom she would vote for. One Kasiime, an official at that polling station, insisted that she should tick the 1st Respondent, and she did so. At Kamala Polling Station, one Charles, the Petitioner's polling agent was chased away by a group of men including Eric Rugirinyangi, Movement L.C.l Chairman, Chairman L.C.lI of Nyabami Leo, and Chairman L.C.V, Misekeera, who were moving with an armed soldier. Kyampaire further said that earlier during the campaign, she was constantly harassed threatened and her shop in Kamwenge Town was vandalized, door shattered, property looted by a group of hooligans headed by the said Rugyeranyengi, Karela, Capt. Charles Byaruhanga, the MP for Kibale County. The Petitioner's Task Force Offices were constantly closed down and reopened, and Petitioners posters torn down by people from the 1st

Respondent's Task Force. The affidavit was based on knowledge and belief. Since what the deponent to and said was from her knowledge, belief is irrelevant. The Chart does not show that Kyimpaire's affidavit was rebutted. The evidence, therefore, stands uncontroverted. I accept **it** as true.

Alex Otim, of Gulu, said in his affidavit of 22-03-2001, that on 1 2-03-2001, he went to vote and to monitor the elections in Paico Division (Sub-County). He did not say whether he was a monitor for any of the Presidential Candidates, but the context shows that he was the Petitioner's

agent. He said that while he was at Paico R7 Primary School Polling Station, he and other fellow agents found that two soldiers were deployed at each polling station. The soldiers started forcing voters, especially old ones, to vote for a candidate of the soldiers' choice. The soldiers involved in such malpractices were Opoka Denis, Maj. Rasheet, Dumba Julius, and Ocen Francis. The Petitioner's agents chased away the soldiers, but the soldiers returned armed and using an armoured army vehicle (Mamba). They assaulted Otim and Okello, arrested them, and released them at 8.00 p.m. after the polling had closed. The affidavit was based on knowledge and belief since the deponent said only what he witnessed, belief was irrelevant. Otim's affidavit was rebutted by Nyeko Charles, who was the Presiding Officer at Paico R7 School Polling Station. In his rebuttal affidavit dated 1-4-2001, he deponed that it was not true, as alleged in Otim's affidavit, that soldiers were deployed at the polling station, nor did any soldier force any one to vote at all. On polling day, no military vehicle went to the polling station, and no soldier assaulted or arrested anybody at that polling station. The election was conducted in conditions of peace, freedom and security. I do not believe Nyeko's denial of what Otim deponed in his affidavit for the reasons, first, that it is difficult to imagine that Otim invented what he said, including names of four soldiers, whom he said forced old people to vote for candidates favoured by the soldiers and that the soldiers ran to the barracks and returned armed and had an armoured army vehicle. Second, Nyeko would not be expected to admit that malpractices alleged by Otim occurred under his very nose. It was also against the law that armed soldiers should be at a polling station, which Nyeko is presumed to known. For these reasons, I believe Otim's evidence as true and Nyeko's denials as false.

Mugalula Joseph of Bukaka, Kayunga, Kangulumira, Kayunga District, was the Secretary General of the Petitioner's Kayunga District Task Force. In his affidavit of 23-03-2001, he deponed that he was also an election monitor in charge of Ntengyeru North and Ntengyeru South Constituencies in Kayunga District. He made a report of what he saw on polling day. The Report, dated 20-03-2001 is annexed as ***'REP"*** to Mugalula's affidavit. The report is also signed by other officials of the said Task Force, namely the Chairman, Vincent Kawooya, and the Vice Chairman Hajji Edirisa Muwonge. It is a four — page report, showing details of malpractices throughout Kayunga District. I shall refer here only to allegations pertinent to intimidation, and harassment of the Petitioner's supporters. Under Nazigo Sub-County, it says that all Presiding Officers and

Polling assistants belonged to the incumbent camp and they never welcomed the complaints from the Petitioner's agents. This was mostly registered in Kisoga and Bukemba Parishes; and that Brigadier Wamala Katumba intimidated, using vocal words against Non — Buganda. Under Busaana Sub-County, armed soldiers moved all over the Sub-County not on foot but on Ndeeba Secondary School Truck. The election Constable especially the Local Defence (LDU) had big sticks and used intimidating language, thus subduing voters. At 2.15 p.m. at Namwama, the Parish L.C.ll sat at about 300 meters in a Muvule tree in an electoral tribunal, briefing voters before they went to vote and referred to other Presidential Candidates as ***"Obote agent Dictators",*** etc. Under Kayunga Sub- County, most voters never voted due to intimidation by the presence of armed men who were patrolling the whole sub-county and telling them to vote wisely. The Deputy CAO Kayunga confiscated books being used by the Petitioner's agents at Sukka Polling Station and used abusive language. Under Wabuwoko/Kitimbwa Sub-County, armed men patrolled all roads to polling stations in their double cabin vehicles, giving instructions and intimidating voters. Most voters never voted because their names were not in the Voters' Register. Declaration forms were not given to the Petitioner's agents because the results were rigged. Under Kayonza Sub-County, armed men in uniform were deployed in most polling stations and they were guarding roads at every point. Armed men were transporting voters to polling stations.

Under Bbaale Sub-County, there was intimidation and use of abusive language by Presiding Officers and Polling assistants. They also assisted voters to vote not according to the voter's wishes. Armed men moved around and intimidated voters to vote for the 1st Respondent.

Under Galilaya, Sub-County, there was intimidation of the Petitioner's election monitors by supporters and or agents of the incumbent and by armed uniformed men. The Petitioner's agents were directly subordinated by armed men in double cabin vehicles and by the 1st Respondent's agents, with the result that they either left polling stations or never appeared there in the first place. The Chart indicates that Mugalula's affidavit is rebutted by Wamala Katumba on page 352 of the 1st Respondent's volume of affidavits, but that page contains an affidavit of another person altogether, not relevant to Mugalula's affidavit.

Lukwiya Pido, of Gulu deponed in his affidavit of 22-03-2001 that on 12-03-2001, he went to the barracks to monitor five polling stations in the barracks. The soldiers chased away all the polling assistants and replaced them with fellow soldiers. There was massive voting by under-aged children. The Presiding Officers could do nothing since soldiers were rude to them. There were discrepancies between the names on the register and the names on the Voters' Cards. There were also discrepancies about the age of the voters in the register and on the Voter's Cards. Even the serial numbers were not the same, but soldiers just forced people to vote, and no one was allowed to question them. The soldiers removed the basin and they were voting in the open so that their superiors saw how they voted. Polling went on up to mid-night. When they complained about the malpractices, Lukwiya and his colleagues were arrested and tortured by a gang of soldiers and taken to the quarter guard inside the barracks. Their clothes were removed and they were flogged, and later transferred to the police station where they were later released on police bond.

The affidavit is based on knowledge and belief. Since the deponent spoke only about what he witnessed, belief is irrelevant.

Odoki Charles Torach rebutted Lukwiya's affidavit. In his rebuttal affidavit dated 1-4-2001, he said that he was the Presiding Officer of Kasubi M-N Palling Station in Gulu Barracks. He was there from 7.00 a.m. to 7.30 p.m. as time for polling had been extended to midnight because it was an Army polling station. What Lukwiya had said in his affidavit was not true. The election was free and fair. There was no multiple voting, harassment or intimidation as alleged by Lukwiya. Torach did not say who extended the polling time at army polling stations. Further, he did not respond to certain allegations in Lukwiya's affidavit; for instance that civilian polling assistants were replaced by soldiers and that names and ages shown in the Voter's Cards did not match with what Voters' Register showed. It is not credible that Lukwiya made up all he said in his affidavit. In any case, Torach would not be expected to admit that electoral malpractices alleged by Lukwiya, occurred at the polling station, of which he was the presiding officer, if the allegations were true. Consequently, I do not accept Torach's denials. I believe that Lukwiya spoke the truth.

Henry Muhwezi, of Kakinga II Village in Kamwenge Lower deponed in his affidavit of 31-03-2001 that he was a campaign agent for the Petitioner in Kamwenge District. He was his Publicity Secretary for the District. He knew Captain Charles Byaruhanga M.R, who was his personal friend and a campaign agent for the 1st Respondent. Muwhezi further said that while he was at Kamwenge Medical Care, opposite the 1st Respondent's campaign Task Force offices, he was called by Byaruhanga, M.R, who was then standing in front of the 1st Respondent's Task Force Offices. Muwhezi went to Byaruhanga, and the M.R told him to change from supporting the Petitioner to the 1st Respondent, Byaruhanga's candidate. Muwhezi replied that as on previous occasions when Byaruhanga asked him to change, he would not change this time. Thereafter, Byaruhanga told him that what suited Muwhezi was the gun, because he was now a rebel and Byaruhanga would deal with him as such. All this happened in the presence of James Birungi Ozo, the Petitioner's District Task Force coordinator. Later in the day at about 6.00 p.m., while Muwhezi was at Jack Tumusiime's place, he was abducted by Nuha Kassim, the escort of Byaruhanga, Abdul Kaneera, and Kenneth Ruzindana, LOU. Muwhezi was bundled into a car owned by Abdul Kaneera, being driven by one Musinguzi. He was taken to Umoja' Hotel, where he found Byaruhanga who instructed his abductors to take him to Bihanga Army Barracks. On the way to the barracks, and at Kiburasoke Village, the car was stopped and Kassim put Muwhezi on gun point. Muwhezi was pulled out of the car and thrown into a trench, where he was beaten and tortured. As Muwhezi lay in the trench, bleeding and his arm injured, his tormentors told him to go away, while Kassim pointed a gun at him. Subsequently he crawled away and hid in a nearby bush. As they drove away Muwhezi heard his tormentors say that they would go to his home at Kakinga. He remained in the bush for three hours and thereafter went to Evelyn Nzige, the Treasurer of the Petitioner's District Task Force.

Evelyn took Muwhezi to Kamwenge Nursing Home for medical treatment. A copy of the treatment notes was annexed to the affidavit as ***"1."*** He reported the matter at Kamwenge Police Station under reference SD 18/26/2/2001 and case file CRB 38/2001. On the following day 27-02-2001, when Muwhezi went to his home, he found that it had been vandalized and the church where he was the coordinator burnt down. Thereafter, he left Kamwenge and went to Mulago Hospital in Kampala for further treatment. He also reported the matter to the Uganda Human Rights Commission, where a case tile Ul-IRC.131/2001 was opened. Muwhezi was thereafter

interviewed by one Katende G. Mohammed, a reporter with the ***"Monitor"*** News paper and the interview was carried on the news paper issue of 20-02-2001, a copy of which was attached to Muwhezi's affidavit as annexture ***"2."***

Muwbezi further said that on 11-03-2001, Faida and Kizza Davis, the Petitioner's polling agents were arrested and detained at Kamwenge Army Detach. Muwhezi ended that due to intimidation on himself and other supporters of the Petitioner, coupled with other malpractices, the Petitioner's Task Force in Kamwenge rejected the results of the elections in a Press Release, a copy of which is attached to the affidavit as annexture ***"3."*** The medical treatments notes attached to the affidavit describe Muwhezi's injuries. They are consistent with assault and torture. The news paper article bears a photograph of Muwhezi showing his left arm in a bandage.
The caption appearing below the photograph reads:

"Henry Muwhezi displays his injured arm at the Besigye Task Force offices yesterday."

Muwhezi's affidavit also corroborates the evidence of Faida and Kiiza Davis about their own arrest and detention.

A copy of the Press Release, dated 13-03-2001 attached to Muwhezi's affidavit starts thus: ***"The Elect Besigye Task Force — Kamwenge District has decided to withdraw from the election exercise due to much intimidation, detention of our Polling agents in Military Barracks and massive rigging in most of the polling stations. This decision has already been communicated and we would like to officially confirm and reiterate our own earlier decision in this Press Release by maintaining some of the incidences that led to this decision.***

This is then followed by a long list of electoral malpractices in many polling stations and incidences of arrest and/or detention of the Petitioner's Polling agents or supporters. The Press Release, three pages long, was signed by James Birungi Ozo, District coordinator, Balinde Wilson, Chairman, Task Force, Julia Bamwine, District Monitor, and Betty Kyimpaire, Women leader.

I think that when the Press Release said that the Task Force had decided to withdraw from the election exercise, it actually meant that it would reject the results of the election. Polling having been completed on 12-03-2001, and only the declaration of the results remained to be made by the 2nd Respondent within 48 hours, the Task Force could no longer withdraw from the election process which was already completed. It could only reject the results due to be announced within the prescribed time.

The Chart shows that Muwhezi's affidavit is rebutted by Byaruhanga, but it does not indicate where the rebuttal affidavit may be found.

The affidavit of Sam Ndagijje, of Bihomborwa Parish, Kihihi, Rukungiri, is relevant to three electoral malpractices. He said that he was a Sub-County monitor for the Petitioner in Kihihi Sub-County. On 1 2-03-2001, when he went to vote at Kinyagwe Polling Station, he found that his name had been ticked as having voted, yet he had not. The L.C.II Chairman of Bihomberwa, one Turach Chairman of the area, insisted that Ndagijje had voted but Ndagijje insisted to the contrary, saying so loudly that many other people heard him. Moreover his thumb was not ink stained. Turach changed his mind and Ndagijje was given a ballot paper and he voted. At the Petitioner's Task Force office in Kihihi, he got a report from Ngabirano Frank, an election agent for the Petitioner, that at Rwangoboka Polling Station of Karubezi, Ngabirano and the second Petitioner's agent had been chased away by Mrs. Jacqueline Mbabazi, wife of a Minister in Government, Amama Mbabazi, using armed escorts, and threatened to shoot the two polling agents if they did not go away.

Ndagijje and the other polling agents for the Petitioner went to Kihihi Police Station to report the incident, but the officer in charge told them that it was a matter for the 2nd Respondent, not for the police. Ndagijje was mobile with a motorcycle, so he decided to visit all other polling stations. On his way to Rwampoboka Polling Station, he met Sergeant Natukunda, the Intelligence Officer in charge of Kinkizi Sub-District of Rukungiri who was on a pick-up with a strong force of 15 to 20 armed escorts. The sergeant stopped Ndagijje and told him that he was undesirable in polling centers and warned him that unless he went back, he was putting his life in danger. On seeing trouble ahead, Ndagijje turned back and went to the election office of the Petitioner's Task Force. There, he continued to receive more and more of the Petitioner's agents

with similar reports. Ndagijje listed 20 such polling agents with their respective polling stations. But due to time and space constraint, I shall not reproduce the list here.

At about 12.00 noon, Ndagijje went to Nyamwegabira Polling Centre in Nyakatungume Parish. As he stepped on the compound, he was greeted by a mob of about 20 youths booing and ready to pounce on him. The youths were led by Samson of Busengo, Busesi of Pwenyerere, and Odongo of Nyamwegabira, all from Nyakatugunu Parish. Those three told Ndagijje almost in a chorus that if he still needed his life, he must disappear from the scene. Odongo said that the Petitioner's agents should not appear at that Centre. Samson picked Ndagijje's monitoring identity card and threw it away, but one youth picked it up and gave it to Ndagijje, when he was almost encircled by the mob. As a result, Ndagijje sensed danger, and feared for his life. Consequently, Ndagijje said, there was no free and fair election in Kihihi Sub-County. The affidavit was based on knowledge and on information, the sources of which were disclosed and belief the grounds for which were also given. The Chart does not show that Ndagijje's affidavit was rebutted. It therefore, remains uncontroverted and I believe it as true.

Nantongo Sarah was the Petitioner's campaign /polling agent for Kasonko, L.C. Kisenyi II, Kampala Central. In her affidavit of 23-03-2001, she said that during the issuance of Voters' Cards non-Nationals, especially Somalis, were given Voters' Cards. She personally tried to stop one Tumusiime James from receiving a card for one Sadiq Muhammed, a Somali, and let the owner pick it himself. L.C.I Chairman Hamza stopped her doing so. Voter's Card for Nakaye Aisha was also issued to a wrong person. Nantongo objected but the L.C.l Chairman stopped her. As a result, Nakaye did not vote. On 12-03-2001, Nantongo saw armed military Police soldiers at Kassato Polling Station, rounding up people including one Sematta Taddeo, as a result of which many voters left the queue for fear of their lives. She also noticed ballot paper booklets with missing ballot papers. The affidavit is based on knowledge and belief, since the deponent spoke of what she witness, belief is irrelevant. The Chart does not show that Nantongo's affidavit was rebutted. Her evidence therefore, stands uncontroverted. I accept it as true.

Levi Tugume of Majya Village, Kiruna Sub-County, Kanungu District was a coordinator for the Petitioner's campaign Task Force in Kanungu District. In his affidavit of 20-03-2001, he said that a week after the nomination of the Presidential Elections Candidates they opened their Task

Force Office in Kanungu and put up posters. Immediately thereafter a gang led by Karabenda, the GISO, removed the posters and gave orders that Tugume and others should close the office and should stop operating there. That gang was composed of the 1st Respondent's supporters, headed by Karabenda. The following night, the office was smeared with human faeces all over by that gang. Tugume reported the matter to the Police but the suspects were never arrested. They closed the officer for about a week and reopened it. That same night, the office was again smeared with human faeces, a tomb was moulded with a cross at the office and the owner of the building was greatly threatened and ordered not to let the office to the Petitioner's Task Force again. On a day in mid February, 2001, Tugume was holding a consultative meeting in his home which he had now turned into an office when a Police vehicle with about ten Police men and LDUs raided Tugume's home and dispersed the meeting. People fled, and many were injured. Tugume was taken to the Police Station and cautioned about, and warned against, illegal meetings — a thing Tugume considered was intimidation and an incursion into his human rights. On polling day, Tugume was one of the first persons to reach the polling station. The Petitioner's agents were stationed about 20 meters away from where they could not properly monitor the polling. About half an hour later, GISO Karabenda went there on a motor cycle and ordered the Polling officials to tick the ballots on the first table and said that it was an order from the RDC. Tugume protested that it was a wrong procedure, but his protests fell on deaf ears. Polling continued in the abnormal way, officials ticking every ballot paper and handing it to voters. All ballot papers were being ticked in favour of the 1st Respondent only. Tugume went to check at other polling stations and found that the method was uniform everywhere. Tugume said that later in the day, they decided to withdraw the Petitioner's agents from the polling stations because they felt that they were being greatly cheated. They considered that the whole exercise was a fiasco and they declined to sign the declaration of results forms. The affidavit was based on knowledge and belief. Since the deponent spoke only of what they witnessed, belief is irrelevant. The Chart does not show that Tugume's affidavit is rebutted. His evidence, therefore, remains uncontroverted and I accept it as true.

Darlington Sebarole of Kitariro, Rutugunda, Kirima, Kanungu District was the Vice Chairman of the Petitioner's Task Force for Kirima Sub-County. On 27-01- 2001, he had a consultative meeting at his house at Kyeijonga. After the meeting at 4.00 p.m. and as he was seeing off some

of the members of the meeting who had come from Rukungiri to their car, a vehicle carrying armed Police men arrived at the place. Sebarole and three others, namely Richard Bashaija, Vairo Rwangara, and one lady were ordered to board the police vehicle. They were taken to and detained at Rukungiri Police Station. Attempts to have them released was fruitless until 30-01 - 2001, through the efforts of Bubihuga MP, and others, and after Press Release from the 2 Respondent, they were released. They were ordered to report to the Police at Rukungiri, and Sebarole did so on 5-2-2001, 19-02-2001, 28-02-2001 and 14,03-2001, when he was finally discharged with the words that he was a free man, and that no one should molest him anymore.

No criminal charge was made against him. On 28-02-2001, after he had answered the Police Bond, at Rukungiri Police Station he boarded a vehicle in the possession of the Petitioner's Task Force to go to Kihiihi via Bugangari and Bwambara. At Bwambara, they found a road —, block; manned by Army Officers. All the nine members of Sebarole's group were arrested and taken to Bwambara Police Station, from where they were driven on Police vehicle to Rukungiri and detained at 7.00 p.m. One George Owaku Kirarwa and Sebarole made efforts for their release which succeeded the same night after three hours' detention.

Again, no criminal charge was preferred against them. The two incidents of unlawful arrest, false imprisonment and torture, Sebarole said, were intended to threaten and deter them from supporting the Petitioner as a Presidential elections candidate. The affidavit was based on knowledge and belief. Knowledge come from what Sebarole witnessed and grounds of belief were what had happened to him and his colleagues. The Chart does not show that Sebarole's affidavit is rebutted, leaving it uncontroverted. I accept his evidence as true

Turyomusi Christopher, of Butaremwa Ndere, Pulinda Rukungiri, was a member of the Petitioner's Task Force. He said in his affidavit of 20-03-2001 that on 20-02-2001, he went to Kanungu in a group of seven people to consult with their Kinkizi Task Force numbers. Before alighting off a vehicle to take tea at 4.00 p.m. in Kanungu, Stephen Rujaga struck Turyomusi on the head, almost fatally. A group of men started beating up the whole Turyomusi's group. They took cover in a hotel. The hotel was stoned and the group fled to the police station, where they saw Rujaga driving the Task Force's vehicle, whose window glass and head-lights had been smashed. The group asked the police to arrest Rujaga, but the police said that they could not

arrest him because Rujaga was under the 1st Respondent's authority. Rujaga told members of Turyomusi's group that he would kill them that night. The RDC of Kanungu arrived at the police station and told them to spend the night at the police station. Mrs. Amama Mbabazi also arrived there with armed Army men and ordered for their imprisonment. The police replied that they could not imprison them because they had been assaulted and wounded. When Mrs. Amama Mbabazi left, the police said that they could not accommodate the group, because to do so would result into trouble for them. They used torches to drive to Rukungiri Police Station. The affidavit was based on knowledge and belief, but since the deponent spoke of what he witnessed, belief is irrelevant. The Chart does not show that Turyomunsi's affidavit is rebutted. His evidence stands uncontroverted, and, I accept it as true.

Mugeere Ahmada of Kalerwe Zone, in Kampala, was registered as a voter in the 2001 Presidential elections. He was a campaign and polling agent for the Petitioner. On 6-2-2001, at 3.00 a.m. he was arrested at Kalerwe Kibbo Zone and taken to Mbuva Military Barracks, where he was detained until 19-02- 2001. At the Barracks, he was asked which Presidential Candidate he supported and would vote for. He told the soldiers that he would vote for the Petitioner. He was then asked whether he would go to the bush it the 1st Respondent lost the elections. During the detention, he was tortured by being caned and pouring cold water on him. He was injured on the foot. He was also told that he would be caned two strokes a day. On 19-02-2001, he was transferred to Kira Road Police Station. On 20-02-2001, at 9.00 a.m., he was taken to the C.I.D. Headquarters where a statement was recorded from him and he was released on Police Bond. Mugeere said that his arrest was meant to intimidate him and to stop him from campaigning for the Petitioner.

The affidavit is based on knowledge and belief. Nearly all that Mugeere said in his affidavit was what he had witnessed and the grounds of belief were the experiences he went through. The Chart does not show that Mugeere's affidavit is rebutted. His evidence stands uncontroverted and I accept it as true.

Bukenya Samuel was a member of the Petitioner's National Task Force. He came from Kinawataka Village, Mbuva, Kampala. In his affidavit of 23-03- 2001, he deponed that on 11-03-2001, at 6.30 p.m., he was forcefully arrested by armed soldiers in a car covered with the 1st

Respondent's election posters. He was arrested at the Trading Centre of Kinawataka Zone. Thereafter, he was detained in Mbuya Military Barracks. While in detention, he told the soldiers that he supported and would vote for the Petitioner. Thereafter, he was taken to a cell and detained until 21-03-2001, when he was released at 11 .00 a.m. During his arrest, he was beaten, tortured and bundled into the car at the barracks, where torturing and beating continued during his detention.

The affidavit is based on knowledge only. The Chart does not show that it was rebutted. Bukenya's evidence, therefore, stands uncontroverted. I accept it as true.

Concern by the Presidential Election candidates and the 2nd Respondent about violence, intimidation, harassment, threats. etc.

The problem of violence, intimidation and harassment by the military, PPU, LDUs, GISOs and supporters of the 1st Respondent against supporters of the Petitioner and other candidates was a matter of concern to the candidates and other people during the whole of the election campaign period. Complaints were made to the 2nd Respondent many times to have the problems contained, and the 2nd Respondent appealed to the 1st Respondent to contain the situation.

At a meeting on 6-2-2001 convened by the 2nd Respondent and attended by representatives of all the Presidential Candidates except Francis Bwengye, they showed their deep concern about acts of violence and intimidation that were marring the presidential election campaign. They also passed a resolution to the effect that candidates should form their own security groups amongst themselves to ensure orderliness and proper security measures at all meetings or rallies, working closely with the police. Supporters of candidates should also discourage acts of incitement, such as taking of posters of one candidate into another candidate's camp, or tearing of posters of candidates they did not support, or making unwarranted, un-researched or malicious allegations against any candidate. They also resolved to ensure security and smooth running of campaign by agents, and to inform the police and Returning Officers of each district of any programme for any meetings or rally organized on behalf of each candidate or agent. A copy of the resolution is annexture ***"11"*** to the Petitioner's affidavit in support of the Petition.

After the Rwaboni incident of 20-02-2001 at Entebbe Air Port, the Petitioner met, and discussed with the Chairman of the 2nd Respondent, the problem of electoral violence. It appears that the Chairman himself, too, felt so concerned that as a result he wrote to the 1 Respondent and the President of Uganda. The letter painted a grim picture of the state of affairs and appealed to the President to intervene to enable the 2nd Respondent fulfill its duties as laid down in the Constitution.

Below is a reproduction of the letter in full:

"EC/25 **24th *February. 2001.***

Mr. Yoweri K. Museveni,

His Excellency The President of the Republic of Uganda,

KAMPALA.
Your Excellency,

RE: VIOLENCE AND INTIMIDATION OF CANDIDATES

The Commission wishes to appeal to you, Your Excellency, as the Head of State and fountain of honour in Uganda, to intervene and save the democratic process from disintegration by ensuring peace and harmony in the electoral process.

The Commission has received disturbing reports and complaints of intimidation of Candidates, their agents and supporters which in some cases has resulted in loss of life and property.
In a meeting that the Commission held with Candidate Dr.* Kizza *Besigye on 22nd February 2001, a number of issues of public concern were raised regarding the way security matters have been handled, particularly during the campaign period.

We wish Your Excellency to draw your attention to the Electoral Commission Act. Section 12(1) which confers powers to the Commission and we quote:

“(e) to take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness;

(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this act or any other law.”

In addition, Section 20(1) of the Presidential Elections Act, No. 17 of 2000 provides that the Commission shall ensure that the relevant organs of the state provide during the entire period of campaign, protection of each candidate and adequate security at all meetings of candidates.

The Commission is aware of its operational limitation in enforcing the powers under the above mentioned pro visions of the law and had therefore, entrusted the keeping of security during these elections to the Police. The Commission has pointed out to the Police that in case there was need for reinforcing the security deployment, then it would be the Police to seek assistance from other security organs so as to ensure smooth running and conclusion of the entire electoral process.

We also expect that the deployment of PPU is made where the President is expected to be as this is a facility that Your Excellency is entitled to as the incumbent. We have also issued press statements instructing public institutions including RDCs and DISO to treat all candidates equally as is provided for in the Presidential Act 2000 and we expect them to abide by those instructions.

The Commission therefore, would like to request you as Commander- in-Chief of the Armed Forces to instruct armed personnel not to do anything that would be interpreted as interference in the electoral process contrary to law and thus jeopardize the democratization principles that our Country has embarked on since the Government of NRM came into power. Your early intervention in this matter will go a long way to enable us fulfill our duties as laid out in the Constitution and other Laws of this Country.

Yours Faithfully,

Aziz K. Kasujja
CHAIRMAN ELECTORAL COMMISSION
c.c. The Minister of Internal Affairs
The Minister of State for Security
The Inspector General of Police
All Candidates' Task Forces."

There is no evidence that, the 1st Respondent as the incumbent President (also a Presidential Candidate) replied to that letter to say what action he had taken or would take about the problems articulated by the 2nd Respondents Chairman in his letter. In my considered opinion, it would be wrong to think that the 1st Respondent did not receive the letter.

In a letter to the Army Commander and the Inspector General of Police dated 20-02-2001, annexture ***"P4"*** the Deputy Chair person of the 2nd Respondent, Mrs. Flora Nkurukenda, informed them that after the Rwaboni incident at Entebbe Airport, the Petitioner had cancelled his campaign trip to Ajumani. It also drew their attention to section 12(1)(e) and (f) of Act 3/97 and section 20 of the Act and requested them to ensure that candidate's campaigns continued without unnecessary interference.

In a letter dated 7-3-2001, four Presidential candidates, including the Petitioner, wrote to the Chairman of the 2nd Respondent (Annexture "**P *17"*** *to* the Petitioner's affidavit) expressing their concern regarding, inter alia, security, violence and intimidation and other flaws in the electoral process. They said that violence and intimidation by the PPU and para-military personnel had escalated resulting in lasso lives and injury to citizens of Uganda. They also said that public officers such as Army Officers, RDCs, DISCs, GISOs, who were supposed to be non-partisan under the law, continued to campaign for the 1 Respondent. At the end the letter said that in view of the electoral flaws referred to by it, the four candidates demanded that the 2nd Respondent should convene a meeting of all Presidential candidates (not their representatives) not later than 9-3-2001 to resolve those serious and very urgent issues.

On 8-3-2001, the Chairman of the 2nd Respondent replied to the letter of 7-3- 2001, written by the four Presidential Candidates. The reply is annexture *"**P 18**"* to the Petitioner's affidavit.

Regarding violence and intimidation the reply said that the 2nd Respondent had written to the Head of State as the Commander — in — Chief of the Armed Forces to contain the Army and to the Inspector General of Police to ensure that the Police carried out their mandate as provided for in article 212 of the Constitution of Uganda. It also said that it was incumbent upon the Police when necessary to seek reinforcement from other state security organs to contain any deteriorating security situation, maintain law and order and protect lives of Ugandans. Regarding campaigning by Army Officers, RDCs, DISOs, and GISO's, for the 1st Respondent, the letter said that the 2nd Respondent had issued instructions to all concerned to stop the practice. The letter ended that in view of the candidates' and 2nd Respondent's last minute activities then taking place a meeting of all Presidential Candidates demanded by the four would not be practicable. The letter was copied to all Presidential Election Candidates.

The documentary evidence I have referred to indicates that the problem of violence and intimidation during the Presidential electoral process was a matter of serious concern to the 2nd Respondent and to at least four Presidential Candidates, including the Petitioner.

The 1st Respondent, as the incumbent President of Uganda was also informed of the problem, but did not respond to indicate what action he had taken or would take to contain violence, intimidation, harassment, etc. by PPU and the military, which he could do as the Commander-in-Chief of the Armed Forces. Evidence also shows that after the appeal of the 2nd Respondent's Chairman to the President and the Deputy Chair person's request to the Army Commander and the Inspector General of Police on 20-02-2001, violence and intimidation continued up to polling day and during polling.

I have considered affidavit evidence from 58 witnesses for the Petitioner, adduced to prove intimidation, harassment, threats, violence and torture against the Petitioner's supporters and agents during the 2001, Presidential Election. I have also considered affidavit evidence in opposition from slightly fewer witnesses from the 1st and 2nd Respondents, intended to prove that the incidents alleged by the Petitioner's witnesses did not happen. As I have said before in this judgment, there were far more witnesses who gave affidavit evidence than I could evaluate within the time available to me. Nevertheless, I think that the witnesses from all sides whose

evidence I have evaluated are enough samples to give an adequate picture of the scenario. Having considered the evidence which I was able to do, I am satisfied and find that:

Before, and after the nomination of candidates, during the campaigns, and up to polling day of the 2001, Presidential Elections, there was a lot of intimidation, harassment, threats of and actual violence and torture against many supporters agents and mobilisers of the Petitioner.

As evidence shows, the perpetrators of such incidents were soldiers of the PPU in particular and of the UPDF in general LDU'S, RDC'S, and Deputy RDC'S. GISOs LC officials, Administrative Chiefs, supporters agents and mobilisers of the 1st Respondent, presiding Officers and other electoral officials.

This is a general finding.

On the basis of the evidence I have evaluated, I shall now make specific findings regarding the main perpetrators of violence, intimidation, harassment, threats, etc. during the 2001 Presidential Election. This is merely to recapulate evidence I have already accepted by slotting it into categories.

THE PPU:

According to the affidavit evidence of Captain Atwooki B. Ndahura, who was the Commander of the PPU in Rukungiri at the material time, the PPU was deployed in Rukungiri in advance of the President's visit there in January 2001, as usual, he said, to prepare and secure the area for his visit on 16-01-2001.

Because the President would soon return to the District for another rally, the PPU soldiers under Captain Ndahura's command camped at the State Lodge in Rukungiri Town. Army Commander, Maj. General Jeje Odong also said that the PPU stayed in Rukungiri to wait for the President's return to that District. During the campaign period the 1 Respondent, who was the incumbent President and a candidate, visited many Districts throughout Uganda. This is indicated by the programme for Presidential campaign in the Districts, annexture "P.10" to the Petitioner's affidavit filed with his petition. There is no evidence to show that in other Districts which the 1st

Respondent also visited to campaign, the PPU also remained, camped, in those Districts to await his return there subsequently. A question to which I have no direct answer then arises, namely, why was the PPU stationed in Rukungiri throughout the electoral exercise and not only when the President was there? If the PPU was also stationed in other Districts to await the 1 Respondent's subsequent visits after the initial visits, why were there no complaints in those Districts against the PPU's activities as there were against their activities in Rukungiri and a couple of neighbouring Districts? Captain Ndahura's affidavit evidence was also to the effect that the PPU camped at the local state lodge in Rukungiri Town and did not move out. I do not believe that evidence, because evidence from many witnesses, corroborating each other, as we have seen is to the effect that the PPU intimidated, harassed, threatened, and tortured many supporters of the Petitioner especially in many parts of Rukungiri and Kanungu Districts.

Harassment of members of the Petitioner's campaign team continued throughout from the time the PPU and Senior District Administrators apparently began a deliberate process to prevent any form of support for the Petitioner in Rukungiri and Kanungu Districts. On 23-02-2001, the PPU confronted and fired at the Petitioner's supporters, killing one of them, Baronda Johnson. As credible evidence shows this attack was against unarmed civilians and was completely unprovoked contrary to Maj. Gen. Jeje Odongo's claim that it was the PPU soldiers who were provoked by the Petitioner's supporters by pelting them with stones and sticks. Only a few other examples of similar conducts of the PPU need be referred to again. They broke up and dispersed meetings of the Petitioner's agents and mobilisers, including rallies for and by Rwaboni, the Petitioner's Chairman of the Youths and Students Committee. With or without the company of a Deputy RDC, they tore up the Petitioner's election posters in Rukungiri, Kihihi, Kambuga and Kayonza. In Kanungu, together with GISO and Police, they arrested the Petitioner's agents at meetings. At Kambuga, they beat up two of the Petitioner's agents for mobilizing his supporters to attend Rwaboni's rally. On polling day, PPU were deployed in some areas to ***"monitor"*** elections. The Commander of the PPU in Rukungiri called in a Petitioner's agent in a Hotel and pointed a pistol at his head and told him that if anything happened to the PPU he would shoot the agent.

The night before polling day, PPU soldiers were distributed around homes of known supporters of the Petitioner. PPU soldiers buried one supporter of the Petitioner in a pit up to his neck; the

commander threatened to shoot the same person. Another person was arrested by the PPU soldiers and thrown into a trench or pit ***("Ndaki)"*** in an army barracks. The PPU also deployed, committed malpractices and offences at polling stations, contrary to the 1st Respondent's contention that the PPU was deployed in Rukungiri and Kanungu to maintain law and order.

Evidence has proved that the PPU terrorized the Petitioner's supporters in areas where they operated. As the witnesses themselves said in their affidavit evidence, the PPU struck terror in the minds of the Petitioner's supporters by intimidation, harassment, arrest, detention, and torture, dispersing meetings etc. in order to discourage support for the Petitioner and to change support for the 1st Respondent. Again, as the witnesses themselves said, it was impossible to hold a free and fair election where the PPU operated.

Deployment of the UPDF for purposes of security, peace, law and order, etc

Before commenting on the activities of the UPDF during the 2001 Presidential Election process, I wish to first examine the propriety or otherwise of the deployment of the UPDF for purposes of the electoral process.

The functions of the UPDF are governed by article ***209*** of the Constitution, which provides:

"209. The functions of the Uganda Peoples Defence Forces are:

(a) to preserve and defend the sovereignty and territorial integrity of Uganda.

(b) to co-operate with Civilian authority in emergency situation and in cases of natural disasters;

(c) to foster harmony and understanding between the Defence Forces and Civilians; and

(d) to engage in productive activities for the development of Uganda."

By virtue of the provisions of article 98(1) of the Constitution, the President of Uganda is the Commander — in — Chief of the Uganda Peoples Defence Forces. From the time he was nominated as a candidate for the 2001 Presidential Election up to the time he was sworn in as the

winning candidate on 12-05- 2001, the 1st Respondent continued to be the President of the Republic of Uganda. He also continued to be the Commander — in — Chief of the UPDF. I think that this is the effect of the provisions of articles 103(3) and 105(1), of the Constitution read together.

The 1st Respondent does not deny that the UPDF was deployed for purposes of the 2001 Presidential Elections. The justification for doing so is found in paragraph 4 of his affidavit in support of his Answer to the Petition. It is that because police were inadequate and security situation so required, the government decided to and did deploy security Forces throughout the Country to keep peace and order. It further says that the deployment of security forces was done for the purposes of securing law and order throughout the country. It is also stat d that the 1st Respondent did not appoint any military officers to take charge of security of the Presidential Election as stated in paragraph 3(2)(c) of the Petition.

The Army Commander, Maj. Gen. Jeje Odong and the Inspector General of Police, John Kisembo gave similar justification in their respective affidavits, namely that the Police Force was inadequate to maintain security, law and order during the election process. It was therefore necessary to deploy the UPDF and the Police for that purpose. Maj. Gen. Jeje Odong said in his affidavit that sometime in January, 2001, the National Security Council noted that there were indications that election related crimes were on the increase. Intelligence reports from various parts of the Country pointed to the same trend. About the same time, the Minister of Internal Affairs pointed out to Maj. Gen. Odong inadequacies of the Police Force in relation to the task ahead and requested that the Police Force be augmented by the UPDF.

Consequently, the 1stt Respondent was advised and the National Security Council put in place a joint task force consisting of the Army, the Police, LDUs, Intelligence Agencies under the Chairmanship of the Army Commander deputized by the I.G. of Police and the Director General of ISO. There was a joint security task force in each District.

Maj. Gen. Odong and the I.G. of Police Kisembo also said in their respective affidavits that similar joint security arrangements were put in place during the 1987 currency exchange, during the Constitutional Assembly election and the 1996 Presidential Election.

The functions of the Police are also governed by the Constitution, Article 212, which provides:

"212. The functions of the Uganda Police Force shall include the following:

(a) to protect life and property;

(b) to preserve law and order;

(c) to prevent and detect crime; and to co-operate with Civilian authority and other security organs established under this Constitution and with the population generally."

In view of the provisions of section 41 of the Act, Parliament appears to have envisaged that it is the Police which should maintain law and order at all polling stations during polling in a Presidential Election. It provides:

"41(1). Where there is no Police Officer to maintain order in a rural polling station and the necessity to maintain such order arises, the Presiding Officer shall appoint a person present to be an Election Constable to maintain order in the polling station throughout the day.

(2) A Presiding Officer may only appoint a person other than a Police officer to be an election Constable under subsection (1) when there is actual or threatened disorder, or when it is likely that a large number of voters will seek to vote at the same time.

(3) There shall be appointed at every polling station established under subsection (2) of section 33 of the Commission Act one person in order to ensure the orderly and prompt entrance of the voters into their proper polling station within the center.

(4) When an election constable has been appointed by a Presiding Officer, the Constable shall take an oath in the Form O-.C. in the sixth schedule to this Act before commencing to discharge his or her responsibilities as election constable.

(5) Every Presiding Officer who has appointed an election constable at a polling station shall state publicly his or her reasons in the space provided for that purpose in the polling report book.

(6) A Presiding Officer of a polling station located in an urban area may, where required for the purposes of sub-section (2) appoint a Police Officer to maintain order in the polling station.

(7) In this section "urban area" means a town, municipality or the city of Kampala."

The provisions of section 41 of the Act clearly impose on the Police the responsibility of maintenance of law order at polling stations. This, no doubt, is in addition to its normal duty of maintenance of internal security, peace, law and order throughout the Country continuously during a Presidential Election like at all other times.

This in my view is consistent with the functions of the Police as stated in article 212(b) of the Constitution. The Act was enacted five years after the Constitution came into force. If Parliament thought that in situations provided for in sub-sections (1) and (2) of section 41 of the Act, when necessity to maintain order arises, and there is no Police Officer, then the Presiding Officer should appoint a UPDF soldier not a civilian person, as an alternative Parliament would have said so if it so intended.

In sub-sections (1), (2) of the Act, Parliament would have provided that a UPDF soldier, not a civilian, should be appointed to maintain order if no Police Officer is available.

The answer to inadequacy of Police personnel is therefore, provided for in section 41 of the Act by authorizing Presiding Officers to appoint civilians to act as Election Constables, where Police Officers are not available. An elaborate procedure for doing so is specified under the section. In view of this law, the claim that it was necessary to deploy the UPDF to augment the police does not, in my considered opinion, with respect, hold water.

The Constitution clearly spells out the functions of the UPDF. Internal policing or maintenance of law and order is not one of them, except in emergency situations and in cases of natural disasters under article 209(b) of the Constitution. Article 209(a), (c) and (d) do not, in my view, permit internal maintenance of peace, security law and order by the UPDF. In the instant case, my considered opinion, with respect, is that the UPDF had no business in the electoral process and should only have been deployed if there were emergency situations or cases of natural

disasters at the same time, which there were not. There is no evidence that such situations existed when the UPDF was deployed. Maj. General Odong said that there were reports of increase of election related crimes, but he did not say that there were emergency situations or cases of natural disasters. If such situations existed, I am certain that he would have said so. With regard to the argument that because on previous occasions, the UPDF was deployed, so it was in order to do so again this time, my considered opinion is that two or more wrongs do not make a right. I do not know why the UPDF was deployed on the previous occasions to which the Maj. Gen. Odong and I.G. of Police, Kisembo, referred, but I think that what is important is that the Constitution should be obeyed by every person and authority in this country. Such is the clear meaning of article 2 of the Constitution.

To summarise, my considered opinion is that deployment of the UPDF should only have been done according to law. This view is strengthened by the provisions of article 201(a) which states:

"201. Parliament shall make laws regulating the Uganda Peoples Defence Force, and in particular providing for — …….

(a) ***the deployment of troops outside Uganda."***

In the circumstances, my considered opinion is that the UPDF was not properly deployed to assist the Police for purposes of maintenance of peace, law, and order during the 2001 Presidential Election in the absence of emergency situations or cases of natural disasters. The question whether the UPDF was properly or not properly deployed, involves interpretation of the Constitution under article 137(5) of the Constitution. None of the parties to the Petition asked for such a question to be referred to the Constitutional Court under article 137(5) (b); and I do not think that the Court should have exercised its discretion under article 1 37(5) (a) to refer the question to the Constitutional Court, because of the impracticability it would involve. Under article 104(3), the Court is enjoined to inquire and determine this Petition expeditiously and declare its finding not later than thirty days from the date the Petition was filed. The Court did so and rendered its judgment on 21-03-2001, one day before the last day it had to comply with the provisio1S of article 104(3). If the Court had to refer the question I have mentioned to the Constitutional Court, it would never have declared its finding within thirty days. It would have

thereby violated article 104(3) of the Constitution. If the Court could not render its decision within the prescribed time, there would have been, in my considered view, a Constitutional crisis. This Court would not, I think, be prepared to be responsible for such a Constitutional crisis.

Activities of the UPDF relating to violence, intimidation, threats, harassment, etc:

Credible evidence shows that in many places, UPDF soldier's intimidated, threatened, harassed or arrested, detained or applied violence against the Petitioner's supporters.

I shall give some examples.

In Kyenjojo, there was heavy gun shooting by UPDF the night before the Petitioner's rally in Kamwenge to scare of people known to be supporting the Petitioner and to turn them to support the 1st Respondent

Armed soldiers also guarded polling stations in Kasese, where a UPDF sergeant claiming to have been sent from State House threatened to arrest all those campaigning for the Petitioner and said that he had a list of them. The same soldier who was, in fact, from Nakasongola D.M.I., arrested a campaign agent of the Petitioner. In Kasese lorry loads of soldiers ferried from the D.R.C. went round shouting ***"No Change",*** and voted several times.

At polling stations in Nyabushozi and Isingiro, armed UPDF soldiers harassed the Petitioner's supporters. In Mbarara Municipality, there was heavy deployment of UPDF soldiers, making it impossible for the Petitioner's agents to meet, and at many polling stations UPDF soldiers chased away the Petitioner's polling agents.

In Ibanda a ***"Monitor"*** News Paper reporter was arrested by UPDF soldiers and detained in barracks for being inquisitive. In Tororo a supporter of the Petitioner who refused to pull down the Petitioner's poster was arrested and tortured by soldiers in a yellow ***"Movement"*** bus. Thereafter he felt too threatened to continue to campaign for the Petitioner.

In Lira, the UPDF Commandant of Aromo Detach arrested and detained a supporter of the Petitioner.

At Wobulenzi, Luwero District, a UPDF Major chased away an agent of the Petitioner from a polling station. In Bugiri, one of the Petitioner's agents was harassed by eleven UPDF soldiers. Soldiers from the RDC's office also went to a polling station threatening others and forcing under-aged children to vote. They also chased away the Petitioner's polling agents from a polling station. At Musasa in Kasese, an agent of the Petitioner was threatened to be killed by the i/c of Nyabirengo Battalion Headquarters, and a UPDF Major.

In Ibanda, UPDF soldiers surrounded the Petitioner's supporters and ordered them to leave a meeting. A UPDF Captain tore down the Petitioner's poster and shot at an agent of the Petitioner. At Nsambya Polling Station, Mubende, two UPDF soldiers, with a walkie - talkie, threatened to arrest anybody who was complaining about the irregular manner in which ballot papers were being counted.

In Mbale, two UPDF soldiers released a person from Mbale Police Station who had been arrested for caning a female supporter of the Petitioner. In Palisa, UPDF soldiers I n a mini bus moved around a trading center, where a Sub- County Chief and L.C. officials were telling people that if they did not vote for the 1st Respondent, soldiers would kill them. In Kamwenge, a UPDF Captain shot at an agent of the Petitioner and armed UPDF soldiers stopped the same agent from campaigning at a trading center; and another agent was attacked by UPDF soldiers at his home and the house burnt down. Escorts of Hon. Byaruhanga, MP, beat up local publicity secretary for the Petitioner and other Petitioner's supporters and told them to denounce the Petitioner. The Honourable MP is an army captain.

In Kamwenge, a UPDF Lieutenant told the Petitioner's polling agents to remove their identity cards and one of the Petitioner's agents was arrested and detained in a ditch in the local UPDF Barracks, guarded by two UPDF soldiers. The Lt. also ordered the Presiding Officer to tick ballot papers in favour of the 1st Respondent. At Paico, in Gulu District, two UPDF soldiers were stationed at each polling station. The soldiers also forced voters to vote for the soldiers' choice. When voters chased away the soldiers, they returned in an armoured personnel carrier, (called ***'Mamba")*** and assaulted two of the Petitioner's supporters.

In Busaana Sub-County of Kayunga District armed soldiers moved all over the Sub-County on a school truck harassing the Petitioner's supporters. In Galilaya Sub-County, armed uniformed men also intimidated the Petitioner's supporters.

At polling stations within the UPDF Barracks in Gulu, civilian polling assistants were replaced by military polling assistants.

In Kampala, two supporters of the Petitioner were arrested, tortured and detained in Mbuya Military Barracks.

On an inference of fact based on credible evidence it is clear that soldiers of the UPDF were in favour of the 1 Respondent being elected. Army Officers campaigned for him. This is clear from the complaint to that effect made by four of the Presidential candidates and the instruction issued out by the Chairman of the 2nd Respondent that Army Officers, RDCs and GISOs should not campaign for the 1st Respondent. On the whole, UPDF was against election of the Petitioner. This, in my considered opinion, is the reason they harassed, intimidated, arrested and in a few cases, shot at the Petitioner's agents. In some incidences, they also interfered with voting process at polling stations. The reply from the 2nd Respondent's Chairman to four candidates indicates that Army Officers, RDCs and GISOs, were campaigning for the 1 Respondent. The Chairman said that he had sent out instructions for them to stop doing so.

Evidence shows that soldiers of the UPDF do not appear to have positively helped in the maintenance of peace, security and order during the Presidential Election process. On the contrary, with respect, my considered opinion is that they were a source of insecurity for the Petitioner's supporters or persons not openly in support of the 1st Respondent. This was mainly in Rukungiri and Kanungu Districts, but it also happened elsewhere.

Activities of RDC's and Deputy RDC's related to violence, intimidation, violation, threats, harassment, etc:

In a few Districts, these clearly intimidated, harassed, dispersed meetings of, and arrested, the Petitioner's supporters. They too, were obviously in favour of election of the 1st Respondent, and against election of the Petitioner. The reason, I think, is not far to see. It is that only by having

the 1st Respondent, the incumbent re-elected, would they also hope to remain incumbent in their respective offices. An L.C. Monitor introduced an agent of the Petitioner to an RDC and an M.R as a rebel who wanted overthrows the incumbents in order to become an RDC in the Petitioner's government.

A few examples may be given. The RDC of Mbale, according to an affidavit based an information was involved in organizing youths to tear down the Petitioner's posters in Mbale Municipality.

In Rukungiri, the Deputy RDC, accompanied by GISO and PPU soldiers, ordered the removal of the Petitioner's poster from the front of his campaign office. The same Deputy RDC also moved around Kambuga, Kihihi and Kayonza with PPU soldiers pointing out whom to harass. The Deputy RDC also pointed a gun at a Petitioner's agent. In Kabale, the RDC with LDU's, Parish Chiefs and GISO kept the Petitioner's Task Force under constant harassment, and threatened the Petitioner's supporters with arrest if they did not abandon his camp.

Activities of GISOs related to violence, intimidation, threats, harassment, etc:

These are Gombolola (Sub-County) Intelligence Officers. A number of them were involved in electoral malpractices or offences. Evidence shows that they, too, were in favour of the 1st Respondent's election and against the Petitioner's election. Some of them were involved in intimidation, harassment and arrest of the Petitioner's supporters. I shall give a few examples.

In Rukungiri, GISO with a Deputy RDC and PPU soldiers pulled down the Petitioner's posters. In Kambuga, GISO took away a motor cycle belonging to an agent of the Petitioner; and GISO arrested others at a road — block and beat them up, and buried one of them in a pit. In Kanungu, a GISO with L.C. Councilors and the 1st Respondent's supporters went round with guns threatening the Petitioner's supporters.

In Tororo a GISO arrested a Petitioner's supporter at Kwapa a polling station. In Mayuge a GISO was seen issuing Voters' Cards.

At a polling station in Sembabule, a GISO arrived with four armed men and ordered people who had voted to go home, and those who refused to be arrested. Two men who disobeyed the order were arrested.

At Matsyono Trading Centre, in Kamwenge a GISO arrested five members of the Petitioner's campaign team, one of who was detained at Ntara Police Station and later released. A Petitioner's monitor going to Rwampoboka Polling Station in Kinkizi Sub District, and met GISO on a pickup with about 15 to 20 armed men, was arrested and warned by the GISO that he was undesirable in polling centers in the area and that unless he went back; he was putting his life in danger.

In Kanungu Town, a gang of the 1 Respondent's supporters, led by a GISO, removed the Petitioner's posters at a newly opened campaign office and ordered his supporters to close down the office. The following day the office was smeared with human feaces by unknown people. On polling day the same GISO ordered a Presiding Officer at a polling station to tick ballots openly at the first desk, saying that it was an order from the RDC.

Activities of L. C. Officials related to violence, intimidation, threats, harassment, etc:

As credible evidence shows, LCI Chairmen, LC.ll Chairmen and LC.III Chairmen and other L.C. officials intimidated, harassed or arrested supporters of the Petitioner, or voters generally not to vote for the Petitioner but vote for the 1st Respondent. I shall give some examples.

In Rukungiri an LCIII Chairman, threatened to shoot one of the Petitioner's agents, if he did not close the Petitioner's District campaign office. When the agent returned the following day, he found that another pad lock had been fixed on the office door. The Petitioner's Task Force had to give up the office. Early in March 2001, L.C. officials were mobilized by Kabale RDC to violently stop the Petitioner's supporters to meet at Ryakarimira. In Bufundi, the L.C. Vice Chairman moved from one polling station to another directing polling official not to allow any officials of the Petitioner at polling stations. In Rukungiri, a Chairman and the Treasurer of LCIII of Nyamishanje, with a group of armed men threatened a Petitioner's agent with arrest. Consequently, the agents found the campaign process difficult to carry on. The L.C.III Treasurer

with the PPU denied two of the Petitioner's campaign agents from Kampala the right to hold a rally. The Petitioner's supporters went into hiding from 11-03-2001, to 12-03-2001.

At a polling station, the L.C. V Chairman of Kumi asked a polling agent of the Petitioner to leave the polling station. At Amoni Polling Station, the L.C.III Chairman for Kwapa, went to the polling station and ordered everybody there to disappear. When some people resisted, the L.C.Ill Chairman went to his car, picked a gun and fired it in the air. He then got a bundle of ballot papers from his car and stuffed them in the ballot box. After information reached them, the Chairman, L.C. V1 Tororo, and Kwapa LCV Councilor arrived at the polling station. The L.C. officials in question successfully resisted removal of 40 extra ballot papers which were found ticked for the 1st Respondent.

At Nsambya, a Polling Station in Mubende District, an L.C.III Chairman, with security operatives and two UPDF soldiers threatened to arrest anybody who challenged the manner in which ballot papers were being irregularly counted. At Kibuku Trading Centre, Paillisa District, an L.C.II Chairman, a Sub-County Councilor and Sub-County Chief, told the people that if they did not vote for the 1ST Respondent, soldiers, who were also present at the place, would kill them. When the Petitioner's agents complained they were roughed up by heavily armed LDUs who told them that they were in power with the 1st Respondent, and there was nothing the Petitioner's supporters could do about it. They should keep quiet.

At Kyevu in Nyamirango Parish, Kabale District, an L.C.I Chairman and other L.C.l officials chased away the Petitioner's agents from holding a rally. When one of the Petitioner's agents was returning from his duty trip, he found a road — block, manned by an L.C.l Chairman who arrested and severely beat up the agent and stripped him naked. He was taken to the L.C.II Chairman's home, where he was tortured to reveal the names of the Petitioner's agents in the area. The list, other documents and money were removed from him. Later on the way home, they met an L.C. Defence Secretary, who suggested that the agent should be killed and thrown into Lake Bunyonyi. Thereafter, the group was taken to the GISO's home, and further to the Sub-County Headquarters, where a statement was recorded from him.

Also in Kabale District, L.C. officials constantly harassed the Petitioner's agents and organized people to throw stones at them, dispersed their rallies, virtually making it impossible for them to campaign in places such as Rubaya and others. The home of the Chairman of the Petitioner's Task Force of Kambugye was burnt down by UPDF soldiers and L.C. officials, and the Chairman went into hiding.

The Voter's Cards for the wife of a polling agent for the Petitioner at Kanyegaramire Polling Station, Kamwenge District was confiscated by L.C. officials because they knew that she would vote for the Petitioner. The Chairman, L.C.III for Kahuge, sent for the head of the mobilization team for the Petitioner for Kahuge. When the agent was taken to the L.C.lll Chairman, the latter told them that he was arresting them, because they had abused the Chairman L.C.lll and Hon. Capt. Byaruhanga, M.P

On polling day at Kaburaisoke, the L.C.lll Chairman demanded that agents for the Petitioner should cross to the 1st Respondent's camp.

In Kampala, an L.C.I Chairman stopped a Petitioner's agent from preventing Voters' Cards being issued to known Somali aliens.

Acts of intimidation, harassment, etc. by supporters and agents of the* 1st *Respondent:

Credible evidence indicates that supporters and agents of the 1st Respondent were involved in intimidation and harassment of the Petitioner's supporters and agents. I shall give some examples When the Petitioner went to address a rally at Kamwenge Town on 16-02-2001, he found that agents and supporters of the 1st Respondent had organized themselves along the streets of Kamwenge, carrying posters of the 1st Respondent and throwing stones at the Petitioner's convoy. This interfered with his campaign and his supporters were intimidated and assaulted. On 17-02-2001, at Ishugu, in Kamwenge, the 1st Respondent's supporters molested student supporters of the Petitioner. On 9-3-2001, when the Petitioner's agents were holding a meeting in Kihanda Parish, 15 vigilantes of the 1 Respondent attacked them with sticks and ran away when an alarm was raised. The next day PPU and the Police started hunting the Petitioner's supporters.

On 12-03-2001 at Kasika Nyakimasa Polling Station when an agent of the Petitioner complained to the Presiding Officer about under-aged children being allowed to vote, the Presiding Officer ignored him and the Respondent's agents threatened to stone him if he continued with his complaints. In Nyabushozi and Isingiro Polling agents for the Petitioner were harassed, arrested and beaten, tied up, detained or threatened with violence and chased away from polling stations by heavily armed UPDF, LDUs and supporters of the 1 Respondents. At Bakabahyenda Polling Station in Jewa Parish, Bungokho, Mbale District, a disturbance was started by the area Sub-County Chief, the Chairman of the 1st Respondent's Task Force, the Sub-County Councilor who went with four armed soldiers, who shot in the air. Early in March, the 1st Respondent's supporters were mobilized by the RDC of Kabale to violently stop the Petitioner's agents from a rally in Nyakamunira Trading Centre, in Rubaya. During the entire period of campaign, many agents and civilian supporters of the 1st Respondent regularly went around with guns threatening the Petitioner's supporters to compel them to support the 1st Respondent.

On 16-02-2001, after the Petitioner had addressed a rally in Kamwenge Town, the Petitioner's supporters met a mob of the 1st Respondent's supporters armed with bricks, stones, and sticks, who beat up the Petitioner's supporters. They shouted ***'Besigye's supporters."*** The victims were pursued up to Kamwenge Police Station where they took refuge and reported about the incident. One of the Petitioner's supporters was very badly beaten and had to obtain medical treatment. In Kibuku, Pallisa, a Petitioner's agent who had complained about electoral malpractices was accused by the 1st Respondent's supporters that he was a rebel. As a result, he felt that his life was in danger and he confined himself at his residence.

On polling day at Rurembo in Kabale District, one of the Petitioner's polling agents, was told by a group of men led by one Kugaja that the agent should go away because they were self-sufficient. They did not need him as a visitor at the polling station. They kicked, beat and trampled on him. He managed to escape when they called a crowd to arrest him for being a Petitioner's agent. The crowd shouted that if the Petitioner's agents went to the polling station, they should be killed. On 28-02-2001, Hon. Captain Byaruhanga M.P., and his escorts, threatened one of the Petitioner's agents with death unless he denounced the Petitioner. Later the same day, the M.P's driver and escort beat up the Petitioner's agent and a colleague.

In Kamwenge, one of the Petitioner's agents was frequently threatened and harassed and her door shattered and shop vandalized by a group of hooligans led by an L.C.I Movement Chairman. The Petitioner's task force offices were constantly closed down and reopened and his posters torn down by people from the 1st Respondent's task force.

In Kayunga, a report of electoral malpractices compiled by the Petitioner's agents, an annexture to the agent's affidavit indicates that in Galilaya Sub-County, the Petitioner's monitors were intimidated by the 1st Respondent's supporters, agents and armed men in uniform. In Kamwenge Town, a campaign agent for the Petitioner was threatened with a gun by Hon Captain Byaruhanga, M.P. and branded a rebel because he had refused to denounce the Petitioner and change sides to the 1st Respondent. When the agent was being driven to Bihanga Army Barracks he was severely assaulted and thrown into a ditch and his arm injured.

At Nyamwegabira Polling Centre, Nyakatungwe, Rukungiri District, a Sub-County election monitor for the Petitioner, was booed by a mob of twenty youths, led by Samson of Busengo, Busesi of Bwenerere and Odongo of Nyaimwegabira, who told the monitor in a chorus that if he needed his life, he should disappear from the scene. Odongo, one of them, said that the Petitioner should not appear at that polling center. As a result, the Petitioner's monitor feared for his life.

Activities of Major Kakooza Mutale and his Kalangala Action Plan Group:

Complaints against what the Petitioner called Major Kakooza Mutale and the Kalangala Action Plan armed para — military group were made in paragraphs 3(1) (v) and 3(2) (d) of the Petition, which I have already set out in this judgment. In his Answer to the Petition, the 1 Respondent, in essence, denied that he deployed such a group or that it harassed or intimidated the Petitioner's supporters. Evidence about this group came from the affidavits of the Petitioner, from the 1st Respondent, Hon. Winnie Byanyima, M.R, and from Major Mutale himself. What the Petitioner said in his affidavit in this connection must be from reports he had received. He did not disclose the sources of such information. Hon. Winnie Byanyima, on the other hand said in her affidavit that she was informed by the Petitioner's Mbale District Task Force Chairman, one Wagyega that two days before the Petitioner's rally in Mbale, Major Kakooza Mutale and his band of armed men beat up the Petitioner's supporters in Mbale. In his affidavit dated 4-4-2001, Major Kakooza

Mutale said, inter alia, that he is a special Presidential Advisor on political affairs. A copy of his schedule of duties as such was annexture ***"A"*** to his affidavit, which enjoins him to carry out duties of political mobiliser and tender advice to the President, etc. Mutale then narrated how a convention was held in Kalangala from 25' to 28th September, 2000. The convention formed ***"Kalangala Action Plan"*** with a long list of objects and organizational structure. The convention was attended by 481 participants all of whom were mobilisers, mass mobilisers, political mobilisers and supporters of the Movement, security officers. GISOs, LC. Officials, businessmen, cadres, youth leaders, etc. from all the Districts of Uganda. The Kalangala Action Plan prepared a document called:

> ***"A Memorandum to his Excellency. The President from the convention of Movement Mobilisers held in Kalangala from 25-09-2000 to 28-09-2000, said in the preamble:***
>
> ***We the Movement Mobilisers, who have been here at Kalangala since* 25th *September 2000, wish to thank Your Excellency The President for having made the arrangement of bringing all mobilisers from the entire Country together to discuss issues of concern to our Country.***
>
> ***For a long time your Excellency, we cadres at the grass roots have felt neglected, we hope that this initiative will not stop here but will continue from time to time.***
>
> ***We wish to congratulate your Excellency and ourselves for having won the Referendum. We appreciate the numerous achievements of the Movement Government and ft is our humble request that these fundamental achievements are fine tuned and consolidated."***

Towards the end of his affidavit, Major Mutale said that after the convention, the various mobilisers returned to their respective districts and countries to continue with their work of mobilization. He then ended:

> ***"14 That I have perused and understood the affidavit of Hon. Winnie Byanyima shown to be sworn on the 23rd March 2001, in support of the Petition and in response to paragraph 3(a) state that ft is not true, I alone or with armed men beat up and intimidated the Petitioner's supporters at Mbale Municipality or at all"***

The only other evidence I was able to find, which tends to connect Major Mutale and his Kalangala Action Plan Group is that of Oketcho Yusuf of Tororo, who said that he was apprehended and tortured in a Yellow Movement Bus in Tororo Town, but he did not link Major Mutale's group with the incident and the Yellow Movement Bus. There is no indication that the armed men who tortured Oketcho and others inside the Yellow Movement Bus were members of the group. Although it is very likely that they were there it is not sufficient proof to the standard required.

In the circumstances, I am not satisfied on the evidence available that the allegations in paragraphs 3(1) (v) and 3(2) (d) of the Petition that Major Mutale's group harassed, tortured, or intimidated the Petitioner's supporters during the 2001 Presidential Election process have been proved to the required standard.

However, Oketcho's evidence is clear proof that the Movement supporters or operatives, intimidated, harassed or tortured the Petitioner's supporters.

Impartiality of election officials:

One serious flaw in the conduct of this election, but which does not appear to have been made a ground of the Petition, but which credible evidence has proved, is the impartiality of election officials. The law does not specifically prohibit the 2nd Respondent from appointing election officials who are impartial, but its empowered by section 30(2)(e) to remove a Returning Officer who has been proved to be impartial in the performance of his or her duties, and under section 30(5) such a Returning Officer commits an offence. But Act 3/97 is silent about impartial Presiding Officers or impartial Polling Assistants. In the instant Petition, credible evidence shows that many persons who had been campaign agents for, or were known supporters of, the 16t Respondent, were appointed Presiding Officers or Polling assistants and acted impartially during registration of voters, issuing of Voters' Cards or polling. Although there appears to a lacuna in the law, I think that the principle behind section 30(3) (e) and (5) should apply equally to Presiding Officers and polling assistants. The law should be amended for that purpose.

Next, grounds 3(1) (v) and* (y) *(vi) of the Petition.

These grounds have already been set out in this judgment. Learned Counsel's submissions about them have also been considered, and the relevant evidence evaluated. On the available evidence as a whole, I am satisfied that the Petitioner has proved the grounds to the required standard. He has proved that:

By its servants/agents, the Presiding Officers, the 2nd Respondent allowed presence of armed UPDF and PPU soldiers, LDUs and others at some polling stations, contrary to section 42 of the Act. Available evidence suggests that presence of armed persons at the polling stations concerned intimidated many voters. *But* ***there is no satisfactory proof that many voters were intimidated to vote for the 1st Respondent and that those who disliked to be forced to vote did not vote at all. However, for purposes, of section 42 of the Act, mere presence of armed persons at polling stations is sufficient non-compliance, no matter the purpose or consequences of such presence.***

Save that the allegations against Major Kakooza Mutale's group has been dealt with arid disposed of, my findings on ground 3(1)(v) regarding free and fair elections shall be made in my consideration of the third issue in the Petition; and my findings on grounds 3(1)(y)(vi), 3(1)(n), (w), 3(2)(c), (d), (f), shall be made in my consideration of issue number four in the Petition.

For the reasons I have given, the findings and holding I have made so far in this judgment, my answer to the first issue is in the positive. During the 2001 election of the President there was non-compliance with pro visions of the Presidential Election Act, 2001.

I shall now move on to deal with the second issue in the Petition, which is whether the said election was not conducted in accordance with the principles laid down in the provisions of the Act.

Mr. Mbabazi made submissions for the Petitioner under this issue. The learned Counsel listed some of the principles which are reflected in the Constitution and the Act. They include transparency and fairness, representation of candidates at polling stations, the right and freedom to vote and to register to vote; values of a democratic society, etc. He referred to section 12(1) (e) and (f) of the Act 3/97 which provide for free and fair elections and secure conditions for conduct of election; section 9(2) of Act 3/97; article 59 of the Constitution; the titles of the Act

and Act 3/97; and article 61 which provides for regular, free and fair elections, which must be organized in conformity with the provisions of the Constitution and the relevant statutes.

The learned Counsel submitted that given the evidence adduced by the Petitioner, there was non-compliance with the principles of the Act. There were two types of non-compliance, he said. Firstly, those which go to the root of the Constitution, which is the supreme law of the land. Examples of these are denying a citizen the night to vote and secondly, allowing persons not qualified to vote to do so. The second category of non-compliance is contravention of provisions of the statutes which he has listed above and others. The results are either unconstitutional or non-compliance with the Act. The learned Counsel then gave examples of non-compliance proved by evidence such as what he called sham polling stations, the people who voted but were not registered to do so, or if the polling stations were gazetted, they had no Voters' rolls. There were no updated Voters' Register. Alternatively, if they were there, the register of voters were flawed. The learned Counsel submitted that the havoc caused by the Army was inconsistent with the principles of free and fair elections. Failure to display Voter's Register to the public; forced absence of the Petitioner's polling agents from polling stations were also inconsistent with those principles. Also relevant is the history of this Country; the objectives of the Constitution to set up and establish democracy in Uganda; and governance according to the will of the people, expressed in a free and fair elections. The preamble to the Constitution and the National objectives stated in the Constitution, counsel submitted, are also relevant.

Dr. Khaminwa made submission for the 1 Respondent on the second issue. The essence of his submission is that the principles of the Act applicable to this Petition are found in the National Objectives and Directive Principles, stated in the Constitution; and in article 1, 2(1), and articles 172 to 173, which set out Uganda's Districts. There are 53 Districts, and the Petitioner's complaints are from only 23 of them. The learned Counsel submitted that the Constitution and the Act do not define the principles. In his view, the principles are found in Act 3/97, in the Act and in the Constitution and its preamble. Some principles are embodied in common law cases, such as - ***Hackney Election Petition (1874) The Law Times, Vol: xxxi NS. 69; Morgan and others vs. Simpson & Anor (1975) 108.151.***

The principles in these two cases may be summarised that the election must be free and fair; must be by secret ballot; must be in accordance with the procedure laid down by Parliament; and, the most important one, according to learned Counsel, is that a substantial proportion of the voters should not be prevented to vote. Counsel submitted that in the instant case, it is the Petitioner's burden to establish that a considerable number of voters were prevented from voting. Demonstration is by figures, he contended. He said that when the Petitioner's learned counsel was asked to give a realistic assessment of the number of people who were prevented from voting at a particular polling station, the Petitioner's learned counsel did not do so. In those circumstances, Dr. Khaminwa submitted, the Petitioner could not be said to have proved that the election was not free and fair; or that the election was not by secret ballot; or that the number of voters denied the right to vote was substantial. He further contended that in this election there were 10,775,836 registered voters, of whom 7,576,144 cast their votes. That was a very high voter turnout on 12-03-2001. These percentages and numbers, said the learned Counsel, demonstrate that the election was free and fair. The Petitioner, in his pleading, has sought an annulment of the election by the Court by interfering with the will of the people of Uganda.

In his view, Counsel contended, with such a high turnout of 70.3%, it would be improper and wrong for the Court to interfere with the will of the people of Uganda, especially in view of the provisions of article 126 of the Constitution to the effect that judicial power is derived from the people and should be exercised by the courts in the name of the people and in conformity with law and with the values, norms and aspiration of the people. In view of the high standard of proof in election cases, learned Counsel submitted, the ground that this election was not carried out in accordance with the law has not been proved.

Mr. Kabatsi also submitted on this issue. He said that the principles referred to in the second issue in the Petition are found in the Act itself, Act 3/97, and in the Constitution. In the Constitution, the principles include free and fair elections, secret ballot, universal adult suffrage. The learned Solicitor General submitted that the principle of free and fair election embodies all the other principles. They are embodied in the case of Attorney ***General vs. Kabourou (7995) 2 LRC 757.*** One of the important principles is that laws should be in place to promote free and fair elections.

The learned Solicitor General submitted that in the instant case, the Act does just that. It is for the Petitioner to demonstrate that the election was not free and fair. According to the Solicitor General, the Petitioner's case is supported largely by inadmissible evidence. Admissible evidence shows scattered trivial incidences, but evidence from officials of the 2nd Respondent, including Mr. Kasujja, its Chairman, shows that the circumstances for freedom and fairness existed. Reports of external observers groups also indicated that the election was free and fair. The reports were attached to Mr. Kasujja's affidavit supporting the 2nd Respondent's Answer to the Petition. Examples of reports from such groups are from Nigeria, the Gambia, Tanzania, the O.A.U. and the Libyan Embassy. Affidavits of many Returning Officers also say that the election was free and fair.

The learned Solicitor General contended that in his affidavit, Francis Bwengye, one of the former Presidential Candidates, also said that the election was free and fair. One witness, Bob Mutebi, a journalist, interviewed the Petitioner, who did not complain to him about any electoral malpractices. Mr. Kabatsi also said that the affidavit of Major Gen. Jeje Odong, the Army Commander, also said that the election was free and fair.

The learned Solicitor General concluded that the Petitioner had not proved to the standard required that the election was not free and fair. That standard is a high one. In the circumstances Mr. Kabatsi concluded, the Court should answer the second issue in the negative.

There is no doubt that the principles of the Act which are applicable to this Petition and which form the basis of a free and fair election are far wider than the principles indicated in cases such as the — ***Hackney Election Petition*** (supra); ***Morgan and Others vs. Simpson & Another*** (supra), and ***Mbowe*** (supra).

It is common ground amongst the parties to this Petition, rightly so in my view, that the principles which governed the holding of the 2001 Presidential Election are laid down in the Constitution of Uganda, in Act 3/97 and in the Act.

The Constitution was made in 1995 against the background of troubled political and constitutional history through which Uganda had passed during the previous 21 years. As stated in the National Objectives and Directive Principles of the Constitution, the state of Uganda is

based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.

This is reflected in the preamble to the Constitution. It is inter alia, that the history of Uganda had been characterized by political and Constitutional instability. It recognises the struggle by the people of Uganda against forces of tyranny, oppression and exploitation, and commits the people of Uganda to building a better future by establishing a socio-economic and political order through a popular and durable National Constitution based on the principles of unity, peace, equality democracy, freedom, social justice and progress. Certain articles of the Constitution then provide for these principles. In article 1, all power belongs to the people who shall exercise their sovereignty in accordance with the Constitution. All authority emanates from the people and the people should be governed through their will and consent. The people should express their will and consent on who shall govern them and how they should be governed through regular, free and far election of their representatives or through referenda. In article 2, the Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda. If any other law or any custom is consistent with any of the provisions of the Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the Constituency, be void.

Article 59 of the Constitution guarantees the right of every Citizen to vote, and imposes the duty on every Citizen over the age of 18 years of age to register as a voter for public elections. The state should take all necessary steps to ensure that all Citizens qualified to vote, register and exercise their rights to vote. Article 61 of the Constitution enjoins the 2nd Respondent to hold regular free and fair elections, and to organize, conduct and supervise elections and referenda in accordance with the Constitution. All these principles are reflected in the Act and Act 3/97 which were enacted to implement the constitutional provisions with regard to Presidential and other elections.

It is also common ground amongst the parties hereto, and I agree with them, that the principles of democracy and the principle that the people should be governed through their will and consent, as provided for in the constitution, are based on inter alia, the principle that the people should

express their will and consent on who should govern them and how they should be governed through regular, free and fair elections.

Consequently, in my view, governance in accordance with the Constitution, the rule of law, free and fair elections are three of the central pillars of a democratic society. The phrase ***"Free and Fair elections,"*** like the word ***"democracy,"*** is an expression frequently bundied about in many Countries of the world even where it is not practiced. After every election, claims of free and fair elections are routinely made however unfree and unfair such an election has been.

Neither our Constitution nor the electoral laws applicable to this case, define the meaning of ***"free and fair elections."*** In my view, for a conclusion that an election has been free and fair, it requires an assessment of the entire process of the election. It begins with the electoral laws that govern all the aspects of the election. In the instant case, the court is not concerned with validity of the laws but with the need for a level playing field for all participants. The Court's duty is to apply the laws as they existed at the material time but it is my view that the entire process as the laws provide has to be examined in order for the court to be satisfied that the principles they embody have or have not been complied with in the conduct of the election. The answer I have to give in the issue under consideration is whether the election under inquiry was not conducted according to the principles of the Act. This means, I think, that the totality of the exercise must be examined. This includes the secrecy of the ballot, voter entitlement to vote and to register to vote; absolute necessity for civic education in a country like Uganda because of high the percentage of illiteracy which is high in Uganda. Every voter, literate or illiterate, must know what to do as a voter regarding registration, polling process, and the counting of votes. They must also know about the declaration of election results. Observance of the fundamental rights and freedom of the individual during the electoral process, as at all times, is also an important aspect of free and fair elections. Other aspects to be scrutinized are the right of the individual who is negatively affected by an action or omission of the state or its officials to have access to a procedure competent to review such measures or errors promptly and effectively; the right of an individual to have equal and effective access to a polling station, in order to exercise his or her right to vote; the right of the individual to exercise his or her right equally with others and to have his or her vote accorded equal weight to that of others; the right of the individual to vote in secret, which right should not be restricted in any manner whatsoever and respect for the

integrity of his or her choice. The behaviour and conduct of election officials is equally important. They must be competent, honest, open, transparent and impartial in their implementation of the electoral laws and conduct of the electoral process. So must the body, such as the 2nd Respondent, charged with the responsibility and duty to organize and conduct the elections. Not only must it be impartial, but it must also be independent. In the instant case, the 2nd Respondent must, therefore, comply with the letter and spirit of article 62 of the Constitution and Act 3/97 and the Act.

Government or state employees or officials should equally be neutral and impartial, and should abstain from supporting sides in elections. As an aspect of fairness and transparency, no agents of any candidate or sides in the election should be excluded from polling exercise, and should be free to observe the process of polling and counting of votes, whether counting is done manually or electronically. Adequate electoral materials should arrive at polling stations in time and be subjected to scrutiny by agents of candidates or sides. Electoral officials should report at polling stations, and polling should commence, at the appointed time. Openness, transparency and impartially by electoral officials should be among their guiding principles. Counting and tallying of votes should be transparently and openly done in the presence of candidates' agents and members of the public who wish to be present at the material time and place. Another condition for a free and fair election is that the state must ensure peace and security for the voters, for candidates and their supporters and agents during the electoral process from the beginning to the end. Law and order must be maintained by the relevant state organs. Finally internal and external election observers should be free to observe the election if they wish to do so, for whatever it is worth. It is common knowledge that external observers rarely pronounce an election not to have been free and fair. Occasionally they do. But more often than not they say that elections have been free and fair and have reflected the will of the people of a country as a whole.

This is a tall order for conditions for free and fair elections. So it should be, because elections, especially national elections, are very serious matters in the development of a country. Free and fair elections are necessary for political, social, economic and democratic development of a country. It is also very important for the stability of a country.

In my considered opinion only a free and fair election is a valid election under our Constitution and laws. A valid election must be one which passes the test laid down in the Constitutional and the electoral laws I have referred to. It must be one which has been organized, conducted and held in compliance with the provisions and principles of the Constitution and the law. Article 104 of the Constitution and section 58 of the Act provide for nullification of a Presidential election not held in accordance with the provisions and principles of the Constitution and law. Now, how did the election under consideration live or did not live up to these principles? That is the question which is required to be answered in the second issue in this Petition, namely whether the election was not conducted in accordance with the principles laid down in the Act. The issue is couched in a negative form.

The foregoing are the principles laid down in the Constitution and in Act 3/97 and the Act in accordance with which, the 2001 Presidential Election should have been conducted. The relevant provisions of the Constitution, the Act and Act 3/7 were set out in full in my consideration of the various grounds under the first issue in this Petition I shall now proceed to examine whether the election was not conducted in accordance with those principles.

Valid registration of voters is, without question, an essential aspect of a free and fair election, because no person is qualified to vote unless the person is registered to vote under article 59 of the Constitution. That is the provision of section 19(2) of Act 3/97. As a result, only voters whose names are on the Voters Register can exercise their Constitutional right to vote Article 59(2) of the Constitution imposes on every Ugandan of the age of 18 and above the duty to register as a voter. The 2nd Respondent has the responsibility under article 61(e) of the Constitution and section 18 of Act 3/97 to compile, maintain revise and update on a continuous basis, a National Voters' Register, and a Voters' Roll for each Constituency and each polling station. By Statutory Instrument 2001 No. 2, the 2nd Respondent appointed the date of 22-01 - 2001 as the date for completion of the National Voters' Register.

After that date no more applications should have been accepted to register as a voter or to transfer to a new voting location. But as credible evidence shows and I have so found, by 11-03-2001, no National Voters' Register and Voters' Roll for each Constituency and for each polling station had yet been completed. This was the Petitioner's complaint underground 3(1)(e) of the

Petition. In the circumstances, the 2nd Respondent, did not comply with the principles embodied in articles 59 and 61 of the Constitution and Section 18 of Act 3/97.

Section 3 2(5) of the Act requires that the 2nd Respondent should provide polling agents with a Voter's roll for that polling station. This is for purposes of fairness and transparency. Polling agents need the Voters' roll to scrutinize names of validly registered voters and of those whose names are missing but should be on the register. Under ground 3(1) (d) of the Petition, the complaint was that the Respondent tailed to supply the copies of the final Voters' Register when the Petitioner applied for them. In the circumstances, I am satisfied that there was non-compliance by the 2nd Respondent with the principles embodied in section 32(5) of Act 3/97.

I have already discussed in this judgment the rationale for display of copies of the Voters' roll, provided for under section 25 of Act 3/97. In the context of free and fair election it is intended to serve the purpose of fairness and transparency. It is an exercise which is intended to enable voters weed out from the Voters' rolls, names of persons who are dead or names of persons who are not validly registered as voters for one reason or another. Voters also need the Voters' rolls to confirm that names of persons who qualify to vote are actually on the register. In the instant case the 2nd Respondent displayed the Voters' rolls for three or five days only. I have already made a finding and held in this judgment that by so doing, there was non-compliance with section 25 of Act 3/97 by the 2nd Respondent. No free and fair election could be held where the Voters' rolls were not displayed for 21 days as required by law as was done in the instant case. For those reasons I make a further finding and hold that there was non-compliance by the 2 Respondent with the principles laid down in section 25 of Act 3/97.

Section 28(1) of the Act requires the 2nd Respondent to publish in the Gazette a list of the polling stations in each constituency at least fourteen days before nomination of candidates. In ground 3(1)(a)(b) and (c) of the Petition the Petitioner's complaints were that the 2nd Respondent did not do this; as a result, he was disabled from appointing his polling agents to supervise all the polling stations and safeguard his interest as he was entitled to do under section 32 of the Act. Transparency and fairness are the main principles embodied in sections 28 and 32 of the Act. Another purpose is to prevent cheating or rigging of the election by election officials and others. It is only fair that a candidate should be able to appoint his polling agents for all

polling stations if he can do so. For this he needs ample time. No doubt that must be the purpose of 14 days in section 28(1). If a candidate cannot appoint polling agents, as he or she is entitled to do under s.32 of the Act because polling stations are not gazetted in time, then his or her interest cannot be safe guarded at polling stations without his or her agents. Credible evidence showed, and I have held, that new polling stations were published as late as 11-03-2001, and some not at all. The Petitioner's polling agents found the unpublished ones on polling day. Obviously there could not have been a free and fair election if polling stations were not gazetted in good time or at all. This was the case here.

I have no doubt, therefore, that there was non-compliance on the part of the 2nd Respondent with the principles laid down in sections 28(1) and 32 of the Act.

I have already found and held in this judgment that contrary, to section 29(4) and section 34 of the Act, the 2nd Respondent's servants/agents allowed people with no valid Voters' Cards to vote. The importance of a Voters' cards in election cannot be overemphasized. It is a means of proper identification of voters — whether the holder of a Voter's Card is the same person whose name appears in the Voter's Register and vice versa. It is also important for fairness and transparency. The 2' Respondent admitted that by a press release on the eve of polling, it allowed people without Voters' Cards but whose names were on the Voters' Register to vote, provided that they were properly identified. Such a practice obviously defeated the purpose of the legal requirement for Voters' Cards. That is not how a free and fair election should be held.

In my considered opinion this is not the type of situation in which the 2nd Respondent may adapt any of the provisions of Act 3/97 as may be required to achieve the purposes of Act 3/97 or any other law other than the Constitution to such extent as the 2nd Respondent considers necessary to meet the exigencies of the situation under section 38(1) of Act 3/97. In any case the announcement was made on the eve of polling, so that even if the 2nd Respondent could exercise such power under section 38(1) of Act 3/97 the notice was too short to be reasonable notice. I have no doubt therefore; that there was non—compliance with the principles laid down in sections 29(4) of the Act.

The law gives a candidate the right to appoint polling agents at each polling station to safe guard his or her interest at the polling station. Again, this is for purposes of fairness and transparency, and to prevent cheating or rigging of election by election officials and others. Credible evidence shows that the Petitioner's complaints in grounds 3(1) (g) and 3(1) (p) were well founded. Many of his agents were chased away altogether from polling stations or were forced to sit at distances from where they could not serve the purposes for which they were to present at polling stations. The 2' Respondent's Polling Officers either allowed such malpractices or themselves chased away the Petitioner's polling agents. The 2nd Respondent was bound by the acts of its servants/agents. In the circumstances, there was non-compliance on the part of the 2nd Respondents with the principles laid down in sections 32 and 47(4) and (5) of the Act.

Denial of the right to vote is a violation of the constitutional right guaranteed by article 51(1) of the Constitution. Credible evidence showed and, I have found and held that many people did not vote in this election for various reasons. For instance, some voters did not find their names on the Voters' Register and others found that their names had already been ticked in the register indicating that they had voted although they had not. Ballots had, in fact, been cast in their names by other persons. The 2nd Respondent's servants/agents either did this themselves or allowed it to happen. The 2nd Respondent is bound by their actions or omissions. This undermined the credibility of this election. It was rigging. There is no way it can be said to have been free and fair for that and other reasons. In the circumstances, I have no doubt that there was noncompliance by the 2nd Respondent with the principles laid down in article 51(1) of the Constitution.

Under ground 3(1)(j), the Petitioner complained that contrary to section 31 of the Act, the 2nd Respondent's servants and agents, the Presiding Officers, in the course of their duty and with full knowledge that some people had already voted allowed the same people to vote more than once. Section 31 of the Act prohibits any person to vote, or attempt to vote, more than once. Voting more than once is cheating and is not compatible with a free and fair election. The rationale of section 31 is therefore, self evident. Credible evidence proved and I have found and held that in many polling stations many people voted more than once. This happened with the active assistance or connivance of the Presiding Officers, whose conduct binds the 2nd Respondent. The Presiding Officers who allowed it to happen must have known that they were cheating in

and rigging, the election. Obviously allowing some people to vote more than once, as was done, was non-compliance with the principles laid down in the provisions of section 31 of the Act.

In order to prevent cheating and for purposes of transparency, fairness and efficiency in the polling exercise, section 29(2) of the Act provides that at every polling station, polling time shall commence at seven O'clock in the morning and close at five O'clock in the afternoon. Credible evidence showed, and I have made a finding and held, that in some polling stations, polling commenced earlier than seven O'clock in the morning and closed later than five O'clock in the afternoon. There is some evidence from a few Presiding Officers that closing time was extended to mid night. They did not disclose the source of their information or the authority which extended closing time for polling. In the circumstances, I find and hold that in some polling stations there was noncompliance by the 2nd Respondent's Presiding Officers with the principles laid down in section 29(2) of the Act.

Another section of the Act aimed at preventing cheating is section 30(7). Credible evidence shows that there were few cases of Presiding Officers not having opened and shown publicity empty ballot boxes at the commencement of polling. But evidence shows that at many polling stations ballot papers were stuffed into ballot boxes during polling. This was done with the assistance or connivance of Presiding Officers, whose acts bind the 2nd Respondent. Stuffing ballot papers into ballot boxes is cheating, and rigging an election contrary to the principle of free and fair election. In the circumstances the 2' Respondent did not conduct the election in accordance with the principles laid down in section 30(7) of the Act.

Article 59(1) of the Constitution and section 19(1) of Act 3/97 provide for the voting age as 18 years and above. Ground 3(1) (o) of the Petition, complained that the 2 Respondent's servants and/or agents allowed people under the age of 18 years to vote. Credible evidence showed and I found and held that the complaint was proved in respect of many polling stations. It is cheating to allow under-aged people to vote. This is inconsistent with the principle of free and fair election. It is obvious therefore, that the 2nd Respondent did not conduct the election in accordance with the principles laid down in article 59(1) of the Constitution and in section 19(1) of Act 3/97.

Section 47(4) of the Act entitles a candidate to be present in person or through his or her agents at the polling station throughout the voting and counting of votes and at the place of tallying of votes and ascertaining of the results of the polls for purposes of safeguarding the interest of the candidates with regard to all stages of counting or tallying processes. The principle behind the provisions of this section of the Act is transparency and fairness. Presence of polling agents is intended to prevent cheating and fraudulent election. The Petitioner complained in ground 3(1)(s) of his Petition that in the course of their duty the 2nd Respondent's agents/savants denied his polling agents information concerning counting and tallying process. I have found and held that this ground was proved together with grounds 3(1)(g and (p).In the circumstances, I am satisfied that the 2nd Respondent did not conduct the election in accordance with the principles laid down in section 47(4) of the Act.

There is a group of three grounds of the Petition which complained against the 2nd Respondent to the effect that by its servants/agents, the Presiding Officers allowed at polling Stations people with deadly weapons which intimidated many voters; that the 2nd Respondent did not ensure that the entire election process was conducted under conditions of freedom and fairness; that it did not take steps to ensure that there were secure conditions necessary for the conduct of the election in accordance with the Act or any other law; that in the result, such non-compliance with the Act and Act 3/97 affected the results of the election in substantial manner; and that the Petitioner was unduly hindered from freely canvassing support by the presence of the military and pare-military personnel who intimidated voters. The complaints are made in grounds 3(1) (r), 3(1) (v) and 3(1) (y) (vi) of the Petition. I have evaluated the evidence relevant to these and other grounds at length and came to the conclusion that the UPDF in general and the PPU in particular subjected to violence, intimidated, harassed, arrested or tortured many supporters of the Petitioner in about 27 Districts of the Country. So did armed members of such groups as LDUs, GISOs, vigilantes and supporters of the 1 Respondent. Such acts violated the principles embodied in sections 12(1) (e) and (f) of Act 3/97. The manner in which and the extent to which supporters of the Petitioner were harassed, intimidated or threatened was incompatible with conduct of a free and fair election.

Another principle relates to impartiality of election officials. As I have said in this judgment, Act 3/97 provides that a Returning Officer who has been proved to be impartial in the performance of

his duties commits an offence under section 30(5). There is no equivalent provision regarding Presiding Officers and Polling Assistants. There can be no doubt that all election officials should be impartial in the course of their duties. This means that only impartial persons should be appointed election officials and once they are appointed they should be impartial in the course of their duties. In the instant Petition credible evidence proved that many Presiding Officers and polling assistants were biased in favour of the 1st Respondent. There could not have been a free and fair election when some election officials were biased in favour of one candidate. The learned Solicitor General placed reliance on reports by foreign observer groups to the effect that the election under the inquiry was free and fair. Such reports were attached as annextures to Mr. Kasujja's affidavit. On invitation by the 2nd Respondent, the O.A.U. Secretary General sent to Uganda an observer team of six members. The essence of the group's report was that the team was particularly satisfied with the 2nd Respondent's efforts to ensure adequate technical arrangements for the polling and conduct of the exercise in a transparent manner in accordance with the existing laws; the wide coverage given by the mass media to the whole process including its contribution to civic education; he restraint of the army and the Police force from interfering in the polling exercise while providing the necessary security; and the active and significant role played by the local monitors

The OAU group also made a contradictory remark that:

"During the campaign period, the team was very much concerned about certain reports of acts of violence and intimidation, which led to loss of lives. Given the above mentioned technical observations and other few technical short comings, it is the view of the OAU Observer Team that the exercise was conducted transparently and in a satisfactory manner."

The Lybian Ambassador was also invited by the 2nd Respondent to observe the 2001 Presidential Election. In his report, he said that he had observed the election in parts of Kampala and Jinja Districts. He commended the 2nd Respondent for its organization that allowed the people of Uganda to freely exercise their democratic rights. He was particularly satisfied with the restraint of the Army and Police Forces from interfering and in providing the necessary security; the high turnout of the electorate; the 2nd Respondent's efforts to ensure adequate technical arrangements

for the polling in a transparent manner in accordance with the existing laws; the wide coverage of the mass media; and the active and significant role played by the local monitors.

An observer team from Tanzania consisted of 4 members. They observed the election process in seven polling stations in Kampala Central and in six other polling stations. They made a short report, that in general, the process was transparent and correctly conducted. There were no shortages of electoral materials; the voting atmosphere was calm and peaceful.

A Nigerian team, consisting of five members observed the election in Kampala and Jinja. Their report is similar to those of the other observer teams. So was the report of the Gambian team which observed polling at only one polling station in Kampala.

There is no indication whether there were more observer teams than those whose reports are attached to Mr. Kasujja's affidavit.

I wish to make only a couple of comments on the observer teams' reports.

They can hardly be taken seriously, in my view, because the teams were here for only a few days and their reports concern only a few polling stations in a limited area of the Country. Consequently, what they reported about, do not reflect what happened in the entire Country. Kampala and Jinja is not Uganda. By nature of their short visit that was to be expected. Secondly, many African Countries are not famous for conducting free and fair elections. This is common knowledge. In one of them Presidential elections have never been held at all. In many of them only the elections which the incumbents have to win are held. As for the OAU, its founding Charter and the Charter for Human and People's Rights are famous for sounding democratic and other principles but it cannot, in my view, be praised as an organization of democracies in which their Citizens, in practice, enjoy their fundamental rights and freedoms. In the circumstances, I am satisfied and find that the election under inquiry was not conducted in accordance with the principles laid down in the Act. My answer to the second issue is, therefore, in the positive.

I shall next consider the third issue in the Petition, which is whether, if the first and second issues are answered in the affirmative, such non-compliance with the provisions and principles of the Act, affected the results of the election in a unsubstantial manner.

Section 58(6) (a) of the Act provides:

"58(6). The election of a candidate as president shall only be annulled on any of the following grounds if proved to the satisfaction of the court.

(a) non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner."

I have already found and held that during the election under consideration, there was non-compliance with provisions of the Presidential Election Act 2001, and that the said election was not conducted in accordance with the principles laid down in the provisions of the Act. These are two of the three conditions under s.58 (6) (a) of the Act, for annulment of election of a candidate as President. The third and only other condition is what is stated here as the third issue. Mr. Mbabazi and Mr. Walubiri made submissions for the Petitioner under the third issue. Mr. Mbabazi did so at the beginning and by way of a reply to submissions by Dr. Khaminwa and Mr. Kabatsi for the 1st and the 2nd Respondents respectively. Mr. Walubiri also submitted by way of a reply at the end.

Mr. Mbabazi submitted that the incidences of various non-compliance with the provisions and principles of the Act proved by the Petitioner affected the result of the election in a substantial manner. He contended that it is the value which matters, not numbers. He then recalled the incidences of non-compliance with provisions of the Act such as violation of the right to vote under article 59 of the Constitution; stuffing of ballot papers in ballot boxes; falsified declaration of results; voting by people not qualified to vote; the absence of an up dated Voters' Register, etc. He submitted that the court has to look at all the noncompliance with the provisions of the Act. So, too, at compliance with the principles of the Constitution, Act 3/97 and the Act. Principles which come from there include the right to vote, free and fair election, universal adult suffrage, secret ballot, and transparency, free and fair election. The totality of all this, learned counsel

submitted, is that you must have a valid election under section 58(1) of the Act under 104 of the Constitution. There must be a President who is validly elected. Compliance with the law and the principles are necessary for a valid election. Compliance with the provisions and principles of the Act has to be total. Only the effect on the result has to be substantial.

In his submission under this issue Dr. Khaminwa referred to ***Halsbury's Laws of England,* 4th *Edition, Vol 15 from paragraph 401,*** which sets out the law in this case, Learned Counsel then submitted that if mistakes have been trivial they must be viewed against the preamble to and the objective of the Constitution of Uganda. In this Petition, the Court is concerned with a Presidential election, not a Parliamentary election. A Presidential election is more important. If there have been trivial errors, you do not annul the election. Learned Counsel referred to ***Gunn vs. Sharpe (1974) 1 QB.808*** in which the court in that case quoted with approval what had been said in ***Re: Hackney Election Petition (1874) 3.LT*** 69 at page ***72*** to the effect that an election is not to be upset for an informality or for a triviality. The objection must be something substantial, something calculated really to affect the result of the election. The judge is to look at the substance of the case and to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect upon the election. Learned counsel also relied on ***Mbowe vs. Eliufoo (1967) EA, 240.*** He urged us to follow ***Mbowe*** (supra). The effect of that decision, counsel contended, is that the will of the people should not be interfered with by annulling the results of the election in which it has been expressed.

Dr. Khaminwa also relied on ***V K. Bategana vs. E. L. Mushemeza, Election Petition No. 1 of 1996 (HCU)*** (un reported), in which it was decided that non-compliance with certain provisions of the Parliamentary Election (Interim Provisions) statute, 1996, did not affect the result of that election. Noncompliance in that election included non-display of the Voters' Register, and voting by un registered voters. In the instant case, the learned counsel submitted that the Petitioner should have supplied numbers, for instance, of the people who voted but should not have voted because they did not have Voters' Cards, or were below the age of voting, and, yet they voted, etc. Learned counsel said that in conduct of the election, there might have been errors. To err is human. But under the third issue the Petitioner had to show that the transgressions, the irregularities, etc, affected the result of the election substantially. Frank Mukuunzi, the Petitioner's witness, in his report said that he was not able to determine what effect the errors he

reported about had on the result of the election. Learned counsel contended that the 1st Respondent obtained 5,123,316 of the votes cast, that being 69.30%; and the Petitioner obtained 2,055,795 of the votes cast, which was 27.08%. In his view that was a lot of votes cast for the 1st Respondent. Such figures could come out only from a free and fair election. The difference in votes between the 1st Respondent and the Petitioner was over 3 million. The total votes cast were 7,576,144 out of 10,775,836 registered voters.

The learned counsel contended that if the electoral errors were trivial according to the laws of Uganda, the result of this election should not be annulled.

It is not sufficient that there have been irregularities, but the Petitioner must go further and say how they affected the result of the election. Ground 3(1) (y) of the Petition pleaded that as a result of non-compliance with the provisions of the Act, the result of the election was affected in a substantial manner. This was then followed by items showing how the result was said to have been affected. Dr. Khaminwa said that neither in the pleadings nor by evidence was it shown how many people were disenfranchised; how many under-aged children voted; how many ineligible people voted; and how many people were affected by the various irregularities. Regarding the Petitioner's complaint against deployment of soldiers, Dr. Khaminwa said that the army is a specific means of power which is at the disposal of a government.

The power of the State is no mystical force concealed behind the State or its law; it is part of the effectiveness of the National Legal order. For this, the learned counsel relied on ***Introduction to Jurisprudence by Lord Lloyd Homestead, 3rd Edition, page 326.***

My comment on the Dr. Khaminwa's submission on the Army is briefly that there is no question that the army is an instrument of power at the disposal of the State. That, in my view is stating the obvious. But my considered opinion is that deployment and use of the Army must be according to the Constitution and other laws in force.

In his submission under the third issue, Mr. Kabatsi said that the answer must be in the negative. Even if the Court were to find that in some instances there was evidence of non-compliance with provisions and principles of the Act, the Petitioner had failed to demonstrate by evidence that such non-compliance affected the result of the election at all and least of all in a substantial

manner. Mr. Kabatsi said that when Mr. Mbabazi was asked to give any figures, he did not do so. Not any breach of the Constitution is adequate to annul the election, Mr. Kabatsi submitted. That duty can only be discharged if there are figures to prove it. Frank Mukuuzi,s evidence had failed to prove it. The incident of shooting in Rukungiri was an isolated incident, which did not happen in the other 50 or more Districts of Uganda. It did not affect the result in a substantial manner. The authorities on standard of proof which the 1st Respondent's counsel have cited, Mr. Kabatsi submitted, show that the Petitioner did not discharge the burden imposed on him and did not satisfy the court in terms of section 58 of the Act. In the circumstances, Mr. Kabatsi submitted the court should answer the third issue in the negative.

In his submission under the third issue, Mr. Walubiri said that if the court answers the first and second issues in the affirmative, the Court has to determine under the third issue whether non-compliance with the law and principles affected the result in a substantial manner. Learned counsel submitted that his learned colleague, Mr. Mbabazi, had catalogued the malpractices in practical terms. He then showed how the non-compliance with the Act led to non-compliance with the principles. The Petitioner's case was that the non-compliance affected the results of the election in a substantial manner. It is common ground, counsel submitted, that these principles derive from the Constitution, translated into the Act. They derive from the need to reverse our painful history, now stated in the preamble. The principles are meant essentially to promote peace, equality, freedom and social justice. They are in the Constitution and National Objectives. They are meant to encourage active participation of all Citizens at all levels in their governance. Article 2(1) tie with the sovereignty of the people. In terms of a Presidential election, the overriding principle as the bench mark is that the election must be free and fair. By article 61(a), the 2nd Respondent is mandated to carry out the people's will provided for in article 1(4) of the Constitution.

The learned counsel submitted that contrary to the contention by the learned counsel for the 1 and 2nd Respondents, the test is not numbers. The essence of the case on the other side is that the Petitioner must prove by numbers how many people were prevented from voting, how many people were intimidated, etc. The Respondents' Counsel also relied on the cases of ***Mbowe*** (supra) and ***Ibrahim vs. Shagari (1985) LRC.*** Mr. Walubiri submitted that such approach is wrong, and that the two authorities on which the Respondents have relied are at variance with the

values under pinning our Constitution and electoral laws. The Tanzanian case of ***Mbowe*** (supra) was decided in 1966 and was dealing with a political and institutional setting no longer applicable to the Tanzania of today, nor, to the Uganda of today, with its present Constitution and electoral laws, Mr. Walubiri therefore, urged us to disregard ***Mbowe*** (supra).

Instead, he submitted, we should follow the more modern Tanzanian case of ***Attorney General vs. Kabourou*** (supra). Learned counsel also urged us to ignore the Nigerian case of ***Shagari*** (supra), saying that the decision did not assist to promote political and social stability in Nigeria. It was followed by two decades of military dictatorship. Nigerians had to start all over again on the road to democracy and the rule of law. In the learned counsel's view, it is dangerous to judge values and democracy by using numbers. He contended that in the instant case, to determine whether non-compliance with the law and principles affected the result in a substantial manner is a value judgment. It is a qualitative judgment, not a quantitative judgment. Those who wrote our Constitution in 1995 were clear in their minds about elections. They had seen the history of Uganda, and of the World regarding various elections. You can have lining up behind candidates or elect by show of hands. Numbers would be there. You can elect without a Voter's Register or without a campaign or have only one candidate. All those would be elections. Not all numbers can satisfy our principle of free and fair election. If the election is not free and fair then, as Mr. Mbabazi has submitted, Article 104 of the Constitution and s.58 of the Act would render it invalid. Learned counsel contended that the court has to look at the entire election process from the campaigns to registration of voters to polling day and to the results etc., and assess that entire process to see whether it was a free and fair election. It is a value judgment to say whether the election was free and fair.

The learned counsel submitted that on the facts before the Courts in this case, the non-compliance with the laws and principles cannot be arithmetically quantified and numbers cannot be used to say that the result of the election was affected substantially. It is not possible, for instance, to quantify how many voters were affected by lack of freedom in Rukungiri, by the trauma caused by killing a supporter in Rukungiri, and by the abduction of Rwaboni. The Court should draw an inference from the general picture as a whole.

Regarding views of teams of international observers on which the 2nd Respondent has relied, Mr. Walubiri said that the reports do not rely on figures but on value judgment, unlike the learned Counsel for both the Respondents. In my view, that is a valid point, which appears, with respect, to indicate an application of double standards. Finally, Mr. Walubiri urged the court to look at the evidence of hundreds of witnesses called by the Petitioner, draw an inference and conclude that the election was not free and fair and it should nullify the election.

Alternatively, Mr. Walubiri submitted that the evidence of Frank Mukuuzi, the Petitioner's witness, to which a report of his analysis of declaration of results from randomly selected 254 polling stations are attached indicates that there were 2,597,000 ghost voters. One in every three voters was a ghost voter. This, learned counsel submitted, had a substantial effect on the result of the election. Frank Mukuuzi is the Petitioner's witness whose qualification and evidence Mr. Kabatsi attacked vigorously. I shall revert to his evidence only if necessary.

I agree with what was said in ***Gunn vs. Sharpe*** (supra) that an election (whether a Presidential or parliamentary) is not to be upset for an informality or a triviality. The objection to an election must be something substantial, something calculated really to affect the result of the election. The court should look at the substance of the case and see whether the informality or errors are of such a nature as to be firmly calculated in a rational mind to produce a substantial effect upon the election. I am very conscious of the importance of the principle which occurs throughout election cases, which I have looked at, that elections should not be lightly set aside simply because there have been informalities and errors. A similar view was expressed in ***Hackney Election Petition*** (supra). That principle, no doubt is the reason behind the provision of sub-section (6) (a) of section 58 of the Act.

In this connection, I am also persuaded by what was said by I.D.Dua, J in ***Gianshand vs. Sm.Ou Prablia, AIR 1959 Punjab 66 (V46 C. 21), 66.*** This was at a time when India, like Uganda, had just embarked on the road to democracy. Dua, J said on page 69:

"It has often been stressed that it is in the interest of justice not to throw out an election petition on hyper-technical grounds and in the trial of election petitions where the purity, of

election is questioned; and the Tribunal trying the Petitions should afford every possible facility, in its power, to ensure such inquiry.

I am not unmindful of the undesirability of lightly setting aside elections on inadequate, flimsy or frivolous grounds; at the same time it is, in my opinion, of the uttermost importance for the healthy growth of parliamentary system of Government and of true democracy that the purity of the election process should be jealously safeguarded, and people should not be allowed to get elected by flagrant breaches of the *law* ***of elections and by corrupt practices. Enquiry into allegations of corrupt practices, therefore, should not be throttled by dismissing election petitions on unsubstantial or highly technical grounds."***

In my opinion, the principles expressed in that Indian case equally apply to an election petition after a full trial. I also think that the principles apply to the instant election petition.

I am also persuaded by the case of — ***Attorney General vs. Kabourou (1995) 2 LRC. 757*** regarding grounds upon which an election result should be nullified. In that case a Parliamentary election result was nullified on grounds of noncompliance with certain provisions and principles of the relevant electoral statute. The result of the election was not nullified because adjustment of numbers made the result much closer than was originally the case. I would apply that the reasoning in that case to the present Petition.

The ***Shagari*** case (supra) on which the Dr Khaminwa relied is distinguishable from the instant case. Although allegations of non-compliance with the relevant law were similar to those in the instant case, the Petitioner in that case failed to prove the alleged non-compliance. On the contrary, his witnesses did a disservice to him. Their evidence disproved his case for him. Another ground for dismissal of the Petition was that the **1st** Respondent had scored 12,047,648 votes and the Petitioner only 540,928. The Petition in that case did not therefore, fall on numbers alone.

The Tanzanian case of *Mbowe (supra)* was a case in which the unsuccessful candidate in a certain parliamentary constituency, petitioned the High Court for an order to nullify the election, Georges, CJ, dismissed the Petition.

In that election, the registered voters were 30,889; the respondent polled 20,213, and the petitioner, 6,399; and the majority was 13,820. That court found that none of the grounds of the petition was proved by the petitioner's evidence. The learned C.J. there said:

"In my view in the phrase "affected the result" ***the word*** "result" ***means that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments.*** *For* ***the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance."***

Again, I think that the ***Mbowe*** case (supra) is distinguishable from the instant case because the Petition was really rejected because of none of the grounds on which it had been brought was proved. The remark to the effect that the result of an election is affected if adjustment of the votes scored by the parties results in narrowing the gap between them was, apparently, unnecessary. It was obiter. But it made the point that the result of an election is affected in a substantial manner if the margin of winning as shown by figures can be narrowed or adjusted as a result of proven errors or non-compliance. Another reason for distinguishing the ***Mbowe*** case is that the principles embodied in our Constitution and electoral laws were not applicable to the Tanzania of the time.

When the Tanzanian Court of Appeal decided the case of ***Attorney General vs. Kaborou*** (supra) in 1 994, it was guided by a democratic constitution, one in which one of the fundamental principles of which was the rule of law.

"Under this principle," Nyalali, C. J., said, ***"nobody is above the law of the land and similarly nobody is authorized to act unconstitutionally or illegally."*** This principle did not figure in ***Mbowe's*** case (supra).

For those reasons, I have no doubt that the case of ***Mbowe*** (supra) is not applicable to the instant Petition.

When I answered the first and the second issues in the affirmative,, it was after what, I believe, to be a thorough examination of the provisions and principles of the Act, according to which this election should have been held, and a substantial evaluation of the relevant evidence, which I found credible. After doing so, I reached the conclusion that the conduct of the election had not been free and fair and was not in accordance with the provisions and principles laid down by the Act. I said that the entire election process had to be examined, not only what happened on Election Day. In the circumstances, it is my considered opinion that in deciding what effect the non-compliance with the provisions and principles of the Act had on the result of the election under consideration arithmetical numbers or figures are not the only determining factors in deciding whether non-compliance with the provisions and principles of the Act, did, or did not, affect the result of the election in a substantial manner. Figures, in the main, are the outcome of one day's exercise, the polling day. The indications of which candidate won and which one lost are the result of the margin between the figures obtained by the two. It is obtained at the end of the polling day. Numbers or figures of course, are terribly important, but to me, they are not the only, yard stick for assessing the quality or purity of an election. Whether or not non-compliance with the provisions and principle of the Act, in the instant case, affected the result of the election in a substantial manner is, in my considered opinion, a value judgment. Figures cannot tell the whole story. In the instant Petition figures and numbers would not show, for instance, the effect on the result of the failure to compile Voters' Register; failure to gazette all Polling Stations; failure to display Voters' Rolls for 21 days; they would not show the effect of armed soldiers or others at polling stations; they would not show the effect on the result of intimidation, harassment, threats, by the PPU, the UPDF, DISCs, LDUs, and supporters of the 1 Respondent. Numbers would not show the effect on the result or impact of killing Beronda, by PPU; and of the abduction of Okwir Rwaboni, by the PPU with all the attendant media publicity, the incidences had, on the general public. Figures would not show the effect on the result of chasing away the Petitioner's agents from polling, stations or forcing them to sit where they could not see what was happening at the Presiding Officers' table, etc. I am also doubtful whether numbers would also show the effect on the result of stuffing ballot boxes with ballot papers; of multiple voting; of voting by under aged voters. Without opening and checking ballot papers in all the ballot boxes throughout the Country, I doubt that numbers would show the effect on the result of

mis-tallying of votes as indicated by the numerous declarations of results forms and tallying sheets put in evidence by the Petitioner.

In my considered opinion an accumulation, or sum total of the non-compliance with the provisions and principles of the Act, is the value yardstick for measuring the effect of non-compliance with the provisions of, and principles laid down in, the Act.

For these reasons and those I gave for my decision that the election under consideration was not conducted under conditions of freedom and fairness, that it was not conducted in compliance with the provisions and principles of the Act, my considered opinion is that such non-compliance with the provisions and principles of the Act affected the results in a substantial manner. My answer to the third issue is, therefore, in the affirmative.

In the circumstances, I would nullify the election of the 1st Respondent as President of Uganda under section 58(6) (a) of the Act.

I shall now proceed to consider the fourth issue in the Petition. It is whether an illegal practice, or any other offence under the said Act, was committed, in connection with the said election, by the 1st Respondent personally, or with his knowledge, and consent or approval.

Section 58(6) provides:

"58(6). The election of a candidate as President shall *only be* ***annulled on any of the following grounds if proved to the satisfaction of the court:***

(a)……..

(h)…….

(c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or knowledge."

In this Petition the Petitioner alleged that the 1 Respondent committed more than one illegal practice or other offences in connection with the election. Ground 3(2) (a) of the Petition pleaded:

"3(21(a). Contrary to section 65 of the Act candidate Museveni Yoweri Kaguta publicly and maliciously made a false statement that your Petitioner was a victim of Aids without any reasonable ground to believe that It was true and this false statement had the effect of promoting the election of candidate Museveni Yoweri Kaguta unfairly in preference to your Petitioner alleged to be a victim of AIDS as voters were scared of voting for your Petitioner who by necessary implication was destined to fail to carry out the functions of the demanding office of President and to serve out the statutory term"

In his affidavit in support of the Petition, the Petitioner said:

"51. I know that I am not suffering from AIDS, but the Respondent maliciously made false allegation that I was a victim of AIDS without any reasonable grounds for believing that that was true and this false and malicious allegation against me had the effect of promoting the election of the 1st Respondent unfairly in preference to me alleged to be a victim of AIDS as voters were scared of voting for me who by necessary implication was destined to fail carry out the functions of the demanding office of President and serve out the statutory term. I hereby attach a copy of the Monitor of 8t March, 2001, reporting the **1st** ***Respondent's false statement and it is marked*** "R22"."

In his Answer to the Petition the 1st Respondent countered these allegations as follows

The statement that the "Petitioner was a victim of AIDS" ***was not made by the*** **1st** ***Respondent publicly or maliciously for the purpose of promoting or procuring an election for himself contrary to section 65 of the Act. However, it is also true that a companion of the Petitioner, Judith Bitwire, and her child with the Petitioner died of AIDS. The 1st Respondent has known the Petitioner for a long time and has seen his appearance to bear obvious resemblance to other AIDS victims that the 1st Respondent had previously observed."***

In his affidavit filed with his Answer, the Respondent said:

"6. The statement that the "Petitioner was a victim of AIDS" ***was not made by me publicly or maliciously, for the purpose of promoting or procuring an election for myself."***

Section 65 of the Act creates the offence complained of in ground 3(2) (a) of the Petition. The section says:

"65. Any person who before or during the election publishes a false statement of the illness. . . . of a candidate at that election for the purposes of promoting or procuring the election of another candidate knowing that statement to false or not knowing or believing it on reasonable grounds to be true commits an illegal practice."

Commission of an illegal practice by any person for the purposes and in the circumstances specified in section 65 is, therefore, a ground for nullification of the election of that candidate as President under s.58 (6) (c). The ingredients of an illegal practice under section 65, in my opinion are:

(I) the statement by any person of the illness of any candidate must be published before or during an election;

(ii) The statement must be false or made by the person not knowing or believing it on reasonable grounds to be true; and

(iii) The statement must be for the purpose of promoting or procuring the election of another candidate.

Paragraph 51 of the Petitioner's affidavit dated 23-03-2001, filed with the Petition gives the purpose for which, according to the Petitioner, the 1st Respondent made the statement — the motive behind the statement.

In his affidavit in reply to the 1st Respondent, dated 5-4-2001, the Petitioner rebutted the Respondent's affidavit. In that affidavit, the Petitioner said that he is a medical doctor. It was true that Judith Bitwire was his companion up to 1991 and that she died in 1999, but the Petitioner did not know the cause of her death. He had a child with her. The child died in 1991 but the child did not die of AIDS. The Petitioner said that the statement which the 1st Respondent admits

having made that the ***"Petitioner is a victim of AIDS"*** was meant to stigmatise the Petitioner and undermine his candidature before the electorate through demoralizing his supporters and/or voters in general and promote the 1st Respondent's own candidature against the Petitioner. The statement was false in all respects, and the 1st Respondent had never diagonised the Petitioner or tested the Petitioner and found him an AIDS victim and the Respondent had never asked the Petitioner about his health status. The Petitioner said that his appearance which is natural just like that of any person cannot be used to know or make one believe that he is a victim of AIDS. There is no obvious resemblance of AIDS victim and none has been given by the 1 Respondent. He is not and he has never been bed-ridden in his life and his able to work normally and during the Presidential campaigns he traversed the whole of Uganda without breaking down or feeling particularly fatigued. The 1St Respondent's false statement that the Petitioner was an AIDS victim was made publicly in an interview with a ***Time Magazine*** Journalist called Marguerite Michaels for publication in the ***Time Magazine*** and Website known as — ***littp .//www.time. com/ time//magazine/print/o, 8816,101373, OOhtm/."***

The Petitioner said further that ***Time Magazine*** is sold all over the World including Uganda, where copies are purchased on the street. The Petitioner attached to his affidavit as annexture ***"P.26"*** a copy of the Magazine. The Website of ***Time Magazine*** is publicly available as an electronic version, which one can access, read down-wad or bring copies. A copy of the printed article by Marguerite Michaels was also attached to the Petitioner's affidavit as annexture ***"P 27"***

The Petitioner continued in his affidavit that the 1st Respondent thereafter explained the meaning of his statement at a Press Conference held on 11-03- 2001, with all Journalists and reporters, local and international, that his statement meant that State House is not a place for invalids. A President should be someone in full control of his faculties both mental and physical. The Petitioner said that by referring to him as an invalid without all his faculties and incapable of being a President, the 1st Respondent undermined the Petitioner's candidature before the voters while promoting his own candidature to the Petitioner's prejudice at the election. **The 1st** Respondent's statement at the Press Conference was published in News Papers in Uganda, namely ***The New Vision,*** and ***The Monitor,*** copies of which were attached to the affidavit as annexture ***"P 28"***

The statement was also broadcast on all Radio Stations, in Uganda namely; Radio Simba, Central Broadcasting Service, Radio One, Capital Radio and Uganda Television. The Petitioner said that as a result of the 1st Respondent's statements, the Petitioner's agents appointed during the electoral process and some of his supporters expressed their concern about the Petitioner's health status and sought for his explanation. He said that he knows the meaning of an invalid, but he is not an invalid as suggested by the 1st Respondent in his press conference held on 11-03-2001.

The affidavit of Dr. Ssekasanvu Emmanuel, dated 1-4-2001, was filed in support of the Petitioner's Petition. It was a rebuttal of the 1st Respondent's affidavit filed with his Answer. Dr. Ssekasanvu is holds of a Master's Degree in Medicine (Internal Medicine) and has had 10 years experience as a Registered Medical Officer. He is now doing his research in HIV Associated Infections. His professional opinion on the definition of AIDS was attached to his affidavit as annexture ***P23"*** It is headed ***"Report on case definitions of AIDS."*** The essence of the Report is that the World Health Organisation has come up with a Clinical definition of AIDS, using signs and symptoms. Such a clinical criteria can only be used by trained Medical personnel to make a presumptive diagnosis and even then, after detailed examination of the person in question. Likewise, the diagnosis of HIV infections as well as AIDS cannot be made in a person merely because of loss of a partner and/or child due to Aids. This is because on some occasions the infection may not necessarily be passed on to the partner despite intimate contact. Indeed the issue of discord between sexual partners is not uncommon in clinical practice. A pathologist can recognize Aids at post — mortem examination of an HIV infected body. However, such individuals usually die of HIV associated illnesses as the immediate cause of death other than HIV disease itself, for example, they could die from severe infection with bacteria or respiratory failure etc., as the immediate cause of death. The term ***"died from HIV associated illness"*** would be more appropriate.

The affidavit of Professor John Rwomushana dated 4-4-2001 was filed in support of the 1st Respondent's Answer to the Petition. Professor Rwomushana is a Medical Doctor. His post graduate studies are in Medicine and Clinical Pathology involving studies in virology, genetics and Immunology, which are basic to the source of HIV Disease. He is the Director of Research and Policy Development at the Uganda AIDS Commission. The essence of his affidavit is that research in Uganda has established that there is a concept of ***"community Diagnosis"*** of Aids

based on community perceptions, beliefs and observations concerning HIV/ AIDS. It is commonly wide spread in conversations to refer to individuals in the community who have lost partners and very young children presumably due to Aids, as persons suffering from Aids. Such practice is common at funerals in reference to deaths of persons and is used in community to protect families through guarding against inheritance of spouses who have lost partners and other sexual based relationship. Research has shown that it is normal practice for ordinary people to make presumptions that an individual is suffering from Aids upon observation of such persons and the individuals Aids related bereavement.

Under this ground of the Petition, Mr. Balikuddembe referred to several affidavits most of which I have already set out or paraphrased under my consideration of this issue. These include the Petitioner's two affidavits, the 1st Respondent's affidavit, affidavits from Dr. Ssekasanvu, Professor Rwomushana, Major Rubaramira, Manita Namayanja, and Dr. Diana Twine. The learned counsel submitted that the 1st Respondent denied that he made the statement publicly or he made it to an American Journalist of the *Time Magazine.* Counsel contended that 1st Respondent knew that *Time Magazine* would publish the statement. It was made to an international journalist. The 1st Respondent's denial that he made the statement publicly should be rejected. The case of *Kabourou* (supra) supports that view. When evidence adduced at the trial of a case shows that statements were widely published in the press, then there can be no doubt that those who uttered those statements were aware that the statement would be published in the press. So in the instant case the 1st Respondent must have known that his statement would be published in *Time Magazine.*

Learned counsel also criticized the 1st Respondent's denial that he made the statement maliciously, because that denial is disproved by the 1st Respondent's subsequent statement at a Press Conference that State House is not for invalids. According to counsel, that Press Conference statement meant that the 1st Respondent intended to undermine the candidature of the Petitioner. It was meant to stigmatise and discriminate against the Petitioner. It was malicious and false and therefore intended to ruin the Petitioner's candidature. Regarding the petitioner's appearance, learned counsel submitted that the 1st Respondent did not say in his affidavit the kind of appearances persons with Aids look like. Nor did Professor Rwomushana give the type of appearance or resemblance of Aids victims. The sum total is that the 1st Respondent made and

published a false statement on alleged health of the Petitioner. The statement, repeated on 11-03-2001, was an illegal act under section 65 of the Act. It was also an offence under section 23(5) (a) and (b), (7) of the Act.

In the circumstances, counsel urged the Court to nullify the election.

Under the fourth issue, Dr. Byamugisha submitted that even if an offence is proved under section 58(6) (c) of the Act nullification is not automatic because the section does not say so. Secondly, unlike under the relevant law in the past commission of an electoral offence under the Act does not lead to disqualification to stand in subsequent elections for five years. Learned counsel also relied on article 1(14) of the Constitution which provides that people shall express their will and consent on who shall govern them and how they should be governed, through regular tree and fair elections of their representatives or thorough referenda. Learned counsel urged the court to hold that in order to nullify on this ground, the Petitioner must also prove that commission of the malpractice or offence made the election unfree and unfair. Article 2(2) of the Constitution should be applied to the extent that section 58(6) (c) of the Act should not nullify the election which was otherwise free and fair. To nullify the election under s.58 (6) (c) would be inconsistent with article 1(4) of the Constitution.

The learned counsel submitted that the Petitioner's affidavits do not comply with provisions of the Evidence Act, nor do the public documents annexed to the affidavits.

Regarding ground 3(2) (a) of the Petition, learned counsel submitted that the Petitioner's affidavit is not an affidavit because it is a repetition of what is stated in the ground of the Petition. The learned counsel said that the 1st Respondent admits that the statement in question was made to a journalist, but the Petitioner has to prove that the statement was false and was intended for promoting or procuring the election of another candidate and that it was made by the 1st Respondent knowing that it was false. Learned Counsel asked why the Petitioner did not know the cause of death of Judith Bitwire; the cause of death of the child; and why the Petitioner did not submit to medical test to disprove that he had Aids. The Petitioner should have produced his diagnosis. The learned Counsel also referred to the affidavits of Major Rubaramira Ruranga, the affidavit of Dr. Ssekasanvu and of Professor Rwomushana. Counsel submitted that the

Professor's affidavit lays the foundation for the 1st Respondent's beliefs that the Petitioner has Aids. Under section 65 of the Act, the 1st Respondent is not required to prove that the Petitioner has Aids, but the Petitioner has to prove that he has not.

Evidence adduced to prove this ground, like all the others is affidavit evidence. So is the 1st Respondent's evidence to controvert the Petitioner's evidence. I have already discussed generally objections raised by the Respondents' counsel against the Petitioner's affidavits. The same views I held there equally applies to the affidavits under this ground. Parts of the affidavits which are valid are severable and admissible from parts which are not admissible. With respect, I do not accept Dr. Byamugisha's contention that the Petitioner's affidavits in this regard should all be rejected. Dr. Byamugisha's submission that production of documentary evidence which includes public documents did not comply with the relevant law equally applies to the 1st Respondent's documentary evidence for instance, the affidavit of Professor Rwomushana.

Ground 3(2) (a) of the Petition clearly sets out the statement which the 1 Respondent allegedly made. The statement was that the Petitioner was a victim of Aids. It was made in Kampala to Marguerite Michaels a Journalist with *Time Magazine.* It was published in the Magazine's Internet on 8-3-2001 and in the magazine on 12-03-2001. There can be no doubt that the 1st Respondent must have known that when he made the statement to the journalist of *Time Magazine*, an international magazine, it would be published internationally and in Uganda. The statement as published in the internet was ***"Besigye is suffering from AIDS."*** ***Time*** Magazine is sold and read all over the World and in Uganda.

The statement was made during the 2001 Presidential Election campaign. According to the affidavits of Dr. Ssakasanvu and Professor Rwomushana, and it is common knowledge, that HIV/AIDS is a disease or an illness symptoms of which lead to death. I find, therefore, that ingredient (a) of section 65 of the Act which I set out earlier in this judgment has been proved by the Petitioner to the required standard.

Regarding ingredient (ii) the 1St Respondent's case is that the statement was not false or that he believed on reasonable grounds that it was true.

In ***"Words and Phrases legally defined",*** 3" Edition, Vol.4 R — Z, by Butterworth London 1 990, at page 11, it is said of section 1 9(3) of the Matrimonial Causes Act, 1 973, which provides that in any proceedings for divorce on the ground of presumption of death, the fact that for seven years or more the other party to the marriage has been continually absent from the Petitioner and the Petitioner had no ***'reason to believe"*** that the other party had been living within that time, should be evidence that he or she was dead until the contrary was proved. The test whether or not there is ***"reason to believe that the other party has been living"*** must relate to the standards of belief of a reasonable man and not to those of the particular Petitioner. The legislature could hardly have intended that on the same set of facts the right to relief might vary according to whether the Petitioner happened to be a moron or a senior wrangler with different approaches to what constitute such reason. See ***Thompson vs. Thompson (1956) 1 AU E.R., 603, at 605, 606.***

In ***Re A. Solicitor (1945) JCB 368*** at 371, the court said ***'The word reasonable"*** has in law the prima fade meaning of reasonable belief on those existing circumstances of which the actor, called up to act reasonably, knows or ought to know.

In ***Booth vs. Clive (1851) B 827,*** at 834, 337 the Lord Chief Justice told the jury that if ***"reasonably"*** meant anything else than in good faith ***"it meant according to his reason",*** as contradistinguished from ***"caprice"***

In the case of ***Hicks vs. Faulkner (1881) 8, QBD, 167, at 171 — 172,*** in an action for malicious prosecution, the jury had to consider whether the Defendant acted maliciously and without reasonable and probable cause. Hawnkins J. defined ***"what is reasonable or probable cause"*** in cases of malicious prosecution as follows:

"Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonable lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was in probability guilty of the crime imputed."

Authorities also say that it is a matter of fact whether the person concerned has acted on reasonable belief.

I think that the principles stated in the cases I have referred to equally apply to the instant case. The test which emerges from the authorities is honest belief founded on a set of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. It must not be speculation, idle gossip or rumour-mongering on the part of the accuser. That is the test I shall apply in considering this ground of the Petition. The issue in the ground of the Petition essentially is that the 1st Respondent is not required to prove that the Petitioner has AIDS but to prove that on reasonable grounds he believed that he had AIDS. The Petitioner has to prove that he has no AIDS which is the same as proving that the statement was false.

The 1st Respondent gave two main reasons as the basis of his statement that the Petitioner was suffering from Aids. The first was that the Petitioner's companion Judith Bitwire had died of Aids. So had a child the Petitioner had had with Judith Bitwire.

The Petitioner said categorically in his affidavit filed with the Petition that he knows that he is not suffering from Aids. Then in his affidavit in reply, he said that he is a medical doctor by profession, implying, I think that as a doctor he would know whether he had AIDS or not. He also said that he did not know Judith Bitwire's cause of death and that the child he had with Bitwire died, but did not die of Aids. Dr. Diana Twine's affidavit was filed to support the 1 Respondent's case. She said in the affidavit, and repeated it in oral evidence when she was cross-examined by the Petitioner's counsel and re-examined by the Respondent's counsel that she signed the Death Certificate of Judith Bitwire after she had died at the Joint Clinical Research Centre (JCRC). The Death Certificate was produced in evidence in the course of her cross-examination. Dr. Twine said that she could not say Judith Bitwire's cause of death for professional reason. Dr. Ssekasanvu's report, attached to his affidavit said that the diagnosis of HIV infections as well as Aids cannot be made in a person merely because of loss of a partner. This tends to corroborate the affidavit evidence of Major Rubaramira that although he has lived with HIV/ AIDS for 6 years whenever he and his two wives test themselves for HIV, he and his second wife tests positive, but his first wife and his 1 1/2 year old child test negative. The Petitioner, himself a medical doctor, said that he was not a victim of Aids.

Another reason the 1st Respondent gave for the statement he made was the bodily appearance of the Petitioner which bears a strong resemblance to other Aids victims, according to the **1st** Respondent. Professor Rwomushana said in his affidavit that Research has shown that it is normal practice for ordinary people to make presumptions that an individual is suffering from Aids upon observation of skin changes and the individuals Aids related bereavement. The Professor did not attach the result of the Report he talked about to his affidavit. Nor did the Professor indicate what percentage of such presumptions have been researched and found to be correct. Regarding change of appearance to resemble individuals who suffer from Aids the 1st Respondent and Professor did not say what such appearance or changed skin looks like. The Petitioner said in his affidavit in reply that there is no obvious resemblance of Aids victim and none had been given by the 1st Respondent. If there is, the **t** Respondent and the Professor did not describe it.

The rest of the Professor's evidence appears to depict common gossip, idle talk, and roumour mongering which goes on at funerals. Not the honest belief by prudent and cautious people.

The professor did not say whether such presumptions came from ordinary reasonable or prudent and cautious persons, or came from people who Gossip or speculate on any person, anything and everything. It is common knowledge that in our villages people indulge in idle talk, roumour-mongering, gossiping and speculation about other people most of the time. They rarely spend their time discussing issues or principles. People do not mind their own business. This is especially true at funerals.

In my considered opinion, that appears to be the effect of the Professor's affidavit evidence.

Like the 1st Respondent, the Professor also did not say how the appearance of an AIDS victim looks like and whether he has compared it with the Petitioner's appearance.

For the reasons given, I am satisfied that the Petitioner has proved to the required standard that he is not a victim of Aids. The statement was false, and the 1st Respondent had no reasonable ground to believe that the statement that the Petitioner was a victim of Aids was true. With respect it is my considered opinion that his statement was based on speculation. It was not based on reasonable belief that it was true. I do not think that it was necessary for the Petitioner to

produce in evidence a report of his diagnostic test. The Petitioner brought other evidence instead. He has proved other than by a diagnostic test that the 1st Respondent's statement that the former had Aids was false or that the 1st Respondent had no reasonable belief that his statement was true.

It is not denied by the 1 **St** Respondent that on 11 -03-2001, at a Press Conference he made a statement that State House is not for invalids. This was with reference to the earlier statement that the Petitioner was suffering from Aids. Since it is not denied I shall reproduce here what the 1st Respondent was reported in the Monitor News Paper of 12-03-2001, to have said:

"I made the remarks but my friend Marguerite (Michaels the author) put it out of context." Museveni told journalists at State House in Nakasero yesterday. Museveni said that he believed State House was not a place for the invalids. "A President should be someone fully in control of his faculties both mental and physical" he said adding there was *no reason to wait* ***for someone to get into office and get sick.***

Museveni drew the wrath of anti AIDS activists when he was quoted in the Time Magazine of the week ending March 12 2001, as having said that "Besigye is suffering from AIDS."

In my considered opinion when the 1st Respondent said that State House is not a place for invalids; that a President should be someone fully in control of his faculties, both mental and physical; and that there was no reason to wait for someone to get into office and get sick, that was part and parcel of the statement he had made earlier that the Petitioner was suffering from AIDS.

Dr. Byamugisha said that what the 1st Respondent said at the Press Conference on 11-03-2001 was a retort to an accusation that the 1st Respondent had been in office for too long. I am afraid, with respect, that I do not see the connection. Did it mean that the 1st Respondent had been in office for a long time (about 15 years) because he was not sick like the Petitioner, as alleged? Dr. Byamugisha should have elaborated what he meant. He did not.

Mr. Balikuddembe on the other hand, submitted that what the 1st Respondent said at the Press Conference of 11-03-2001 showed that the 1st Respondent intended to undermine the

Petitioner's candidature. That was malice. According to the learned counsel, this emphasizes the point that a person in the 1st Respondent's position could only have made the statement maliciously. It was meant to stigmatise, and discriminate against, the 1st Respondent. It was malicious and false and therefore intended to ruin his candidature, while it was intended to enhance, to promote or procure the 1st Respondents election.

I agree with that submission.

Mr. Balikuddembe further submitted that the 1st Respondent having published a false statement on alleged health of the Petitioner and repeated the same on 11-03-2001, the 1st Respondent committed an illegal practice under section 65 of the Act because he made it when he knew that it was going to be published and it was for purposes of promoting or procuring his own election as President of Uganda.

On the credible evidence available, I am satisfied that the 1st Respondent committed the illegal practice proscribed by section 65 of the Act. The 1st Respondent during the 2001 Presidential Election published a false statement of a candidate in the said Election, the Petitioner, that the Petitioner was suffering from the disease of AIDS, for the purpose of procuring or promoting the election of the 1st Respondent (who was also a candidate in the same election) not believing it on reasonable grounds to be true. As a result the 1st Respondent committed an illegal practice under section 65 of the Act.

As I have said earlier in this judgment, my foregoing finding is a condition for nullifying the 2001 Presidential Election under section 58(6) (c) of the Act. Dr. Byamugisha has submitted that that alone is not enough. He submitted that if the election is free and fair, the election cannot be nullified on that ground alone. With respect, I do not agree. If it were so, section 58(6) (e) of the Act would have said so. There is no ambiguity about the meaning of section 58(6) (c) of the Act. In any case, I have made a finding that the Presidential Election was flat free and fair. In the result, I would declare the result of the 2001 Presidential Election to be null and void. I would nullify the election of the 1 Respondent as President of Uganda.

Agency in elections:

The question of agency and agents in election is important and relevant to the remaining grounds of the Petition. I wish to consider it before I deal with the grounds in question. The general principles of the law of agency apply to elections as well. However, the relationship between an election candidate and his agent is much more intimate than that which subsists between an ordinary principal and agent. The closest analogy is that of a sheriff and his under— sheriff and bailiffs. For as regards a Parliamentary election the candidate is responsible for all the misdeeds of his agents committed within the scope of his authority, although they were done against his express directions and even in defiance of them. In my view, this applies equally to a presidential election candidate and his agent as to a parliamentary election.

An agent is a person employed by another to act for him or her and on his or her behalf either generally or in some particular transaction. The authority may be actual or it may be implied from circumstances, It is not necessary in order to prove agency to show that a person was actually appointed by the candidate, If a person not appointed were to assume to act in any department of service as election agent, and the candidate accepted his services as such, he would thereby ratify the agency, so that a man may become agent for another in either of two ways, by actual employment or by recognition and acceptance. If agent, the next question is, what is he appointed to do; or, if not appointed, what kind of service does he profess to do which is accepted by the principal. If a person were appointed or accepted as agent for canvassing generally, and he were to bribe a voter, the candidate would thereby lose his Parliamentary seat. But if he was appointed or accepted to canvass a particular class for instance, a master were to ask the agent to canvass his workmen and the agent were to go out of his way, and bribe a person who was not the candidate's workman, the candidate would not be bound. In the one case the agent would be acting within the scope of his authority, though it may be in abuse of it; in the other, he would be acting beyond his authority, and he would be no more to the candidate than a stranger. It follows that if a person whom the candidate had not authorized to canvass at all, or to take such part in the management of the election as including canvassing, whatever else he was employed to do, the agent were to take upon himself to bribe a voter, the candidate would not be responsible. See ***The Digest of Annoted British, Commonwealth and European Cases, 1982 Reissue, Butherwerths & Co. (Publishers) Ltd. 1982;*** Page **72.**

The same authority says on Page 74:

"When Dominion Controveted Elections Act RSC, 1927, S.49, enacts that "any corrupt practice committed by a candidate or by his agent" ***renders the election void, the word*** "agent" ***does not mean only the*** "official agent" ***but includes any unofficial agent; and where a candidate and his official agent rely upon a political organisation to promote the campaign and bring the election to a successful conclusion, the accredited members of the association should be held to be agents of the candidate, and all those employed by the association are, within the limits of their duties, in the same sense agents of the candidate himself." Halsbany's Laws of England, 4th Edition, Vol. 15 from Paragraph 698,*** also discusses agency in relation to elections. It is to the effect that in order to prove agency it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment, or authorization of the agent by the candidate to do some election work or the adoption of his work when done. The candidate, however, is liable not only for the acts of the agents when he has himself appointed or authorized, but also for the acts of the agents employed by his election agent or by any other agent having authority to employ others. In the absence of authorisation or ratification the candidate must be proved either by himself or his acknowledged agents to have employed the agent to act on his behalf or have to some extent put himself in the agent's hands or to have made common cause with him for the purpose of promoting of the candidates election. The candidate must have entrusted the alleged agent with some material part of the business of the election. Mere non-interference on the candidate's part with persons who, feeling interested in the candidates success, may act in support of his canvass is not sufficient to saddle the candidate with any unlawful acts of theirs of which the candidate and his election agent are ignorant. Employment in the business of the election is a question of degree, but it has never been distinctly and precisely defined what degree or evidence is required to establish such a relationship between the candidate and the person guilty of corruption as to constitute agency. No one has yet been able to go further than to say that, as to some cases, enough has been established, but as to others, enough has not been established, to vacate the seat. All the circumstances of the case must be taken into consideration and the evidence may be regarded cumulatively as establishing agency.

I agree with the views expressed in the learned works I have just referred to. In my view the principles of agency, between an election candidate and his/her agent discussed therein equally

apply to the election in the instant petition but subject to the provisions of section 58(6)(c) of the Act.

The complaint in ground 3(2) (b) of the Petition is that:

"3(2)(b), Contrary to Section 63 of the Act the 1st Respondent and his agents with the 1st Respondent's knowledge and consent offered gifts to voters with the intention of inducing them to vote for him."

This was denied by the 1st Respondent's Answer to the Petition, in which he pleaded:

"4. Neither the 1st Respondent nor his agents with his knowledge and consent or approval offered gifts to voters with the intention of inducing them to vote for him."

The Petitioner did not refer to ground 3(2)(b) of the Petition in his affidavit accompanying the Petition, but he provided the relevant evidence in his affidavit in reply, dated 5.4.2001, to which I shall revert shortly. The 1 Respondent's affidavit filed in support of his Answer said:

"8. That neither myself nor my agents, acting with my knowledge and consent or approval, gave gifts to voters with intention of procuring them to vote for me."

"13. That no illegal practices or offences were committed by myself personally or through my agents and sympathizers or through any other person whatsoever with my knowledge and consent or approval."

In his affidavit in reply dated 5-4-2001, the Petitioner said:

"21. That in reply to paragraphs 8 and 13 of the Respondent's affidavit in support of his answer to the Petition. I know that the l Respondent at a campaign meeting held at the International Conference Centre on Friday 26th January, 2001 to solicit support for the motor-cyclist (Boda-boda) the 1st Respondent gave a gift of a motor cycle to one of the cyclists/voters by the name of Sam Kabuga in order to influence the motor cyclist/voters to vote for the 1' Respondent.

The gift giving ceremony by the 1st Respondent was published both in the <u>Sunday Monitor</u> and <u>Sunday Vision</u> of* 28th *January, 2001 copies of which are herewith attached and marked "P30" and "P31" and subsequently I personally heard the said Sam Kabuga on Central Broadcasting Corporation FM Radio urging his fellow Boda-Boda Cyclists to support Presidential Candidate Museveni Yoweri Kaguta in his bid for the Presidency of Uganda."

22. That in further reply to paragraphs 8 and 13 of the 1st Respondent's affidavit the Respondent with the intention of inducing persons to vote for him offered the following:

(a) Abolished cost sharing in all Government Health Centres including those operated by local Governments.

(b) Increased the salaries of medical workers in the middle of the budget year.

(c) Offered to increase pay to teachers and indeed made this offer in a meeting at the International Conference Centre with all the teachers in Kampala on 5th March 2001.

(d) Hurriedly caused his Minister of Works and campaign agent Hon. John Nasasira to publicly and out of the ordinary in full view of voters to sign contracts for the tarmacking and upgrading of the following roads using his position as the incumbent President to execute the said contracts and deliver on his promise to the people of the beneficiary districts:
(ii Busunju - Kiboga

(ii) Kiboga — Hoima

(iii) Arua — Pakwach

(iv) Ntungamo — Rukungiri; and that the tarmacking and upgrading of these roads was part of the 1st Respondent's campaign.

(e) That at a campaign meeting at Arua on 12th February, 2001, the Respondent offered a gift of money to voters who attended the Rally and a record of this rally was video-recorded, a copy of this recording is herewith submitted."

Hon. Nasasira, Minister of Works, swore an affidavit in rebuttal of the Petitioner's affidavit in this connection. The affidavit was filed in court by the 1 Respondent's counsel during the hearing of this Petition, but at the time of writing this judgment, I was unable to trace the affidavit. However, the essence of the contents of the affidavit as I remember it is that it denied what the Petitioner said in his affidavit in reply concerning road works. It said that road works listed in the Petitioner's affidavit had long been budgeted for under planned government projects. They were not outside the ordinary course of business of government.

Section 63(1) of the Act provides:

"63(1). Any candidate or agent of a candidate who either before or during an election gives or provides any money, gift or other consideration, to a voter with the intention of inducing the person to vote for him or her commits an illegal practice."

"Illegal practice" means, according to section 2(1) of the Act, "an act declared to be an illegal practice under part lx of the Act." Section 63 is under part lx of the Act. The ingredients the Petitioner has to prove 63 are:

(i) ***that a gift was given to a voter;***

(ii) the gift was given by a candidate or his agent;

(iii) it was given with the intention of inducing the person to vote

"Voter" in section 2(1) of the Act means "a person qualified to be registered as a voter at an election who is registered and at the time of an election is not disqualified from voting." ***"Bribery at election"*** is defined by *Black's Law Dictionary Edition*, *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.

Mr. Walubiri submitted for the Petitioner under this ground. He said that the first category of gift was what the 1st Respondent himself gave or offered and the second category is what was given or offered by his agents. In the first category are those which the Petitioner listed in his affidavit

in reply. Learned counsel submitted that the gift of a motor cycle was given to one Sam Kabuga to influence him and other motor cyclists who attended that campaign meeting to vote for the 1st Respondent in the Presidential election. The gift giving ceremony was widely published including pictures in news papers as annextures ***"P.30 and P.31"*** show:

The picture in the ***Sunday Monitor*** of 14-01-2001, annexture *"**P.3O**"* shows what appears to be the 1 Respondent presenting a motor cycle to a man in long trousers and a T-Shirt. The T-shirt bears a picture of the 1st Respondent with a hat on his head. A caption on top of the picture reads: ***"Museveni rewards boda boda man."*** The one at the bottom reads ***"Sam Kabuga receives a new motor cycle from President Museveni at the National Conference Centre, Jan. 26. Kabuga rode Museveni to his nomination at Kololo Air Strip Jan. 9 (PPU photo)."***

Mr. Bitangaro submitted for the 1st Respondent that the Petitioner alleges that Sam Kabuga was given a gift, but no evidence has been led to prove that he is a voter.

That is a valid argument, because, there is no evidence to prove that Sam Kabuga was a voter which is one of the conditions necessary for operation of section 63 of the Act. A ***"Voter"*** is defined in section 2(1) of the Act.

In the circumstances, I am not satisfied with the Petitioner's proof that on 26- 01-2001, at the International Conference Centre the 1st Respondent gave a gift of a motor cycle to one Sam Kabuga to influence him and other boda-boda motor — cyclists to vote for the 1st Respondent. There is no doubt that the 1st Respondent gave Kabuga a gift of a motor cycle, but there is no evidence that Kabuga was a voter. Where was he registered as a voter? What was his registration number? These questions are left unanswered by the Petitioner's evidence.

For some unexplained reason, Mr. Bitangaro did not make submissions on the rest of the Petitioner's allegations underground 3(2) (b) of the Petition.

Regarding the alleged abolition of cost-sharing in Government health centers made in 22(a) of the Petitioner's affidavit in reply Mr. Walubiri submitted that the abolition was done without an Act of Parliament. Learned counsel contended that under article 191(1) of the Constitution, Local Governments operate their own budgets of money raised from their own income. They

were levying cost- sharing at Health Centres. A directive by the 1st Respondents abolished cost sharing in Health Centres and Hospitals.

The Petitioner's affidavit in reply concerning cost sharing in Hospitals, and the alleged abolition of cost-sharing in Health Centres was rebutted by Dr. Crispas Kiyonga, the Minister of Health in the Uganda Government by his affidavit dated 7-4-2001. In the affidavit, Dr. Kiyonga denied that cost-sharing had been abolished by the Government. He said that cost-sharing had been introduced some years back to assist in filling the financial gaps in Health sector Budget. Under the Constitution, Primary Health Care is the responsibility of the Local Governments (Districts) but the Central Government can always come in to assist and finance directly where there is need by prioritizing the sector.

In 1997, the Government introduced Primary Health Care Conditional Grants under which the government had increased funding to the sector aimed at improving the health of the population particularly the poor of the poor. At the same time, there has been on-going debate and no consensus in government as whether to abolish cost-sharing or not, because it was blocking the poor people's access to health services.

By December 2000, government had disbursed one half of shillings one billion for purchase of supplementary drugs in this financial year. It was no longer necessary to justify health cost-sharing. With or without elections the government agenda on cost-sharing had already been set by the budget of the Financial Year 2000/2001. It was not true, therefore, to say that the 1st Respondent abolished cost sharing to induce voters in view of the Government Agenda.

What I understand all this to mean is that the government had been phasing out cost-sharing during the last few years after it was introduced in 1997.

In the absence of any other evidence from the Petitioner in this connection, which is the case, I find that the Petitioner has not proved to my satisfaction that the 1st Respondent abolished cost-sharing in health services in order to induce people to vote for him.

Regarding the alleged increase of salaries of Health workers and of teachers made in 22(b) and (C) of the Petitioner's affidavit in reply, Mr. Walubiri submitted that the 1st Respondent made the

increases in contravention of articles 154, 155, and 1 56 of the Constitution. Since the learned counsel did not explain what he meant, I shall not go into details about those articles of the Constitution. The learned counsel also said that the Petitioner's affidavit evidence regarding the salary increases in question was not controvented. That may be so but I do not think that the Petitioner's affidavit evidence alone is sufficient to prove the allegations to the required standard. There is no evidence to prove, for instance how the salary increments were made, by how much the salaries were made, who were the beneficiaries and when the increase would be effective. The absence of controverting evidence, in this case, does not automatically mean that the allegations have been proved to my satisfaction

In the circumstances I am not satisfied that the Petitioner has proved to the required standard the allegation that the 1st Respondent increased the salaries for health workers and for teachers with the intention of inducing them to vote for him.

Regarding the alleged road contracts signed for purposes of inducing people to vote for the 1 Respondent (para 22(d) of the Petitioner's affidavit in reply), Mr. Walubiri submitted that the contracts were executed without budgetary provisions. By so doing, learned counsel submitted, the 1st Respondent was abusing his position by offering such considerations. The learned Counsel relied on the case of ***Attorney General vs. Kabourou*** (supra).

I agree with the learned counsel that the case of ***Attorney General vs. Kabourou*** (supra) is relevant to this case. In that case, the respondent was one of six candidates in a Tanzanian Parliamentary by-election for Kigoma Urban Constituency on 13-02-1994. After the count of the polls, the third appellant, the candidate for Chama Cha Mapinduzi (CCM), was declared the winner. The respondent, the candidate for another party, CHADEMA, brought an election Petition in the Tanzanian High Court, seeking the annulment of the election on various grounds. One of the grounds was that the government corruptly sought to influence the result of the by-election by undertaking certain road works in the Constituency.

The High Court upheld that ground because the road construction in Kigoma during the campaign period was executed with the corrupt motive of influencing voters to vote for the CCM

candidate and that it affected the results of the election. The basis of the trial judge's handling was three fold.

Firstly, he was of the view that the maintenance work of the Kigoma — Ujiji Road was undertaken by the Central Government as a reward for the people of the Kigoma Urban Constituency agreeing to vote for the CCM candidate. Secondly, he was of the view that the undertaking by the Central Government was not made in the ordinary course of business of government. Thirdly, he was also of the view that since the undertaking was made by prominent cabinet Ministers at well attended rallies in the constituency, it must have influenced the voters to vote for the CCM candidate. The Tanzanian Court of Appeal, to which the Attorney General appealed against the decision of the trial court, agreed with the learned trial judge's reasons. The Court of Appeal's judgment, rendered by Nyalali, said at 775:

"We respectfully agree with these reasons. There was credible evidence given by witnesses who attended the public rallies addressed by Augustine Lyatonga Mrema, the then Minister of Home Affairs and Deputy Prime Minister, and by Nalaila Kiula, the Minister of Communications, Transport and Works. These witnesses include one Kanyari Donatus, the sixth witness for the Petitioner (PWVI), one Ramadhani Juma Kalovya, the seventh witness for the petitioner (PW VII), one Hamisi Shabani Maranda, the ninth witness for the petitioner (PW IX), one Kudra Mussa, the tenth witness for the petitioner (PW X), who tape recorded one of the speeches made by Augustine Lyatonga Mrema, and Mwinyi Baruti, the eleventh witness for the petitioner (PW Xl). The testimony of the witnesses who attended the public rallies addressed by Augustine Lyatonga Mrema and Nalaila Kiula shows clearly that the Kigoma-Ujiji road was being repaired by the central government as consideration for the people of the Kigoma urban constituency agreeing to vote for the CCM candidate. PW VI in a part of his testimony told the trial High Court regarding Mrema's speech:

> ***'He asked if you get a tarmac road will you have any quarrel with CCM. And the citizens said they would have none. He asked how many would vote for CCM if we gave you a tarmac road. All people raise up their arms. –***

PW XI, in a part of his testimony concerning the speech made by Nalaila Kiula, told the trial High Court:

'Then he said I have come here to remove the stigma you are putting on CCM. The tarmac you wanted will be put on the road by the government.

Further on witness said, inter alia:

'He said he was sent by the President to remove the stigma or in Kiswahili "nuksi" which was thrown at CCM.'

No witness was produced by the other side to seriously contradict these or other witnesses who testified to the same effect On a proper evaluation of the relevant evidence directly linking the road works with voting for CCM, no reasonable court or tribunal can come to a conclusion other than that the maintenance work of the Kigoma-Ujiji road was valuable consideration given by the central government to the people of the Kigoma Urban Constituency for agreeing to vote for the CCM candidate.

As to the second reason, it is beyond controversy on the evidence that the Kigoma-Ujiji town council, had failed to live up to its responsibilities of maintaining the road in question under the road maintenance programme which had been in existence for a long time. There was credible evidence given by one Ven Kayamba Nyamkama, the seventh witness for the defence (RW VII) who is a road maintenance management engineer in the relevant ministry headquarters in Dar as Salaam, to the effect that the responsibility of maintenance of the country's roads is divided between the central government and the local authorities, and that local authorities can request the central government to assist in maintenance of local authorities roads, whenever the need arose. The evidence given by one Augustine Mudogo, the first witness for the defence (RW I), who is the director of Kigoma-Ujiji town council, appears to show that the central government had assisted his council in maintenance of the road in question by providing funds amounting to Shs. 7,000,000 in 1992 and Shs. 10,000,000 in 1993. The evidence of this witness together with that of RW VII, however, shows that at the time of the by-election, the central government decided to take over the maintenance work of the Kigoma-Ujiji road, and Augustine Lyatonga Mrema instructed RW I to put aside Shs.

10,000,000 which had been previously supplied and intended by the central government to assist the town council This sudden and total intervention by the central government, in the absence of an earthquake or similar disaster or situation affecting the Kigoma-Ujiji road is clearly way out of the ordinary course of government business.

With regard to the third reason relied upon by the trial judge concerning the large number of people who attended the public rallies addressed, and corruptly influenced by Mrema and Kiula, there was evidence given by witnesses for the petitioner, which was not seriously contradicted by the defence, and which showed that large numbers of people attended these rallies.

It was contended by counsel for the appellants to the effect that there was no one who testified about being influenced to vote for CCM by this road maintenance undertaking. However, the contention collapsed when counsel for the appellants conceded that under the principle of secrecy of the ballot, no one could be expected to testify to the effect. In our considered opinion, the fact of influence affecting the vote can be inferred from the circumstantial evidence relating to the large number of people who attended the public rallies, the pressing desire of the people of the Kigoma urban constituency to have their road repaired and the respect usually given by the people of this country to ministers of their government."

In the instant case, I only have the affidavit evidence of the Petitioner on this point. There is no evidence from any of the people who attended the occasion at which the Minister of Works publicly signed contracts for tarmacking and upgrading the roads in question. There is no evidence of what was said either by the 1 Respondent or by the Minister. There is no evidence that the road works were promised as consideration for the people of the areas concerned agreeing to vote for the 1 Respondent. There was no evidence from any person familiar with the responsibility of local or central governments regarding tarmacking or upgrading of roads. In the circumstances, I find and hold that the Petitioner has not proved to the required standard that the 1st Respondent, with the intention of inducing people to vote for him, caused the Hon. Nasasira, the Minister of Works, to publicly and out of the ordinary in full view of voters to sign contracts for tarmacking and upgrading roads using his position as the incumbent President to execute the said contracts and deliver on his promises to the people of the beneficiary districts.

Allegation of bribery in Arua: Paragraph 22(e) of the Petitioner's in reply.

Mr. Walubiri said that a video recording of the incident was submitted to the Court but due to lack of time the video cassette was not screened. The Petitioner has the burden to prove this allegation of bribery by the Respondent. He could prove it by any admissible evidence. As it appears that he wanted to use a video recording to prove the allegation necessary evidence for admission of the video recording should have been adduced. An application to the court to have the recording viewed on a screen should also have been made. As it is this was not done. My view is that the Petitioner's learned counsel was rather casual about the video recording as evidence for purposes of proving this allegation. Further, there was no attempt to prove the allegation by any other in my view.

There is no evidence of what the 1st Respondent said if he said anything at all at the rally. None of the people who attended the rally or received the money was called as a witness. As the case of Kabourou (supra) shows, evidence is necessary to prove this kind of allegation of bribery at a rally.

In the circumstances, I am not satisfied that the Petitioner has proved to the required standard that at a campaign meeting at Arua on 12-02-2001, the 1stRespondent offered a gift of money to voters who attended the rally in order to induce them to vote for him.

The second category of corruption practices under section 63 of the Act, Mr. Walubiri submitted, were committed by the 1st Respondent's electoral agents. He submitted that such gifts were given or offered by the 1st Respondent's agents with his knowledge and consent or approval.

Mr. Walubiri submitted that Mwesigwa Rukutana. MP was such an agent of the 1st Respondent. Evidence in that respect is provided by the affidavit of Gariyo Willington, dated 2-3-2001. In that affidavit the deponent said that he was the Petitioner's agent responsible for overseeing operations of the Petitioner's polling agents in Rubaare Sub-County. Ntungamo District. At about 11.00 a.m., he visited Kyanyanzira cell and he saw Mwesigwa Rukutana loading people on a motor vehicle Registration No. UAA 006A, a Nissan Pick-up. Rukutana was giving Shs. 5000/= to every person who was boarding the pick-up and instructing them to vote candidate Museveni Yoweri Kaguta. Mwesigwa Rukutana rebutted Gariyo's affidavit. In his rebuttal affidavit dated

9-4-2001, he said that he had read, and understood, the affidavit of Gariyo and he found that it contained material falsehood. It was not true, as alleged in that affidavit, that he was at Kyanvanzira Village loading people on pick-up No. UAA 006A and giving Shs. 5000= to every person who boarded it. He said that on that day, he never stepped in that village, nor did he load anybody on the alleged or any vehicle at all, nor give any money to anybody. On polling day he cast his vote at Ruyonza Polling Station around 7.00 a.m. after which he proceeded to Omugyenyi, where he found one Bob Kabonero with whom he moved around Rukutana's Constituency in his vehicle a Prado Registration No. UAA 915S, which was being driven by his driver, Richard Asingwire. During his movements with Kabonero they never went to Kanyanyunzira Village or Rwabaramira Polling Station. The allegations that Bob Kabonero was escorted by four UPDF armed soldiers and that Kabonero chased away the Petitioner's agents from Rwabaramira Polling Station are false. Rukutana said that he was with Kabonero throughout the day and he did not see soldiers, neither did he see Kabonero chase away any agent of the Petitioner.

The implication of Rukutana's affidavit is that Gariyo invented out of the blue all that he (Gariyo) said in his affidavit, making allegations against Rukutana. Rukutana did not suggest any reason for Gariyo to have fabricated his detailed story, including the number of the motor vehicle Rukutana allegedly used to load voters on. I find the suggestion that Gariyo invented his evidence incredible. On the contrary, Gariyo's evidence has some corroboration from Rukutana's affidavit that he was in company of Kabonero whom Gariyo alleged was also at the scene and chased away, the petitioner's polling agent. Kabonero was allegedly the 1st Respondent's campaign agent. It is more than a coincidence, in my view, that Kabonero was in Rukutana's company and that Rukutana allegedly gave voters money and told them to vote for the 1st Respondent. The allegations that Rukutana bribed voters to vote for a particular candidate was a serious electoral offence, which Rukutana, as a lawyer and an MP, must have known very well. He could not, therefore, be expected to agree that he committed such an offence. It would be natural for him to deny the allegations.

In the circumstances, I reject Rukutana's denial. I believe Gariyo's affidavit as true, and find that Rukutana paid Shs. 5000/= to some voters whom he told to vote for the 1St Respondent. This was an illegal practice under section 63 of the Act. Section 58(6) (c) of the Act, however,

requires that the election of a candidate as President can only be annulled if an illegal practice is committed by a candidate personally or with his or her knowledge and consent or approval. Regarding the incident of bribery of voters which I have found happened the question is, did Rukutana commit the illegal practice with the 1st Respondent's knowledge and consent or approval? The requirements for proving that an illegal practice has been committed have to be proved by the Petitioner to the required standard. As it is, although I find that the Petitioner has proved that Rukutana committed an illegal practice under s. 63 of the Act, allegedly on behalf of the 1st Respondent, I am not satisfied that the illegal practice was committed by the 1st Respondent personally, or with his knowledge and consent or approval.

Another incident of corrupt practice was alleged against one Ali Mutebi. In his affidavit dated 21-03-2001, Mugizi Frank, of Rubaare, Ntungamo District, said that he was a polling agent for the Petitioner at Rubanga Polling Station where, he said, he witnessed massive rigging on polling day. People were being allowed to vote more than once. When he protested, the 1st Respondent's supporters, namely, Simon Twahirwasura, Kanyangira, Siriri, Kakyota Mayambi threatened to assault him and he was chased away from the polling station. After leaving the polling station, Mugizi said, one Au Mutebi, a campaign agent of the 1st Respondent, offered to Mugizi Shs. 15,000= to persuade him to go back and sign the Declaration of Results Form and not report about the malpractices. Mugizi said that he rejected the money and refused to go to sign the forms. Musinguzi Siriri rebutted the affidavit of Mugizi. In his rebuttal affidavit of 4-4-2001, Siriri said that there was no rigging at all at Rubanga Polling Station. The rebuttal affidavit does not refer to Mugizi's allegation that Au Mutebi offered Shs. 15,000= to Mugizi in consideration for Mugizi signing the Declaration of Result Forms and for not reporting the malpractices he had witnessed at Rubanga Polling Station. As a result, Mugizi's evidence about the illegal practice in question is uncontroverted and must be regarded to have been accepted by the 1st Respondent. Mugizi said that Au Mutebi was a campaign agent of the 1 Respondent. There is no reason to doubt that. In the circumstances, I am satisfied that the Petitioner has proved that on polling day at Rubanga Polling Station in Ntungamo District the 1 Respondent's agent, Au Mutebi, offered Shs. 15,000 = to the Petitioner's agent, Mugizi Frank in consideration for Mugizi to ignore electoral malpractices at that polling station and to sign the Declaration of Results Forms. That conduct on Au Mutebi's part was an illegal practice under section 63 of the Act. I accept

Mugizi's evidence that Au Mutebi was an election agent for the 1st Respondent. The next question to consider is whether the commission of the illegal practice meets the conditions under section 58(6) (c) to make the 1st Respondent responsible for it. There is no evidence to that effect. Consequently, I make the same finding as I have done above in this judgment regarding the illegal practice committed by Mwesigwa Rukutana. The 1st Respondent is not bound by the illegal practice.

Another allegation of corrupt practice was made against Daudi Kahurutuka. In his affidavit of 21-03-2001, Ssali Mukago of Rubaare I cell, Rubaare Trading Centre, Rushenyi, Ntungamo District, said that he was a registered voter at Rubaare Muslim Primary School L — Z Polling Station. At 5.00 p.m. on 12-03-2001 when the Presiding Officer was counting ballots, Mukago witnessed ten ballot papers, folded together and ticked in favour of the 1st Respondent. When Mukago complained, the Presiding Officer said that it was allowed. On March 9-3-2001, one Daudi Kahurutuka a campaign agent for the 1st Respondent met Mukago at Ali Mutebi's hotel at 8.00 p.m. and told him (Mukago) that he should mention any amount of money he (Mukago) wanted from the 1st Respondent's Task Force so that he would "leave them to steal votes."

Mukago did not say what followed the offer of money to him.

The Chart does not show that Mukago's affidavit was rebutted. The evidence there remains uncontroverted. The 1 Respondent is therefore regarded to have admitted that evidence. In the circumstances, I am satisfied that on the basis of the evidence adduced by the Petitioner the 1st Respondent's agent, Daudi Kahurutuka on 9-3-2001, offered Ssali Mukago an unspecified amount of money to bribe Mukago to overlook electoral malpractices committed by the 1st Respondent's campaign Task Force. That was an illegal practice under section 63 of the Act. The question is whether the illegal practice was committed in the manner required by section 58(6) (c) of the Act.

The illegal malpractice was committed not by the 1st Respondent but by his election agent. In order for the 1st Respondent to be bound by his agent's commission of the illegal practice, the conditions under section 58(6) (c) must be proved by the Petitioner. These are that the illegal practice must have been committed with the knowledge and consent or approval of the 1st

Respondent. The Petitioner did not adduce evidence to prove it. Consequently I make the same finding as I did in respect of the illegal practice committed by Mwesigwa Rukutana. The 1st Respondent is not bound.

Another allegation of corrupt practice was made against Onyango Wilboard. In his affidavit of 23-03-2001, one Omaha Ram said that he was Eastern Region Veterans for the Petitioner. On 12-03-2001, as he monitored the polling process, one of the Petitioner's agents, Opio Katamira, reported to him (Omalla) that at Payawo Polling Station, Councilor, Onyango Wilboard, had given his father, Odomi, money to give to people to vote for the 1 Respondent. On hearing the report he (Omaha) drove to Payawo Trading Centre near the polling station in question. He found there Onyango's father with many people about the allegation. When Omalla contacted other people in the area about the allegation, they said that it was not true that Odomi had been given money by his son, Onyango, to canvass for vote for the 1st Respondent. In the circumstances, I am not satisfied that this allegation of an illegal practice was proved at all. It appears that Omalla received a wild allegation and he went on a wild goose-chase. I am not satisfied that an illegal practice under section 63 was committed by Onyango Wilboard.
In the result, I find and hold that ground 3(2) (b) of the Petition was not proved to my satisfaction.

A number of grounds of the Petition make allegations to the effect that certain electoral illegal practices or offences were committed by the Military in general and the PPU in particular by interfering with the electioneering activities of the Petitioner, contrary to section 25 of the Act; that the Petitioner's agents and supporters were abducted or arrested by the Army to prevail upon them to vote for the 1st Respondent, contrary to section 74 of the Act; that contrary to section 12(1)(e) and (f) of Act 3/97, the 1st Respondent appointed Major General Jeje Odong and other partisan Senior Military Officers to take charge of security of the Presidential Election Process and thereafter a partisan section of the Army was deployed all over the Country with the result that very many voters voted for the 1st Respondent under coercion and fear or abstained from voting altogether.

These include grounds 3(1) (n), 3(1) (w) and 3(2) (c) which I have already set out in full in this judgment. The alleged illegal practices or offences are said to be contrary to sections 25 and 74 of the Act. The aforesaid sections of the Act have also been set out already in this judgment.

Ground 3(1)(y)(vi) is to the effect that the alleged malpractices and offences affected the result of the election in a substantial manner in that the Petitioner was unduly hindered from freely canvassing support by the presence of Military and Paramilitary personnel who intimidated voters.

Ground 3(2) (f) then alleges that the aforesaid illegal practices and offences were committed by the 1st Respondent personally or by his agents and supporters with his knowledge and consent or approval through the military, PPU, and other organs of the State attached to his office and under his command as the President, Commander — in — Chief of the Armed Forces, Minister of Defence, Chairman of the Military Council and High Command, and Chairman of the Movement organization.

I have already considered the submissions of Counsel for all sides in this Petition, on the grounds in question. I have also evaluated the relevant evidence at considerable length. I have also made findings of fact and of law. On the basis of finding of fact I have made, I have no doubt that some soldiers of the UPDF in general and the PPU in particular interfered with the Petitioner's and his agents' or supporters' electioneering activities in many parts of the Country numbering about 23 to 27 Districts. This was illegal practices or offences under section 25(c) of the Act. There is also no doubt that some agents and supporters of the Petitioner were threatened with injury or death or abducted and some were arrested by the Army and PPU to prevail upon them and others to vote for the 1 Respondent or to refrain from voting for the Petitioner. Some members of the Military or PPU used or threatened to use violence against the agents or supporters of the Petitioner. The most prominent examples are the arrest, torture and detention of Rwaboni and the shooting dead of Johnson Beronda. These were illegal practices at offences contrary to section 74(a) (i), (ii) and (b) of the Act.

Section 12(e) and (f) of Act 3/97 which is cited ground 3(2) (c) of the Petition does not create any offence or illegal practice. It imposes a duty on the 2nd Respondent to take measures for

ensuring that the entire electoral process is conducted under conditions of freedom and fairness; and to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with Act 3/97 or any other law. The import of ground 3(2) (c) of the Petition is that, instead of ensuring that the conditions for free and fair 2001 Presidential Election as stipulated in section 12(e) and (f) existed, the 1 Respondent deployed Senior Military Officers to take charge of security of the Presidential Election Process; as a result partisan section of the Army was deployed all over the Country made many voters to either vote for the 1st Respondent under coercion and fear or abstained from voting. This was noncompliance with section 12(e) and (f) of Act 3/97, without committing any illegal practice or offence.

Credible evidence available clearly shows that many soldiers of UPDF and PPU, whether senior officers or not, were not neutral or impartial during the electoral process. They campaigned for the 1st Respondent, intimidated, harassed or threatened or used violence against supporters and agents of the Petitioner. How many voters either voted for the 1st Respondent under coercion and fear or abstained from voting altogether due to fear, I doubt could be, or will ever, be known

I have expressed my views about the deployment of the UPDF and PPU. I said that the deployment was not consistent with the provisions of the Constitution. I gave my reasons for those views.

The 1st Respondent said in his affidavit that the security forces were deployed by Government, and he gave the reason why the security forces were deployed during the 2001 Presidential Election Process throughout the Country. Briefly it is that the Police were inadequate and the security situation so required. The purpose was to keep peace and order. I have already expressed my view and made my findings about that. The Army Commander, Maj. Gen. Odong and the Inspector General of Police, John Kisembo gave the same reason for deployment of UPDF. The Army Commander also said that UPDF was deployed on the advice of the National Security Council (NSC).

NSC is a creature of the Constitution. The Constitution provides:

“219. There shall be a National Security Council which shall consist of the President as Chairperson and such other members as Parliament shall determine.

220. The function of the National Security Council are:

(a) to inform and advise the President on matters relating to National security; and

(b) any other function prescribed by Parliament."

The National Security Council Act, 2000, came into force on 21-06-2000. The Act also provides for the functions of NSC. The list is longer. It says:

'4(1). ***The functions of the national Security Council shall be:-***

(a) to inform and advise the President on matters relating to National security;

(b) to co-ordinate and advise on policy and matters relating to intelligence and security;

(C) ***to review National security needs and goals;***

(d) to brief the Cabinet regularly on matters relating to National security;

(e) to receive and act on reports from the Joint Intelligence Committee;

(f) to carry out any other functions as Parliament may assign the council"

Under section 5 of the NSC Act the composition of NSC includes the President, who shall be Chairman, and the Minister responsible for defence. The Inspector General of Police and the Army Commander are ex-official members.

Considering the provisions of the Constitution and of the NSC Act, and the fact that the 1st Respondent, during the election process, was also the President, Commander — in — Chief of the Armed Forces, and Minister of Defence, and the 1st Respondent's evidence and that of Major General Jeje Odong in this connection, inference is inevitable that it was the 1 Respondent as the incumbent President who deployed the UPDF and PPU during the 2001 Presidential Election Process. Moreover, the PPU was a facility attached to him as the incumbent President by virtue of the provisions of section 21 of the Act.

By a correspondence dated 20-12-2000, addressed to the Speaker of Parliament by the Minister of Public Service, the Minister laid before Parliament the Government facilities which were attached to and utilized by the President. Security was one of such facilities. PPU, no doubt, was one of the security facilities attached to and utilized by the President.

On the available credible evidence which I have already evaluated, I am satisfied and find that the UPDF and the PPU committed the illegal practices or offences prescribed by sections 25 and 74 of the Act. The 1st Respondent did not commit such illegal practices or offences personally. They were committed by soldiers of the UPDF and PPU, which the 1st Respondent had deployed, as his agents. They acted with his knowledge and approval, thus fulfilling the ingredients of section 58(6) (c) of the Act. These are my reasons:

Firstly, the 1st Respondent, as the incumbent President was informed of what was happening by Mr. Kasujja, the 2nd Respondent's Chairman by his letter of 24-02-2001. The letter was headed ***"Violence and Intimidation of candidates."*** It appealed to the 1st Respondent as the President of Uganda and Commander — in — Chief of the Armed Forces to instruct members of the Armed Forces not to do anything that would be interpreted as interference in the electoral process contrary to the law and thus jeopardize the democratization process that our Country had embarked on since the NRM Government came to power. The letter appealed for the 1st Respondent's early intervention in the matter to enable the 2nd Respondent fulfill its duties as laid down under the Constitution and other laws. The appeal was made to the 1st Respondent to intervene and save the democratic process from disintegration by ensuring peace and harmony in the electoral process.

The letter also said that the 2nd Respondent expected deployment of the PPU to be made where the President was expected to be as the PPU was a facility that His Excellency was entitled to. It was a desperate letter meant by the Chairperson to save a desperate situation to save the election, as a democratization process, from disintegration. It was a passionate letter written politely, but firmly.

It was not argued by the counsel for both Respondents that Mr. Kasujja's letter of 24-02-2001 was not received by the 1st Respondent. I do not think such an argument would be tenable even

if it was put forward. The 2nd Respondent is an independent Commission under the Constitution and appointed by the President. It has heavy and important responsibility. It is not some small insignificant body in a far away corner of Uganda. The 2nd Respondent is based in Kampala, not far from the President's Offices or State House. Above all neither the 1st Respondent nor the 2nd Respondent denied that Mr. Kasujja's letter of 24-02-2001, in question was received by the 1st Respondent. In the circumstances, a valid assumption is inevitable that the 1st Respondent received the letter.

Secondly, as I have already said in this judgment there is no evidence that the 1st Respondent responded to the letter, or otherwise indicated to the 2nd Respondent whether he would take any action to contain the desperate situation conveyed to him by Mr. Kasujja.

Thirdly, it is my considered view that by not responding in a demonstrable manner or at all to Mr. Kasujja desperate plea to intervene to save the situation of violence and intimidation conveyed in that letter, interference is inevitable that the 1st Respondent approved of what some soldiers of the UPDF and PPU were doing. As I have said before in this judgment, violence, intimidation, harassment, and threats by the PPU in Rukungiri and Kanungu and by some soldiers of the UPDF elsewhere continued up to polling day. There is no doubt that an order by the 1st Respondent as the Commander — in — Chief of the Armed Forces, Chairman of the UPDF High Command and Minister for Defence, would have brought to a rapid halt all the illegal malpractices and offences which were being committed by the UPDF and the PPU in connection with the election if the 1st Respondent had made such an order. If he did not approve what the UPDF and the PPU were doing, he would have made an order to stop it, or would have prevented it from starting in the first place. In the circumstances, inference is inevitable that the 1 Respondent approved of what some soldiers of the UPDF and PPU did in this regard. His approval was not express. It was tacit.

I am satisfied, therefore, and I find, that soldiers of the UPDF and PPU committed offences under sections 25 and 74 of the Act as agents, with knowledge and approval of the 1st Respondent. The ingredients of section 58(6) (c) of the Act have been proved by the Petitioner to my satisfaction.

I am also satisfied and find that the Commission of such illegal offences rendered the 2001 Presidential Election not free and fair.

I would hold therefore, that grounds 3(1) (h), 3(1) (w), 3(2) (c) and 3(2) (f) must succeed. On the basis of that alone, I would nullify the result of the Presidential Election of 2001 and declare the election of the 1st Respondent as President of Uganda invalid.

That disposes of the fourth issue in this Petition.

I shall next consider the fifth and last issue of the Petition.

It is what reliefs are available to the parties under this issue. Mr. Balikuddembe submitted that the Petitioner had adduced efficient evidence to prove all the grounds canvassed in the Petition. On the basis of the grounds put forward, the evidence adduced by the Petitioner and the submission of his Counsel Mr. Balikuddembe urged the court to grant the prayer made in the Petition, which is that the court should declare that the 1st Respondent was not validly elected and that the election be annulled and costs be awarded to the Petitioner.

In his submission, Dr. Khaminwa prayed for judgment in the 1st Respondent's favour. On his part Mr. Kabatsi prayed that the judgment should be for the Respondent, and that the Petition be dismissed with costs to the 2nd Respondent.

In view of what I have already said and the findings I have made in this judgment, my considered opinion is that the Petition should succeed, and that the Petitioner's prayers be granted. Accordingly, I would declare that Museveni Yoweri Kaguta was not validly elected President, and that the election be annulled.

On the issue of costs the Court heard counsel for all the parties and unanimously decided in its judgment of 21-04-2001 that each party to the Petition should bear its costs. It so ordered but reserved its reasons for doing so. I now give my reasons.

Section 27(1) of The Civil Procedure Act (cap. 65) provides:-

"27(1).Subject ***to such conditions as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the judge or court has no jurisdiction to try the suit shall be no bar to exercise such powers:***

Provided that the costs of any action, cause or matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

Although costs should normally follow the event the section of the Civil Procedure Act above referred to gives the court wide discretionary powers to order otherwise for good reason. Like all judicial discretions, this one must be exercised judiciously.

In the case of ***Major Gen. D. Tinyefuza Constitutional Appeal No. 1 of 1997 (SCU)*** (unreported) this court ordered each party to bear its costs although the appeal was dismissed. The Court's reasons for doing so were that in order to encourage constitutional litigation parties who go to court should not be saddled with the opposite party's costs if they lose. If potential litigants know that they would face prohibitive costs of litigation, they would think twice before taking constitutional issues to court. Such discouragement would have adverse effect on development of exercise of the court's jurisdiction of judicial review of the conduct of authorities or individuals which are unconstitutional. It would also stifle the growth of our Constitutional jurisprudence. The culture of constitutionalism should be nurtured, not stunted in this Country, which prohibitive litigation costs would do if left to grow unchecked. I agree with the principles in that decision. In my view they should equally apply to the instant Petition.

I think that there are even more compelling reasons for applying them to the instant case. First, this is the first time in the history of this Country that the result of a Presidential Election has been challenged in Court, not elsewhere. As Mr. Balikuddembe said, the Petitioner went to court in order to encourage the development of peaceful settlement of political and election disagreements.

This is important for the sake of peace and stability of the Country. The Petitioner took the right step by coming to Court, in my view.

Second, access to the Court for peaceful settlement of constitutional, political and election disputes should be available to all, the rich and the poor alike, which prohibitive costs of litigation would discourage effectively.

The third reason for ordering each party to bear its costs, is that even by the majority decision, the Petitioner won on certain issues, though few. The manner in which the 2nd Respondent conducted the election fell below expected or normal standards. So, the Petition was not frivolous. It had some substance.

Fourthly, this case should be regarded as a special one due to its circumstances. For these reasons my view was that each party to the Petition should bear its costs.

Before I leave this Petition I wish to say first, that there are certain flaws in the Presidential Election laws, some of which I have pointed out in the course of these reasons. I hope that the authorities concerned will study the laws with a view to amendments for improvement. Secondly I wish to express my gratitude to the learned counsel for each and all the parties to the Petition for the industriousness with which they discharged their responsibility within the very limited time which was available. They did so much research of authorities, evidence and materials which gave me tremendous assistance in my work. Without such assistance it might have been impossible to achieve what I did in preparation and writing of these reasons.

A. H. O. ODER
JUSTICE OF THE SUPREME COURT

REASONS OF TSEKOOKO JSC FOR JUDGMENT

Col (RTD) Dr. Besigye Kiiza, the Petitioner, this year contested presidential election with five other candidates. The others were **Awori Aggrey, Bwengve Francis, Karuhanga K.Chaapa, Kibirige Mayanja Muhammad and Museveni Yoweri Kaguta**, the first respondent. The contest was for the office of the President of the Republic of Uganda. The Electoral Commission, the second respondent, which organized the election, declared the first respondent the winner. He polled 5,123,360,votes representing (69.3%) of valid votes cast. The petitioner who polled 2,055,795 votes (27.8%) was dissatisfied with the election result. On 23rd March, 2001, he petitioned this Court and set out many complaints as the basis for his dissatisfaction. The petitioner asked the court to declare

(a) That Museveni Yoweri Kaguta was not validly elected as President.

(b) That the election be annulled

Five issues were framed for decision by the court. Each is produced in the appropriate place in this judgment. The hearing of this petition was concluded on Good Friday the 13 April this year. By law we were required to give our decision within 30 days from 23/3/2001. So Judgment was due on 21/4/2001, barely eight days after the close of hearing. Because of the volume of the material produced during the hearing of the petition, it was not possible within those remaining 8 days to produce reasoned judgments incorporating views on a number of important legal questions and on the relevant materials cited by the parties. Since each of us had formed his opinion on the petition, we gave our decision on 21/4/2001 and promised to give reasons later. In that decision, we pointed out that the decision was by majority and that each one of us would give his reasons later. I now give my reasons in support of the position I took on the petition namely that the petition should succeed.

21st APRIL, 2001 DECISION

For the sake of clarity, I will recapitulate the decision of the Court. On 21/4/ 2001 we stated:

1. That during the Presidential Election 2001, the 2nd Respondent did not comply with provisions of the Presidential Elections Act-

   (a) in S.28, as it did not publish in the Gazette 14 days prior to nomination of candidates, a complete list of polling stations that were used in the election; and

   (b) in S.32 (5), as it failed to supply to the Petitioner official copy of voters' register for use by his agents on polling day.

2. That the said election was conducted partially in accordance with the principles laid down in the said Act, but that

   (a) in some areas of the country, the principle of free and fair election was compromised;

   (b) in the special polling stations for soldiers, the principle of transparency was not applied; and

   (c) there was evidence that in a significant number of polling stations there was cheating.

3. By majority of three to two, that it was not proved to the satisfaction of the majority of the Court that the failure to comply with the provisions of and principles laid down in, the said Act, as found in respect of the first and the second issues, affected the result of the election in a substantial manner.

4. Again by majority of three to two, that no illegal practice, or other offence under the said Act, was proved to the satisfaction of the Court, to have been committed in connection with the said election, by the 1st Respondent personally or with his knowledge and consent or approval.

Because of the conclusions reached in resolving the third and the fourth issues, the petition was dismissed. We ordered each party to bear its own costs.

This petition presents a unique opportunity for this Court to give its views on pertinent electoral questions1 which were raised during the hearing.

SUMMARY OF FACTS AND CONTENTION

In the petition, the Petitioner raised very many complaints against the two respondents and their agents and/or servants, for acts and omissions which he contends amounted to non-compliance with the provisions of the Presidential Elections Act, 2000 (PEA) and the Electoral Commission Act, 1997 (ECA) and indeed the Constitution.

The Petitioner's case against the 1st Respondent is that he personally, or by his agents with his knowledge and consent or approval, committed illegal practices and offences in contravention of Ss.25, 42, 63 and 65 of the PEA and Section 12 of the ECA. These include publication of a false statement that the Petitioner was a victim of AIDs; offering money and gifts to voters; appointing partisan senior military officers and partisan sections of the Army to take charge of security during the elections; organising groups under the Presidential Protection Unit and under Major Kakooza Mutale with his Kalangala Action Plan, to use violence, to harass, to intimidate, to molest and threaten persons supporting the petitioner and the petitioner's agents; and threatening to cause death to the petitioner.

In his answer to the petition the first respondent denied most of the allegations made against him, contending that the entire presidential electoral process was conducted under conditions of freedom and fairness. He admitted making the statement that the petitioner was a victim of AIDS but stated that it was not made publicly or maliciously. He denied giving gifts or being privy to giving gifts. He denied threatening to put the Petitioner six feet deep. Among the major complaints, which the Petitioner makes against the 2nd Respondent are failure to efficiently compile, maintain and up- date the national voters' register, voters' roll for each constituency and for each polling station; failing to display copies of the voters' roll for each parish or ward for the prescribed period of not less than 21 days, failure to publish a list of all polling stations within the prescribed period of 14 days before nomination; increasing the number of polling stations on the eve of polling day without sufficient notice to candidates; allowing, or failing to prevent stuffing of ballot papers into ballot boxes, multiple voting and under-age voting; chasing away the petitioner's polling agents or failing to ensure that they are not chased away from polling stations and counting and tallying centres; allowing or failing to prevent agents of the 1st Respondent from interfering with electioneering activities of the Petitioner and his agents;

allowing armed people to be present at polling stations; falsification of results; and failing to ensure that the election was conducted under conditions of freedom and fairness. According to these allegations, the 2nd Respondent violated Sections 12,18,19, and 25 of the ECA as well as Sections 25, 28, 29, 30, 31, 32, 34, 42, 47, 56, 70, 71, and 74 (b) of the PEA.

In its answer to the petition, the second respondent denied most of the allegations contained in the petition and averred that if any of the allegations were found to be true, they did not affect the election result in a substantial manner. The second respondent admitted setting up new stations belatedly but claimed that the new stations were a result of splitting up the old stations. It also admitted that it was unable to furnish copies of registers to the Petitioner due to insufficient time to prepare the registers. It again admitted displaying voters' registers for a total of five days only instead of the statutory 21 days. It averred that the election was held under conditions of freedom and fairness.

The Petitioner's counsel were led by Mr. Joseph Balikudembe who was assisted by Messrs. Peter Walubiri, M. Mbabazi, Y. Nsibambi, S. Njuba, Prof. Oboth-Okumu, K. Katino, D. Lubega, C. Alaka, and Lukwago, all members of the Uganda bar.

Counsels for the first Respondent were lead by Dr. Joseph Byamugisha, with Dr. J. Khaminwa, (of the Kenya Bar), as Deputy lead Counsel. They were assisted by Messrs. Mwesigwa-Rukutana, M. Kimuli, F. Natsomi, Didus Nkurunziza, S. Bitangaro, Peter Nkurunziza, W. Byaruhanga, A. Kasirye, all of Uganda bar and Eugine Wamalwa (of the Kenya Bar).

The second respondent was represented by Peter Kabatsi, the Solicitor- General who was assisted by Messrs. Deus Byamugisha, the Ag. Director of Civil Litigation, Barishak Cheborion, the Commissioner for Civil Litigation and J. Matsiko, Senior State Attorney.

I will first dispose of the "preliminary" objections to the affidavits.

OBJECTIONS TO AFFIDAVITS SUPPORTING PETITION

The counsel for the two Respondents objected to the admissibility of very many affidavits sworn in support of the petition. We heard the petition de bene esse promising to decide the question of the admissibility and or probative value of any of the affidavits to which objection was made later in the judgment. I had personally gone through the affidavits before the objections were raised. I formed the view that the requirement for this petition to be heard essentially on affidavits created problems for those drawing affidavits hurriedly so as to beat time. In addition to what I am going to say presently, I think that Article 126(2) (e) applies to most if not all, of the affidavits objected to. I would therefore overrule the objection for lack of merit. The objections were raised by Dr. Byamugisha, lead Counsel for the first respondent and his deputy lead Counsel. But it was Mr. Didus Nkurunziza who presented the arguments in support of the objections. The Solicitor General, Mr. Peter Kabatsi supported the objections.

Mr. Nkurunziza classified the affidavits in three categories:

(1) He called the first category “inadmissible affidavits” to which objection should have been made initially but because of the need to expedite the hearing of the petition, the objection was postponed to the stage of the main submissions by his side.

(2) Those affidavits specifically referred to by Counsel for the petitioner in his address to this Court.

(3) Those affidavits, which were filed but were not referred to specifically by Counsel for the petitioner in his address to the Court.

INADMISSIBLE AFFIDAVITS

Mr. Nkurunziza submitted that, certain affidavits breach the law and should be struck out. He started with the affidavit of Major (RTD) Rwaboni Okwir, which was sworn outside Uganda, (in the United Kingdom), before a Solicitor, contending it was inadmissible for non-registration as required by S.7 (3) of Statutory Declarations Act, 2000 (SDA) and, therefore, it should be struck out. For the respondent Mr. Balikudembe submitted that Rwaboni Okwir’s affidavit was sworn by virtue of S.3 of the SDA and that the affidavit does not require registration before it can be used in a court in Uganda.

The instrument in question is headed ***"AFFIDAVIT".*** It then begins with the following words:

"I ***am a Ugandan citizen of the above mentioned particulars would hereby solemnly and sincerely declare the following".***

After setting out facts including his arrest at Entebbe in eleven paragraphs, the instrument ends with the following words which, like the opening, are normally used in statutory declarations:

"AND I MAKE THIS SOLEMN DECLARATION conscientiously believing the same to be true by virtue of the Statutory Declarations Act, ***135*** (sic).

Declared by the said OKWIR RWABONI MP".

On the face of it, the instrument appears to be both an affidavit and a statutory declaration. This shows that the drafting is less than elegant. The instrument was made before a Solicitor in England. In that country a Practicing Solicitor, appointed by the Lord Chancellor, can act as Commissioner for Oaths and can administer Oath: See paragraph 76, Halsbury's Laws of England, Vol.36, 3 Ed. and Commissioners for Oaths Act, 1889. The capacity in which the Solicitor acted is not challenged.

Subs. (1) and (3) of Section S.7 relied on by Mr. Nkurunziza, state as follows:- "7(1) *A person wishing to depone outside Uganda to any fact for any purpose in Uganda, may make a statutory declaration before any person authorised to take a statutory declaration by the law of the country in which the declaration is made.*

(3) A statutory declaration taken outside Uganda under this section shall not be admissible in evidence unless it is registered with the Registrar of documents under the Registration of Documents Act."

On the other hand, section 3, which was relied on by Mr. Balikudembe, reads as follows:-

"3 ***After commencement of this Act, no affidavit shall be sworn for any purposes except: (a where it relates to any proceedings application or other matter commenced in any Court or referable to a Court; or***

(b) where under any written law an affidavit is authorised to be sworn. –

It appears to me that S.7 does not prohibit the use of statutory declarations in court, provided they are registered under the Registration of Documents Act. Further it is clear that although at the end the Okwir instrument refers to the Statutory Declarations Act, 1835 of the United Kingdom's it was drafted as an affidavit because of its heading. In any case this would be a technicality curable under Art. 126(2) (e). I think that the instrument is admissible because it is to be used for Court purposes.

Within the same category of affidavits, Mr. Nkurunziza enumerated other affidavits in support of the petition, which he considered to be inadmissible because they were sworn in contravention of Section 5 of the Commissioners for Oaths (Advocates) Act. Learned counsel's contention is that because the deponents of the various affidavits supporting the Petitioner swore before Mr. Wycliffe Birungi and Mr. Kiyemba-MUtale and yet the same advocates later appeared or were mentioned in this Court as Counsel for the Petitioner, all those affidavits have been rendered invalid and valueless and therefore they should be struck out. These affidavits include those deponed by Okello-Okello Mugalula Joseph, W. Nalusiba, Louis Otika, Dr. Ssekasanvu Emmanuel, Dr. Mukasa D. Bulonge, and Major Rubaramira Ruranga.

In response, Mr. Balikuddembe conceded that the affidavits were indeed sworn before the said advocates as Commissioners for Oath, but he contended that the two advocates were not on his team by the time he filed the petition. He stated that it was at the beginning of the hearing of the petition and when he was on his feet introducing his team of advocates that he received a chit containing the names of the two advocates He then referred us to S.5 of the Act and contended that the proviso thereto applies only where an advocate administers an oath to his own client.

Now S.5 (1) of the Commissioners for Oaths (Advocates) Act, reads as follows:

> ***"A Commissioner for Oaths, may by virtue of his commission, in any part of Uganda, administer any Oath or take any affidavit for the purpose of any court or matter in Uganda,……..***

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter

With respect I do not agree with Mr. Balikuddembe that the above quoted proviso only prohibits the swearing of a client by his own advocate/commissioner. The prohibition includes the swearing of witnesses in a case where the advocate appears. I understand Mr. Balikuddembe to contend that Mr. Birungi and Mr. Kiyemba-Mutale were not advocates for the petitioner at the time when the various witnesses made the affidavits before the two advocates. There is nothing on the record to controvert this. Further, there is no evidence before us to show that the two advocates or any one of them is a member of the firm of Balikuddembe and Company advocates. I think that if one or both were members of the firm the affidavits would be caught by the proviso. That being the case, I do not, with respect, accept the argument that any of the affidavits sworn before either Mr. Birungi or Mr. Kiyemba-Mutale are defective by reason of client/advocate relationship and therefore inadmissible in these proceedings.

ORDER 17 RULE 3 OF CP RULES

The last objection to the other affidavits (which are very many) in support of the petition is that the various affidavits were drawn in contravention of the provisions of 0.1 7 Rule 3 of the Civil Procedure Rules. Mr. Nkurunziza submitted, and the learned Solicitor General associated himself with the submissions, that as this petition is not an interlocutory matter, any affidavit which is not confined to such facts as the deponent is able, on his own knowledge to prove, are in breach of the Rule and the affidavit should not be relied upon. He submitted that each of the entire offending affidavits should be rejected and that no parts of the same should be relied on. He relied on Constitutional Petition No.3/99 - ***P Ssemogerere & Olum vs. Attorney General, (unreported); Constitutional Petition No 1 of 2001, C. Mubiru vs. At. Gen. (unreported); Kabwimukyi vs. Kasigwa*** **(1978) HCB251** and ***Hudani vs. Tejani and 6 others*** (unreported) being a ruling of the Principal Judge of the High Court in H.CC No.7 12 of 1995.

The last two authorities are in support of the opinion that a defective part of an affidavit vitiates the whole affidavit. On the basis of these authorities, Mr. Nkurunziza submitted that the affidavit

of Winnie Byanyima along with 28 other affidavits offend the Rule because the affidavits or parts of them are based only on information without grounds. Learned Counsel submitted further that 87 other affidavits are based only on belief, without showing grounds for belief. ***Ssemogerere*** and ***Mubiru*** are decisions of the Constitutional Court. With the greatest respect to that court, I think that the Court erred in both of these cases. First I think that in Constitutional Petitions, 0.1 7 Rule 3 ought not to be strictly adhered to in view of the special Rules which regulate the hearing of Constitutional Petitions. The Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions, 1996 (Legal Notices No.4 of 1996) were made by the Chief Justice by virtue of powers given to him under para (c) of subsection (2) of S.51 of the Judicature Statute, 1996. The rules are special intended to apply to the expeditious disposal of constitutional cases. That is why Rule 12 thereof directs that all evidence at the trial of the petition shall be by affidavit. Moreover, Rule 13 which makes the Rules of the High Court, including Order 17, applicable subjects the application of the High Court Rules to Legal Notice No. 4 of 1996. This appears to suggest that whenever the technical application of the Rules of the High Court conflicts with the objective intended to be achieved by the provisions of Legal Notice No. 4 of 1996, namely expeditious delivery of justice, the High Court Rules must give way. Indeed at that stage the provisions of Article 126 (2) (e) would come into aid, I think.

Be that as it may, I have seen the ruling of the Constitutional Court in the ***Ssemogerere*** petition and I find it difficult to accept the view that paragraphs 6 and 8 in Kadaga's affidavit contravened 0.17 Rule 3. Para. 6 shows that Hon. Kadaga talked to Members of Parliament who confirmed her own knowledge that they had been present in Parliament. The position appears to me more interesting in the ***Mubiru case.*** The deponent (Mubiru) disclosed in the affidavit that he had a discussion with his advocate who gave him legal opinion. The deponent believed the opinion of his advocate and relied on it. That was his basis for belief. Moreover the information can be verified by reference to the law quoted or the Court files. I think that ***Mubiru case*** ruling on the first point of objection (source of information) represents bad law and practice.

At this point I find it pertinent to make general observations. Objections by Counsel for the two respondents concerning the admissibility of affidavits by deponents supporting the petition were based on:

(a) 0.1 7 Rule 3 of the Civil Procedure Rules and decisions in election petitions decided by Judges of the High Court since the Parliamentary elections of 1996.

It does not appear to me that there was adequate consideration during the trials of petitions in the High Court of the import of S.121 of the Parliamentary Elections (Interim Provisions) Statute 1996, (Statute 4 of 1996), and the objectives of Rules 15 and 17 of the Parliamentary Elections (Election Petitions), Rules, 1996 (S.1. 1996 No. 27). These provisions are special and regulate the hearing of election petitions in the High Court (at least after 1996).

(b) A number of Constitutional cases decided since 1996. Proper consideration should be accorded to the import of Rules 12 and 13 of the Rules contained in Legal Notice No. 4 of 1 996 (supra).

The words of Rule 17 of S.1. 1996 No.27 and of Rule 13 of Legal Notice No.4 of 1 996 are identical. The rules in the two enactments contain general procedural provisions, which regulate the institution of Petitions and the conduct of the inquiry or the trial in the respective courts. In each set, like in this petition, although the calling of witnesses is provided for, the trials are to be conducted on affidavits to be read in Court. In either case, here is rule 17 and rule 13 (which I shall call the "rule of resort") which provides for resort to the Civil Procedure Act and the Civil Procedure Rules, but, when resorting to these latter rules (General Rules), neither the High Court, nor the Constitutional Court, nor indeed this Court, is expected to apply those general rules in disregard of the objectives of these special rules. I think that there would have been no need to enact the special laws and rules if courts hearing petitions were expected to follow the letter and spirit of the Civil Procedure Act and the Civil Procedure Rules.

Now I think it is instructive to consider Rule 2 of S.l.2001 No.13 which declares that;-

> ***"These Rules shall apply to the conduct of election petitions under section 58 of the Presidential Elections Act, 2000"***

In conclusion I think that the special rules enjoin the High Court, the Constitutional Court and this Court, when trying petitions governed by the laws I have referred to, to expeditiously deliver justice to the parties with least regard to technicalities. In connection with the objection I would

like to refer to ***Maidstone Borough case, Evans vs. Castle Reagh (1906)*** 5 O'M & H 200 at 201, where Lawrence J. observed:-

"That ***it is true that in election cases we have to throw over board the rules which regulate ordinary cases, because we have to deal with peculiar circumstances."***

I don' think that the learned Judge was there advocating for ignoring the general rules altogether. However the message is clear. Avoid undue technicalities

For the reasons I have endeavoured to give, I do not think that it is appropriate to apply 0. 17 Rule 3, too strictly as was the case in the petitions of ***Ssemogerere*** & ***Olumu*** (supra), and ***Odetta vs. Omeda*** (supra). In my view those decisions in so far as they decided that 0:17 Rule 3 must be applied strictly in election petitions and in Constitutional petitions, represent bad law and to that extent, these decisions should be overruled.

Bearing the foregoing in mind let me revert to the other arguments on the objections by Dr. Byamugisha. He referred to Ss.57 and 58 of the Evidence Act and submitted that the affidavits are hearsay and also that annexed documents violate sections 60 to 63 of the same Act. He said that the affidavits and documents did not comply with sections 72, 75, and 76, of the Evidence Act. Mr. Kabatsi, the learned Solicitor-General concurred and submitted that Rule 3 of 0-1 7 does not appear to accept severance of bad parts of affidavits from their good parts. He suggested that if this Court were to depart from the established practice of not acting on defective affidavits, the Court should not overrule existing decisions (presumably Ssemogerere, Mubiru, Kabwimukyi), because we would create a bad precedent for the Courts below.

Mr. Balikudembe, for the Petitioner, submitted that under 0.17 Rule 3, a court has discretion to accept or to reject proper or improper material appearing in an affidavit in the same way as courts do in regard to oral testimony. He relied on my decision in ***Reamaton Ltd vs. Uganda Corporation Creameries Ltd & Kawalya*** - Sup. Court Civil Application No. 6 of 1999 (unreported) and ***Motor Mart (U) vs. Y Kanyomozi*** - Civil Application No. 6 of 1999 (unreported) and urged us to consider the substance of these affidavits and decide the petition on its merits.

Let me begin with the main affidavit of the Petitioner accompanying the petition, which was also included among the so-called defective affidavits, containing hearsay and matters based on information and without source which offended Rule 3 of 0.17.

I have already referred to Rule 2 of S.l.2001 No.13 which directs that:-

> "These ***Rules shall apply to the conduct of election petitions under section 58 of the Presidential Elections Act, 2000"***

Under Rule 3,

"An election petitions includes the affidavit required by these Rules to accompany the petition"

On the basis of the chart provided to us by the respondents' counsel I take it that their objection to the petitioner's affidavit was restricted to the main affidavit sworn on 23/3/2001. I think that an election petition like a plaint is likely initially to make allegations1 which are subject to proof or disproof. In a petition, like the present, which is presented expeditiously under special rules as those set out in S.1. 2001 No. 13, a petitioner will inevitably including hearsay matters in the main affidavit accompanying his petition- I am not saying that hearsay should be included deliberately. What I believe happens is that grounds in the petition would most likely be based on information provided, in all probability by his agents or supporters from various parts of the country. The proper course to take during the inquiry, in such circumstances, is to consider the petition and the accompanying affidavit and, unless the affidavit contains obviously scandalous or frivolous matter, finally reject any matters contained in such affidavit as appear not to have been satisfactorily proved unless perhaps the petition does not disclose a cause of action. Alternatively where time is still available the petitioner should seek leave to correct errors by way of supplementary affidavit. It would be unjust to reject the petitioner's whole affidavit at the beginning of the inquiry. In the result, I do not agree, and in any event, I am not persuaded1 that the accompanying affidavit of the petitioner violated 0.17 Rule 3.

Let me quote Rule 15 of S.1. 2001 No.13 which makes the Civil Procedure Rules applicable in these proceedings. It states as follow:-

> ***"Subject to the provisions of these Rules, the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the Rules made under that Act relating to the trial of a suit in the High Court with such modifications as the Court may consider necessary in the interests of justice and expedition of the proceedings."***

I have already stated that the import of this rule is to advance expeditious disposal of petitions without forgetting to do justice to the parties. Speed is the reason why the trial of the petition is by way of affidavits. It is, I think, the broad principles of the CP. Rules, which are to be applied. By the way if we stick to the rules, it is arguable whether paragraphs 9, 15 and 16 of the first Respondent's affidavit attached to his answer would not violate 0.17 as they contain some hearsay and therefore would render the whole affidavit defective.

A part from the two decisions of this Court cited by Mr. Balikudembe, there are decided cases from other jurisdictionS1 such as England and Kenya, which support the proposition that parts of an affidavit can be severed from the rest of the same affidavit where the severance does not affect the merits, or will not detract from the other paragraphs, of the affidavit. See M. B ***Nandala vs. Father Lyding*** (1963) E. A. 706 where the concluding and the only offending part of the affidavit was severed. That is a decision of Sir Udo Udoma, C.J., in which the present 0.17 Rule 3 was considered. See ***Mayers & Another VS. Akira Ranch*** (1969) EA. 169 (K). See ***Zola vs. Ralli (1969) EA. 691, at page 693*** which is authority for the proposition that an affidavit may be defective but not necessarily a nullity. The E. A. Court of Appeal rejected arguments substantially similar to what were put forward by Mr. Nkurunziza.

In ***Rossage vs. Rossage*** (1960)1 W.L.R 249, an authority listed by Counsel for the first Respondent, the English Court of Appeal considered a similar objection. The Court, Hudson, L.J. at page 250, considered Order 38 Rule 3 of the then Supreme Court Rules of England, which was substantially the same as our 0.17 R.3. The Court of Appeal expunged some of the affidavits from the court record but that was because the proportion of the offending materials to the relevant materials was so high that the court found it proper to remove the offending affidavits all together. The offending matters were scandalous and would have embarrassed the Court as

well as the opposite party. The effect of that decision is that striking out an affidavit depends on the contents of the affidavit.

The affidavits complained of in the petitions before us are listed in a chart provided by the respondents' counsel. The chart lists the respondent's affidavits also. I have gone through these affidavits. Very many of the affidavits complained of are very similar to the affidavit in ***Nandala case*** (supra) Deponents speak about what they personally saw and or what they heard. That is very clear. The concluding paragraph then ends with the sentence.

> "— ***What I have stated herein is true to the best of my knowledge and belief".***

I think that the inclusion of the words 'belief" or 'information" is in some cases superfluous and does not render each affidavit invalid, at any rate not the whole of each affidavit. In my opinion it would be improper in this petition to strike out wholly affidavits which are found to contain so called hearsay evidence in some parts where the offending parts of the same affidavits can be severed from the rest of the affidavit without rendering the remaining parts meaningless.

Incidentally 0.1 7 R.3 has a punishment provision for parties who offend. Rule 3(2) reads as under: Perhaps for those who press for striking out affidavits containing hearsay matter, I would like to quote sub-rule 2 of Rules 3 Order It states:-

> **'The** ***costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall, unless the court otherwise directs, be paid by the party filing the same"***

This sub-rule envisages matters complained of by Mr. Nkurunziza. Punishment by way of costs against a party who files an offending affidavit appears to me to be a suitable remedy in appropriate cases. And just to emphasis the point that election petition rules are special rules, I refer to page 600 of vol.3 of A.I.R. 1Qth Ed. Commentaries, on the Indian Code of Civil Procedure. The commentators refer to the existence of Election Rules of 1961 whose purpose is the same as the present Presidential Election (Election Petition) Rules, 2001. Discussion there concerns the Indian 0.19 Rule 3 which is identical to our 0.17 Rule 3. The commentators opined that there is nothing in the (Indian) Code….. Which can apply in derogation of the (Indian)

Representation of the People Act or the Rules framed there under. Authorities are quoted to show that a defective affidavit filed in an election petition is not fatal and a petitioner can be allowed to make appropriate correction. I share this opinion.

SAMPLE AFFIDAVITS

At the risk of being lengthy, I shall quote some of the affidavits, which I have picked at random. After all these affidavits are part of the evidence to which I shall refer to in the course of this judgment.

AFFIDAVIT OF GUMA MAJID

The first is that of Guma Majid. It reads:

"I, ***GUMA MAJID do solemnly affirm and state as hereunder:***

1. THAT I am an adult male Ugandan of sound mind, duly registered as a voter with voters Registration number 00281689 residing at Lomunga Parish, Yumbe District.

2. THAT I was appointed as a polling monitor for Presidential Candidate Col (Rtd) Dr. Besigye Kizza at and have capacity to affirm this affidavit.

3. THAT on the 12th day of March 2001, while monitoring elections. I saw one Achaga Safi whom I know as the LC Ill vice chairman of Kuru Division and a member of Candidate **Museveni Yoweri** ***Kaguta's task force casting at the said Bura B polling station a ballot paper.***

4. THAT immediately thereafter I proceeded to Bura A another polling station where I saw the same Achaga Safi going to cast another ballot and immediately asked the voters register and I saw Mr. Achaga Safi was registered with voter's card No.00267715, where upon I recorded the number.

5. THAT I thereafter proceeded to Bura B polling station where I saw that Mr. Achaga Safi was registered as a voter with voters card No.0027587.

6. THAT I reported the matter to one prisons constable deployed to take charge of the station together with the presiding officer but two told me that they could not arrest Mr. Achaga Safi as he was a member of the task force of Candidate Museveni Yoweri Kaguta.

7. THAT I thereafter reported the matter to Mr. Keniga Rashid Yumbe District Chairman of the elect Besigye Kizza task force.

8. THAT I proceeded to Aleapi Parish Ojinga Polling Station and saw one known to me as Mawa and a member of Candidate Museveni Yoweri Kaguta's District Task office and Campaign Manager distributing voters cards to people who were not appearing on the register and who did not have voters cards.

9. THAT I and a polling agent for Presidential Candidate Col (Rtd) Dr. Besigve Kizza arrested him.

10. That he released to me a voter's card for one Leila Alungaru a female with voter's card No.002279167.

11. THAT as I was recording the number of a second voter's card I had got from the said Mawa, armed military personal came and took Mawa away with the other cards and threatened to arrest me.

12. THAT I proceeded to Geya Parish, Aliba A Polling Station where I saw the Presiding officer one Abele Young Majid giving six ballot papers to the L. C. III Chairman Kuru Sub-county known to me as Mr. Drasi All a member of the Yumbe task force for Museveni Kaguta Yoweri.

13. THAT I got the register and saw those 23 people had voted. I proceeded to check the serial Numbers of the ballot papers issued to the 23 people only to find that the serial number run from 531 to 560 which was in excess by six (6).

14. THAT I directed the polling agent for Dr. Besigye Kizza one Olenga to arrest the said Mr. Drasi Ali as / was going to police.

15. THAT when I came with the police 1 found the Polling agent for Dr. Besigye Kizza wasn't around and I was threatened with arrest and I had to escape.

16. …….

17. …….

18. THAT whatever is stated herein is true and correct to the best of my knowledge and belief"

The above affidavit is objected to by the Respondents solely on basis that in para 18 it does not show grounds of belief yet the body of the affidavit is absolutely clear. The same ground is the basis of objection to very many other affidavits including the next following affidavits, namely that in their concluding paragraphs; these affidavits do not show grounds of belief.

AFFIDAVIT OF WAFIDI AMIR

Another affidavit is that of Wafidi Amir of Mbale who states:-

"(1) ***1 was a person entitled to vote in the presidential Elections held on the l2 March 2001. I was also a monitor for the Task force of Colonel Dr. Kiiza Besigye responsible for monitoring elections in Musoto.***

(2) On l2 March, 2001 at about 11.00 a.m., I was at Munkaga stage. The motor vehicle of Hassan Galiwango the Resident District Commissioner - Mbale came and packed at the stage facing Tororo side. The Sub-County Chief Nambale - Mutoto whose names I have not yet known as he was recently transferred was at the stage and he ran to Mr. Hassan Galiwango who had alighted from the vehicle. The two held private discussions. The Sub-County Chief who was travelling in motor vehicle No. 903 UED drove towards Mbale. The R.D.C. continued towards Tororo.

(3) After some time the area Movement Chairman Geoffrey by name came from Tororo side being driven on a motor cycle by one Sonya David and they went towards Musoto which was my next destination.

(4) Being given a lift on another motorcycle by one Mr. Musongole who is Vice Chairman of my village. I went to Musoto. At Musoto to my surprise I found the Movement Chairman holding discussions with the Sub-county Chief Nambale-Musoto who had driven towards the town in motor vehicle No.903 UDE. On reaching where they were, Sonya drove in his motor vehicle in the opposite direction carrying a black hand bag which he did not possess when he was driven to Musoto.

(5) As there were rumours that there were plans to rig the election in our area I become suspicious. I told my driver to turn back and we gave a chase. At the local Railway crossing his motorcycle developed a problem. On reaching him I asked him what was in the black hand bag. Mr. Sonya tried to grab the hand bag and run away but I held him back and we struggled for the hand bag which got torn and some voters cards more than 50,000 and some official stamps plus Return Forms for the Sub-County of Bungokho were poured down. I raised alarm, which was answered by a crowd who assisted me to hold Mr. Sonya and retain the bag.

(6) The Movement Chairman and the Sub-County Chief came to the scene and tried in vain to rescue Sonya with the voters' cards and the records I had arrested but in vain.

(7) With the assistance of the crowd I detained Sonya together with the voters cards until some Police Officers from Mbale Police Station arrived at the scene in a motor vehicle. Mr. Sonya was then taken to Mbale Police Station together with the voters' cards, the polling station and Return Forms. I accompanied him to Mbale Police Station. My complaint was registered at the Police Station as S.D. 18/12103/2001.

(8) Two days later I saw Mr. Sonya at large in our area.

(9) The contents of this affidavit are true and correct to the best of my knowledge and belief."

I think the use of "and belief" is as unnecessary as it is harmless in the above affidavit.

AFFIDAVIT OF MULINDWA

"I, MULINDWA ABASI of Kobolwa Zone L.C. I, Kibuku Parish, Kibuku Sub-County, Pallisa District affirm as under:

(1) ***On the* 12th *March, 2001, I was one of the persons supposed to vote in the Presidential elections held on that day.***

(2) 1 cast my vote at Kobolwa Polling Station at 7.00 a.m.

(3) I was also a Monitor for candidate Colonel Dr. Kiiza Besigye in Kibuku Parish.

After casting my vote, I started my monitoring work within Kibuku Parish. I observed the following during my monitoring.

a) When I was at Kibuku Trading Centre, I detected that Mrs. Mujwi the Sub-County Chief Kibuku was issuing out some voters' cards to the crowd, which was around her at the Trading Centre. I was with Gideon Kalaja who was the Sub-County Monitor for Colonel Dr. Kiiza Besigye. We went and challenged Mrs. Mujwi but the Local Defence Unit personnel who were heavily armed roughened us up. They told us that they together with Museveni they are in power and we cannot do anything. They told us to keep quiet.

b) There were motor vehicles, which were bringing voters from villages, and they were told all to vote for Candidate Yoweri Museveni. Some soldiers were travelling in a mini bus all around the Trading Centre to who the Sub-County Chief Mrs. Mujwi, one Hail Nangeje Abubakali, Sub-County Councilor Maliki Kitente and Nyaigolo Peter L.C.II Chairman were telling the people that if they don't vote for Museveni the soldiers would kill them. They were 3 polling stations within the Trading Centre namely Kobolwa Polling Station, Kibuku Secondary School Polling Station and Ginnery Polling Station. Mrs. Mujwi and her group were going round these Polling Stations giving voters cards giving those who had already voted. I complained to the Presiding Officers in the 3 Polling Stations but in vein. Instead I was being laughed at.

4) At all the Polling stations I went to, there were voters who could not vote because on reporting they were told their names had been ticked and they were told they were not supposed to vote. When they complained they were chased away.

5) Because of the complaints I raised during elections, my life is under threat as a result I have been lying very low and confining to my residence all the time. I am being told by Museveni's supporters that I am a rebel. I am under great fear for my life.

6) The contents herein above are true and correct to the best of my own knowledge and belief."

There is the affidavit of BERNARD MASIKO, of Ntungamwo Parish, Nyabitunda village, Kayonza Sub-county, Kanungu District.

"1. That I was also appointed a campaign agent for Col Dr. Kiiza Besigye and on polling day as a monitor in Kayonza Sub-county.

2. That on* 9th *February 2001 at around 3.00 p.m., I saw Deputy RDC Mr. Mugisha Muhwezi Nyindombi accompanied by Gomborora Internal Security Officer (GISO), one Paul Bagorogoza who came to our office with army men from the Presidential Protection Unit (PPU) and ordered our Office attendant to remove out Candidate's posters and the sign post of our office and keep it inside, which our attendant did for fear of being harmed.

3. That four days to the polling day Mrs. Jacqueline Mbabazi came and held a meeting with Sergeant Nankunda Paulo Bagorogoza and ordered Museveni's supporters to beat up all Besigye's supporters. I personally heard her giving this order.

4. That Sam Karibwende Chairman L.C. III also threatened to shoot us if we did not close the Besigye district campaign office.

5. That when I returned the following day, I found another lock had been fixed on the office door and from then on we gave up the office.

6. That on polling day, I reached the polling at 6.30 a.m. with our agents, we found out the voting had already started earlier.

7. That all the voting was done by Museveni's agents where one Rehema Biryomumaisho had about 200 ballot papers. She ticked all of them and put them in the ballot box. I found out that

it was unfortunately done on all polling stations at that cluster by Sulait Mugaye and Ismail all Museveni's agents.

8. That when I attempted to stop the habit together with other Besigye's agents, we were forcefully chased away from the Polling Station by Polling Officers with the help of armed personnel and our letters confiscated.

9. That by 3:00 p.m. voting had ended. Many of Besigye's supporters especially the youth did not vote because their names in the register had already been ticked and their votes cast by Museveni's agents.

10. That I went to a nearby Polling Station called Kyeshero and found there the same procedure. I witnessed Canon Murakazi and Rwamahe also ticking ballots as they wished. I found it strange and Rwamahe who was armed with an AK 47 chased me away with the help of LDUs and some army men who were threatening voters.

11. That incidents similar to the above were wide spread in our area and the surrounding Sub-counties and I personally witnessed many of them.

12. In the circumstances, it became impossible for us to hold a free and fair election.

13. ……

14. That I certify that what is stated here in is true and correct to the best of my knowledge and belief."

I will reproduce the affidavit of James Musinguzi in another context later in this judgment. The above affidavits and very many similar ones were objected to on the principal reason that they contain hearsay and that no grounds of belief were given. Therefore they should be struck off. It is very clear that these affidavits and others like them speak of matters seen or heard by the deponents. Would it serve justice to strike out these? No. I do not see merit in these objections.

Interestingly, although two wrongs do not create a right, some of the affidavits supporting the respondents contain hearsay evidence. Typical examples are the affidavit of Marita Namayanja

(paras 11 to 14), of Prof. J. Rwomushana, (paras 9, 10, and 12). Mr. Balikuddembe submitted that we should strike out the affidavit of Marita Namayanja who deponed in support of the claim that the Petitioner suffers from AIDS.

It is apparent from the decisions cited as authorities by both sides that judicial opinion has not been consistent as to whether an affidavit containing hearsay matters should be rejected entirely or whether only the non-offending part of the affidavit should be relied upon. It is clear that in this country going say as far back as 1963 ***(Nandala's case)*** (supra) there has grown a string of authorities which support the view that where it is possible, offending parts of the affidavit should be severed so that the admissible parts can be relied upon.

In view of the provisions of Article 126(2) (e) of the Constitution, I venture to suggest that whenever possible1 a Court which is faced with an affidavit containing some inadmissible matter that are not deliberately intend to mislead and that can be severed and discarded without rendering the remaining part of the affidavit meaningless, that court would be justified in severing the offending part and using the rest of the affidavit. In this regard, I think that the decisions of ***Odetta vs. Omeda*** (supra) and of ***Hudani vs. Tejani*** (supra) on defective affidavits do not represent good practice. I think that any tribunal placing much reliance on 0.1 7 Rule 3 in order to disregard affidavits in support of election petitions would do well to look at the provisions of Article c.86 (3)(b) and 104 (9) from which the Statutes regulating the conduct of election petitions spring. The former Article confers power on Parliament to make provisions with respect to the circumstances and manner in which and the conditions upon which to challenge the validity of a Parliamentary election. In the case of challenging Presidential election result, Parliament is empowered to make such laws as may be necessary for the purpose of challenging the validity of election of the candidate including laws for grounds of annulment and rules of procedure. Parliament delegated its powers to make rules of procedure to the Chief Justice:
See S.58 (II) of PEA, 2000. The Chief Justice made S.1. 2001 No. 13 which contains the rules to regulate the procedure of hearing petitions.

I have reached a point at which I should raise my fears which I held when I first read Rule 1 4(l) of the Presidential Election (Election Petitions) Rules, 2001. (The rule has its equivalent in the

rules regulating Constitutional petitions and Parliamentary election petitions). The conduct of a trial of such an important petition, as this one, on affidavits, desirable though it may appear because of expediency, creates unnecessary problems during the hearing of the petition. Some of those problems have been clearly brought out by the objections to the Petitioner's affidavits. In view of sub-rules (2) and (3) I suggest that in future Presidential election petition be tried by hearing oral evidence. The hearing would be expedited if counsels for all sides produce the relevant witnesses and relevant evidence. The report in the Nigerian case of ***Ibrahim vs. Shehu Shagari*** shows that the hearing of a presidential election petition in Nigeria seems to have been disposed of expeditiously through three tiers of the courts within less than two months.

I will make brief comments on some of the sample affidavits sworn in support of the petition. One such affidavit is by Charles Owor. The objection is based on lack of grounds for belief. In my view the use of the word "belief" is superfluous.

Baguma John's affidavit was objected to because of absence of grounds for belief. But the affidavit is a factual narrative of what he experienced in Bukonzo County in Kasese District. Again the use of the word "belief" is superfluous. Yet another example is the affidavit of Peter Byomanyire from Mbarara District. Objection to his affidavit is that it contains hearsay. The objection is wholly baseless because the deponent talks about facts he knows.

There was a submission that the affidavits which were filed but were not referred to or were not read in court should be ignored because as the affidavits were not referred to in open court they are not part of the evidence. ***Y. Katwiremu Bategana vs. Mushemeza*** Mbarara H. Ct. Petition 1 of 1996 is relied on for this proposition. With due respect, I think that the relevant rule 15(1) was misconstrued by the trial Court. Rule 15(l) is similar to our R14 (I). Rule 14(l) of S.l.2001 No.13 does not say that affidavits not read in court though they are already part of the court record should be ignored. The Petitioner did not abandon the evidence filed with pleadings. I do not accept the proposition that pleadings in the form of affidavits, which are properly filed on the court record, should be ignored. With respect to the learned Judge in the Katwiremu Bategana petition, I do not think that the proposition is in consonance with Rule 15, which was relied on. Indeed the absurdity of the proposition is fully illustrated by the fact that although two witnesses (Patrick Rwihangwe and Nuwamanya Buhitya) had been called and cross-examined on their

affidavits, their oral evidence was eventually disregarded purely because the affidavits had been discarded. With the greatest respect, that procedure is wrong and to that extent the decision represents bad practice.

FIRST ISSUE

I will now discuss the issues in the order they were framed beginning with the first which is whether during the 2001 presidential election, there was noncompliance with the provisions of The Presidential Elections Act, 2000. The Court briefly answered this issue in the affirmative. I have to give my reasons for and expand on that answer. I will show that apart from section 28, more sections of the PEA were not complied with.

MESSRS BALIKUDEMBE AND MBABAZI FOR PETITONER

The petition cited non-compliance with sections 12,18,19,25 of the ECA and sections 25,28,29,30,31,32,34,42,47,56,63,70,71, of the Presidential Elections Act, 2000 (PEA). It seems from the wording of S.58 (6) (a) and (C) that violation of the ECA does not matter for purposes of annulment.

Be that as it may, Mr. Balikuddembe made submissions together with Mr. Mbabazi. Mr. Balikuddembe opened by stating that the 1995 Constitution did away with political instability by putting the people of Uganda in charge of their own destiny. He referred to Articles 1,60 and 61 of the Constitution to the provisions of the Electoral Commission Act, 1997 (the ECA) especially S. 12 thereof which spells out the special functions of the Electoral Commission (hereinafter called the Commission); to the Presidential Elections Act 2000 (PEA), especially Ss.2 (2) and 5. Counsel pointed out malpracticeS and non-compliance with the provisions of PEA and ECA. He criticised the Commission for its failure to display the Voters roll for 21 days as a result of which the Voters Register was not cleaned up of names of people whose names should not appear in the register. That the Commission did not complete the Voters Register, which in the event contained two million ghost voters.

He criticised the Commission for the establishment, at the eleventh hour, of over 1716 new and ungazetted Polling Stations on 11/3/2001. Because of this, it was contended, the petitioner was

unable to appoint Polling agents to most of the new Polling Stations to protect his electoral interests. He criticised the Commission for printing excessive Voters cards as well as excessive ballot papers numbering about two million of them. These ended up in wrong hands. As a result, the agents of the first respondent used the excess ballot papers to stuff the same into ballot boxes. Counsel complained of the deployment of the Army during the campaign period, contending that the militarization of the electoral process hindered the petitioner and his agents and his supporters from canvassing for support and also the Petitioner's supporters were terrorised into abandoning the petitioner. He referred to the exercise of undue influence exerted by the first respondent and the Army of which he is the Commander-in-Chief.

Mr. Mbabazi stepped in to further argue the merits of the first issue and indeed his arguments overlapped into the second issue. Learned counsel referred to the affidavits of Major (RTD) Rwaboni Okwir, that of Mukasa D. Bulonge, of J. Oluka of Soroti, Ebulu, Ongee Mariono of Kitgum, Kiiza Davis and Birungi Ozo, both of Kamwenge, Kipala J, James Musinguzi of Rukungiri, Charles Owor and Kironde both referred to general situation, Ogute Nicholous, Frank Mukuunzi to support his arguments.

Counsel contended that the Commission failed to compile, maintain, revise and update registers and rolls as required by Article 61(a) of the Constitution, and sections 12, 18 and 19 of the ECA. By 8/3/2001, the National Voters Register was not ready. As a result many voters could not inspect the registers and they were unable to raise objections as provided for by S.25 of ECA (Act 3/97); that the commission violated the law by displaying some registers for less than 21 days. That because of this, about 101,000 voters surfaced and there was no time available to enable voters and agents of the petitioner to verify any of these new voters. As a result there was falsification of registers and the creation of sham polling stations on the eve of the Polling Day.

Counsel argued that in terms of S.28 (1) (a) of PEA, (17/2000) polling stations should be published 14 days before nomination day, i.e., before 8/1/2001, but not later, as was done in this case.

He referred to the chasing of the Petitioner's polling agents from Polling Stations. That there was voting before the appointed time which perpetuated multiple voting and ballot stuffing. Counsel

contended that as a result of these, there was non-compliance with the provisions of PEA (Act 17/2000) and ECA (Act 3/97) because of:

1) Failure to update registers by 22/1/2001.

2) No updated register on voting day.

3) Failure to print and gazette constituency rolls.

4) Failure to display voters rolls for all the Polling Stations for at least 21 days.

5) Failure to gazette all Polling Stations within 14 days before nomination.

6) Failure to notify voters within reasonable time of Polling Stations where they were to vote contrary to S.33 (1) of ECA.

DR. BYAMUGISHA AND DR. KHAMINWA FOR 1ST RESPONDENT

Dr. Byamugisha, Lead Counsel for the first Respondent submitted that by virtue of S.12 (1) (e) and (f) of the ECA (3/97) it was necessary to take measures to ensure that the entire election is conducted under conditions of freedom and fairness. He referred to the affidavits of the Commander of the Army, Major General Jeje Odongo, that of the Inspector General of Police, John Kisembo, of Lt. Col. Mayombo, the Ag. Head of the Chief tenancy of Military Intelligence and of Major-General Tinyenfuza that of Chairman of the Commission, Hajji Aziz Kasujja, especially his letter (obviously wrongly dated 8th March, 2000) and marked as annex 7 to the affidavit of Dr. Mukasa D. Bulonge. The letter (Annexture 7) was addressed to the petitioner and two other Presidential Candidates but it was also copied to the rest of the Presidential Candidates including the first Respondent and the Commander-in-Chief of the Uganda Armed Forces as well as to the Inspector General of Police. The Chairman started in his letter by saying:-

"……You raised issues of violence, intimidation and serious flaws in the electoral process……."

He revealed that he had written to the Head of State as the Commander-in Chief of the Armed Forces beseeching him to contain the army, and to the Inspector General of Police asking him to ensure that the Police carry out their mandate under Art.212 of the Constitution. Learned lead counsel supported the deployment of the army contending that it was necessary because of the inadequacies of the police and that in any case army deployment had been done in the past in 1987 during currency reform exercise, in 1989 during the expansion of the NRC; in 1992, RCs elections and during the last Presidential Elections of 1996 as well as the last Parliamentary elections which followed.

Dr. Khaminwa, Deputy lead counsel, also briefly made submissions relevant to the first and second issues. He referred to certain Articles of the Constitution and supported the role of the army in the electoral process stating that the army was doing its constitutional duty. He agreed with Mr. Mbabazi that the principles, which are necessary for a good electoral process, are:-

a) Free and fair election;

b) Secret ballot;

c) Procedure must be according to laws enacted by Parliament.

d) Considerable proportion of voters should not be prevented from voting

He then submitted that the petitioner had to prove, but did not prove that the election was not free and fair, that voting was not by secret ballot and that the voters who were denied to vote were substantial. He contended that because the voter turnout was 70.3%, out of over 1 0 million registered voters, it would be improper for this Court to interfere with the will of the people of Uganda, which is enshrined in Article 126(1). That Article reads:-

"126(1) ***Judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with Law and with the values, norms and aspirations of the people."***

Pausing here for a moment I do not, with respect, agree that these provisions were intended to hinder the judiciary from determining election disputes according to law.

Dr. Khaminwa cited a number of authorities in support of his arguments. These included ***Mbowe vs. Eliufoo*** (1967) EA. 240, Halsbury's Laws of England, 4th Ed., Vol. 15, pages 581, et seq. And the Uganda High Court decision of ***Y Katwiremu vs. Mushemereza and two others*** Hct Petition No.1 of 1 996. Counsel argued that the standard of proof required to be reached in order to justify annulling the presidential election is very high. He contended that the petitioner had not proved non-compliance, which can result in the annulment of the election.

MR. R KABATASI - SOLICITOR GENERAL

Mr. Peter Kabatsi, the Solicitor-General, on behalf of the Commission agreed with submissions made on issue number one by the other Counsel for the first Respondent on the standard of proof in election petitions. He added that if there is non-compliance by the Commission, the burden of proof of non-compliance rests on the petitioner throughout. In his view the standard of proof for noncompliance in respect of a presidential election is even higher than normal parliamentary elections. He cited the case ***of Ibrahim vs. Shehu Shagari and others*** (1985) LRC (const.) in support.

On the involvement of the Uganda Peoples Defence Forces (UPDF) in the electoral process, the learned Solicitor General referred us to Article 209(a) to (c) of the Constitution, which provides that:

> ***"209 The functions of the Uganda Peoples' Defence Forces are:***
>
> ***(a) to preserve and defend the sovereignty and territorial integrity of Uganda;***
>
> ***(b) to co-operate with the civilian authority in emergency situations and in cases of natural disasters; and***
>
> ***(c) to foster harmony and understanding between the Defence Forces and civilians."***

He submitted that UPDF as an active force cannot allow the country to disintegrate. The learned Solicitor General referred to the affidavits of ***Chairman Kasujja*** and contended that the National Voters Register has existed since 1993 and that it has been maintained and updated continuously. He referred to the affidavits of some of the Chief Administrative officers (CAOs): such as of

Kisoro District, Balaba of Mayuge District, Barnabas of Mubende District and G. Bwanika of Kayunga District who deponed that registers existed.

On display, the learned ***Solicitor-General*** conceded that the display period was less than the 21 days stipulated by S.25 of ECA (3/97) but he argued that the Commission had powers under S.38 to display registers for less than 21 days; that even if the display was for a shorter period, the exercise was successful because the register was cleaned up by reducing the number of registered voters as explained in paragraph 28 of Chairman Kasujja affidavit. He argued that the Commission was hard pressed on time.

The ***Solicitor-General*** argued that it is the duty of the petitioner to prove that non-compliance affected the Presidential election in a substantial manner. That the Petitioner did not produce figures to show that the shorter period of display affected the results contending that because the display was done at village level, more voters had access to the registers for verification. On voters' cards, learned Solicitor-General submitted that it is not mandatory under S.26 of ECA to issue voters cards. That Article 59(1) of the Constitution gives citizens the right to vote but that S. 19 of ECA prohibit persons who are not registered from voting. He referred to paragraphs 1 5 and 16 of chairman Kassujja's affidavit and annexture R7 thereto and submitted that the Commission gave effect to the provisions of Article 59(1) of the Constitution and S.19 (1) of ECA (Act 3/97). He contended that in this petition there was no evidence of the number of persons affected by not voting because of lack of cards.

On Polling Stations and the splitting of Polling Stations, the learned Solicitor- General referred to para 7 of Chairman Kasujja's supplementary affidavit where the Chairman mentions Nursery school N-Z Katwe II Polling Station, which was split, and where the petitioner got majority votes and submitted that the petitioner had agents at the new Polling Stations. He also relied on the affidavit of candidate Francis Bwengye in which candidate Bwengye averred that he was not aware of the chasing of candidates' agents. The Solicitor General referred to "apparent falsification" of results in the constituencies of Makindye and Mawokota and submitted that if there were any falsifications, this was due to human error and not to deliberate acts by anybody. He submitted that the affidavits in rebuttal show that there were no ghost voters, no foreigners voting, no underage voting, no pre-ticking of ballot papers, no multiple voting, that there was no

ballot stuffing of polling boxes as alleged by the petitioner and his supporters in their respective affidavits. He argued that if there were any ghost voters or any multiple voting or any ballot stuffing or falsification of results or any other errors, they did not affected the results in a substantial manner.

Like ***Dr. Byamugisha and Dr. Khaminwa,*** the ***Solicitor-General*** contended that the Petitioner and his Counsel have been unable to prove by number of the votes complained of which could affect the result in favour of the Petitioner. He referred to various affidavits sworn and filed in support of the reply by the Commission and in rebuttal of the affidavits sworn in support of the petition. These affidavits include several sworn by Chairman Kasujja, those sworn by some Chief Administrate Officers in their capacities as Returning officers or District Registrars, of their respective Districts, e.g., of Kisoro, Mubende, Ntungamwo, Kayunga, Yumbe, Bushenyi, Kasese and Kabale. He also relied on affidavits of the Commander of the Army, of John Kisembo, (Inspector-General of Police), former Presidential candidate (Francis Bwengye) and other persons such as Magumba Arajabu from Mbale, Tumuhairwe and Juma Majid. The learned Solicitor General asked us to answer issue No.1 in the negative.

COURT'S OPINION

In discussing objections raised by counsel for the respondents against affidavits in support of the petition, I have reproduced affidavits of some deponents. They support some of the petitioner's complaints Those witnesses are Guma Majid from Yumbe, Wafidi Amiri from Mbale, B. Masiko of Ntungamwo and Mulindwa Abas from Palisa. I should add that the respondents have filed replies to those affidavits.

It is pertinent to begin the discussion of this issue by referring to some provisions of the Constitution wherein is enshrined the arrangement for the Government or management of Uganda. The arrangement for the election and the method of election of the President of the Republic of Uganda are all enshrined in the Constitution as well as in the Presidential Election Act 2000 (PEA).

CONSTITUTIONAL PRINCIPLES

The preamble to our Constitution is instructive, for it states:-

> **"Recalling** ***our history which has been characterised by political and Constitutional instability;***
>
> ***Recognizing our struggles against the forces of tyranny, Oppression and exploitation;***
>
> ***COMMITTED to building a better future by establishing a social- economic and political order through a popular and durable national Constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress;"***

These lofty sentiments remind all Ugandans of our past and a better future in which democratic and sound political principles would be practiced.

In the National Objectives and Directive, some Principles of State Policy are set forth as follows:

> **I. "*Implementation of Objectives"***
>
> ***(I) The following objectives and principles shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a lust, free and democratic society***
>
> ***Political Objectives***
>
> ***II. Democratic Principles***
>
> ***(i) The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all level in their own governance***
>
> ***(ii) All the people of Uganda shall have access to leadership positions at all levels, subject to the Constitution"***

The sovereignty of the people of Uganda is embodied in Article 1 of the Constitution in the following words:-

"1 ***(1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.***

(2) Without limiting the effect of clause (7) of this article, all authority in the State emanates from the people of Uganda; and the people shall be governed through there will and consent.

(3) ***All power and authority of Government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution.***

(4) The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."

Part of the democratic electoral process is reflected in Chapter five of the Constitution as follows:-

"59. ***(1) Every citizen of Uganda of eighteen years of age or above, has a right to vote.***

(2) It is the duty of every citizen of Uganda of eighteen years of age or above, to register as a voter for public elections and referenda.

(3) The State shall take all necessary steps to ensure that all citizens qualified to vote, register and exercise their right to vote"

It is the Electoral Commission, which supervises elections. In that respect, Article 61 states:

"61. ***The Electoral Commission shall have the following functions:***

(a) to ensure that regular, free and fair elections are held;

(b) to organise, conduct and supervise elections and referenda in accordance with this Constitution;

(c) …….

(d) ……..

(e) to compile, maintain, revise and update the voters' register;

(f) ……..

Articles 70(l) states:

The movement political system is broad based, inclusive and non-partisan and shall conform to the following principles:

(a) Participatory democracy;

(b) democracy, accountability and transparency;

(c) accessibility to all positions of leadership by all citizens

(d) individual merit as a basis for election to political offices.

The President is the embodiment of the State of Uganda. He is the Chief Executive. The Constitution has the following provisions about the President:

"98 (1) There shall be a President of Uganda who shall be the Head of State, Head of Government and Commander-in-Chief of Uganda Peoples Defence Forces and the Fountain of Honour.

99. (3) It shall be the duty of the President to abide by, uphold and safeguard this Constitution and the laws of Uganda and to promote the welfare of the citizens and protect the territorial integrity of Uganda.

"103 (1) The election of the President shall be by universal adult suffrage through a secret ballot"

These provisions are clear. I can only emphasize that the presidential election by secret ballot is a Constitutional and democratic requirement. The President of Uganda enjoys enormous powers, which he/she must exercise in accordance with the constitution and other laws.

Article 104 which so far as relevant states: -

"104. (1) Subject to the provisions of this Article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected as President was not validly elected.

(2) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed"

It is trite that in court disputes, whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist. He bears the burden of proof: See S. 100 to 1 02 of the Evidence Act. These sections are clear.

The Petitioner had to adduce evidence before us to prove that there was non-compliance with the Presidential Elections Act 2000. His complaints are set out in his petition and the accompanying affidavit, which were lodged in this Court on 23td March 2001. They are set out in paragraph 3(1) of the petition. I have summarised them at the beginning of this judgment. The Petitioner prayed in paragraph 3(1)(y) that non-compliance with the provisions of the Presidential Election Act 2000 and of the Electoral Commission Act affected the result of the Presidential Election in a substantial manner in that:

(i) The number of actual voters on the Voters Roll/Register remained unknown and some people were disfranchised; and the number of votes cast during the election at certain Polling Stations exceeded the registered number of registered voters or the ballot papers delivered at the station.

(ii) The identity of the Voters could not be verified.

(iii) The electoral process regarding the voters' register was full of serious flaws and voters were denied the chance and sufficient time to correct those flaws.

(iv) No sufficient time was allowed for the petitioner and his agents and supporters to scrutinise the voters roll/register and take corrective measures regarding the same.

(v) The Petitioner's polling agents were denied the opportunity to safeguard their candidate's interests at the time of polling, counting and tallying of votes and in their absence illegal voters voted while legitimate voters voted more than once.

(vi) The Petitioner was unduly hindered from freely canvassing for support by the presence of the military and para-military personnel who intimidated the voters.

(vii) It cannot positively be ascertained that the 1st Respondent obtained more than 50% of valid votes of those entitled to vote.

On 23rd March, 2001 the Petitioner swore an affidavit to support the above complaints. I have said that very many other affidavits were sworn by other deponents in support of the petition. I have already reproduced five of these affidavits in relation with objections raised by the respondents about the admissibility in evidence of the majority of these affidavits. Those same affidavits are part of the effort by the petitioner to prove his complaints raised in paragraph 3(I) (y) (v) and (vi) On this issue the pertinent paragraphs of the Petitioner's affidavit are:- 9, 11, 12, 13, 14, 15, 17, 18, 21, 22, 23, 29, 35, 36, 39, 40, 41, 42, 43, 45, 46,47, 48 and 49. In brief he complained of the gross mismanagement of the electoral process, unjustified military involvement in the electoral process or rather, the over militarization of the electoral process, the rampant intimidation, the violence, the harassment, assault and beating up of his supporters and his agents which constituted non-compliance with the provisions and principles of the Presidential Elections Act, 2000.

The first Respondent answered these complaints in his answer and his main affidavit. I have already summarised his answer. Many other persons including UPDF officers, such as Major General Odongo Jeje, Major Gen. Tinyefuza, J., Lt. Col. Mayombo, PPU officers, like Captains Ndahura and Rwakitarate and also his agents swore affidavits to support his reply. Hajji Aziz Kasujja, the Chairman of the Commission, swore three affidavits in the rebuttal of the petitioner's complaints. The gist has been given earlier. CAOs and other officials supported him by swearing other affidavits relating to specific complaints in their spheres of work.

The Petitioner complains about the non-compliance with the provisions of the PEA, before the election and during the election exercise on 12/3/2001. Complaints before the election are about violence, the harassment, assault, abduction, and intimidation of the petitioner and or of his agents and supporters.

About violence, harassment, intimidation and beating of himself and his agents and supporters, the Petitioner testifies to this in his own affidavit. In particular, there is the evidence about the mistreating and assault of Rabwoni Okwir in the petitioner's presence and other supporters in Entebbe. There are affidavits giving evidence on violence, harassment, mistreatment, assaults in Rukungiri, Kanungu, Mbarara and Kamwenge Districts during February, 2001 and subsequently: See the affidavits of B. Masiko, about violence and intimidation in Kanungu, James Musinguzi of Rukungiri, (about violence intimidation and harassment) in Rukungiri and Kanungu, Kakuru Sam, intimidation and violence in Kanungu, J. H Kasamunyu, Mpwabwooba C., Bashaija. R. Mubangizu. All these witnesses give various harrowing and horrendous accounts of what happened. A study of the affidavits of these witnesses reveals that the epicentre of terror, harassment, intimidation, assault and all manner of violence was Rukungiri, Kanungu, Mbarara and Kamwenge. This spilled over into surrounding districts of Ntungamwo, Bushenyi, Mbarara, Kamwenge and Kabale. The witnesses for the Respondents deny that these complaints are genuine. Let me evaluate the evidence of the two sides on the matter of intimidation, violence, humiliation and harassment

In his complaints, the petitioner refers to acts of the agents of the respondents. In my mind the agents of the second respondents are easy to identify since these are its officials. These including CAOs, Assistant CAOs and lower election or polling officials. But because there is unwillingness by the **1st** Respondent to reveal all his agents, there is some difficulty in identifying agents or representatives of the first Respondent except those who have accepted. PEA and ECA are not quite helpful on this. Neither of them defines precisely who is or what is the characteristic of an agent of a Presidential candidate.

As I pointed out at the beginning, that we found on 21/4/2001 that there was non-compliance with the provisions of section 28 and S.32 (5) of the PEA, 2000. This relates to non-gazzetting of polling stations and failure to supply to petitioner with the official copy of registers.

The questions to answer are was there violence, intimidation, assault, abduction, and harassment? If yes, where was it and for what purpose? Does the proven violence, intimidation, harassment and assault amount to non-compliance with the provisions of PEA?

UNDISPUTED FACTS

There are facts in the petition which are not in dispute. For instance it has been accepted that UPDF was deployed throughout the country during the Presidential election campaign period. It is also accepted that PPU had been deployed in many districts in Uganda during the campaign period. It is also, I think, clear that there was a considerable concentration of deployment of members of the PPU in the districts of Rukungiri and Kanungu in particular and neighbouring districts of Ntungamo, Bushenyi, Mbarara and Kamwenge. The petitioner, his agents and supporters claim that the deployment was for purposes of humiliation, intimidating and harassing the petitioner, his agents and supporters so as to deprive the petitioner of support in the area. The first respondent and his supporters claim that deployment of UPDF was intended to ensure freedom and fairness in electioneering exercise and that PPU was in Rukungiri pending his return visit there. It is also accepted that registers were displayed for a shorter time than that provided by ECA.

EVIDENCE ON VIOLENCE AND INTIMIDATION

I shall refer to evidence contained in the affidavits of the witnesses for both sides. Mr. James Musinguzi was the petitioner's agent in charge of Rukungiri and Kanungu. I will latter in this judgment reproduce his affidavit. But the gist of it is as follows: -

He was a co-ordinator for the petitioner in south-western Uganda especially Rukungiri and Kanungu Districts. He and the team under him were "exposed to enormous intimidation, harassment and violence throughout the region where PPU soldiers had been heavily deployed "after the Petitioner had declared his candidature of the Presidency. Among the petitioner's supporters who were intimidated or harassed are Richard Bashaija, Sam Kaguliro and Henry Kanyabitabo. These and others have sworn affidavits.

Musinguzi complained about harassment and intimidation by state agents like Gadi Butoro who was the Gomborora Internal Security officer (GISO) of Kihihi and a direct supporter of the first Respondent. This Butoro appears to have harassed and intimidated the Petitioner's supporters and agents throughout the campaign period. Musinguzi made reports of intimidation to S. Okwaling the Regional Police Officer, (RPC) and the District Police Commander, (DPC). When these officers especially the RDC intervened, they were transferred immediately from the area the following day. This transfer, according to the Petitioner's affidavit, was preceded the previous day, (3/3/2001), by the intervention by the UPDF and PPU in the campaign rallies of the petitioner. The invisible hand interested in the campaign must have been operating. Paragraphs 9 to 26 of the Petitioner's affidavit explains the PPU's brazen interference in the electioneering activities of the Petitioner which resulted into the shooting to death of Beronda, an innocent man, and the injuring of at least fifteen other innocent people. In his affidavit, the former IGP John Kisembo does not refer to this nasty incident nor does he explain why RPC Okwaling and the DPC were hurriedly transferred from such a volatile area where, apparently, the civilians had faith in the civil police. Petitioner's evidence shows that the presence of PPU and the shooting and harassment had left the people gripped with fear and distress and this is reflected in the voting pattern.

On his part, Major General Odongo Jeje, in para 1 7 of his affidavit in support of the respondents described the matter in these words:-

> "**That** ***in further response to paragraphs 18-19 of the Petitioner's affidavit, I wish to state that on the 3rd March 2001, I received a report that there was a clash between groups of people in Rukungiri after the Petitioner had addressed a public Rally and in the process some members of the groups pelted stones, bottles and sticks at the soldiers and in the process of self-defence, one person was fatally wounded by a stray bullet".***

One can categorise this information as hearsay based on official reports. However taking that information on its face value, it is obvious that the Major-General is cautious about what he is prepared to tell us. He is not willing to tell us which group was pelting the soldiers and which soldiers were pelted and why the soldiers were there and why they were pelted. This leads to the inevitable inference that the senior army officers were partisan. Surely if there had been such a

serious incident resulting in the death of a Uganda citizen, the Army Commander should have carried out or caused to be carried out investigations leading to remedial measures.

I find it convenient to refer to other matters about which Musinguzi deponed. Mr. Musinguzi in his affidavit shows that there were over- bloated (inflated) voters on registers in the region. This inflation of voters' countrywide is now common knowledge and even the first respondent and, in veiled manner, Chairman Kasujja agreed.

Musinguzi indicates that following his group's complaints about the inflation of voters' registers, the commission half-heartedly attempted to correct the problem but never went far. The attempt appears to have been frustrated, presumably by some invincible hand. This speaks against the commission indicating the contravention of the PEA (provisions and principles of transparency). This is because according to the provisions of S.34 a voter must produce a voters' card and his name must be on the voters roll before he is allowed to vote. This process enables elimination of impersonation. Ghost names are recipe for ballot stuffing.

On the voting day, Musinguzi witnessed malpractices. This included violent intimidation of voters, agents and supporters of the Petitioner; chasing away agents of the Petitioner from various Polling Stations where those agents were to look after the interests of the Petitioner. He witnessed and learnt of deliberate pre-ticking of ballot papers in favour of the first Respondent. The respondents described the affidavit of Musinguzi as hearsay with no ground for his belief in what he states. Unfortunately the respondents did not specify the paragraphs of his affidavit to which objection is made. Perhaps this was because of the stand taken by the respondents that once an affidavit contained hearsay, it was vitiated in its entirety. I have already said that in general this is a misconception. Multiple voting contravenes S.31; chasing away of polling agents is contrary to S.32 and because of S.32 (5) the agents must have official copies of voters registers.

I think that some paragraphs of Musinguzi's affidavit contain some hearsay matters. But others are factual expressions of the personal experience of the witness (Musinguzi). There is, moreover, support of his evidence from many other witnesses, not only from Rukungiri and Kanungu region, but also from Ntungamwo, Kamwenge, Mbarara and other Districts. Witnesses

who describe similar incidents from various districts are Orikiriza Livingstone, Levi Tugume, Sebarole, Major Rwabwoni Okwir, Arinaitwe Hope, S. Rukingo, Byaruhanga Frank, S. Ndagigye who described the arrest, intimidation torture and terror in Rukungiri and Kanungu districts, Henry Muhwezi and Kiiza Davis who testify about terror and intimidation and harassment in Kamwenge District. Jomo Kashaija, B. Turyamusiime, R Matsiko wa Muchoori, Bagyenyi Grace, Mwebaze Robert Gariyo, Byaruhanga Frank are among witnesses who testify about intimidation, violence, torture, bribery irregularities, and voting malpractices in Nutungamwo and Mbarara Districts. Even in a District like Kampala, irregularities and intimidation was not lacking. This is spoken of by Ebulu Vicent (Mbuya), Mugerere Ahmada (arrested from Kalerwe, tortured and detained) and Bukenya Samuel (arrested, tortured and detained) at Mbuya. Mugalula Joseph talks about intimidation and bribing in Kayunga District. Magalula talks of intimidation by a Senior Army officer. I have not been persuaded that this witness told lies. The provisions of S.25 were contravened and we said so on 21/4/2001.

In his affidavit, Kakuru Sam supports Musinguzi about the reign of terror against and intimidation of the Petitioner's agents and supporters in the area throughout the campaign period and on the voting day on which day PPU and GISO were so arrogant as to force policemen to tick ballot papers under the supervision of GISO men before the policemen cast their votes! What a humiliating exercise! Kakuru testified about the role played Deputy RDC, Lt. Mugisha Muhwezi in the whole exercise. Mugisha-Muhwezi denies this in his affidavit but I have not seen any sound reason to believe him. Kakuru again supports Musinguzi about the agents of the first Respondent who terrorised the area. These include Stephen Rujaga. There is the account given by Byaruhanga Frank. He together with Mr. Robert Sebunya from Mengo, Kampala were assigned by the Petitioner to address a rally at Bikurukuru in Bwambara Sub-county on 3/3/2001.

In his own words, Byaruhanga tells us this in part of his affidavit:-

"3. ***That on arrival, my driver Batuma was called aside by four (4) soldiers of the Presidential Protection Unit (PPU).***

4. That the said PPU started beating the said driver on the pretext that no one else was supposed to campaign that day, other than Besigye.

5. That immediately thereafter the Task Force Area Chairman of Col (RTD) Dr. Besigye Kiiza, one Doma was caned and his shirt stripped off, by PPUs saying that it was a punishment for MOBLIZING and WELOCOMING us for the day's campaign.

6. That the sub-county cashier was similarly called aside, by the PPUs and beaten for getting involved with Besigye support group, yet he was working with the Government.

7. That in the above circumstances, the PPUs started beating/harassing people and ordering them to disperse. The rally was in the result abandoned by people, me and the said Sebunya

Byaruhanga goes on to give more harrowing account of events in Rukungiri on the voting day. For the Respondents, D/SP/Wamanya, swore an affidavit, claiming that Mugeere was arrested on suspicion of being a terrorist, taken on 20/2/2001 and released on the same day. The affidavit of Mugeere shows he was a supporter of the Petitioner and that he was arrested at night on 6/2/2001, taken and detained at Mbuya Military barracks where he was interrogated about which candidate he supported. He was detained and tortured before he was transferred to police who released him on police bond. It would be interesting to know what types of terrorism charges were contemplated against Mugeere. It is remarkable that D/SP Wamanya would release Mugeere soon after he is handed in by the militarily on terrorism charges. I prefer the story of Mugeere. He was detained because of supporting the Petitioner, and I so find. The police officer appears too cautious about the arrest of Mugeere, which suggests that he is not being honest about the cause of the arrest.

As I have stated elsewhere, I do not believe the evidence of Captain Ndahura. In paragraph 4 of his affidavit, he refers to the contents of the affidavits of B. Masiko, Kakuru Sam and Frank Byaruhanga as falsehoods. The good captain does not say or attempt to explain why these three witnesses, and, indeed the other 6 witnesses, of the Petitioner should tell lies against him and or his PPU soldiers. If his soldiers were always in camp, waiting for the first Respondent as President, how come that when Hon. Okwir Rwaboni was addressing a rally in Kanungu, Captain Ndahura deemed that rally to be illegal and he had the audacity to disperse it? What power did Captain Ndahura have to interfere with a political rally? I do not believe in what he denies. His deeds and terror were witnessed by too many witnesses, namely Bernard Masiko,

Kakuru Sam, Frank Byaruhanga, Koko Medard, Hon. Rwaboni Okwir, J. Hassy Kasamunyu, Mpwabwooba Kalisiti, Bashaija Richard, Byomuhangi Kaguta, Mubangizi Dennis and James Musinguzi. Capt. Ndahura has not given the least reason why all these people should gang up to tell lies against him, the PPU or any other soldier under his guard. I believe that Captain Ndahura and the PPU were in Rukungiri and Kanungu osintensibly to wait for the President but their real purpose was interfering with the electioneering programmes of the Petitioner. They were there for purposes of frustrating the support, which the Petitioner enjoyed in the area. The group was there to harass assault and intimidate agents and supporters or potential supporters of the Petitioner. The group achieved this and they effectively and brutally denied the Petitioner support from the region. The activities of the group violated with impunity various provisions and various principles of the PEA and the Constitution which says that all Ugandans shall have access to positions of leadership [Art.70 (1) (c)] and that elections should be held under conditions of freedom and fairness.

As I said, harassment or intimidation was not confined to Rukungiri and Kanungu. There is the evidence of harassment of supporters of the Petitioner in the districts of Kabale (see Anteri Twahirwa and Arinaitwe W.) Sande Wilson of Kabale complained about harassment to the CAO of Kabale who as Returning officer is the agent of the Commission. There is evidence that the Resident District Commissioner of Kabale, Mr. James Tumwesigye himself campaigned openly, on polling day, for the first Respondent. Mr. Tumwesigye threatened the agents and supporters of the Petitioner right up to the polling day itself when he urged all polling officials to violate the electoral law. It must be realised that Resident District Commissioners are direct appointees and are field representatives of the President. [Art.203 of the Constitution]. At the material time, the first Respondent was the President.

The evidence of Betty Kyimpaire, Patrick Kikomberwa and Moses Tibayendera all testify to the extreme harassment, violence, beating or assault of the agents and supporters of the Petitioner in Kamwenge District There is the evidence in affidavits of witnesses from among other Districts, Mbale District, from Pallisa District, from Mayuge District where agents and supporters of the Petitioner were severely harassed and beaten and denied voting on the voting day.

THE ROLE OF UGANDA PEOPLES DEFENCE FORCES (UPDF) AND THE PRESIDENTIAL PROTECTION UNIT (PPU)

The Respondents have spoken in support of the participation in the electoral process by the army and indeed the Presidential Protection Unit. This is based on the argument that the UPDF is supposed to co-operation with civilians especially in emergencies. Two reasons were advanced. First that the UPDF has, at various points in time in the past, been deployed during various national activities: such as the currency conversion exercise in 1987, the expansion of the National Resistance Council in 1989, the Resistance Councils elections in 1992, the Constituency Assembly elections in 1994 and the Presidential and Parliamentary elections of 1996. I consider this argument totally lacking in merit, in reason and in logic. It is not the role of the army to supervise civilian elections of any sort. My view is that those who advance such a reason do not want to entrust the management of civil or civilian affairs into the hands of apt civil institutions like the civil police who are trained specially for civilian work and are expected to deal with civilians appropriately. It is because of this that I find incredible the claim by the Commander of the Army and the Inspector General of Police that because the Polling Stations were more than the number of policemen and policewomen, therefore, the UPDF had to be deployed to assist the police, It is well known that the police force has existed in Uganda since before Independence. Various successive Governments have had the duty to improve and recruit so as to expand the police force. Ever since 1987 there have been elections of one sort or another. Since that time, the strength and inadequacies of the police force must have been known, or ought to have been known, by those in Government and in charge of electoral process. It was the duty of the Commission and the various organs of Government to plan for holding civil election with the help of civil police. Indeed why not train and involve prisons personnel for just one or two days. Why not involve Local Government askaris?

Since the promulgation of the 1995 Constitution in which the democratic principles are set out and elections for the President are known, periods when elections for the President would be held were predictable as were the possible number of Polling Stations as well as the strength of the police force. Therefore I can only say that perhaps by policy, the police was incapacitated. Nobody has explained why the police force has fewer policemen or why no emergency measures were taken to train, say Local Government askaris, to complement the civil police. I cannot

therefore accept the argument that the UPDF and PPU were deployed because of deficiencies in the strength of the police force. That is an argument without any merit. I think that deployment of UPDF was deliberate, intended to interfere with electioneering activities of the Petitioner and his supporters as the evidence abundantly shows.

THE PRESIDENTIAL PROTECTION UNIT (PPU)

The other aspect of violence arises from the deployment during the presidential election campaign period of the Presidential Protection Unit (PPU) particularly in the districts of Rukungiri and Kanungu If the unit is supposed to protect the President, I find no sound basis for the deployment during the critical campaign period in areas beyond where the first Respondent was, or is, of the unit in the absence of the President in these districts. From evidence available I think that the Presidential Protection Unit was in these areas for the purposes of advancing the first Respondent's campaign and to frustrate that of the Petitioner. Moreover if the members of the unit were for the purposes of protecting the President, why not confine them in barracks. Cpt. Ndahura claimed that the members of the unit were confined in one place on PPU duties. Yet in the same affidavit he, perhaps unwittingly, suggested that he and his detach helped to disperse an illegal rally. What powers did the PPU have to disperse a rally in which the 1st Respondent did not participate or was not expected to participate?

The violence and intimidation intensified so much that the petitioner and most of the other candidates were on 7/3/2001 forced to write a joint protest to chairman Hajji Aziz Kasujja. That letter forced the chairman to reply in his letter reference EC/1.6 dated 8th March 2000 (should be 2001).
I reproduce here below the two letters;

WRITTEN **COMPLAINTS BY CANDIDATES**

PRESIDENTIAL CANDIDATES CONSULTATIVE FORUM, 2001

C/o Crest House, Kampala Road, P. 0. Box 194, Kampala

Tel., 077-776600, 077-651131, 077-519302, 077-500461

March 7, 2001

The Chairman

Electoral Commission

KAMPALA.

Dear Hajji Aziz Kasujja,

RE. FLAWS IN THE PRESIDENTIAL ELECTORAL PROCESS, 2001

We the undersigned presidential candidates are writing to express our concern about the serious flaws in the on-going Presidential Electoral Process.

1. Security, Violence and Intimidation

As you are aware, President Museveni has deployed Major Gen. Jeje Odong, the Army Commander together with other senior army officers to take charge of security during the Presidential Electoral process. The President Protection Unit (PPU) has also been deployed in different parts of the country even where the security situation does not warrant it.

As you rightly pointed out in your communication to President Museveni as Commander in Chief of the armed forces, on 24th February, 2001, it is the duty of the Electoral Commission to ensure the security of the Presidential Electoral process and in pursuance of this responsibility the Electoral Commission entrusted the keeping of security during elections to the police. President Museveni's act of deploying the military in this exercise has usurped the powers of the Electoral Commission and the police, who are by law responsible for security during any electoral process.

Violence and intimidation by the PPU and para-military personnel has escalated of late and has resulted in loss of lives and injury to citizens of this country.

2. Serious Flaws in the Electoral process

We have noted with great concern the delay in the issuance of the cleaned, final voter's register and yet we have only 4 days to polling day. Furthermore voters are being issued with cards using a national voter's register which is not final.

Following to the National Bureau of Statistics, Uganda cannot have more than 8.9 citizens of voting age and yet you have quoted a figure of 11.06 million voters on the basis of which voter's cards have been printed and are being issued out.

We have evidence that the Electoral Commission and/or its contracted suppliers have printed blank voters' cards which can be easily abused. We also draw your attention to the very poor quality of voters' cards that can be easily reproduced.

In certain parts of Uganda such as Kampala City, there are less polling stations currently gazetted than those in the June 2000 Referendum.

To date we have not received any explanation about the reported intrusion, activities and identity of the culprits who entered the data processing centre of the Electoral Commission.

Public officers as Army Officers, RDCs, DISOs, GISOs, who are supposed to be nonpartisan under the law continue to campaign for candidate Museveni.

In view of the above stated flaws, we demand that you convene a meeting of Presidential candidates (and not their representatives), not later than Friday March 9th, 2001 to resolve these serious and very urgent issues.

Signed:

…….. **……**

Dr. Col. (Rtd) Kiiza Besigye **Aggrey S. Awori**

…….. **……**

Chapa Karuhanga **Kibirige Mayanja"**

(Underlining supplied)

Clearly this letter raised very serious concerns about widespread violence, harassment, and intimidation in many parts of the country. The measure and effect of harm to the electoral process of each of the factors complained of is limitless. The chairman was prompted to reply as follows:

REPLY BY CHAIRMAN HAJI KASUJJA

THE REPUBLIC OF UGANDA

THE ELECTORAL COMMISSION

Fax: 241299/241907/241655 Plot 53/56 Jinja Road

Telephone: 230140/234850/255671 P. 0. Box 22678 KAMPALA

Our Ref EC/16 Date 8th March, 2000

Dr. Col. (Rtd.) Kiiza Besigye,
Presidential Candidate, 2001.
Mr. M. K. Mayanja,
Presidential Candidate, 2001.

Mr. Chapa Karubanga,
Presidential Candidate, 2001.

FLAWS IN THE PRESIDENTIAL ELECTIONS PROCESS. 2001

This is to acknowledge receipt of your letter dated March 7th, 2001 which was signed by Presidential Candidates Dr. Col. (Rtd.) Kizza Besigye, Mr. Chapaa Karuhanga and Mr. M. Kibirige Mayanja. You raised issues of violence, intimidation and serious flaws in the electoral process. We wish to respond to these issues as follows: -

a. Security, **Violence and Intimidation**

The Electoral Commission in line with Section 20(1) (a) and (b) of the Presidential Elections Act. 2001 has contacted the Police and other State Security Organs to provide during the entire campaign period, protection of each Candidate and adequate security at all meetings of Candidates. To this effect the Commission has availed Police protection to each Candidate at home and while travelling and addressing Campaign Rallies.

With regard to **violence and intimidation, Electoral Commission has written to the Head of State as the Commander In Chief of the Armed Forces**, to contain the Army and to the Inspector General of Police to ensure that the Police carry out their mandate as provided under Article 212 of the Constitution of Uganda.

It is incumbent upon the Police when necessary to seek reinforcement from other State Security Organs to contain any deteriorating security situation, maintain law and order and protect the lives and property of Ugandans.

Following these communications, reports from the Police indicate that the security situation during the campaigns has improved and acts of violence and intimidation have reduced considerably countrywide.

b. Serious Flaws in the Electoral Process

You have expressed concern over the delay in producing the final Voters Register. Please be assured that, the final Voters Register will be, ready in time for Polling.

Your worry about the number of Voters on the Voters Register has been noted. It is important to note that the last Population Census for Uganda was conducted in 1991. What the National Bureau of Statistics has provided you with are population projections, which might not rhyme with the list of eligible electors. The figure of 11.6 million Voters on the Register is derived from returns received from the field after the National Voters Register Update Exercise. It is during this exercise that new Voters are registered, those who wish to transfer to other voting centres are transferred, the dead and other non bona fide Voters are deleted from the Register. You will recall that at the request of the Presidential Candidates the period for this exercise was extended to allow the Voters more time to scrutinise and clean the Register. There is no way the Commission

can cause the number of Voters on the Register to rhyme with the mandate methodology and legal requirements of the two Government bodies are different.

A few blank Cards were mistakenly issued to some Polling Stations. These should have **been** returned **to** the Commission and appropriate ones issued.

It should be pointed out that these Cards are to be used for the Presidential **Elections** only. The Electoral Commission could not invest a lot of money in them **by way of quality.** However, they have sufficient security features to allow for detection of any imitations. Holders of suspected fake Cards should be reported to the authorities.

Various factors are considered when creating Polling Stations. Should these factors change, new Polling Stations may be created or existing one could be closed. The Commission relies very much on the input from the field. It would have been helpful if you had indicated specific names of Polling Stations affected so that remedial action is taken or reasons are given for their being degazetted if at all.

The mater of the intruders into our Data Processing Centre is being handled by the Police. We wish nevertheless to assure you that our data was not damaged, tampered with or corrupted. With regard to Army Officers, RDCs, DISOs, and GISOs campaigning for certain Candidates, the Commission issued instructions to all those concerned to stop the practice. The Commission will be grateful to receive specific names and places of persons still engaging in this practice so that appropriate action can be taken.

I am sure the issues you have raised have been satisfactorily answered and in view of the Candidates' and Commission's last minute activities currently going on, the meeting of all Presidential Candidates demanded for will not be practicable.

A. K. Kasujja,
CHAIRMAN,
ELECTORAL COMMISSIQN.

c.c. The Commander in Chief of the Uganda Armed Forces.

The Inspector General of Police.

Mr. Y. K. Museveni,
Presidential Candidate, 2001".

Mr. A. Awori,
Presidential Candidate, 2001.

Mr. F. W. Bwengye,
Presidential Candidate, 2001."

These letters are clearly part of the evidence showing that the Commission was not in command of the electoral process. The chairman avoided convening a meeting of all candidates at that critical moment to discuss problems raised by the Petitioner and some of the other candidates. This refusal was unwise whatever the reasons for the refusal. I think that by this refusal to hold candidates meeting, the Commission dealt a blow to transparency.

As late as 10/312001, Chairman Hajji Kasujja briefed International observers (see Annex 6 to Dr. Mukasa's affidavit sworn on 1/4/2001). Chairman Hajji Kassujja referred to many things during his briefing. He admitted violence during the campaign. He avoided mentioning the culprits. He admitted appealing to the first Respondent as Head of State to restrain security forces from perpetuating violence and intimidation. He had difficulty in updating registers.

I have studied the affidavits of many witnesses for the petitioner and for the Respondents including Haji Kasujja and the other witnesses of the Respondents, e.g., Major General Jeje Odongo, Lt. Col. Mayombo, Moses Byaruhanga (Secretary to NIF), Captain Rwakitatare, Major Kakooza-Mutale, RDC Naava-Nabagesera, Munyani Naabya, Moses Muhairwa, Mudabi Emmanuel, Kakuba Nachan, Muhamad Masaba, Capt. Ndahura, Mrs. Jackline Mbabazi, and RDC James Mwesigye. Some of these witnesses are RDC, (Nabagesera and Mwesigye); CAOs, (Kakuba) or members of UPDF (Major Gen. Odongo) or PPU (Captain Ndahura). As the

contents of the chairman's letter (supra) show, UPDF officers, RDCs were seen as partisan during the campaign and their partiality towards the Petitioner was known. Accordingly I prefer the story told by the side of the Petitioner to that of the respondents.

The lamentations of Chairman Haji Kasujja contained in his letter EC/25 dated 24th February 2001 addressed to the First Respondent speak volumes. It shows that certainly either his agents or the first Respondent did not respect the rules of the election. This is strange because participants in a democratic election prescribed by the constitution have to obey those rules. I find that there was systematic, if not orchestrated, intimidation, harassment of petitioner and his agents and interference with electioneering or campaigns of the Petitioner personally and his agents and supporters. I believe that this was not accidental. This was contrary to the provisions of S.25, 28, 32, 47(4) & (5) 70, 71, 74 of the Presidential Elections Act, 2000. This was non-compliance with the provisions of the Act. These discussions and conclusions dispose of the first issue, really.

I have heard submissions that this could not or did not affect results. I disagree completely and I shall give more reasons later. Suffice is to say here that persistent harassment and taunting and beating of campaign agents of the Petitioner demoralised and degraded both the Petitioner, his agents and or supporters. The arrest of such high-ranking person as Rabwoni, the youth and students leader must have had devastating effect on the youths he led. It must have had profound psychological impact. The torture of Masiko B, Kanyabitabo, Byaruhanga speaks of this consequence.

REGISTRATION, REGISTERS, VOTERS CARDS, DISPLAY, POLLING STATIONS AND AGENTS

Let me now briefly consider the submissions and evidence on Registration, Registers, Voters' Cards, Display of Registers, Polling Stations and Polling Agents.

I have summarised the contentions of all the sides as put forth by their respective counsel. In the petition, the complaints are set out in paragraphs 3(1)(a), (b), (c), (d), (g), (h), (i), (j), (I), (n), (p), (q), (r), (5), (u), x and y. The two respondents denied these complaints in their affidavits accompanying their respective answers and in the affidavits of their witnesses especially the

CAOS cum-Returning officers and their various assistants who are collectively called in the Electoral Commission Act as election officers.

In his affidavit, the Petitioner deponed that he appointed agents to all Polling Stations throughout Uganda before the creation of new stations. He complained of the sudden creation and the existence of new and at the eleventh-hour, of ungazetted Polling Stations. Chairman Kasujja does not deny the creation. He instead nicely described it as splitting the stations. The complaint by the Petitioner is of the failure by the second respondent to avail him (the Petitioner) copies of Final National Voters Register for which he was prepared to pay. He and his agents needed the copies of the voters Registers for use during the polling day. The Petitioner complained of failure by the second respondent to display the voters Register for 21 days. This omission certainly contravenes S.25 (1) of ECA; the respondents have conceded this much but argued, in the alternative, that this failure is not fatal under S.58 (6) (c) of PEA, an argument which I find relevant to issues No3.

Again the candidates (except the first respondent) in their joint letter of 7/3/ 2001 (supra) wrote to Chairman Kasujja and complained about insecurity and the serious flaws in the electoral process. These flaws included the delayed display of cleaned final voters register, excessive voters, excessive voters' cards, blank voters' cards, the poor quality of voters' cards, the concerns about the number of Polling Stations, the campaign on behalf of the first respondent by partisan Army officers, RDCs, DISO and GISOs. Many of these army officers, RDC, DISO and GISO officials carried out not ordinary campaigning but terror and harassment. Examples are Captain Ndahura, Captain Hon. Byaruhanga and others. Chairman Kasujja replied the letter and (at page 2 of the reply) admitted the genuiness of some of the complaints. In fact he accepted that by 8/3/2001 the Final Voters Register was not ready. He admitted the intrusion by strangers into the Data Processing Centre by strangers but played down the possible harm involved and claimed that the electoral system had not been affected. In effect he admitted that the Army Officers, RDCs, DISOs and GISO had been campaigning for the first respondent but he sought to dampen the effect of this by saying that the involvement by these officers had decreased. There is evidence in the affidavits of both sides, i.e. in support of the petitioner and against Petitioner pointing out the acts of non-compliance with provisions of PEA. The affidavits in support of the respondents are to the effect that there was compliance with the PEA, 2000. Whilst it must be

accepted that each side will naturally offer evidence in the affidavit to support it side, I think that in the circumstances of this petition, the respondents' deponents, many of whom happen to be public officers, and who may seek to protect their jobs must have given their evidence to protect their positions and or even cover up their misdeeds and failures in the case of those working on electoral work. I have taken pains to find a sound reason why many of the ordinary witnesses should give evidence, which implicated public officials. I am not persuaded that an ordinary citizen supporter of a presidential candidate has anything to gain by telling lies other than speaking the truth about what happened during the Presidential election campaign.

MAJOR KAKOOZA-MUTALE

Again there is a complaint against the Kalangala Action Group lead by Major Kakooza-Mutale. That they interfered with the petitioner's electioneering by beating up supporters of the petitioner. This group is a creature of the major.

The group held at Kalangala a convention from 25th to 28/11/2000. The major attached to his affidavit literature about what transpired in Kalangala from 25th to 28th September, 2000. The literature consists of records of proceedings of those four days. It shows that the group, which was composed of political mobilizers from all over Uganda, was determined to campaign for the success of the first Respondent in the forthcoming elections and even beyond into 2006. They (group) resolved to call themselves Fundamentalist who must go out and do everything possible to succeed. Since there were two main elections namely the Presidential election and Parliamentary elections which were due in the near future, the reasonable inference to be drawn from the resolutions is that the major and his group discussed the recent Presidential elections as inevitable. This is a logical inference. It is not farfetched. The movement bus phenomenon as used by Major Kakooza-Mutale in some of his activities had become so common as to be a subject of judicial notice.

In his affidavit, the major admits he is a special Presidential Advisor on Political Affairs. He does not specifically deny participating in campaigning for the first Respondent in Mbale or elsewhere. There is Louis Atika's letter showing that on 26/2/2001 the major was in Tororo and Busia when the first Respondent was campaigning there. Major Mutale is reported to have

beaten people there. Major Mutale did not say anything about this in his affidavit sworn on 4t April 2001. He does not deny that at the recent Presidential election, his group mobilised for 1st Respondent. In his affidavit, the first respondent denied organizing directly or indirectly Major Mutale-Kakoza and his group and that whatever the group did was without his knowledge, consent or approval. Yet from the letter of appointment, Major Kakooza-Mutale's role is very clear. His portfolios include liaising with the Movement Secretariat, mass-mobilisation, Political Organizations, and RDCs, etc. Annex A is his letter by which the President appointed him special Presidential Assistant to the President. The major admits that at Kalangala, he convened the movement mobilizers who were eventually addressed by the first Respondent as the President of this country. As earlier mentioned the question of forthcoming election was discussed during the convention.

The major does not deny being in Mbale; nor does he really deny the beating that took place. Rather, he vaguely denies beating up people in Mbale. The activities of Major Kakooza-Mutale and the yellow movement bus were such a common feature of the 1**st** Respondent's campaign trail that I must take judicial notice of it. It is a common knowledge that during his campaign, the 1S respondent arrived at rallies in the movement yellow bus. So did Major Kakooza-Mutale. The question that needs to be answered is whether Major Kakooza-Mutale and or his assistants operated as agents of anybody or of the first Respondent.

I think that Major Kakooza-Mutale was an agent of the 1st Respondent during the Presidential election campaign.

NEW POLLING STATIONS

The evidence established quite clearly that new polling stations were set up on 11th March, 2001. The PEA, by S.28 (1), thereof1 directs that the list of polling stations be published in the Gazette at least fourteen days before the nomination of presidential candidates. The list should be provided to returning officers for circulation in Constituencies. There is evidence that gazetting was done after nominations. No sound reason was given for this haphazard way of doing such an important job. This we have already said was non-compliance certainly. Furthermore, fl many instances, polling stations were created over night on 11/3/2001, in flagrant violation of the PEA.

It certainly negates the principle inherent is S.28 -, which directs publicising polling stations in good time. Chairman Kasujja admits the creation of the stations very late. He calls it splitting of the stations.

MULTIPLE VOTING, POLLING AGENTS ETC.

Again there is evidence about people who voted more than once. This was a breach of S.31 of PEA, 2000. I have considered the evidence given for and against the petitioner. For the same reasoning, which I have just given above, I am unable to accept the evidence in the affidavit of an RDC J. Mwesige of Kabale, CAOs as Returning officers and of the presiding officers whose evidence I have read that the petitioner's agents and supporters were not harassed or chased away from Polling Stations. There is ample credible evidence, which I believe, that polling agents of the Petitioner were systematically harassed and indeed on the polling day those who were able to go to the stations were chased away from Polling Stations to which they were appointed.

There is evidence that in some cases the agents of the second respondent appear to have just looked on and in some other cases participated. This is clear in Ntungamwo (See Gariyo), Rukungiri (See J. Musinguzi), Kamwenge (See Kiiza D. and M. Tibayendera), Kanungu (See H. Muhwezi), Kabarole (Turyahebwa), Kasese, Pallisa, (Mulindwa and K. Seganyi), Mayuge, Tororo (Imons and Okware S.), Kabale (See Matsiko A. and Arinaitwe W). There is evidence that during voting there was campaigning at or near Polling Stations, in many districts including Mayuge, Kanungu, Kamwenge, in Palisa, in Rukungiri and in Kabale, in Tororo, in favour of the first Respondent. The witnesses I have quoted testify to this fact. Such campaigns at the polling stations on the polling day contravened section 43 and 44 of the PEA, 2000.

There is evidence of ballot stuffing, e.g., in Iganga, see A. Mwanja's affidavit; Bushenyi (Tukahebwa), in Mbarara, (Mrs. Semambo) and see Kazikazi from Ntugamo. Stuffing was done in some instances by polling officials but in other cases by people claimed to be agents of the first Respondent and in some other cases with the collusion of the election officers who are agents of the second Respondent, e.g., Rwenamira, in Ntungamo District, Sibomana stuffed acquiescence of the presiding officer.

TORORO EXAMPLE OF BALLOT STUFFING, ETC.

At Amoni RS, in Tororo District, Okware witnessed a dramatic situation. A. Obore, an agent of the first Respondent and an LC Ill Chairman, went to the Polling Station at 2.30 p.m. and ordered everybody to disappear. His orders were defied. He pulled out a gun from his car and twice shot in the air. This was on a polling day at a polling station. Many people fled, but election officials stayed. Okware took cover. Obore collected ballot papers from his car and stuffed them into the ballot box. Because of intervention by Okware, an agent of the petitioner1 the police and LC.5 Chairman (Mr. Nabala-Mudanye) came to the scene. Counting and tallying of votes showed there were 40 excess ballot papers which were given to first respondent at the insistence of Obore and Mudanye. Obore was sub-county agent for first Respondent. He has not denied Okware's claims although he swore rebuttal affidavits. Further Mr. Mudanye the L.C.5 Chairman and the District agent for the first Respondent in his affidavit accepts that there was a disagreement between Obore on one hand and Okware and other youths on the other. L.C.5 Chairman accepts that Okware's group did not like Obore to be at that polling station. As L.C.5 had brought their policemen he advised Obore to go away. Obore left. The L.C. 5 Chairman, Mr. Mudanye, corroborates Okware in respect to the presence of Obore and police at the polling station and the disagreement between Obore and the Okware group. Further, L.C. 5 Chairman and the police were called to the polling station. Of course the L.C.5 Chairman does not talk about the shooting partly because he arrived after the shooting event. But the L.C.5 Chairman's story, cautious, though it was, certainly lends considerable credence to what Okware deponed. I have no sound reason not to accept the evidence of Okware that Obore, a Sub- country agent of the first Respondent committed at least two illegal practices on polling day (12/3/2001) at a polling station. First by stuffing the ballot box with ballot papers, Obore voted more than once in contravention of S.31 (I) of PEA. Secondly, Obore bore fire arms while he was at a polling station on the polling day, C/s 42(l) of the same Act. Then the presiding officers contravened S.48 (I) by failing to take the complaints of Okware, the agent of the petitioner. The presiding officer acquiesced in the stuffing offence! Of course the respondent can quip that there were only 40 excess votes. My answer is that this is one station and moreover arising from violent conduct breaching the law.

MORE EXAMPLES OF BALLOT STUFFING AND OTHER MALPRACTICES

On the same issue of ballot stuffing, there is the evidence of James Birungi Ozo who was the petitioner's district monitor in Kamwenge. At Bushyenyi polling station, he saw the presiding officer called Mwesigye pre-ticking ballot papers for voters before they cast the ballots. Mwesigye was also L.C.II chairman. There was evidence of ballot stuffing at the station. Birungi reported the malpractices to the Returning officer who in turn sent his Assistant to attend to the complaints. The police wanted to arrest the presiding officer. They were advised against arresting the presiding officer. They were advised against the arrest because there was no replacement. In that way the Assistant Returning Officer condoned or acquiesced in the contravention of the provisions of the PEA. I failed to get any affidavit in rebuttal of these claims. I must accept them as true. They are on the record other affidavits about ballot stuffing. Mr. Muhamed Mbabazi, Junior counsel for the petitioner in his address to us described some stations as sham polling stations. He cited the various stations created belatedly at Mbuya in Kampala. He contended, and I agreed and the Court has so found, that there was breach of S.28 (1) of the PEA by creating new polling stations over night without gazetting them. It was argued by the learned Solicitor General, on behalf of the second respondent, that in one new polling station, Katwe Nursery School, Makindye Division in Kampala, where the Petitioner got more votes and therefore that there was no breach of the law. I cannot accede to this. A new polling station created in Kampala is not the best example to prove that a candidate or his agents had access or ample opportunity of access to new Polling Stations generally. A new Polling Station in Kampala can be accessed in a matter of minutes. Not so up country. In any case, the complaint is that of failure to gazette the stations and not distance.

Mr. Moses Byaruhanga, secretary to the National Task Force of the 1st respondent swore affidavit on 12/4/200 1 denying that any new polling stations were created. He echoed Chairman Kasujja's view that old stations were split and that in some of the stations, which were split, the petitioner got more votes than the 1st Respondent. He cited 8 stations most of them from Kampala. I am not impressed by these examples. He then cites unsplit stations where the petitioner got less than the 1st Respondent. He cited 20 stations from outside Kampala. We do not know the criterion used in the selection. Moreover it must not be forgotten that in some of the Districts cited, there is evidence of intimidation, e.g. Mbarara and Kamwenge. So the value of

winning or loosing is distorted in the face of brutal violence and harassment of the supporters and agents of the petitioner.

The essence of publishing polling stations many weeks in advance is intended to enable voters to ascertain the location of the stations where voters will cast their votes. Likewise publicity of polling stations in advance enables presidential candidates to appoint their agents in time for the agents to ascertain the location of the stations at which they will officiate and take care of the electoral interests of their candidates. Early creation of stations is evidence of transparency and it enables candidates to determine the possibility of raising objections so that those objections can be dealt with before voting. How could objections be raised about these new stations which were created on the evening before polling? To gloss over this action would constitute a total disservice to the electoral law and the democratic principles of transparency and fairness.

It was argued that as old stations were merely split into more stations only, even the agents appointed earlier to the old stations by the candidates could cover all the new stations in the same centre. First of all this assumes that there will be a very simple arrangement in such a way that the polling stations and the respective officials manning the stations are cooperative and very close together. This may not be practical. And in any event too close an arrangement would in operation violate the Constitutional principle of secret ballot voting: see Article 68 of the Constitution and sections 7 and 30 (1) of PEA.

There have been attempts by witnesses and officials of the second Respondent to deny that there was voting by people below the age of voting. There is the argument that the Petitioners' witnesses might not have known the ages of the voters. They may or may not be correct. Remember that there was evidence of children voting for their sick parents or indeed relatives: See Zeyi Patrick Manja of Iganga Luwemba of Busunju Barugahare (Kabarole) Okwele (Kumi), Byaruhanga (Busia). The evidence is not from one or two places but it is reasonably widespread, persistent and consistent as not to be a creation of one or two people. I believe that S.64 of the PEA, 2000 was breached because of voting by the under aged or those not entitled to vote. Consequently I hold that there was noncompliance with the provisions of the Presidential Elections Act. Adult people use will power to make choice at an election. Children can easily be

manipulated. In any case I do not think that it is proper or lawful for a person barred by law from himself voting for him to vote on behalf of another person.

There is evidence of the presence of armed soldiers at Polling Stations in Rukungiri, Kanungu, Kamwenge, Palisa, Tororo, and Mbarara, among other Districts. Soldiers intimidated agents of the Petitioner in Pallisa, in Rukungiri, in Kanungu and in Soroti. This contravened S.42 of PEA. The presence of soldiers on voting day is not seriously contested. Evidence for the Respondents is that soldiers did not interfere with voting. On the evidence available I disagree.

There were submissions by Counsel for the respondents that because this is a presidential election petition the standard of proof of the allegations by the Petitioner placed on Petitioner is very high. I know that a presidential election is a very serious national exercise, which requires that every participant in the exercise must be aware of the consequences that would follow a mismanaged presidential election. Whilst, therefore, we must examine each complaint with due care before making a definite finding on it, it must be recognized that we are engaged in performing the function of the due process which is part of the concept of the rule of law. If after observing the essentials of the due process of the law as an ingredient of the rule of law, it is found that the law has been breached, the normal and natural consequences of breach of the law must follow. Once I am satisfied that the evidence establishes the allegations in the manner prescribed by law, I must grant appropriate relief.

A number of decided cases were cited in respect of noncompliance. These include ***Attorney General vs. Kabourou (1995) 2LRC757, Odetta John vs. Omeda Omax*** Soroti H ct. Election Petition 001 of 1996, ***Eng. V. Katwiremu Bategana vs. E. D. Mushemeza and 2 others,*** Mbarara H.C. Petition No. 1 of 1996 and ***P K. Ssemogerere & Another vs. Attorney General Const. Petition Non. 3 of 1999*** (unreported). I think that there is a distinction between this petition and the authorities cited which arise from election petitions. There were claims of threats and violence in the ***Odetta case.*** The trial judge did not believe the evidence on violence. I have not come across credible evidence in the other authorities cited of obvious violent military involvement on a large scale in campaigns as in this petition. This in my opinion is a very significant factor in this petition and it must be appreciated.

I do not think that on this issue, Ssemogerere's case is helpful. The facts of ***Attorney General vs. Kabourou*** and ***Katwiremu Bategana*** make these cases relevant in respect of the 3rd issue.

Meantime I am satisfied that the Petitioner proved noncompliance with provisions of PEA (ACT 3/2000). It is remarkable that by 8/3/2001, hardly three days to go before elections were held, the whole chairman of the electoral Commission could not in his letter say that the violence, the intimidation and the harassment of the Petitioner's supporters had been eliminated. How then can I say that there is compliance with the provisions of the PEA? The answer to the first issue surely must be in the affirmative.

ISSUE TWO

The second issue is whether the said election was not conducted in accordance with the principles laid down in the provisions of the said Act. I think that this issue is related to the first issue. In our decision, which we gave on 21/4/2001, we answered this issue in the affirmative. It now remains my duty to say how and why I concurred.

I have summarised the submissions of Mr. Balikuddembe, lead counsel, and his junior, Mr. Mbabazi, for the Petitioner, on the main principles. For instance S.5 (1) of PEA states that the election of the President shall be by universal adult suffrage through a secret ballot using one box for all candidates. This provision is a reenactment of Article 103(1) of the Constitution which states that:-

> "**103(1)** ***The election of the President shall be by universal adult suffrage though a secret ballot."***

The principles to be gathered from this statement are that:-

> ***(a) election is by all eligible adult persons aged 18 and above. Children do not qualify to vote;***
>
> ***(b) election is by secret ballot;***
>
> ***(c) Use of one box portrays the principle of transparency;***

(d) There is one vote one ballot;

(e) Under S.4 of PEA an aspiring candidate is entitled to carry out nationwide consultations- This is freedom of Association, of Imparting ideas and of electioneering.

According to Mr. Mbabazi the principles which were breached are:

1 ***The principles of transparency and fairness. (See Art. 68 and S.32).***

2. Representation of the candidates at the polling stations.

3. The secrecy of the ballot was not observed.

4. A citizen of voting age has a right to be registered and a right to vote.

5. ***Freedom to choose.***

6. General values of a democratic society.

When they made submissions in respect of the first issue, all counsel for the parties entered the territory of the second issue.

Mr. Mbabazi contended that these principles were breached in respect of registers and on registration1 voting and ballot stuffing. That evidence shows that persons eligible to vote were denied the freedom to vote secretly and that non-Citizens were allowed to vote; that is this noncompliance and goes to the root of the Constitution. Counsel submitted that because of deploying the army, the freedom of and fairness in voting were missing and this affected the election in a substantial manner. He asked us to answer issue 2 in the affirmative.

Dr. Khaminwa agreed with Mr. Mbabazi on the question of the principles but learned counsel submitted that these principles were complied with and that the petitioner failed to prove by the number of votes how noncompliance with principles affected the results. He asked us not to interfere with the will of the people by setting aside the election. Learned Counsel relied on ***Bater vs. Bater*** (1950) 2ALL E.R. 458 and ***Mbowe vs. Eliufoo*** (supra) for the view that the

standard required to prove non-compliance is very high and that the evidence of Frank Mukunzu, the expert in figures, did not assist the petitioner to establish the extent of noncompliance.

Mr. Kabatsi, the learned Solicitor-General, whose other submissions I have already summarised, agreed with the aforementioned statements of the applicable principles being: free and fair election, universal suffrage and the right to vote. He shared Dr. Khaminwa's view that the standard of proof required to prove non-compliance with the principles is very high. He defended the deployment of UPDF in the electoral process arguing that UPDF should be involved in the protection of Human Rights because of Article 221 of the Constitution. He contended that the expert evidence of Mukunzu supports the view that there was substantial compliance with the principles of the PEA, 2000.

The learned ***Solicitor-General referred*** to Chairman Kasujja's affidavits and the affidavits of other witnesses for the 21 Respondent. These included the affidavits of the Chief Administrative officers (CAOs) cum Returning officers. He then submitted that there was compliance with respect to the maintenance of the voters register; he defended the display of registers and of rolls for less than 21 days, and suggested that it is not mandatory to issue voters cards; that Art59 (1) guarantees citizens the right to vote; that S. 19 of PEA prohibits unregistered people from voting, that splitting the polling stations facilitated voting; that the Petitioner failed to adduce evidence in support of ballot stuffing, that the affidavits of Tukahebwa, Kyimpaire and Naggayi Lucia, about ballot stuffing and other malpractices did not establish the allegations, contending that their stories were imaginary or had been rebutted by the affidavits of the witnesses for the respondents such as that of Mugyenyi Sylvia (which I was unable to find among bundles of affidavits provided). The learned Solicitor-General argued that the proper procedure at voting and during tallying had been observed and that if there were any multiple voting, underage voting, mistakes or errors in tallying, they did not affect the results in a substantial manner. About the arrest of ***Commissioner Miiro, Mr. Kabatsi*** submitted that the process of the law took its course and that the arrest further shows that there is compliance with the law irrespective of the status of the culprit. He also argued that the absence of Miiro's signature from the results declaration form does not affect the declaration.

On the question of free and fair election, the learned Solicitor-General relied on ***Kabourou's case*** (supra). He said there exists a law to regulate election. In this case, there is PEA, 2000. He relied on Chairman Kasujja's affidavit and submitted that the complaints by the Petitioner in this matter were trivial. He asked us to accept the opinions of foreign observers from OAU and some countries to the effect that the election was free and fair. He also relied on affidavits of the returning officers in addition to that of Presidential candidate Francis Bwengye and Bob Mutebi. The later claims to have witnessed the Petitioner cast his vote in Rukungiri where the witness recorded statements attributed to the Petitioner on 12/3/2001 in which the petitioner appears not to have complained about the presence of soldiers or the malpractices now raised in the petition.

I must say I have found it difficult to place any probative value on the affidavit of former candidate Francis Bwengye. On 9th March, 2001, just three days to the election, candidate Bwengye, along with the Petitioner and three of the other candidates wrote their joint letter (P19) to Chairman Kasujja referring to the contents of R17 and P.15 which complained about insecurity and other malpracticeS. Surely he could not be the same Francis Bwengye who turns up after elections to claim that during campaigns there were no problems. I have already reproduced these letters elsewhere in this judgment. Besides I think that candidate Bwengye's affidavit is full of valueless hearsay matters.

Back to the submissions of the learned Solicitor-General. His view is that the Petitioner did not complain about free and fair elections on 12/3/2001. I would like to observe here that there are affidavits from various parts of Uganda talking about beating, intimidating, violence and harassment of agents and supporters of the petitioner. Two interesting examples are Mrs. Marry Frances Ssemambo and Mr. Peter Byomanyire both of Mbarara. In her affidavit of 21/3/ 2001, Mrs. Ssemambo, who was chairperson, Mbarara District Task Force for the petitioner, talks of massive rigging and she also talks of harassment, intimidation, arrests, beating and chasing away from polling stations of the supporters and agents of the petitioner especially in the counties of Nyabushozi and Isingiro. The witness says that it was the armed UPDF and LDU and agents of the first Respondent who committed these wrongs. Peter Byomanyire, a coordinator for the petitioner supports Mrs. Ssemambo with regards to intimidation, rigging and chasing away of agents of the petitioner in Mbarara and Kamwenge Districts. Byomanyire talks of excruciating

treatment on 1 6/2/2001 following an address by the petitioner. He and others were harassed on 8/3/2001 by armed UPDF for supporting the petitioner.

In an effort to challenge the evidence of Mrs. Ssemambo and other witnesses of the petitioner, Samuel Epodoi, the Districts Police Commander (DPC) for Mbarara District, swore an affidavit. He swore that Ssemambo's claims about harassment, arrest, beating, detention and chasing away of supporters and agents of the petitioner are false. He claims that nothing of the sort happened in Nyabushozi and Isingiro countries, which were patrolled by police and UPDF. The remarkable point about the affidavit of the DPC is that he does not appear to have been in the counties of Nyabushozi and Isingiro at the material time. His information is wholly hearsay. He does not disclose the source of his information. Therefore DPC Epodoi's claim that what Mrs. Ssemambo and other agents of the petitioner complain about is false is itself without any foundation whatsoever and I reject it. Mrs. Ssemambo is again supported on rigging, multiple voting and chasing away of the petitioners agents by Muhairwoha Godfrey who is from Isingiro County. He was an agent for the petitioner at Kajaho 4 polling station where a supporter of the first Respondent called C. Rwabambari and a parish chief took over the duties of the presiding officer. When he protested, Muhairwoha was forced by an UPDF reserve to flee. Messrs Tugumisirize and Rukara Caesar both from Mbarara and both agents of the petitioner at different stations were arrested, beaten, detained or chased away!

There are complaints by Mubbajje, Amir and Naddunga in Mbale District. There are complaints by Mulindwa in Pallisa, by Imon and Oketcho in Tororo, Ndifuna Wilber in Busia, Kirunda and S. Niiro in Bugiri, in Masindi, in Mayuuge, by Matovu A. in Kayunga, by Omuge in Soroti, by Lukwiya Pido in Gulu, by Drobo Joseph of Arua and every district in the whole of Western Uganda. Take the affidavits of Kakuru, Baguma H., Musinguzi and of Barnard Matsiko, for instance. These affidavits are sworn to support the allegations pleaded in the petition.

Alex Busingye, a resident of Kakiika, in Mbarara District, was the petitioner's overseer in Kazo County of Mbarara District. He looked after the welfare of the petitioner's agents in Kazo. In paragraphs 3 and 4 of his affidavit he states:-

"3. ***That in the majority of polling stations I visited I found the polling agents for the petitioner off the polling (sic) they had been assigned having been chased away by armed UPDF soldiers.***

5. That at one polling station called Nkungu I found a monitor for that station had been tied by the UPDF soldiers and was bundled on motor vehicle Reg. 114 UBS, pick-up in which they were travelling

One may say that para 3 contains some hearsay material. But the deponent does support Mrs. Ssemambo to the effect that the petitioner's agents and representatives were harassed, beaten and subjected to inhuman treatment. More affidavits from many other districts testify to the terror and intimidation that was meted out to the agents and supporters of the petitioner.

I have gone through the affidavit of the petitioner and the documents attached thereto relevant to the second issue, particularly PB, date 11/3/2001, about splitting polling stations, P12 and P13 Chairman Kasujja's letter to His Excellency the President in which Kasujja lamented about violence and intimidation and beseeched the President to save the bad situation from ***getting worse and to save democracy from disintegrating*** See P14 dated 20/2/2001 in which the Vice-Chairperson, Mrs. Flora Nukurukenda, implored the Army Commander and the Inspector General of Police to ensure that there was no "unnecessary" interference with Candidates' electioneering. From this letter I do not know whether there is "necessary" interference and what is its limit. Yet the letters show that candidates continued to complain; P15, is a press release, dated 9/3/2001 by which the Army commander attempting to justify the continued deployment of UPDF, ISO, and PPU during the electoral process. That letter from the Army Commander is a tacit acknowledgement of excessive deployment of the army. Then there is the letter P17, dated 7/3/200 1 written to the Chairman of the Commission by the petitioner and some of the other candidates, complaining about flaws in the Presidential election process. The flaws included insecurity, violence and intimidation. In the letter, the candidates further complained about deployment by the first respondent of UPDF and the PPU and other paramilitary personnel which had resulted in loss of lives and injury to people and to property; it complained of the partisan campaign in favour of the first Respondent, by Senior Army officers, RDCs, DISOs and GISOs. To that was a reply, now P8, wherein the Chairman in effect acknowledged the grounds

for the complaints and this was reemphasised by P19 dated 9/3/2001 still complaining about the 2001 flawed Presidential election process. True, the evidence on loss of life shows at least two deaths. Beronda in Rukungiri and another in Busia. It can be said that there are only two deaths. But what about the injured, the violence and intimidation. Indeed even the killing of one person by shooting can reach far and can have far reaching ramifications. Beronda's shooting is a perfect example.

P20 shows that the Commission printed excess voters' cards for purposes of rigging. This matter was not explained properly. Exh.P21 dated 13/3/2001 is a letter by the Petitioner rejecting the election results and demanding for a fresh election on various grounds some of which had, before the election, been highlighted in P17, P18 and P19, mentioned above.

I have studied the affidavits, together with the supplementary affidavits in reply by the first and second respondents. I have studied the other affidavits sworn by witnesses for the respondents. I have considered the fact, which is not in dispute that, Rwaboni Okwir, the MP youth in charge of the youth and students' desk of the petitioner1 was violently hounded out of supporting the petitioner and this was epitomised by his brutal and violent manhandling and arrest in the glare of video cameras at Entebbe International Airport. This must have by all standards driven chills in the spines of many of the youths, supporting the petitioner. Of course it may be argued that the effect of Rabwoni incident cannot be measured easily in terms of loss of votes. But, I say, the incident is the outward and explicit measure of determination to suppress opposition. It shows the determination to win at any cost. It gives support to commission of other malpractices. Musinguzi, who lead the Rukungiri! Kanungu co-ordination of the petitioner's campaign got so frustrated by various malpractices that he personally refused to vote out of revulsion against the excessive malpractices.

Mr. Mbabazi argued that the evidence available showed that by 22/1/2001, the Commission had not produced the updated National Voters' Register. That by 12/3/200 1 there was no updated National Voters roll. Paragraph 28 of Kasujja's latest affidavit of 9/4/200 I showed that on voting day there appeared to be an increase of voters by 103447, voters who were not subject to scrutiny. Counsel put forward a theory by which twelve polling stations each catering for 500 voters would in all produce 6000 votes, which could be used for stuffing in new stations.

Counsel again pointed out the unexplained increase of more Polling Stations in Mbarara, Mbuya and some other places. He submitted that the totality of absence of free arid fair election, the interference with the right to vote and of the exercise of secret ballot and absence of transparency such as the abrupt creation of very many polling stations, all this affected the validity of the vote and rendered the election exercise invalid.

Article 212 of the Constitution sets out the functions of the Uganda Police Force to include the following: -

> ***"(a) to protect life and property;***
>
> ***(b) to preserve law and order***
>
> ***(c) to prevent and detect crime, and***
>
> ***(d) to co-operate with the civilian authority and other security organs established under this Constitution and with the population generally?***

These functions when compared with the functions of the UPDF set out in Article 209 show obvious differences. One of the main differences is that the police is charged with the responsibility of ensuring orderly management of the affairs of civil society. In this respect I think that it is the responsibility of the police to ensure that elections, such as the questioned Presidential election, are conducted under conditions of freedom and fairness. The only constitutional provision, which envisages the involvement of the UPDF in civil matters in Article 209(b), which reads as follows: -

"209 the functions of the Uganda Peoples Defence Forces are:

(a)……..

(b) to co-operate with the civilian authority in emergency situations and in cases of natural disasters."

A presidential election is neither an emergency nor a natural disaster. At least that was not the case during the Presidential election of March, 2001.

It may be noted that in its wisdom when Parliament enacted the PEA, 2000, it foresaw the possibility of shortage of policeman power. That is why it included section 41, in the Act. The section empowers a presiding officer to appoint an election constable in certain circumstances.

Subsection (1) of S.41 reads as follows: -

"Where there is no police officer to maintain order in a rural polling station and the necessity to maintain such order arises, the presiding officer shall appoint a person present to be an Election Constable to maintain order in the Polling Station throughout the day"

By sub-section (2) the appointment of any person other than a policeman as an election constable can only be made where there is actual or threatened disorder or a large number of voters who need to be controlled.

This provision was enacted just last year. Members of Parliament must have been aware that the Army has over the years been involved in the electoral process. Yet Parliament did not see it fit to enact that members of the UPDF can be called upon to assist in the management of presidential election or any other election. In these circumstances, I am not persuaded by arguments put forward by the two respondents to justify the deployment of the army and the PPU for purposes of the recent Presidential election.

In his letter (dated 25/1/2001) to the Minister of Internal Affairs, John Kisembo, former IGP, showed that there were about 2700 Polling Stations more than the strength of police which was at 14700 men and women. He wanted other security agencies to help in the surveillance. This did not mean that each Poling Station had to have a policeman or a member of the other security forces. If that were so one would ask, why not leave the matter to the Electoral Commission to ask polling officers to appoint election constables as provided by S.41. This brings in the question of what power the Electoral Commission has over security forces especially the police during an election. The impotence of the Commission IS clearly shown by Kasujja's letter to the President. In order to strengthen the commission, I share the view that the commission must be

given power so that during election time it is able to summon and instruct police or any other appropriate law enforcement agency. It must be given legal authority to instruct the police or whoever is put under the direction of the Commission to carry out commission wishes. This will ensure some degree of independent management of the electoral process by the Commission.

If the IGP, the Army Commander or anybody else says that for many years, the Uganda Government had failed to recruit, train and equip enough police to oversee such an ordinary democratic election such as that of the recent Presidential election, then this must mean that, either the Commission was deliberate or the omission was evidence that those in charge of the election exercise never cared about preparing the police for civil elections.

I have gone through the affidavit evidence in support of the petition and in support of the two answers to the petition. I have considered counsels' submissions. The principles ***enshrined*** in S.28 (1) (a) is that Polling Stations should be published early to enable a candidate and his agents to ascertain whether any Polling Station is in a place convenient for voters and accessible easily by the candidate and or his agents and his supporters. The overnight establishment of Polling Stations violated the principle of transparency; the same principle was violated when polling agents of the petitioner were chased away from many polling stations or tallying centres. Again the principle of secrecy enshrined in Sections 7 and 30 of PEA was violated in many Polling Stations in Kabale, Ntungamo, Rukungiri, Kanungu, Kamwenge, Mbarara, Mayuge, Sembabule, Mbale, and Bushenyi, because of pre-ticking, supervision of ticking and by polling officers ticking ballot papers for voters. This is graphically explained in the affidavit of Boniface Ruhindi Ngaruye of Ishongororo Sub-county, Mbarara. LDU chased him away and shot at him. This bit is irrelevant. But according to him on the evening of 11/3/2001, the massive presence of UPDF in Mbarara that evening aborted his plan to campaign for the petitioner that night. He shows that in Mbarara Town, he was unable to get the petitioner's polling agents to new stations. There was voting by school children.

Again the principle of transparency was violated because of voting before 7.00 a.m. and after 5.00 p.m. Also the principle of oneperson0ne vote enshrined in S.31 was violated by officials of the 2 respondent. They consciously allowed this to go on in the aforementioned places. I have studied the affidavits of the petitioner's witnesses and the responses thereto by

witnesses for the respondents. It is clear from the affidavits of the agents of the Petitioner which affidavits I find more reliable that there was deliberate and brutal interference by members of the UPDF, LDUs and PPU with the campaigns of the petitioner See in Kabale (Matsiko D. and Twahirwa), in Ntungamo, in Runkungiri (Orikiriza and H. Muhwezi) Kanungu, Mbarara (see J. Kasujja and Peter Byomanyire) in Rukungiri see J. Tumusiime, Bushenyi, Kamwenge (see Kiiza D. and Tibanyendera), in Kasese, in Sembabule (see Kiryowa). Affidavits show that RDCs such as J. Mwesige (Kabale), GISOs like R Bagorogoza in Kanungu and Kamwenge Army personnel like Lt. Richard mentioned by D. Kiiza were involved in this.

ROAD CONTRACTS, SALARY INCREMENTS, ETC.

The idea of starting to implement work on the Mubende/Kiboga, Fort Portal Road during campaign period; the announcement of abolition of health cost sharing during campaign period which cost sharing has been in operation for some years in Government health units throughout the country; the promise to increase salaries of teachers, medical personnel and of the police, again during the campaign period, were not done in the course of ordinary and usual government business. I think that it was all part of the campaign, to lure voters to vote for the incumbent who is the first Respondent. These acts surely affected the principle of a free and fair election. The Petitioner stood every disadvantage in relation to the first Respondent in so far as these matters are concerned. The Constitution prescribes that candidates for political offices should be chosen on individual merit [(Art.70 (l) (d)] and the same Constitution and the PEA require elections to be held under conditions of fairness. Where is fairness if an incumbent can avail oneself of opportunities in the Government and exploit those opportunities maximally during campaign time whereas the non-incumbent has no such opportunities? How can there be merit and fairness? A non-incumbent enters the race without previous Presidential record of performance. The implementation of several programmes during the period of a Presidential campaign can only benefit the incumbent president.

The respondent could only promise in his manifesto and his address to the voters whereas the first respondent could announce immediate implementation of decisions which he wishes to announce and have it implemented as head of Government.

I do not accept the explanations offered by the Hon. Dr. Kiyonga, the Hon. B. Mukiibi, and the Hon. Eng. John Nasasira that these are matters for which money had been budgeted. How come all these had to be announced during the critical campaign period for the election of the President of this Republic? The Tanzanian case of ***Attorney General vs. Kabourou*** (1 995) 2LRC 757 is in point, if authority for this view was necessary.

On 24/2/2001, Chairman Kasujja, wrote his letter reference EC/25 to the President asking the President

"To intervene and save the democratic process from disintegrating by ensuring peace and harmony in the electoral Process".

The Chairman stated further that: -

"THE COMMISSION HAS RECEIVED DISTURBING REPORTS AND COMPLAINTS OF

INTIMIDATION OF CANDIDATES, THEIRAGENTS AND SUPPORTERS WHICHIN SOME CASES HAS RESULTED/N LOSS OFLIFEAND PROPERTY":

I have not seen evidence that the chairman received a reply. Yet the complaint was serious. This augments the need for making the Commission independent by giving it powers to direct the Police Personnel under its charge during campaign. The chairman's letter is an expression of great concern bearing in mind the fact that the election was barely two weeks away. In the ordinary course of things the letter reached the first Respondent as President. There is no evidence of the reaction of the first Respondent to show that he took steps to improve the situation. That letter was written barely two weeks before the Presidential election and after nearly one and a half months of campaigning, during which the petitioner, who was specially mentioned in the letter and his supporters had been harassed and some of his agents and supporters had been subjected to beating and harassment. Apparently even after Chairman Kasujja's letter had been written, nothing was done by the first Respondent as Head of State and the Commander-in--Chief of the Army to reduce the tension. Instead there is evidence of insecurity, violence and intimidation continuing. That is why on 7/3/ 001, just four days before the election and on 9/3/2001, another two days before the polling day, the rest of the presidential

candidates including the Petitioner wrote letters to and implored Chairman Kasujja to save the situation. I note that in his letter to the Minister of Internal Affairs (dated 25/1/2001) which letter is annexed to his affidavit, John Kisembo did not indicate that security was beyond the control of the police. The contents of the letter suggests that the National Security Committee decided on the matter and asked IGP to request for other security agencies to be involved in the election exercise.

The affidavit of Charles Owor shows that he was denied access to the National tallying centre. The affidavit of Robert Kironde shows that Hon. Bakabulindi, MP, a Chief Campaign Manager of the first Respondent and who was not an official of the Commission was at the forefront of receiving important information on results from upcountry in the Commissions Communication and Data Centre. Therefore, although Bakabulindi enjoyed that freedom as an agent of the first Respondent, Mr. Kironde, an agent of the Petitioner who is entitled to be at a tallying centre, was denied authority to note the verification of the result where Bakabulindi was positioned. Chairman Kasujja and Wamala of the omission in their affidavits poured Scorn on this but I think refusal of access to Kironde violates the principle of transparency and fairness.

Another interesting and most disturbing case is voting in Mbarara Municipality. There were many irregularities. Mr. Boniface Ruhindi Ngaruye, a member of the petitioner's Mbarara District Task Force, explains in his affidavit how he was harassed and intimidated during the campaign period. On polling day he coordinated the petitioner's polling agents in Mbarara Town. Boniface Ruhindi Ngaruye's affidavit shows that Military Police supervised the voting by an unspecified number of voters including students at Kakyeka stadium and three Mankeke polling stations. Military Police poured there lorry loads of students who voted. The latter station was created on 11/3/2001. There were no agents for the petitioner because the Commission created these stations late. There was no verification of voters. The witness saw what he describes as massive rigging.

Another story of interest is that of A. Otim which shows how soldiers in Gulu forced voters to vote contrary to voters' wishes. He monitored voting at Paico P. School. Armed soldiers were at the polling station. Soldiers brought an APC military vehicle with which they intimidated voters and the petitioner's monitors at the polling station. Because Otim was protesting he and one

Okello Saul were arrested and detained till 8.00 p.m., when they were released, after the polling time.

The complaints about harassment, intimidation, violence, threats and assaults were raised before the Election Day. That is why candidates in writing expressed their concern to Chairman Kasujja. In these circumstances, it would be wholly unreasonable to suggest, as do witnesses and counsel for the Respondents suggest, that the Petitioner's witnesses, who, after the election, swore affidavits about harassment, intimidation and violence, threats and assaults were making up stories. In my opinion the correspondence between Chairman Kasujja and his Deputy on the one hand, and the Petitioner with his fellow candidates on the other hand, fully corroborates the evidence of the supporters of the Petitioner. I find that the petitioner was subjected to harassment and interference during his electioneering. I also find that representative's agents and supporters of the petitioner were subjected to violence, intimidation, harassment and assault.

CONCLUSIONS ON ISSUE NO.2

On 21/4/2001 in our decision we said that the election was conducted partially in accordance with the principles laid down in the PEA, 2000. We pointed out that:

(a) In some areas of the country, the principle of free and fair election was compromised. In the foregoing discussions on issue two I have indicated areas where this happened. What effect did it have on results? Wait for the third issue.

(b) In special polling stations for soldiers, the principle of transparency was not applied. There is overwhelming evidence of this in barracks or soldiers' polling stations near barracks of, for instances, Mbarara, Gulu, Kitgum, Mbuya and Soroti. A. Otim's affidavit, which I have just referred to, illustrates what happened in Gulu. Soldiers had the audacity to get an APC military vehicle and drive around the polling station obviously to intimidate the agents or monitor of the petitioner because he was protesting. In Mbarara at Kakyeka stadium and Mankeke polling stations the military bulldozed everybody and got both soldiers and school children to vote without any verification whatever. Mr. Ruhinda Ngaruye's affidavit shows this. In his affidavit, James Oluka, swore that at AKISIM NRA polling stations, in Soroti, two new more stations were created over night and the petitioner was unable to post agents there.

Wives of soldiers of Olilim barracks were taken to polling station where they voted. There was no control or verification of those voters by the agents of the petitioner. Cpl. Oyo James, political commissar in the AKISIM Barracks, in his reply attempted to explain how soldiers from Chum detach were transferred to Soroti and how ballot boxes for these soldiers was sent to Soroti at that time of polling. He stated that there were candidates' agents and no voters were smuggled in. It is clear from both Olika and Cpl. Oyo that at least one polling station was created over night. I cannot see how the petitioner could have appointed an agent on the same day when the station came into existence. I think Oluka is telling the truth that there was no agent for the petitioner.

There is the affidavit of Hon. J. L. Okello-Okello, M.P, who co-ordinated the petitioner's election in Kitgum/Pader Districts. To his affidavit is attached a letter signed by 4 polling agents of the petitioner and of candidate Bwengye. The agents listed six ungazetted army polling stations created at Pajimo A, Pajimo B. Ngom Orom FN and Ngom Orom F-N, Ngom Orom (outside barracks and Abondio's Home II (outside quarter- guard). The agents saw delivery of a one ballot box for Pandwong (outside quarter guard) and for Patika (outside quarter guard). That a further three ballot boxes were also delivered at night intended for Ngom Oromo. The agents wanted the six ballots boxes to be opened to verify their contents. This was not done. The electoral commission's explanation is not satisfactory. Clearly the principle of transparency was compromised absolutely.

I have already discussed areas outside the barracks where the principle of transparency was breached. Such areas include many polling stations; counting and tallying centres from where the polling agents and representatives for the petitioner were chased. What is the cumulative effect on the election results? We deal with this under the third issue.

(c) We also held that there was evidence that in a significant number of polling stations there was cheating. Glaring examples are in places where soldiers voted. Soldiers just bulldozed their way and that of their dependants in voting. Multiple voting, under age voting, pre-ticking and supervising ticking, so that a voter has no choice on which name to tick. These are examples of cheating. I have referred already to districts like Mbarara, Bushyenyi, Mbale, Tororo, Iganga and Busia. What effect did this have on the election result? I shall answer this in the next issue No.3.

I have no doubt in my mind that on the evidence before me, the principles of free and fair election and of transparency were persistently violated and trampled upon across the country and therefore I must reemphasize our answer to the second issue as being in the affirmative. In very many parts of the country the presidential election was not conducted in accordance with the principles laid down in the provisions of the Presidential Elections Act, 2000.

THIRD ISSUE

The third issue is whether if the first and the second issues are answered in the affirmative such noncompliance with the provisions and principles of the said Act, affected the result of the election in a substantial manner.

I have answered both issues one and two in the affirmative. What do these answers lead to? They lead to two questions the answers to which will clear the matter. Did the noncompliance affect or did not affect the result of the election? Second if the answer is yes, I must answer the next important question whether the effect was or was not substantial. I am aware that Parliament did not in its wisdom define what it meant by either "affecting the result" or "in a substantial manner". I shall indicate what I understand these two expressions to mean in the context of this petition. There are decided cases here in Uganda, and outside, which discuss what is meant by "affecting the result" and or "in a substantial manner". See for instance, ***Ojera vs. Returning Officer & Banya*** (1961) EA 482 [also (1962) EA 532], ***Hackney's case vs. Gill vs. Holms*** (1874) 31 L.T.R.N.S.69 at P.721. I shall return to these later.

Evidence by way of affidavits and documents were filed in support and against the petition by both sides. On the basis of that evidence and the law, submissions on this issue were made by counsel.

Issue number three covers a wide field. I think that to answer the issue satisfactorily calls for an evaluation of the situation before the election, that is to say, during the campaign period first. Secondly I think that it is equally essential to evaluate the evidence relating to the voting day activities on 12/3/2001.

I have already stated that perusal of many affidavits and the letters between Chairman Kasujja and the candidates (especially the Petitioner) show that the complaints about the campaign problems1 such as harassment, violence, intimidation, beating, insecurity, impropriety characterised the campaign period up to and including the voting day.

BEFORE 12/3/2001

Let us review the evidence prior to 12/3/2001. The petitioner complained that his electioneering or campaigning was interfered with by the army, the PPU and agents of the first Respondent. That campaigning was not under conditions of freedom and fairness. That there was general intimidation and harassment of his supporters and agents during the general campaign; the harassment and arrest of Rwaboni Okiwr, who was the National Leader of the Youth Desk of the Petitioner, has to be evaluated as well as the special circumstances obtaintng in many districts of Western Uganda: especially Mbarara, Kabale, Ntugamwo, Kisoro, Rukungiri, Kanungu and Kamwenge Districts. We have also to discuss the Question of envelopes and gifts, (which is understood to mean bribes), the announcement about and implementation of road construction, the salary increases for medical, teachers, and police personnel during campaign period as well as the promises to reduce Graduate tax and the Arua Video. We have got to consider the allegation of harassment and intimidation by Major Kakooza Mutale and his Kalangala group. Were the provisions of S. 19,23,25,27,28,29,30 and 32 respected? I have in a way of answered this question about these sections.

The events which took place on 12/3/2001 include the alleged chasing away from polling stations of the representatives or agents for the petitioner by either the agents of the first or of the second Respondent or some other persons like UPDF and LDUs. We have to consider the evidence of the alleged pre-ticking of ballot papers by other persons before voting by a voter, the supervision by polling officials of ticking ballot papers and the ballot stuffing, the creation of new polling stations, on 10/3/2001 or 11/3/2001; video interview of the Petitioner on 1 2/3/2001, excess ballot papers, irregular issuing of voters cards, the arrest of Commissioner Miiro and the general atmosphere on the polling day. Were the provisions of and principles of section 7 of the PEA, 2000 respected? If not what are the consequences? And what of the OAU observers' report and other reports by election observers both local and foreign? The positions taken by the two

sides on this issue are clear. Counsel for the petitioner submitted that the noncompliance with the provisions and principles of the PEA, 2000 affected the election result in a substantial manner. Counsel for the two respondents submitted to the contrary adding that if any non-compliance affected the election result, this was not in a substantial manner.

Mr. Walubiri for the Petitioner referred to the principles "inherent in" the preamble to the Constitution and the National Directives and State Policy and contended that these are meant to encourage Ugandans to participate in their own governance. (I have reproduced those provisions already in this judgment). Learned counsel argued that it is wrong to rely on the approach adopted in the decisions of ***Ibrahim vs. Shehu Shagari*** (supra) and ***Mbowe*** (supra) because that approach which was based on the number of votes gained by the winner in each petition is at variance with the values underpinning the current Constitution and the current electoral laws in Uganda. Counsel urged us to rely on ***Attorney General vs. Kabourou (supra).*** He submitted that we should base the decision in this case not on the numbers of votes won by the first Respondent, but on qualitative principles, because not all voting by numbers would satisfy our Constitutional requirements and the PEA. That if elections are not free and fair, we must annul the election. Learned counsel argued that in order to arrive at a fair judgement, we must consider the whole electoral process, namely from registration right through to and including events of the polling day. That use of Government property by the second respondent and the declaration of the results must all be evaluated. Counsel urged us to consider certain irregularities and illegal practices; these include the account in the affidavit given by Ronald Tumusiime of Mparo, Kabale District, who was a polls monitor for the Petitioner.

According to Ronald Tumusiime, presiding officers, who are officials of the second respondent, declared at the beginning of the polling that voting would be done in the open. Voting was indeed done openly under direct supervision of presiding officers in that Voters were given ballot papers already ticked in favour of the first Respondent in contravention of S.7 and S.30 of PEA and Arts. 68(1) and 103(1) of the Constitution. There was multiple voting in his (witnesses') presence. There was intimidation of supporters of the Petitioner. On harassment of the Petitioner's agents, Tumusiime is corroborated by Matsiko M. of Rutare, Kabale District, a different area. Again Sande W. of Kitohwa, Kabale District who was the Petitioner's moblizer in two sub-counties of Kabale deponed about harassment of the Petitioner's agents and supporters

by no less a state official than Mr. James Mwesigye, the very Resident District Commissioner of Kabale, who, among other things, encouraged ticking of candidates names under direct supervision of Polling officers thereby violating the cardinal principle of the secrecy of the ballot. In his affidavit Mr. Change Gideon, an election monitor, was told on voting day, by Mr. Dan Kaguta, Deputy RDC for Kabale asked Change to over look the rigging. The witness saw the Deputy RDC give out tacks of cards and money. Of course, Mr. Mwesigye has in his affidavit denied this. Also Benson Bayunyanga, LC2 Chairman, in his affidavit claims that Change was telling lies. He gave no reasons why Change should tell lies. I do not believe these denials. In sum Mr. Walubiri submitted that this type of behaviour by many RDCs, GISOs, by some presiding officers and by agents of the two respondents affected the election in a substantial manner.

Barimenshi Abel of Gitebe village in Kisoro District, who was the petitioner's sub-county agent in Kanaba sub-county was chased away by Habyarimana (and a policeman), the sub-county agent for the first respondent when Barimenshi protested about voting by many non-Ugandans who had crossed the border from Rwanda. Harassment and chasing away from polling stations of representatives or agents or the petitioner in Kisoro is testified to by Ngandura John of Bufumbira county, Ntaho Joseph of Kisoro Town and Twesige Alex of Bufumbira.

There is the harrowing story in Kamwenge District by Henry Muhwezi and other deponents. They describe events, which happened before and on 1 2/3/2001. He talks of torture by Hon. Cpt. Charles Byaruhanga. Similar story by Sam Ndagije who was harassed by Sgt Natukunda, the GISO (Gomborora Internal Security Officer) of Nkinkizi sub-County on polling day. There are the disturbing activities perpetuated in Kamwenge District as deponed to by James Birungi Ozo and Everlyne Nzige. Hon. Captain Byaruhanga has sworn his affidavit accepting that he campaigned for the first Respondent. He accepts speaking to Muhwezi and other deponents. He does not give any reason why supporters of the petitioner should give false evidence against him, incriminating him in the torture and harassment, intimidation of agents and supporters of the petitioner. I believe these deponents namely Henry Muhwezi, James Birungi Ozo, Everlyne Nzige that the Hon. Captain C. Byaruhanga violated the electioneering activities of the petitioner by intimidating, harassing and causing the assault of the petitioner's agents and supporters.

Mr. Walubiri submitted that the deployment and the activities of the army and especially the Presidential Protection Unit (PPU) made the election unfree and unfair. He contended that the arrest of Rwaboni, the killing of Beronda in Rukungiri during the campaign period had far reaching effect on the election. Counsel submitted that even on the question of numbers, there is evidence, in, for example, the affidavits of Twinomasiko's and of Ndyomugyenyi and the analysis by Engineer Mukunzi, to show that the election was effected by numbers. Mr. Kabatsi, the learned Solicitor-General, submitted, On behalf of the second Respondent, that even if this court were to hold that in some instances there was non-compliance, the petitioner failed to prove, that whatever the complaints, the causes of these complaints affected the result of the presidential election at all or in a substantial manner. He contended that it would be absurd to annul the election on proof of minor irregularities or because of the prevention of a small number of people from voting. According to the learned Solicitor-General, the polling would be affected only if a substantial number of voters, such as one quarter or three quarters of the voters, were prevented from voting. He stated that the shooting of one man in one of the districts would be an isolated incident, which could not affect the result. He contended that the Petitioner had failed to satisfy the requirements of S.58 (6) and as such the answer to the 3rd issue should be in the negative.

Dr. Khaminwa, for the first respondent, had earlier alluded to the undoubted importance of this petition which arises, as it does, from the election to the high office of the President of Uganda, who is the Head of State of this Country. Because the petition is the first petition of its kind in the history of this country, he opined that the court must be satisfied that the petitioner has proved his case. Learned counsel contended that all the witnesses for the Petitioner are on his payroll and are therefore accomplices. (Here Learned Counsel appears to forget that the same reasoning would, with greater force, apply to witnesses of his client many of whom are public employees and therefore under the supervision of the first Respondent. Counsel should also know that complaints about the various alleged election malpractices were experienced and foreseen by the rest of the candidates before 12/3/2001. That is why candidates held meetings with, and wrote letters to, Chairman Kasujja). I have already reproduced the candidates' letters dated 7/3/2001 and 9/3/2001. Counsel dismissed the expert evidence of Engineer Mukuunzu who had opined that the result were inconclusive. Counsel contended that the petitioner had to show

that the errors, the mistakes and the irregularities affected the election result in a substantial manner. He argued that because the petitioner got 27.4. % of the votes cast, ipso facto, there must have been free and fair election, and that, in any case, the other four candidates were satisfied with the election results since none of them has petitioned. On this last point I need only say that there is no evidence to show why the other former candidates have not petitioned. I have already held that former candidate Bwengye's affidavit is of no probative value whatsoever except to prove that he too did participate in the presidential election, 2001 and got a very low number of votes. On 13/3/2001 Mr. Bwengye's agents in Kitgum (Oryem William and Opio Faustino) in a letter to the Returning officer, Kitgum District complained about irregularities and malpractices.

Dr. Khaminwa contended that complaints have been raised from only 20 districts out of 56 districts. I don't remember him mentioning every name of the 20 districts. Whatever the case, one of the considerations which must be borne in mind in matters like this about the number of votes gained by any candidate from a particular district is the location of the districts and the population of the voters in such districts. Moreover, 20 districts out of 56 is a large percentage of the population and the land area (about 36%). Some districts are more populous than others. Some have higher numbers of registered voters than others. This should normally be reflected in the votes registered1 barring rigging. Thus the population of Mbarara, Bushenyi or Kabale Districts cannot be compared with the populations of Gulu, Kitgum and Lira Districts. The first respondent got huge majorities in the first three Districts while the petitioner got majorities in the last three yet the number of voters in each case is different for some reasons.

Dr. Khaminwa agreed that there are at least three principles which had to be complied with namely, free and fair election; secret ballot and voting according to the applicable laws and the right of voters to vote. Learned counsel argued that the Petitioner was unable to give figures of the votes he lost because of the subject of complaints. He contended that in terms of article 126(1) of the Constitution, it would be improper for this court to interfere with the will of the people where the turnout of voters was 70.3%. That the allegations in the petition have not been established by evidence as required by law particularly in a Presidential election where the standard of proof is very high: He cited ***Bater vs. Bater*** (1950) 2 ALL ER. I, ***Gunn vs. Sharp*** (1974) 10 B. 809. ***Mbowe vs. Elufoo*** (1967) EA 240, ***Katwiremu's case*** among other authorities. He submitted that the petition must collapse.

Now, ***Katwiremu's decision*** is a High Court decision of this country concerned with a parliamentary election in one constituency. ***Mbowe*** case arises from a parliamentary election in one constituency in the sister Republic of Tanzania. The ***Gunn case*** relates to Local Government Council election in England. ***Bater case*** is a divorce matter. All these authorities arise out of different backgrounds. The common ground in all these cases is the reference to the standard of proof to the ***satisfaction of the Court.*** What does proof to the satisfaction of the court mean? I do not think that in this petition, the events, which occurred in January, February and during March up to and including 12/3/2001, can be ignored. They have a bearing on the results. I have indicated that such events as occurred before the voting day as well as on the voting day matter. The result of an election can be affected as much by events which happened before, as with events which occurred during the Election Day. It is important to review the evidence on the record, which shows that events that happened before included the militarization of the election campaign, by deploying the army, including the Presidential Protection Unit (PPU), throughout the country but with special concentration of the army and PPU in some districts. There is the harassment, arrest and assault of Rwaboni Okwir, the youth member of Parliament for W. Uganda; the special operations in the Districts of Kabale, Ntungamwo, Rukungiri, Kanungu, Bushenyi, Mbarara and Kamwenge, the general country wide harassment and intimidation of supporters and of the agents of the petitioner.

What is the picture, which emerges before 12th March, 2001?

First there is the story narrated by the Petitioner in his own affidavit sworn on 23/3/2001, which accompanied the petition. This was followed by three other affidavits. One of the three was sworn on 5th April, 2001 which is a reply to the first respondent's answer to the petition. The second is supplementary to it and was sworn 6th April 2001. The third affidavit also sworn on 6th April, 2001 is a rejoinder to a reply to that of the second respondent. The Petitioner's complaints are against both Respondents.

The summary of these complaints is as follows:

The first respondent militarized the Presidential election campaign. The first respondent in para 4 of his affidavit accompanying his answer to the petition, deponed that because the police were

inadequate, the government decided to and did deploy security forces throughout the country. The first respondent does not say he personally ordered deployment. He refers to the Government. But he was the Head of State, Head of Government and Minister of Defence though he was a candidate. I take it he gave the orders. He in effect deployed the Presidential Protection Unit in Rukungiri, which spilled over to Kanungu District. The petitioner says that the deployment was done for purposes of interfering with, and in fact did interfere with, the Petitioners' personal electioneering and campaign and security as well as that of his representatives and agents and supporters. The affidavits show that the Petitioner and his supporters and campaign agents were harassed and intimidated; many of his agents and supporters were humiliated, assaulted and some agents or supporters were abducted (e.g. Rwaboni) or arrested by the military men and Major Kakooza Mutale paramilitary group. These facts also appear in the affidavit of Mpwabwoba C., in Rwaboni's affidavit, as well as in Henry Muhwezi's (Kamwenge District). See also that of Arinaitwe Hope alias Tunankye of Ruyayo Kihihi Town Parish (who was an NGO election monitor).

When chairman Kasujja briefed Ambassadors, observers and monitors as late as l0th March, 2001, he mentioned problems he had encountered during the campaign period. These included violence, insecurity, intimidation and harassment. He had asked the President (the first Respondent) to ***restrain the security forces*** from ***perpetuating violence and intimidation.*** In this regard I should observe that I have not seen in the chairman's evidence a suggestion that the Petitioner or his supporters were blame worthy. It is the evidence of Major General Odongo and Captain Ndahura which raise a possibility and only in regard to the events of 3/3/2001 in Rukungiri Town.

Literature on Major Mutate Kakooza's Kalangala Action Group is revealing. It shows the group was determined to succeed during elections at any cost. The harassment by UPDF and PPU resulted into the shooting to death of Beronda on 3/3/2001 and the wounding at the same time of about 14 other supporters of the Petitioner. Captain Ndahura swore an affidavit in support of the respondents. He attempts to deny the claims of the petitioner and his witnesses. Captain Ndahura suggests that UPDF and not PPU were involved. Yet he was there himself. He in any case contradicts Major Gen. Odongo Jeje, who admitted shooting by the army but says that the shooting was by a stray bullet. Further Ndahura blames supporters of the Petitioner. He claims

that the UPDF and police only shot in the air. The Captain does not say that supporters of the petitioner had guns yet the evidence shows that Beronda was shot dead. Who shot? I do not believe this captain.

We have been urged to treat the killing of Beronda and the shooting and injuring of many people as isolated incidents in one district. The killing and the shooting occurred during the height of the campaign. These incidents happened when the Petitioner was campaigning in his home districts of Rukungiri and Kanungu. He was a lawfully nominated candidate. He had both the constitutional and other lawful rights to campaign there. From his account, he actually escaped and had to flee the area. He could not address people who had turned up to hear him. For their own safety he advised them to go home instead of giving them his campaign message. There are witnesses who corroborate his story: Musinguzi for one. Moreover, the incident was reported so widely as to call for taking of Judicial notice. What was the effect? Frightening? Did the effect stop only in Rukungiri and Kanungu? I say no. It spread to other corners of Uganda such as Kamwenge. Many voters and supporters and agents of the Petitioner must have heard of these matters through various media i.e., radio or they must have read about these in newspapers and must have wondered or even got scared. In any case, terror and intimidation is reported in other districts. The terror was persistent and appeared to be orchestrated. I cannot understand how such a defiant and a brutal suppression of electioneering can fail to have substantial effect on voters. The petitioner's affidavit tells how his agents and supporters were frightened. The stories told by Musinguzi James, by D. Kiiza and other witnesses all speak about campaign of terror and the fear of the people. The effect of Beronda's killing and injuring of many other people must have been great. That is why it was reported to General Odongo. People had to flee Rukungiri and sleep at the home of the petitioner or Musinguzi. The petitioner had to flee and go to Mbarara and Kampala.

The principal witnesses for the two respondents who challenge the complaints of the petitioner and his witnesses about harassment, threats, intimidation and beating are Captain Ndahura, Captain Rwakitarate (in respect of Rwaboni arrest), Major-General Odongo Jeje, Major-General Tinyefuza and Lt. Col. Mayombo. The last two concentrate on the Rwaboni story. These two senior Army officers want us to believe that in fact Rwaboni Okwir was their spy in the petitioner's camp and that all they did was for his safety. With all due respect to such senior

officers I do not accept their version of that story. Indeed the story that Rwaboni was arrested for his own safety makes the whole story as ridiculous as it is incredible to believe. Major Kankiriho Patrick of Bihanga Barracks, Ibanda, made an affidavit in support of the 1st Respondent and in rebuttal to those of Betty Kyimpaire1 Kiiza Davis and Birungi Ozo who had sworn affidavits in support of the petitioner to prove harassment, violence, intimidation, terror, which were spread from Rukungiri and Kanungu Districts right into Kamwenge District, Indeed, the major's affidavit contains some information which on closer scrutiny confirms the petitioner's complaints that his supporters were harassed, beaten, arrested, detained, intimidated and told not to vote for him and that these actions affected the election result.

The relevant parts of the major's affidavit deponed on the 7' April, 2001 state as follows:-

1. ***That it is not true as alleged in the affidavit of Betty Kyimpaire and Kiiza Davis both sworn at Fort Portal on the 22nd March, 2001 that four agents of the Petitioner were arbitrarily arrested on the night of the 17th March, 2001.***

2. In reply there to I aver that Kamwenge District is an insurgency area, which is susceptible to and has in the recent past suffered attacks from the Allied Democratic Front Rebels.

3. That in consequence of the above, candidate's agents and mobilizers were urged not to hold late night meetings or activities so as not to get entangled in UPDF operations in the area.

4. That well after mid-night on the eve of the polling day four persons including the said Davis Kiiza, a known Army deserter, were found by UPDF patrol unit to be holding a secret meeting in concealment and were promptly taken to Kamwenge Army detach for questioning.

5. That at the said detach the four persons were interrogated and screened as is the normal procedure with persons suspected of rebel activity and they were promptly released the following morning.

6. That it is not true as alleged that the arrests (sic) were politically motivated or that the said persons were forced to vote for 1st Respondent and in reply thereto I aver that the political

inclination of the said persons was never an issue during interrogation and the detention was purely for security reasons.

7. That it is not true as alleged in the affidavit of Birungi James Ozo that I shot at him in the presence of the LC III movement chairman and two other persons therein mentioned in order to prevent him from campaigning for the petitioner.

8. In reply thereto I aver that on the night of 10th March, 2001 at about 9.00 p.m. while in Ibanda Town I saw the said Birungi Ozo who on setting eyes on me run and quickly mobolized a group of eight unruly youths who surrounded me and were positioning themselves to attack me.

9. That in self-defence, I took out my concealed weapon and shot in the air to scare them away"

The major does not say why the deponents should swear falsely against him. He does not tell where the secret meeting was taking place. Curiously enough the major does not explain why these youths led by Birungi should be so courageous as to wish to attack him. Can ordinary youths attack a UPDF major for no reason? I do not believe the major. If Davis Kiiza was a well-known army deserter, why arrest the others?

Betty Kyirnpaire, Birungi James Ozo and seven other agents of the petitioner have sworn their affidavits in support of the petitioner. They give detailed accounts of what took place on the days proceeding the voting and on the voting day and show that Major Kankiriho is hiding the truth. If, as he claims, he was operating in a dangerous zone, I can't see a whole major moving without escorts and AIDEs at night. The story of being surrounded by youths is false created simply to cover up the terror and intimidation unleashed by the major to innocent supporters of a political dissenter, the petitioner.

Betty Kyimpaire was district monitor in Kamwenge for the petitioner's campaign activities. She gives her impressions of what happened before and on 12/3/2001, the polling day. In paragraph 20 of her affidavit, she sums up the position in the following words:

during campaign I was constantly harassed, threatened and my shop in Kamwenge Town was vandalized, doors shuttered, property looted by a group of hooligans headed by Eric Rugyeranyangi, Kerela, Hon. Captain Charles Byaruhanga, the MP Kibale county"

This MP in his affidavit admits campaigning in Kamwenge for the first Respondent. Of course the Hon. Captain Byaruhanga has denied what Kyimpaire states. But, as I said earlier, I have found no sound reason or any plausible reason on the basis of which this woman and other deponents could accuse the MP and swear falsely against him. I believe that what she has stated in her affidavit represents what happened, namely-violence against, intimidation and harassment of the representatives and supporters of the petitioner.

INTIMIDATION, VIOLENCE, HARASSMENT

There are many other affidavits such as those of Mpabwooba C. of Kanungu and M. Tabanyendera of Kamwenge which support the complaints of the petitioner that his agents and supporters were subjected to exceeding mistreatment, great harassment, violence, intimidation and humiliation. The objective was to deny him supporters and votes. The following is the affidavit of James Musinguzi, himself a regional co-ordinator, which reveals the devastating effect which the degrading treatment, intimidation, violence, harassment and humiliation had on his mind as a regional organizer and voter and on the results of the presidential election, 2001.

"2. That lam a registered voter - ……I was also in charge of Presidential candidate Dr. Besigye's campaigns in the South-Western region of Uganda.

3. That in the course of discharging my said responsibility, the team, which I lead, was exposed to enormous intimidation, harassment and violence throughout the region.

4. That shortly after Dr. Besigye had announced that he intended to stand as Presidential candidate, soldiers belonging to the Presidential Protection Unit (PPU) were heavily deployed in the districts of Rukungiri and Kanungu.

5. That the said soldiers unleashed terror and suffering on the local people believed to be our supporters, and the said people, including Richard Bashaija, Sam Kaguliro, Henry Kanyabitabo and many others complained to me about the harassment, and I forwarded the complaints to the Electoral Commission and Police but no action was taken.

6. That the said soldiers were deployed and continued to harass suspected Besigye supporters up to the elections.

7. That during the entire period of campaigns, Gad Buturo the Gomborora Internal Security Officer (GISO) for Kihiihi Sub-county, Peter Mugisha, a Councilor for Kambuga, Stephen Rujaga, Godfrey Karebenda and many other civilians on candidate Museveni's task force regularly went around with guns threatening Besigye supporters to compel them to support candidate Museveni. We reported their activities to the Electoral Commission and Police and the Region Police Commander, Mr. Stephen Okwaling, who promised to handle the issue, sent a Mobile Police Unit to Kanungu which attempted to arrest the said Rujaga without success. The following day, the said Regional Police Commander was ordered out of the region on the very day that candidate Besigye was to address a rally in Rukungiri town. The district Police commander for Rukungiri had also earlier been withdrawn.

8. That in the absence of any Senior Police Officer in the said town, the PPU soldiers unleashed even more terror and in the process, they shot to death one of our supporters and injured 14 others without any provocation whatsoever. <u>As a result of this terror our agents feared to canvass for support for our candidate.</u>

9. That following our complaint about inflated voter's registers in Rukungiri and Kanungu districts, the Electoral Commission agreed to directly handle the issuing of voters' cards in Rukungiri town to sample the veracity of our complaint and they found that only less than 50% of the cards were actually picked. We demanded that in the circumstances they should handle distribution in the whole sub-region, but this was not done. Instead, on the eve of the election, the Electoral Commission announced that whoever was on the register was

free to vote. <u>As a result in Rukungiri town votes were cast under names which, the, Commission had found to belong to fictious/non-existent persons.</u>

10. That by reason of the foregoing, we demanded that fresh elections be held in Rukungiri under direct supervision of the Electoral Commission, but our demand was rejected.

11. That on the day of elections, I visited Kashojwa, Nyarurambi Kijumbwe and Ntungamwo Polling Centres in Kanungu district and at all these, I found that the polling agents for Dr. Besigye were chased away from the polling area <u>and there was no actual voting since ballot papers were being pre-ticked in favour of candidate Museveni by polling officials who would then direct the "voters" to just put them in ballot boxes.</u> I complained about this to the returning officers but I was disregarded. In fact the GISO of Kirima, in the presence of the Kirima L. C. III Chairman bluntly told me that my complaints were a waste of time as it had already been decided that Dr. Besigye should be allowed not more that 4 votes in Kujubwe parish. Indeed, Besigye ended up with 3 votes from that polling centre comprising of three polling stations, although our agents and scouts alone numbered 15.

12. At the said Kajubwe polling centre, our agents had been chased away but after the so-called "vote count", the said agents including one Sam Kakuru were dragged from their homes and forced to sign the declaration forms in respect of voting which they had not witnessed.

13. That when I arrived at my polling station at Ntungamo, all voters were being given pre-ticked ballot papers to cast in favour of candidate Museveni. I asked for our agents and was told they had been sent off. I traced them to their homes and the confirmed this, and also informed me that voting had in fact started at 4.00 a.m. I went to Butogota Police Station and confirmed that this illegal commencement of voting had been well before the time of voting was supposed to commence.

14. The said malpractices were being done at Ntungamo in the presence of police personnel

15. <u>That in the circumstances. I did not vote since it was meaningless to do, by casting a ballot pre-ticked for me.</u>

16. That I swear this affidavit in support of a petition by Dr. Kizza Besigye for the nullification of the presidential elections held on the 12th of March, 2001.

17. That what is stated herein is true and correct to the best of my knowledge and belief". (Emphasis is added).

Musinguzi's affidavit is one of those affidavits, which were listed down by counsel for the Respondents as objectionable on the general ground that it contains hearsay evidence. The parts containing hearsay were not pointed out. I think that the drafting of this affidavit is rather sloppy. The use of words like "we" and "our" in paragraph 7 and 8 tend to cloud the passages. But there can be no doubt that as one of the Petitioner's Sub-regional campaigners, James Musinguzi experienced, saw and learnt a lot about the violence, humiliation, harassment and the intimidation, all aimed at denying the Petitioner any support in Rukungiri and Kanungu Districts. Results show what he got in his home Districts and the effect of humiliating harassment, violence and intimidation, on the voter can hardly be so clear in these two districts. I have not come across evidence that the petitioner was terribly unpopular in these home districts. So how come he got such a low vote? Terror.

One of the key witnesses for the first respondent about what happened in Rukungiri and Kanungu is Captain Ndahura. Captain Ndahura in paragraph 25 of his affidavit sworn on 4/4/2001 in support of the first Respondent only denies Musingunzi's averments in para 8 of affidavit. However, Ndahura accepts that there were clashes at the relevant time between security people and representatives and supporters of the petitioner. Captain Ndahura carefully distances PPU from the scene of the shooting of Beronda by placing there the police and UPDF. In his affidavit, he refers to affidavits of ten other deponents and who are the Petitioner's supporters, claiming that they speak falsehood. He does not give a single reason why any of or some or all these witnesses should "tell lies" against him or any other person. Indeed, all the ten deponents do not originate from the same home or the same village, but rather, they are people from different places and homes in the Districts. It is a pity that none of the key witnesses for either the petitioner or the Respondents except D. Arinaiitwe was called and cross-examined on their affidavits. This might have enabled us to form impressions of the witnesses. As none of the important witnesses has appeared physically before us, I have been unable to benefit from

physical presence of witnesses to form opinions. I now rely on comparisons of stories given by various witnesses and reason and logic. Therefore unless a sound reason is given to show that a witness is lying or unless what he/or she says is inherently or incredibly improbable, I have to accept the story.

Moses Tibanyendera in his affidavit describes how, since February, 2001, he and other agents and supporters of the petitioner had been threatened with death and how they were persecuted and harassed by the Hon. Captain Byaruhanga, his escorts and other agents of the first Respondent who demanded that he (Moses) should denounce the petitioner and join the camp of the first Respondent. Hon. Captain Byaruhanga, another key witness for the Respondents, has sworn his affidavit to deny this. However, like Captain Ndahura, in his affidavit, Byaruhanga does not offer any reason to explain why these witnesses should swear falsely about him, a Member of Parliament, and his escorts. He himself indicates that he knows these witnesses. There is no obvious and rational basis upon which I can disbelieve their evidence.

Again in his affidavit, Kiiza Davis, another agent of the petitioner in Kamwenge District, describes his arrest by LDUs and his detention on 11/3/2001 on the orders of a Lt. Richard of a UPDF detachment in Kamwenge Town. He and another agent called Faida Charles were put in a trench. He was put in a trench along with his brother. He was guarded by two soldiers. On 12/3/2001 Lt. Richard ordered presiding officers to tick a ballot paper which was then given to Kiiza to vote at Kamwenge PS Block one. Kiiza's voting was under the supervision of two soldiers. This is demoralizing and dehumanising treatment during an exercise of a democratic right guaranteed by our Constitution and our electoral laws.

From the same Kamwenge District, there is James Birungi Ozo who was himself the District monitor and campaign co-ordinator in Kamwenge District for the petitioner. In his affidavit, he narrates his experience and the ordeal he and his colleagues went through because of supporting the petitioner. The affidavit highlights what went on before and during the polling day. It states, in part that:

"2. I was appointed a District Monitor by Col (RTD) Dr. Besigye Kiiza - the petitioner

3. That as a District Monitor I was supposed to monitor and observe the election in Kamwenge District on behalf of the Petitioner.

4. That I was informed by Kahesi Slaya a supporter of the Petitioner that the LC III Vice Chairperson a one Bwengye stuffed 300 ballot papers ticked in favour of Museveni Yoweri Kaguta in the ballot box during the election at Busing ye Primary School polling station.
5. That Slaya was supposed to be a polling agent but his appointment letter was confiscated with (sic.) Davis Kizza by the Army.

6……..

7. At the same station I found the Presiding Officer a one Mwesigye ticking ballot papers for voters and would thereafter give them to the voters to cast in the ballot box.

8. That the said Presiding Officer - Mwesigye is also an LC II Chairman.

9. That I complained to the Police and the Returning officer a one Mr. Nkata whom I found at the District offices. The Returning officer sent his Assistant and the O. C Station of Kamwenge Police Station to investigate the matter.

10. The 0. C. Station ordered for the arrest of the Presiding officer but was stopped by the Assistant to Mr. Nkata because there was no immediate replacement.

11. That I also saw counterfoils of the ballot books destroyed in front of the Presiding officer.

12. At Kakinga polling station at around 3.30 p.m. I found the Parish Chief removing the votes cast for the Petitioner from the ballot box, using sticks inserted into the box.

13. That the said Parish Chief being assisted by Abdalla were standing at the ballot box and would check all ballot papers ticked and those ticked for the Petitioner would be torn.

14. That one of the voters whose ballot paper was torn complained to the Presiding officer who called in the Police which instead wanted to arrest the complainant that he was disrupting the election.

15. That at this polling station there was no polling agent as his letter of appointment had been confiscated while in the possession the Parish Coordinator who was beaten and went into hiding the night before the election.

16. That during the campaigns on 8th March 2001 I was shot at by Captain Kankiriho the C/O Bihanga Barracks in order to prevent me from campaigning for the Petitioner. That the shooting was in the presence of Peter Byomanyire and Engineer Dan Byamukama and LC Ill Movement Chairman for Ibanda.

17. That the LC ill Movement Chairperson is the one who identified me to Captain Kankiriho who had prior knowledge of my campaigning for the Petitioner.

18. That fortunately the bullet shot did not hit him but passed by my legs as I entered my car and drove off.

19. That I reported the incident to Ibanda Police Station where I made a statement and a file was opened and was told that they will investigate the matter.

20. The earlier in the day of 8 March 2001 I was stopped from campaigning for the Petitioner by armed UPDF Solider at Matsyoro Trading Centre. The team I had comprising of about 7 persons were surrounded and ordered to leave at gun point

21. The supporters were sent away and the rally stopped.

22. That on the same day 5 other agents (Ntara Sub-county Task Force officials for the Petitioner) were arrested by the GISO a one Lauben and detained at Ntara Police Post and later were released without any charges preferred against them.

23. The Chairman of Kahungye Sub-county Task Force a one Gervazio was attacked at his home by armed UPDF Soldiers and LCs and his house was burnt and there after went into hiding."

In the rest of the affidavit this witness talks of the effect of the harassment: Gerrazio could not help in cleaning up of the registers nor could he monitor elections on 12/3/2001. The witnesses

also talks about what happened to Muhwezi Henry who was beaten up by bodyguards of Hon. Captain C. Byaruhanga. I have seen the affidavit of Mubimbura Milton who says he was the O.C. Kamwenge Police Station by 12/3/2001. He denies complaints made by Betty Kyimpaire and James Birungi. He however accepts receiving reports of electoral malpractices and he visited the area concerned. There can be no doubt therefore that these two witnesses experienced problems.

Even if it can be said that some paragraphs contain some hearsay evidence, in this affidavit, the deponent sets out what appears to have been a tensed up and terrifying situation in Kamwenge District notwithstanding what Major Kankiriho says in his affidavit. I note that the major accepts the arrest of the agents of the Petitioner. The major's affidavit doesn't say where and in which place and the manner in which Kiiza's group were concealing themselves. If Kiiza was a well-known deserter, as claimed by Major Kankiriho therefore, apparently left free, why was it necessary to arrest the others? Is it not reasonable to infer that Kiiza was arrested because of supporting the Petitioner? It is hard for me to believe Major Kankiriho that in his position and rank in the UPDF, a few youths would be so daring as to surround him and threaten his very life or security knowing that he was a senior army officer in an area where supporters of the petitioner were being hunted down.

The chart provided by the respondents listed Silver Mugenyi as their witness whose affidavit was to answer the averments of Kiiza, Nzige, Tibanyendera, Abigaba, Kyimpaire and Musanga but I have not been able to trace Mugenyi's affidavit on the records I got.

Be that as it may, as a result of the harassment, and the election result clearly shows, the Petitioner lost. In this respect Louis Otika, R. Tumusiime, Bwabwooba Calisti and others give corroborative evidence that the loss was due to intimidation, harassment, detentions, beatings and the threatening of the petitioner's agents and supporters as well as to violence and cheating on the voting day. I believe that this is a correct inference.

Wilfred Nalusiba tells an interesting story. He was the petitioner's representative in Makerere 1ll. On 26/2/2001 he found Dirisa a polling official and LC.1 had "62" certificates of voters and 2 voters cards hidden in a box- He eventually reported him to Kalerwe Police Station. Dirisa was arrested. When the witness was following up the matter, three people from "the President's

office" wanted to take him away. For his safety he was detained at Police Station. Dirisa admits the possession of the documents and his arrest by Police. DPC S. Ekollot in effect confirms detention of Winfred. The DPC thinks that the incident was due to procedural error and not malpractice. The DPC also confirms that later N. Nalusiba and an Army officer called James were arrested because of threats presumably arising from Nalusiba's report.

LOYALTY OF MAJOR RABWONI OKWIR

The second complaint is about the harassment, intimidation, brutal and degrading mistreatment of retired Major Rabwoni Okwir, the petitioner's National Task Force leader for youths and students. On 1 9/1/2001, according to his affidavit, he went to Rukungiri District to consult petitioner's agents and supporters. He was arrested twice at different meetings. At the last venue, Rugyeyo Sub-county, no less than 1 2 guns were pointed at him and the other group in the rally. The soldiers under Captain Ndahura threatened to shoot Rabwoni because of campaigning for the petitioner. The meeting was dispersed. On 1 9/2/200 1 he was forced to sign a false statement to the effect that he had deserted the petitioner.

On 20/2/2001 at Entebbe following a confrontation between him and the Petitioner on the one hand and on the other hand, the military police, led by Capt. Rwakitarate and the UPDF, ending in that degrading treatment. I call the arrest degrading because before Rabwoni was arrested on 20/2/2001 he was seized and carried by several soldiers who threw him onto a pickup. They beat him and sat upon him. I believe Rabwoni's story that he was forced to sign the false statement on 19/2/2001 withdrawing his support for the Petitioner; I am not convinced by the contents of the affidavit of Lt. Col. Mayombo and Major General Tinyefuza that Rabwoni Okwir was in the petitioner's camp to spy on the camp. If that were so, he could not have continued to denounce the 1st Respondent and Lt. Col. Mayombo even when he is in the United Kingdom as his affidavit suggests. The contents in Rabwoni's affidavit and the story of Henry Muhwezi's experience support the inference that the Petitioner's agents, particularly in Western Uganda, were being brutally forced to denounce the Petitioner.

The claim that Rabwoni Okwir was arrested and detained because of his (Okwiri's) own safety is very far-fetched and as unsound as it is incredible and ridiculous. The evidence of Major Okwir,

Hon. Winnie Byanyima and that of the Petitioner about the arrest and humiliation of Okwir at Entebbe Airport is for all- purposes and intents corroborated by the first Respondent in his affidavit and in many respects, if only indirectly by, Major Gen. Tinyefuza, Lt. Col. Mayombo who swore affidavits to support the first Respondent. Rabwoni in his affidavit narrates the suffering he went through from the time of his arrest at Entebbe on 20th February until he left the country on 27/2/2001. He had meetings on 20tI and 21st while restricted, with Mayombo Tinyefuza, Odongo Jeje and Elly Tumwine who made him make the false statement purporting that he had withdrawn support for the petitioner. He asserts that on 21/2/2001, the first respondent spoke to him on telephone from Gulu and tried to convince Rabwoni to leave "that wrong group" and promised to take care of Rabwoni's interest if he went abroad. The first respondent admits he had a telephone conversation with Rabwoni but denied that he tried to convince Rabwoni as stated. First Respondent then advised Rabwoni to get leave of the speaker to go abroad so that Rabwoni continues to draw his parliamentary allowance. The first respondent said that in talking to Rabwoni, he wanted to find out who between Tinyefuza and Rabwoni told the truth, concerning the statement of the withdrawal. Here there are some points to note. We are not told who initiated the telephone talk. Second I do not see a sound reason why the first respondent was interested in knowing who between Rabwoni and Tinyefuza was telling the truth about whether Rabwoni had said that he was or he was not withdrawing from the petitioner's task force. In the circumstances prevailing at the time and considering what Rabwoni had been subjected to in Rukungiri on 19/1/2001 and 19/2/2001 when he went there to address supporters of the petitioner, I think that the first respondent would have been happier to hear that Rabwoni, who was one of the top leaders of the petitioner's National Task Force, being in charge of youths and students, had deserted the petitioner. I doubt very much if there is any leader who would not want to have youth and students on his side. I also think that it fits in well if arrangements were made at that time for Rabwoni who was, apparently becoming more and more controversial and perhaps unwilling to leave the petitioner to go out of Uganda. I would therefore, with the greatest respect to the first respondent, prefer the version given by Rabwoni to that given by the first Respondent. From the look of things it is apparent that Lt. Col. Mayombo, Major General Tinyefuza and Major Generals Elly Tumwine and Odongo Jeje would prefer that the first Respondent should win the presidential election. It would be natural for them to do what is possible to make Rabwoni desert the petitioner. I am not persuaded that whatever the four

senior army officers did, they did it for nothing outside the creation of smooth passage for the success of the first Respondent in the presidential election.

The affidavit of many witnesses' leaves no doubt in my mind that the campaign of humiliation, intimidation, violence and terror was deliberate and was aimed at disabling the Petitioner personally or through his agents and representatives from affective electioneering and campaigning. This humiliation, intimidation, violence and terror were so much that the Petitioner had to personally ask chairman Kasujja to intervene.

I have perused the affidavits of John Kisembo, former Inspector General of Police, of Lt. Col. Mayombo and of Major General Jeje Odongo including his (Jeje Odongo's) press release dated 9U March, 2001. With the greatest respect due to such high-ranking officers, I am not satisfied, nor am I persuaded, that there was real security need to involve the army and the Presidential Protection Unit in the election in the manner shown. Nor do I find the so-called inadequacy of the police a satisfactory reason. I take it that because the army had been used since 1987 in the Currency Reform exercise, in 1989 during NRC expansion, in 1992, during the RCs elections, in 1996 during Presidential and the Parliamentary elections, and during the referendum of 2000 election, it was taken as routine to deploy the army.

Further because some senior Army officers are said to have campaigned for the first Respondent, who as President and is the Commander-in-Chief of the UPDF, I am not surprised by the contents of the affidavits of the senior UPDF and PPU officers. The army is a disciplined force in which disciple and loyalty is expected among the rank and file.

The commander of the army could hardly be expected to say, nay deny, that there was need to deploy the army. In his press release, the Army Commander correctly admits that the electoral laws do not authorise the army to be involved in the electoral process. He invoked Art.209 of the Constitution as the route through which the army enters the exercise of election. This was also the reasoning of the Solicitor- General. I disagree completely. Art.209 has nothing to do with civil elections.

The Army commander says that in 1998 a joint anti-terrorism National Security Task Force was formed to fight urban terrorism. That there was intelligence information suggesting that some

negative forces against peace were planning assassinations, riots, demonstrations and acts of violence, looting and other criminal acts. There is a possibility that such information was received. There is yet another possibility that the information may not have justified the actions and decisions taken. The conduct of PPU and UPDF in many parts of the country raises doubts about why deployment was ordered and effected. The expression “intelligence information” is amorphous. It can be misused, if it is remembered that the agencies who gather the information are said to be involved in supporting a particular candidate. These agencies are the Chieftaincy of Military Intelligence, ISO and ESO who are said to be involved. Moreover, if there had been threats since 1998, I would expect that there should be more recruitment of more personnel in and training of the police and special branch to equip these institutions for such tasks.

There is ample evidence in affidavits to show that the PPU and UPDF were not confined in barracks or in one place or few places where the first Respondent, as President, was electioneering. Captain Ndahura who is part of the PPU in his affidavit admits that PPU was deployed throughout the country. The complaints about army involvement and involvement by other security personnel spread across many parts of Uganda. For the foregoing reasons, I find it irresistible to infer that the deployment of UPDF and PPU was for purposes of frustrating the campaign of the petitioner and for promoting the candidature of the 1st Respondent and the objective was achieved. If there is any single factor that I can say had influence on the election, it was the deployment of the UPDF and PPU. They had substantial effect on the election result.

Six Feet In The Ground

The Petitioner further complains that the first Respondent threatened to put the Petitioner six feet in the ground. This probably means killing the petitioner who stated that this threat scared voters. The first Respondent admits making the threat but he says that the threat was not aimed at the Petitioner. Apart from him (the petitioner), there is no evidence from any voters who say that they were scared. The statement is generally vague. It is possible to conclude that the statement was aimed at the Petitioner who must have been apprehensive because of this threat that must have affected his freedom of movement, the effect of the threat is minimal, I think. Moreover its vagueness leaves many interpretations to be put on it. Consequently I think that it does not amount to anything.

INCUMBENCY AND USE OF STATE PRIVILEGES BY 1ST RESPONDENT

Another bundle of complaints concerns INCUMBENCY and the use of state privileges by the first Respondent, which privileges are considered to be disadvantages to the Petitioner. In his main affidavit, the Petitioner referred to the incumbent's privilege of use of PPU and the Army. In the subsequent affidavit of 5/4/2001, the petitioner amplified this and referred to the various privileges, which arise from being an incumbent President. Apart from naming the date of the meeting between the first Respondent and teachers on 5/3/2001, the petitioner did not give dates on which contracts for roads were signed, salaries revised. But dates are not material, as they are not disputed.

The use of incumbency includes abolition of health cost sharing in Government health units and units run by Local Governments. It is true that Hon. Kiyonga Minister of Health in his affidavit of 7/4/2001, states that government has been engaged in debating the question of the abolition of health cost sharing for the poor. However the petitioner's complaint is specific. The abolition was announced, strategically, during the prime campaign time. Increase of salaries for medical workers, as well as the offer to increase pay to teachers was also made during the same prime period of the campaign period. Moreover, for the teachers, it was announced at a special gathering of the teachers' conference in Kampala (on 5/3/2001). Hon. Mukiibi attached to her affidavit a copy of the budget speech of the Minister of Finance for 2000/2001 financial year. Paragraphs 78, 79, 80, and 81 of the speech discussed proposals about the increment of salaries and salary arrears and pensions and categories of teachers and middle rank professionals. These paragraphs are vague in terms of when the implementation of salary increases or revisions would take place. The complaint though is not against the increase of salaries or pensions. It is the mode of announcing, which is questioned. Now the reasoning for the complaint appears to me to be that if the Ministries of Public Service and of Finance have budgeted for these salary increments, the minister should have implemented the budgetary provisions instead of causing it to be announced during the peak of the Presidential election campaign. At such campaigns, the announcements take on a new face, to wit, that it is the 1st Respondent who has caused the payments to be made and therefore voters should be grateful.

The other complaint is that the first Respondent, as incumbent President, caused his campaign agent, the Hon. Engineer John Nasasira, Minister of Works, Transport & Communications, to hurriedly and publicly, in the presence of voters, sign contracts for the tarmacking or upgrading of several roads, namely Busunju-Kiboga, Kiboga-Hoima, Arua/Pakwach and Ntungamwo-Rukungiri Roads. The Hon. John Nasasira in his affidavit denied signing the contracts but admitted that he attended the signing by Permanent Secretary. He admits that contracts were signed publicly, as it is always done. The Roads in issue are included in the 10 years country programme which begun in 1996. It is the public signing of the contracts in the public and during the peak campaign period, which is questioned. There are no explanations given why the signing was done during the campaigning.

Dr. K. Kiyonga who is Minister for Health, Hon. Mukiibi Minister of State for Public Service and Major Gen. Jeje Odongo and the former/IGP and others have sworn affidavits defending the decisions and actions taken by the Government or by the first Respondent during the campaign period. I think that management of public affairs in a democracy needs to be done fairly and in a transparent manner. Excessive exploitation of incumbency certainly amounts to unfairness. In my view here was an example of unfairness.

DEMOCRACY AND THE ROLE OF UPDF, PPU, ESO, ISO

I have already found that there was no justification for involving the army in the election exercises. I have said and I repeat that the fact that the army was involved in previous national exercises, namely the Currency Reform in 1 987, in the election to expand the National Resistance Council in 1 989, the elections of Local Councils in 1 992, the Presidential election and Parliamentary elections in 1 996 and the Referendum in 2000 is not good enough reason for persisting in deploying the army during a purely civilian presidential election. Article 209 of the Constitution does not authorise deployment of the army for civil elections. It does not matter to me that the decision was taken at the highest level by the National Security Council. This council which is a constitutional institution (article 219) is chaired by the President of Uganda. In pursuance of that Article, Parliament enacted the National Security Council Act 2000, which sets out membership and functions of the council. The Council is chaired by the first Respondent by virtue of his being Commander-in-Chief of the army and the Head of State. Several Ministries

are members. Composition of the Council may be a matter of policy. But I note that Major General Jeje Odongo, as commander of UPDF, the Inspector General of Police, the Directors General of ISO and of ESO and the head of Chieftaincy of Military Intelligence, are among the officials who constitute the Council. The Petitioner complained that persons from the military, the military intelligence and ISO were prominently involved in intimidating and harassing himself, his agents and his supporters. Rabwoni's story fully supports him. So I think, does the affidavit of Captain Rwakitarate. Incidentally because of the method of the hearing of the petition, it was not possible to find out what military intelligence was received by the Army Commander, the Head of the Chieftaincy of Military Intelligence or the Inspector General of Police on the basis of which the Council decided to deploy the army. It may be noted here that the country was not under an emergency nor under a threat of sudden invasion.

I have already said that there was more than enough time to enhance the capacity of the police to man the recent presidential elections. I have great respect for heads of institutions, in this country, but I find it difficult to accept that the Council chaired by a candidate in a presidential race would be so objective in its considerations and arriving at its decision about not to deploy the army during electioneering. In the same manner, where members of ISO, intelligence and other military intelligence personnel are accused of involvement in partisan campaign, it is practically difficult for senior officers of the Army, of ISO, or Chieftaincy of Military Intelligence to be objective and deny honestly the deployment of their members of the respective institutions. The presidential election exercise was a test of the observance of democratic behaviour. This behaviour demands that voters must be afforded maximum freedom to make a choice from the six candidates. No democratic choice can be made freely when members of UPDF force the voters how and for whom to vote. That means it is the Army Personnel who voted for would be voters.

The facts so far disclosed do not convince me that it was necessary, as stated by Major General Odongo and Captain Ndahura to permanently deploy the PPU in any part of the country throughout the presidential election campaign. Nor am I persuaded that the Petitioner's witnesses are telling lies. No sound reason has been advanced or offered as to why the supporters or agents of the Petitioner should falsely tell lies about the people and officials who have been implicated. There is no question of mistaken identity. It cannot be said that these witnesses are motivated by

sheer support for the petitioner. This is because complaints were raised before the Election Day. Henry Muhwezi reported his horrifying abduction and torture to Kamwenge Police Station. Many others did the same. Muhwezi could not have reported a lie to the police knowing it will be investigated and the truth would come out. Nor could the other witnesses. The Police would investigate and take action against anybody telling lies. Moreover police were cowed. The O.C Kamwenge Police Station (already referred to) arrived at the scene after the evil had been done.

I expect the PPU to be disciplined, considering the fact that they protect the Head of State. It should be mobile and moving from place to place likely soon to be visited by the President. It is most unconvincing for Captain Ndahura, as an officer-in-charge of part of the PPU, stationed in Rukungiri/Kanungu, to claim that his unit was always in camp, when in the same breath he states that he and his unit helped in dispersing an alleged illegal rally of the supporters of the Petitioner in Rukungiri. He dispersed a rally to be addressed by Rwaboni Okwir. Is Captain Ndahura not now saying, and in effect proving, that actually he was deployed to harass agents and supporters of the Petitioner? That is what Hon.

Captain Byaruhanga and Sgt. Natukunda, the GISO man in Nkikinzi Sub-county did. That is a witness for the first Respondent. I have no sound reason to believe neither Captain Byaruhanga nor Sgt. Natukunda. I find it ironical that in an exercise of democracy, that exercise is more or less supervised by the military.

The Presidential Elections Act, 2000 permitted the Petitioner personally or through his agents, representatives and supporters to canvass for his election during the campaign period. Yet Captain Ndahura's statement is part of the clearest testimony to the effect that the PPU and, indeed the army, were deployed in the country side for purposes of decampaigning the Petitioner and for the purpose of promoting the cause of the first respondent. This is clearly the height of unfairness and illegality. The police should be given the training and opportunity to do these things. Nobody has explained why this was not done or attempted. There exist a local police (askaris) in Local Governments. These should be called upon, given refresher or proper training and not the army, to assist in matters such as elections. I am not convinced that it was necessary to call in the army. If there were any serious threats then the army should have been alerted and left in barracks but not to be unleashed upon voters.

There is one remarkable matter, which has not been explained and which I find pertinent to mention. It is evident that in areas of Northern Uganda, and some parts of Eastern Uganda and Central Uganda, where brutality against the representatives or agents and supporters of the Petitioner was minimal or least, the Petitioner got most votes. Yet the opposite is true in areas of Western and most populated areas where there was much brutality, intimidation and harassment. The sound explanation appears to be that brutality affected the election and this indeed in a substantial manner, in my opinion.

The evidence on acts of the Government officials and the 1st Respondent during Presidential campaign is strong on some aspects but weak on others. On signing contracts to construct roads, I think that that was politicking by the 1st Respondent and his ministers. I have looked at the 1 0 years road development programme. I noticed that almost all roads in Uganda are included; three of the four roads questioned by the petition are scheduled for Financial Year 2001/ 2002. While implementation during this current financial year was envisaged, the work on the roads was incorporated in the campaign manifesto of the first respondent for implementation after his election.

What is remarkable, though, is the ostensious style of signing of the contracts for tarmarcking and or upgrading the roads. It is the fashion it was done, which is correctly interpreted to mean that it was intended to win votes for the first respondent. On the authority of the Tanzanian case of ***Kabourou,*** the decision to announce work on the roads during the height of campaigning is not in keeping with normal Government operations. It is out of the ordinary Government business. It was done in favour of the first Respondent. It was done unfairly. It violated the principles of fair play in an election, which is supposed to be conducted under a democracy. I gave considerable thought to this matter especially on the possibility that to accept the opinion, I have just expressed, may amount to undue restrictions on government ability to conduct its programmes. My view however is that the Government had more than the election time in which to implement its policies. To implement as it was done here amounts to dangling a carrot before the voters. Therein lies the evil.

I know it is proper to award salaries and other benefits to employees of the Government. But it does not require much imagination to conclude that:

(a) the award of salary increments for teachers during the conduct of their (teachers') conference, in any case why the candidate himself? Why not a civil servant.

(b) for medical personnel during campaign period just before the election was all aimed at getting votes.

I think also these actions were intended for nothing other than catching votes. The same reasoning applies to the reduction of graduated tax and the abolition of health cost sharing. Ugandans have been paying graduated tax for a long time. Health cost sharing has been in operation for some years. The timing of implementing or abolishing some of these things couldn't have come at a time so convenient to the first respondent as the incumbent president.

Of course counsel for the first respondent has argued that these decisions and the actions as taken were part of government programmes and they were done or decided upon in the course of government work. I cannot agree. I share the views expressed in the ***Kabourou case*** (supra) that the actions and decisions taken during the prime of presidential election campaign were out of regular and ordinary Government work. They deliberately targeted voters; It was intended to show to voters that the 1st Respondent was a performer. These decisions weighed heavily in favour of the first respondent and quite unfavourably against the Petitioner. Bearing in mind the virtues of our constitution to the effect that all people of Uganda shall have access to leadership positions at all levels, subject to the constitution (see National objective [I (ii)], it is wrong and improper for any incumbent in a political office to use incumbency unfairly and to the disadvantage of competitors. It is in the interest of the public good that an incumbent holder of any office should not be allowed the temptation to misuse his power for his own interest.
It has been argued that the number of votes gained through these actions cannot be counted nor can their effect on the campaign be ascertained. I say clearly they must be substantial. The whole thing was wholly unfair and I think that this affected the election in a substantial manner.
In our decision delivered on 21/4/2001, we answered the first issue and the second issues in the affirmative. I have given my reason why I concurred in answering the first and second issues in the affirmative. In my reasoning on the first issue I have showed that more sections and not only S.25 and 28 of PEA were breached.

DEFICIENCIES OF ELECTORAL COMMISSION

The letters to and fro Chairman Kasujja shows that his Commission was not up the mark organizing the presidential election 2001. One obvious examples is that the Chairman and his Commission decided arbitrarily to reduce the period of display of the voters registers from 21 days to 3 days which, because of the intervention by candidates, was eventually extended for a further two days. I do not believe in the least that the Commission has got any powers whatsoever under either S.38 of ECA or under any other law to abridge the period of display.

The power that the Commission has is to extend time. And this is for good reasons, namely to enable candidates, their agents, supporters and voters to scrutinize the registers for purposes of the clean up exercise, among other things. The expression "or otherwise adapt any of those provisions" appearing in section 38 must be construed ejosdum generis so as to refer to things which are similar to "extended" or "increasing," but not the other way round. By abridging the display period, the Commission defeated the very spirit and purpose of the section, which is to help voters and candidates to inspect the registers in good time. The abridgement was too arbitrary and contrary to the provisions and principles of the Act.

SHAM/NEW POLLING STATIONS

It was argued by counsel for the respondents that violation of the provisions of the ECA is no ground for annulling Presidential election. This is not in accord with Article 104 (9). Moreover because of section 2(2) of the PEA, the Electoral Commissions Act, 1997 must be construed as one with PEA.

Let me briefly discuss sham or new stations. The problems arising because of sham or new stations are vividly illustrated in the affidavits of E. Bumezi, Bagenda Bwambale, Ongee Marino, J. Oluka, Dr. Mukasa D. B., D. Odwok, Piwang, R Kwaya Tumusiime Enoch, and Turyamusiima Barnabas of Ntungamwo Town. Before concluding issue No.2, I alluded to the new polling stations in or near army barracks in Kitgum, Gulu, Soroti, Mbarara and Soroti.

It is obvious from the affidavit evidence that cheating was not confined to one or two places or one or two Districts. It was spread throughout much of the country. It reached its height in

Western Uganda especially the districts of Ntungamwo, Mbarara, Bushyenyi, Kabale, Rukungiri, Kanungu and Kamwenge. I would not ascribe most of the malpractices to the deliberate creation of many (1176) Polling Stations at the eleven-hour in various parts of the country. The candidates were informed of the creation on 11/3/2001. In the event, the Petitioner has complained, and I find his complaints justified, that he was unable to exercise effectively his right of appointing agents to look after his interests in new polling stations. The second respondent should or must have known the problems.

Some high-ranking officers such as Mr. J. Mwesigye, the DRC of Kabale, deliberately flouted the electoral law by campaigning even on the voting day at Polling Stations in favour of the first respondent. For this and the involvement of the Army, there are many affidavits, which include those of John Kijumba, Kakuru Sam, Frank Byaruhanga, Patrick Matsiko, Mpabwoowa Calisti, Bashaija R, Mubangizi D, and D. Okello.

There are many witnesses from many areas who witnessed and who speak about intimidation and harassment of the Petitioner's representatives, his agents and supporters. See, for example, Bwambale Kasinini, J. Tumusiime, R Byomanyire, Ngaruye Ruhindi; A. Busingye, Mugamba Abdu, F. Masinde, Tukahirwa David from Mubende, Idd Kiryowa from Mawogola County, Guma Majid from Yumbe, Mubajje S. from Mbale, J. Musinguzi from Rukungiri, B. Matsiko from Rukungiri, Kakuru S; Oketcho Y. from Tororo District, Imon Stephen of Tororo, Okware Stephen of Tororo, Aeko Hellen from Kumi, Kiiza D. and M. Tibayendera and Betty Kyimpaire all of Kamwenge District. I have found the evidence of RDCs unconvincing just as the evidence of policemen like the O.C., Kamwenge Police Station.

Major Kankiriho Patrick, in his affidavit of 7/4/2001, which has already been reproduced, sought to discredit Kiiza B., Birungi and others in regard to the violence, intimidation and the harassment meted out to these witnesses, claiming that these witnesses were holding a concealed meeting. In view of the contents of the affidavit of Birungi supported by other witnesses such as Kiiza and Tibanyendera, the major appears to have been on the lookout for supporters of the Petitioner so as to silence them in order that they stop campaigning for the Petitioner during the final days of electioneering. Another aim was to prevent them from looking after the Petitioner's interests on the polling day.

Ballot Stuffing

There are witnesses who have sworn affidavits about ballot stuffing, interference by LCs, and Presiding officers, under age voters, early voting, multiple voting, aliens voting and lack of Secrecy in voting. Some of these are Ngandura J. and Ntaho J., both of Kisoro, Baarugahare J. of Kabarole District, Birungi James of Kamwenge, Sande and Tumusiime both of Kabale, Matsiko A. of Rubanda county, Change Gideon and Mutungi B. of Kabale Municipality, Etetu S. and Otim H. of Soroti Municipality, Nyangan A. Kol, Ima Stephen, Byaruhanga Yahaya of Busia Town, Ndifuna Wilber of Busia, Kerenzio E. of Kanungu, Kassim Seganyi of Kibuku County, Mulindwa Abas of Pallisa, Guma Majid of Yumbe, Horwad Kana of Arua, Moses Babikinamu of Mawogola, Kasigazi Noel and Hangiro John of Ntungamo, F. Masinde and Kirunda M. of Mayuuge, Tugumisirize Manansi of Mbarara District, Muhairwoha G. of Isingiro, Mbarara and A. Mwanja of Bulowoza, Kigulu, Iganga. These are from many districts appearing too consistent

to be anything but evidence of what took place.

Voting and Voters Cards

There are a number of witnesses who swore affidavits to highlight problems or malpractices relating to voting and voters' cards. These include Sulaiti Kule of Kasese Town, F. Masinde of Mayuuge, Guma of Yumbe, Maliki Bukoli and Ojok D. of Mbale Municipality, Wafidi Amir of Bungokho County, Koko Medard and J. H. Kasamunyu of Kanungu, Kirima Karenzyo E. of Kanungu and Bwambale S. of Kasese Town Council. Again these witnesses are from different districts across the country and each independently speaks about unregistered voters voting and multiple voting and so on.

Chairman Kasujja in his supplementary affidavit of 9/4/2001 and the other affidavit in reply to those of Dr. Mukasa B, of Ndyomugenyi and of Twinomasiko has challenged these witnesses. So has Byaruhanga Moses and others. I cannot tell from Chairman Kasujja's replies that he himself used to go up country. He was in Kampala. Moreover he does not appear to recollect that in the critical month of March he had admitted in his letters of 8/3/2001 and of 9/3/2001 that wide spread intimidation and harassment existed and he had no powers to control the army and PPU

who perpetuated these acts, contrary to his earlier advice. Many of the witnesses mentioned above refer to various acts of malpractices by agents of the two respondents that were committed on 12/3/2001. There is evidence of absence of polling materials even in as near a place as Kampala. (See Kassam), Louis Otika and Dr. Mukasa's affidavits, for example, there was the verbal extension of voting beyond 5.00 p.m. on 12/3/2001, itself evidence perhaps of lack of foresight or absence of competence. This was followed by voting without verifying voters especially by members of the UPDF who never respected the principles of transparency and therefore they interfered with the free will of the voters.

It baffles me how a very serious exercise like a presidential election can be reduced into a sort of farce by announcement that people without voters cards can vote. The consequences are clear namely the disregard of rules which would ensure that unregistered or wrong people do not vote.

Excess Ballot Papers

Dr. Mukasa D. Bulonge headed the election monitoring Desk and electoral process section of the NTF for the petitioner. From his affidavit it is clear that he was closely involved in the arrival and verification of the ballot papers. He has sworn that by the time the election for the President was held, the number of ballot papers was not known. He also shows that even the number of registered voters was not known but the Commission on 11/3/2001 claimed that voters were 10,674,080. Yet after voting the Commission said that the voters were 10,775,836 with an increase number of polling stations.

There is the mysterious printing of excess ballot papers. Nobody therefore knows or is able to tell how many excess ballot papers went into circulation. In his affidavit of 9/4/2001, Chairman Kasujja explained the causes of the rise in the number of voters. Counsel for the respondents were happy to contend that in that case the Petitioner has failed to prove his case and all candidates were affected. In view of the reports of rampant intimidation, harassment and chasing away from polling stations of the Petitioner's representatives or agents in particular, I do not think that it makes sense to say that all candidates were affected by the excess ballot papers. Indeed it makes some sense if complaints were from a few polling stations. Further the former candidate Bwengye was not affected, according to his affidavit. In any case there is no evidence

that distribution of excess ballot papers was given evenly to all candidates. Where new polling stations are created over night, I think that excess ballot papers can be a recipe for cheating, whereas, in this case, there is evidence of cheating in favour of only one candidate. In such circumstances I am unable to accept that the election result was not affected.

Arrest of Commissioner Miiro and Excess Cards

Commissioner Miiro and her two high ranking Commission officials raise yet another complication in electoral process. The full magnitude of the excess ballot papers and voters cards, which may have been spewed out by her group, will never be known. Because at the time we heard the petition there was a criminal case pending against Miiro and the other two officials, we were told that the principle of sub-judice rule bars as from receiving evidence on or discussing the question of her arrest and the cards. I am doubtful whether in the context of the petition this principle still holds good any more. In any case our court and the criminal court are different courts applying different standards of dealing with evidence. Whatever the case the fact that the number of voters cards and ballot papers appears not to be known and the arrest of a Commissioner and senior officers of her staff who were allegedly in possession of electoral materials throws a cloud of doubt about the ability of the Commission to produce a fair and free presidential election. To this must be added the other ugly aspect of the printing of poor quality cards whose security is highly suspect. There is the mystery of the unidentified security people who broke into the data processing centre. Chairman Kasujja attaches no importance to this. On the vote tallying day (13/3/2001) agents of the Petitioner were not allowed at sensitive areas to verify how the tallying was being done. Yet Hon. Bakabulindi, who is no official of the commission and yet he was campaigner for the first Respondent was allowed a prominent seat at the reception of vital information relating to the tallying of votes without let or hindrance. This is evidence of blatant violation of the principle of transparency.

CHEATING

There is ample evidence showing wide spread interference by state officials and by polling officials, such as the returning officers and the presiding officers, whether in Kabale, Ntungamo, Rukungiri, Kanungu, Mbarara, Bushenyi, Kamwenge, Mayuge, Sembabule, Fort Portal, Kasese,

Tororo, Bugiri, Busia, Mbale or Soroti. Thus the interference is sufficiently substantial because cheating was found to have been carried out in many parts of the country. There was the ballot stuffing. The pre-ticking of ballot papers and supervision of the ticking on the presiding officers' table, sometimes in the absence of the agents of the Petitioner. Other times stuffing was done in the very presence of such helpless agents or helpless monitors. Thus Arinaitwe Hope, alias Tunamukye, a member of the Christian Monitoring Team, contended in para 6 of her affidavit that

"I *noticed at the Polling Station where I was monitoring (Kasiiro) many grievous and deliberate cheating malpractices:-*

(i) In many cases individuals were allowed to cast many votes by coming and voting over and over again using other voters' cards given to them there.

(ii) In other cases individuals were handed many voters cards each to vote.

(iii) One particular case specifically is that of All Rugomwa who cast about ten votes ———'

The pre-ticking by polling officials and the supervision of the ticking of ballot papers in favour of one candidate by such officials or other persons, according to affidavit evidence, did not take place in one or two paces only, or in a single district. Further, and what is remarkable is that, there was no pre-ticking in favour of any other candidates; the pattern shows that it was only in favour of the first Respondent. It occurred in so many districts, giving the inevitable conclusion that it was orchestrated. It could not have been by mistake or due to the enthusiasm of a few officials. I do not believe Chairman Kasujja's affidavit and those affidavits of his officials denying this. His agents, especially the presiding officials as much as the agents of the first Respondent are to blame for this. This must surely affect the election result. In the circumstances of this petition in which the petitioner's agents or representatives were either chased away or denied opportunity to verify the votes and cards, it is not possible to establish how many excess ballots and or cards were involved. What we can say is that the petitioner did not benefit in this malpractice and is therefore not to blame. But on the basis of countrywide complaints, the effect on the election is substantial, I think.

Bob Mutebi and the Petitioner on 12/3/2001, at Voting

It was submitted that during the polling day, at Rukungiri, the Petitioner was shadowed by Mr. Bob Mutebi of Media Plus, who deponed that the Petitioner appears to have expressed satisfaction with the election. First of all Mutebi does not disclose who assigned him the responsibility to cover the Petitioner during polling time. Secondly it appears that in the alleged interview, the Petitioner was referring to polling in the Polling Station where the Petitioner voted. That is nothing in the whole electoral exercise. This would not estop the petitioner from complaining. The petitioner was clearly conscious of the heavy presence, in the whole district of Rukungiri, of the army and the PPU and he was not sure about what the election result would be eventually. That is what I gather from the interview, to represent what the petitioner said. I attach no importance to that interview.

ARTICLE 126(l) OF THE CONSTITUTION

I have referred to the confusion surrounding the tallying of votes. Dr. Khaminwa, learned Deputy Lead Counsel, for the first respondent, cited to us Article 126(1) of the Constitution and urged us not to interfere with the will of the people: namely that because of these provisions, we should, as serene judges, behave as if nothing wrong has happened because the majority of the people have voted for the first Respondent. On the facts, his arguments should have been that the majority of the people are deemed to have voted for the 1st Respondent.

Clause (1) of Art.126 states as follows:-

> ***"Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people."***

Perhaps I should here mention that the same Constitution contains our Judicial Oath couched in these words:-

> **"I …swear** ***in the name of the Almighty God/solemnly affirm that I will well and truly exercise the Judicial functions entrusted to me and will do right to all manner of people***

in accordance with the Constitution of the Republic of Uganda as by law established and in accordance with the Laws and usage of the Republic of Uganda without fear or favour, affection or ill will"

Art. 126 (1) does not restrict this Court in doing justice to parties. We are engaged in a democratic process, namely the exercise of doing justice to the parties in accordance with law. I do not think that the people of this country would want this Court to shut its mind, or eyes, to the breaches of the law because the apparent majority of voters have voted in favour of a particular candidate. I think that the norms and aspirations of the people of Uganda would be served most properly by upholding democratic values, principles and the rule of law under which elections are conducted under conditions of freedom and fairness. I may add, with respect, that if this Court hesitates to say that anybody, whoever if it is, has violated any of the laws of this land, this Court would be inadvertently condoning a conspiracy to destroy democracy and the rule of law.

STANDARD OF PROOF AND NON-COMPLIANCE

A number of cases were cited to us by both sides to support contentions about what is or is not :-

(a) proof to the satisfaction of the Court, and

(b) that non-compliance affected the result of the election in a substantial manner.

Art. 126(1) is one such authority. I have already referred to it. Cases cited include: ***Yorokam Katwiremu Bategana vs. E. D. Mushemeza & two others P K. Ssemogerere & Olum vs. At. Gen.*** The other authorities cited included ***Special Reference No. 2 of 1992*** by the ***Public Prosecutor*** (1993) 2 LRC. 114, ***Kawesa vs. Minister of Home Affairs and others*** (1994) 2 LRC.263 and ***R. L. Maharag vs. Att. G. of Trinidad & Tobago, Gunn vs. case*** Sharpe (supra) and ***Bater case*** (supra).

Among the cases cited by the respondents were ***Ibrahim vs. Shehu Shagari &*** others (1985) 2.LRC (Const) 1; ***Charles Mubiru vs. Att. Gen.,*** Constitutional Petition No.1 of 2001, ***Gunn vs. Sharpe*** (1974) 2 ALL ER 1058, Halsbury's Laws of England, 4th Ed, Vol.1 5, and Indian case Law and text books as well as the recent American case of ***Bush vs. Gore.***

It is axiomatic that the petitioner bears the burden of proving that non-compliance with the provisions of the PEA and of the principles of the said Act affected the results in a substantial manner. As indicated earlier in this judgment, this Court has already found that certain sections of the Act and the principles laid down in the same Act were not complied with. I have discussed the situation obtaining during the campaign period and on the polling day. I have held that the conduct of the two respondents and or their agents affected the results in favour of the first respondent. I have also found that the conduct of the agents of the first respondent and the conduct of the second respondent and its agents on 12/3/2001, (the polling day) affected the election result substantially. The question really is how substantial was the effect. I do not think that the case of ***Gore vs. Bush*** (supra) is helpful to our discussions.

SHEHU SHAGARI CASE

In Ibrahim vs. Shagari (supra) the facts were these:

The appellant was an unsuccessful candidate for the election to the office of the President of the Federal Republic of Nigeria held on 6th August 1983, at which the 1st Respondent, Alhaji Shehu Shagari, was returned as having been duly elected to the office in accordance with the provisions of section 126(2) of the Constitution of the Federal Republic of Nigeria, 1979, in that he had a majority of the votes cast at the election and he had not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation.

The appellant presented a petition in the Federal High Court complaining about the election and the return. The substance of his complaints was that in ten states the election was conducted without the voters register; that some registered voters were not allowed to vote while people who had not been registered were allowed to do so; that under-aged children with fake voters' cards were allowed to vote; that the officials of the Federal Electoral Commission in collusion with the police prevented the polling agents appointed by the appellant from performing their duties at the polling booths and at the counting centres; that in many polling stations no votes had been cast but that results were declared in favour of the 1 respondent; that ballot boxes were illegally stuffed with ballot papers and that there was widespread rigging and blatant electoral malpractices in the conduct of the election; that statements of results were fraudulently prepared

and mutilated by the agents of 2 respondent, the Chief Federal Electoral Officer of the Federation and the Federal Electoral Commission.

On account of the aforementioned alleged irregularities and malpractices, the appellant prayed the Federal High Court to invalidate the election of the respondent by reason of non-compliance with the provisions of part II of the Electoral Act 1 982 and to order the 2nd respondent and the Federal Electoral Commission to hold a fresh presidential election throughout the Federation.

At the hearing of the petition, 23 witnesses including the appellant testified for the appellant. In its well-considered judgment, the trial court rejected the evidence of all the witnesses other than four whom it believed as reliable witnesses. The evidence of the three reliable witnesses, namely Alhaji Gambo Gubio, the Executive Secretary of the Federal Electoral Commission, (PW2), Justice Ovie-Whiskey, the Chairman of the Federal Electoral Commission (PW15) and Mr. Asuquo Nya the Returning Officer for the Federation (PW1 ***6), did not assist the petitioner at all. Instead of proving his case, their evidence disproved all the allegations contained in the petition. The totality of their evidence was that none of the serious irregularities and malpractices complained of ever took place in the conduct of the election;*** that all the election returns from all the States of the Federation from which the results of the poll was collated by the returning officer for the Federation in exhibit B were authentic; that the election was ***conducted scrupulously in accordance with the provisions of the Electoral Act and the Constitution and that it was free and fair.***

Mohammed Kuru Goni (PW21) was the fourth reliable witness who testified that he was the Presiding Officer at the Polling Stations BO/l5/E in Maiduguri, Borno State and when he delivered the result, which was 81 votes for the political party of the appellant and 62 votes to the political party of the 1st respondent, to the Electoral Officer at the collation centre the officer asked him to falsify the result by adding figure 1 in the NPN result to read 1 62 votes. The witness said when he refused to do so, the officer ordered a policeman to beat him out of the centre. The witness left the result with the Returning Officer and ran away. The trial court found that there is no evidence the result in question was in fact falsified and it further held that, even if the said result had been so falsified, it would not affect the validity of the election since the

respondent had scored ***12,047,648*** votes while the Petitioner had only **640,928** votes when the result of the poll was declared.

Upon the preponderance of the foregoing evidence, particularly coming from ***the lips of the petitioner's witnesses,*** the trial court had no alternative other than to dismiss the petition. It would not surprise a reasonable tribunal that the Federal Court of appeal also dismissed the petitioners' appeals to that Court.

An election may be invalidated upon the grounds specified by section 122 and 123 of the Nigerian Electoral Act 1982, which provide:

"122(1) an election may be questioned on any of the following grounds that is to say:-

(a) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of Part II of this Act;"

By S.123 (1), of the same Act.

"An election shall not be invalidated by reason of non-compliance with part II of this Act if it appears to the Court having cognisance of the question that the election was conducted substantially in accordance with the provisions of the said Part II and that the non-compliance did not affect the result of the election'

In his petition, the appellant questioned the election on the ground of the second limb of section 122(1)(b) i.e. alleging non-compliance with the provisions of Part II of the Act and also on the ground of section 122(1)(c) alleging that the 1st respondent was not duly elected by majority of lawful votes at the election. The petitioner's witnesses not only failed to prove his case but they proved the contrary. Their evidence established that the election had been conducted in scrupulous ***compliance with the Act and that the 1st Respondent was duly elected by majority of lawful votes at the election.***

Now although in the present petition learned Counsel for the two respondents submitted that the Shehu ***Shagari*** decision is similar to the petition now under consideration, the facts as set out above make the Shagari case clearly distinguishable. A part from the fact that ***Shagari*** won by 1

2,047,648 votes and the Petitioner (appellant) got a mere 640,928, being defeated by a majority of over 11 million votes, the appellant failed to get even the statutory minimum of one quarter of votes in every one of the Federal States of Nigeria. That alone was sufficient to knock him out. Secondly he made the fatal error of calling as key witnesses for his case, three witnesses who were the key players in the election and whom ***he had sued as respondents to the petition.*** They indeed testified on his behalf that ***the provisions of the law, which were alleged to have been breached, had been scrupulously compiled with.***

Thirdly the rest of his twenty-three witnesses, including himself, had been proved unreliable. It was therefore easy for the panel of the trial judges to dismiss the petition and the dismissal was easily upheld by both the Court of Appeal of Nigeria as well as by the Supreme Court of Nigeria.

One of the key witnesses in the ***Shagari case*** testified and was believed that the provisions of the Act which those witnesses administered, had been scrupulously complied with; therefore I think there was no longer an issue to decide whether the election was conducted substantially in accordance with the provisions of that law and whether that non-compliance did affect the result of the election. It was therefore not surprising that Irikefe, JSC, ***found evidence available to the appellant was so palpably unreliable as to reduce the proceedings in Court to a farce.***

In summary in the ***Shagari's case,*** the Petitioner had wholly failed to prove every one of the allegations against the Respondent. On the facts the court found no need to decide the issue of non-compliance affecting the election result and if so whether the effect was substantial.

OTHER AUTHORITIES

In our petition, on 21/4/2001, this Court found that the provisions of sections 28 and 32(5) and the principles laid down in said PEA, 2000 had not been complied with. Moreover I personally believe, as I have indicated earlier and shall further show that the petitioner and his witnesses have established that the non-compliance with the provisions and the principles of the Act affected the result of the election in a substantial manner.

Throughout the trial, Counsel for the present two Respondents relied on the provisions of Sub-section (6) of S.58 of the PEA and contended that the standard of proof required of the Petitioner

to justify annulment of the election is very high. Learned Counsel cited many cases (some common to both respondents); such cases as ***Bater, Gunn,*** Re: ***Kensington*** North Constituency (1960) 2 ALL ER.150, ***Morgan vs. Simpson*** (1975) 1Q.B.151, ***Katwiremu*** (supra).

Sub-section (6) in so far as relevant reads:-

"The election of a Candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the Court:

(a) non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a substantial manner.

(b) …….

(c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."

In the ***Bater case,*** the wife had sought divorce on grounds of cruelty as provided for under the Matrimonial Causes Act, 1950 (UK). Under that Act, a decree of divorce was to be pronounced if the ***Court is satisfied*** that the case has been proved and if the Petitioner had not condoned the cruelty. The Commissioner (Judge) who heard the petition dismissed it because the wife had not proved the charges of cruelty "beyond reasonable doubt". On appeal by the wife to the Court of Appeal on grounds that the Commissioner had misdirected himself, the Court of Appeal upheld the Commissioner. ***Denning. L. J.,*** who attempted to explain the burden of proof, said among other things, that:

"A reasonable doubt is simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion".

The ***GUNN CASE is*** relevant in construing the expression ***"conducted substantially In accordance with the law".*** There at a Local Government election, the returning officer, in accordance with the requirements of the law, gave clear instructions to the staff at each of the ten

Polling Stations to ensure that ballot papers were stamped with the official mark as required by certain local elections rules. Appropriate notices containing instructions for voters were displayed at the Polling Stations. In the event, 102 ballot papers were rejected under rule 43 because they (papers) did not bear the official mark. Of the rejected papers, 98 came from one Polling Station, constituting more than half of the 189 papers issue at that Station. If the votes on the rejected papers had been counted, the two petitioning candidates would have been successful instead of the respondents who had in fact been elected. The petitioners sought a declaration that the election of the Respondents was void on the grounds:- (1) that the election had not been conducted substantially in accordance with the law as to elections within S.37 (1) of the Representatives of the People act, 1949, and (ii) that the errors had affected the results of the election.

The judges who heard the petition held that the errors which had occurred at the Polling Station in question were of such a nature that they went beyond the trivial errors that inevitably occurred at all elections. The errors were substantial and such as to be likely to effect the result of the election, since they had resulted in more than half the voters who had sought to vote at the Polling Station being disfranchised and thus prevented from voting for the Petitioners. It followed that the election could not be said to have been conducted “substantially in accordance with the law as to elections”. Since the errors had in fact affected the results, the elections of the two respondents were declared void.

In the ***GUNN CASE*** the Returning officer had done his duty well. Even notices about voting had been placed in places for voters to see, read and understand what to do. The two petitioners contended that the election was not conducted substantially in accordance with the law because the Presiding officer at the Polling Station omitted to mark the ballot papers. Although the voters were somehow to blame because they could have read instructions from which they could have ensured that a ballot paper was properly marked before the voters voted, the negligence of the Presiding officer in not marking the papers led to the avoidance of the elections. It is true that in that case it is the number of votes in a Polling Station, which affected the results. But the other very material aspect of that case is that the conduct of the Presiding officer was the effective cause of the avoidance of the election. This decision is therefore not quite helpful on the question of the burden of proof.

Among the other cases cited is ***Morgan vs. Simpson*** (1975) 1 QB 151. ***Morgan case*** was also concerned with Local Government elections. Other authorities relied on are ***Mbowe case*** from Tanzania, ***Katwiremu*** Petition (supra), ***Ayena Odongo vs. Ben Wacha*** and others, (Lira High Court Election Petition 2 of 1996) (unreported) ***A. M. Ogola vs. Akika Othieno*** and another ***Tororo H.ct. Eletion Petition 2*** of 1996 (unreported) and ***Returning Officer, Kampala and two others vs. C. Naava Nabageresa*** Court of Appeal Civil Appeal No.39/97 (unreported).
In ***Morgan vs. Simpson*** (supra), the facts, somewhat similar to ***Gunn's,*** were as follows:-
At a local government election, the total number of ballot papers put into the boxes was 23,961. On the count, 44 of the papers were rejected because Polling officials at 18 Polling Stations had ***inadvertently omitted to stamp*** them with the ***official mark when issuing*** them to voters and the omission had not been noticed by the 44 voters. After a number of recounts the candidate declared duly elected had a majority of 11. If the votes on 44 unstamped papers had been counted in, the nearest rival candidate would have been elected by a majority of 7 votes. That candidate and four voters petitioned Court for a declaration, as against the person "duly elected" and the returning officer, that the election was invalid in that the issue of the unstamped papers ***was an "act or omission" in breach of the officer's official duty and that as ft had affected the result, the Court ought,*** under section 37(1) of the Representation of the People Act 1949 to make the declaration. Sect .37(1) reads as follows:

> ***"(1)*** ***No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result."***

The Court dismissed the petition, holding that as the election was conducted ***"substantially in accordance with the law as to elections"*** the fact that a ***small number of errors*** had affected the result was not a sufficient reason for declaring it invalid.

On appeal by the petitioners to the Court of Appeal, the appeal was allowed and the election was declared invalid for though it had been conducted substantially in accordance with the law as to

elections, ***the breach of the rules in omitting to stamp the 44 papers had affected the result,*** and on the proper construction of section 37(1) of Act of 1949 ***any breach of the local elections rules which affected the result was by itself enough to compel the Court*** to declare the election void.

The law embodied in the Act and the rules requires that an election shall be declared invalid where it appears either that it was so conducted that there was substantial non-compliance with the law as to elections or that there was a breach of the rules or an irregularity which affected the result. But where there have been breaches or irregularities, an election will stand only if the tribunal is satisfied as to both the circumstances set out in section 37(1), namely, that it was conducted substantially in accordance with the law as to elections and that any breach of the rules or mistake at the polls did not affect the result.

Lord Denning reviewed many previous decisions on the subject and concluded as follows:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the election.

3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls-and it ***did affect the result*** - then the election is vitiated. That is shown by ***Gunn vs. Sharpe*** (1974) Q.B. 808, where the mistake in not stamping 102 ballot papers ***did affect the result.***

These statements by Denning L.J. seem to apply in these proceedings in so far as the Commission and its officials contributed to the mismanagement of the election exercise.

The decision In the ***Morgan vs. Simpson*** case shows that violation of the electoral law by election officials can and often does lead to avoidance of an election. I may add that in the case

of ***Morgan*** and the ***other English cases,*** it was the actions of the election officials, which contributed to non-compliance with the law, and the burden of proof was the normal one.

Let us look at the Uganda decisions. In ***Y.Katwiremu Bategana vs. Mushemeza & 2 others*** there is one outstanding feature in the petition. Deponents of affidavits in support f the petition as well as in opposition to the petition, were all cross- examined. As a result, the learned trial judge and counsel formed opinions about the parties and the witnesses from what they saw and heard. The judge set aside the election on two grounds, namely:

(g) proof that the winning candidate bribed two voters and

(ii) that the same winning candidate who was the first Respondent had been nominated on nomination day outside the statutory nomination time.

The other allegations were dismissed because they had not been proved to the satisfaction of the Court. The learned judge's view on the burden of proof was that the burden was like in any other civil matter. But he preferred the standard of proof to be ***to the satisfaction of the Court.*** Elsewhere in this judgment I have observed that the learned trial judge wrongly rejected the affidavit evidence because the affidavit was not read out in court. That approach which is wrong waters down the effect of the decision.

In ***Akisoferi M. Ogola vs. Akika Othieno*** and 2 ***others*** (supra) Ouma, ***J.*** who was somewhat ambivalent held that the standard of proof is to ***be beyond reasonable doubt.*** He seems to have been swayed by the fact that on the day when election results were announced, the Petitioner did not express dissatisfaction with the conduct of the election and therefore the Petitioner was ***"estopped from challenging"*** the results subsequently. With all due respect, I think that this approach by the learned judge blurred him from investigating the petition judicially. I would therefore overrule the decision as it represents bad law.

In ***Ayena Odongo vs. Ben Wacha*** and another, ***Okello J,*** as he then was, relied on the Tanzanian case of ***Mbowe*** (supra) and equated proof beyond reasonable doubt as the standard of proof required.

Our Court of Appeal in the case of the ***Returning officer of Kampala and two others vs. C. Naava Nabagesera,*** Ct. Appeal, Civil Appeal No.39/97 (unreported) relied on Uganda cases and ***Mbowe case,*** before holding that the standard of proof must ***be beyond reasonable doubt.*** The effect of the holding in the ***Mbowe case,*** and, the Uganda cases that followed ***Mbowe case,*** is that grounds for setting aside an election of a successful parliamentary candidate set out in S.91 of [The Parliamentary Elections (Interim Provisions) Statute, 1996] Statute 4 of 1996, must be proof beyond reasonable doubt. The Court of Appeal adopted the language of the English Court of Appeal in the ***Bater vs. Bater case*** (supra). Our own Court of Appeal did not find it necessary to discuss whether the trial court (Okello) directed itself correctly on the standard of proof and whether that trial court, correctly applied the standard. In effect this means that the Court of Appeals' considered opinion on the issue of the standard of proof in ***Nabagesera case*** is not definitive and so is not helpful.

In the case before us, learned counsel were content to say that the standard of proof should be to the ***"satisfaction of the Court," meaning*** that it is beyond the standard of the preponderance of probabilities and yet below the criminal law requirement of proof beyond reasonable doubt. This approach is about the same, as did ***Lord Denning*** in the ***Bater case*** (supra).

Draftsmen of legislation appear to be in the habit of sticking to well trodden paths. I say this because the expression of proof to the satisfaction of the Court is used in much legislation (both penal and non-penal) and yet when Courts are called upon to try criminal cases arising under penal enactments, those Courts require the prosecution to prove criminal charges under investigation beyond reasonable doubt. I know it is convenient and perhaps, a matter of practical draftsmanship for legislative draftsmen to follow the old path of precedent. However I wonder why draftsmen of our election laws have avoided the inclusion of the commonly used expression of "proof beyond reasonable doubt" in the various enactments such as PEA. For this reason, I do not, with respect, subscribe to the view that the expression "proving to the satisfaction of the Court" inevitably means proof beyond reasonable doubt. I think it is safer to apply the words themselves and say that the standard of proof required to nullify an election of a President after a Presidential Election, must be proof to the satisfaction of the Justices trying the petition, namely proof so that the trial justices are sure that on the facts before them one party and not the other party is entitled to judgment.

In the present case, I am myself satisfied that the Petitioner adduced enough evidence showing that there was non-compliance with the provisions of the PEA and the principles of the same Act and that the non-compliance affected the result in substantial manner.

From the reasoning in the ***English cases*** and also of Kibuuka- Musoke, J. in ***Katwiremu case,*** and based upon my understanding of the words of section S.58 (6) (C), proof that a candidate committed an illegal practice or other electoral offence.

In many recent Parliamentary election petitions, courts in Uganda relied on Mbowe for the view that to show that results were affected there should be proof of numbers of votes won or lost. I think that each case must be decided on its own facts. In this connection, it is instructive to appreciate the following passage appearing at pages 242G of the EA report of the judgment ***in Mbowe*** case:-

"We now come to allegations (a) and d), which I shall deal with together, because they are closely related and they are the most serious allegations *in the petition. Each of them would constitute an illegal practice contrary to ……S.99. In particular as far as (a) is concerned, had it been proved to our satisfaction it would have gone so deeply into the root of the whole election that it would be difficult,* ***however large the majority might have been, to say that it did not effect the result of the election" Per Georges, C.J. (Emphasis mine)***

The summary of evidence about allegation in (a) and (d) is that the petition alleged that there were campaigns or canvassing at or inside Polling Stations as well as intimidation of voters. The court held that the witnesses who testified about these allegations were not reliable. According to Georges, CJ, as above stated, if witnesses had been reliable, the winning majority of over 13,820 by the respondent in ***Mbowe*** would not have mattered.

FINDINGS ON ISSUE 3

The evidence adduced by the Petitioner has satisfied me that most of the allegations in paragraph 3(1) of the petition have been proved to my satisfaction:

(i) 3(1)(a) that new Polling Stations added or created by the 2nd Respondent were out of time contrary to the provisions of S.28 (1)(a) of PEA.

(ii) 3(1)(b) that contrary to S.28 (I) a of the Act, the second Respondent failed to publish the full list of all Polling Stations in each Constituency 14 days before nomination days of 8th and 9th January, 2001.

(iii) Because of proved facts in (a) & (b), above the Petitioner was disabled from appointing his Polling agents as provided for under S.32 of the Act. This violated the two provisions and the principle of transparency. Therefore ground 3(1) (c) of the petition succeeds.

(iv) The 2nd Respondent failed to supply copies of the Final Voters Register C/S 32(5) of the Act. Therefore ground 3(1) (d) is proved.

(v) The second Respondent contravened Ss. 12 (e) and 18 of the ECA by failing to efficiently compile maintain and update National Voters Register, the Voters Roll for each Constituency. Ground 3(1) (e) succeeds but this appears Pyrrhic victory because S.58 (6) does not appear to make breach of ECA, 1 997 a ground for annulment.

(vi) The 2nd Respondent contravened S.25 of the ECA by failing to display copies of the voters register for 21 days as required. Ground 3(1) (f) must succeed. But because of S.58 (b) of PEA, this is not ground for annulment.

(vii) Contrary to Ss.32 and 47(4) & (5) of PEA, 2000, in many districts such as Kabale, Bushenyi, Ntungamo, Rukungiri, Kanungu, Kamwenge, Mbarara, Sembabule and Kisoro, on the Polling day, during Polling time, agents of the Petitioner were chased from Polling Stations during polling and counting of the votes in the above mentioned districts. As pointed out earlier agents and or servants of the two Respondents in some instances participated in the chasing. Therefore the interests of the Petitioner were not taken care of in such districts as Mbale, Rukungiri, Kanungu, Ntungamo districts. Ground3 (1) (g) succeeds.

(viii) Agents and servants of the 2nd Respondent allowed voting by the army in stations outside barracks, outside statutory time. This contravened the provisions of S.29 (2) and 29(5) of PEA, 2000, and the principle of transparency and therefore ground 3(1) (h) succeeds.

(ix) C/S.30 (7) of PEA, agents/servants of the second Respondent in the course of their duty allowed commencement of the poll without first opening ballot box. This also breached the principle of transparency. Ground 3(1)(l) succeeds.

(x) The agents and servants or presiding officers of the second Respondent allowed multiple voting in the District of Pallisa, Mbale, (Bungokho), Mayuuge, Busia, Iganga, Soroti, Kumi, Kisoro, Kabale, Ntungamwo, Bushenyi, Mbarara, Rukungiri, Kanungu, Kamwenge and Kabarole districts. This contravened S.31 and 71 of PEA. This also violated the principle of one-person one vote. Therefore ground 3(1) (J) succeeds.

(xi) The second Respondent failed to take steps to protect the integrity of the Data Processing Centre in contravention of S.70 of the PEA. This also affects the principle of transparency and fairness. Ground 3(l) (1) has been proved.

(xii) The Petitioner has proved Ground 3(l)(m) in the petition in that c/s.12 (b) & (c) of the ECA, 1997 the second Respondent failed to control the distribution and use of ballot papers in some districts (e.g. the District of Kampala, Kabale, Mbale, Tororo, Busia, Ntungamo, Bushenyi, Mbarara, Sembabule, Rukungiri, Kanungu, Kamwenge and Kabarole). Lack of control enabled the ballot papers to be stolen. This also affects the principles of transparency. Ground XII is proved.

(xiii) The Petitioner brought evidence to prove allegations in para 3(1) (o) of the petition that persons aged below 18 years were allowed to vote in such districts as Kamwenge, Kabarore, Kabale, Ntungamwo, Bushenyi, Mbarara, Kanungu, Rukungiri. This contravened S.19 (1) (b) of the ECA, 1997 as well as S.71 of the PEA, 2000. However the evidence is not of the quality that has satisfied me about the underage voting. So the ground fails.

(xiv) The Petitioner alleged and adduced evidence to prove that contrary to section 32 of the PE Act, the 2 Respondent's agents/servants, the Presiding officers, ***failed*** to prevent the Petitioner's

polling agents from ***being chased*** away from Polling Stations and as a result, the Petitioner's agents were unable to observe and to monitor the voting process. Witnesses include C. Owor, R. Kironde, Kimumwe, Acko H, James Birungi, Sentongo, B. Matsiko, J. Musinguzi and Kirunda. Therefore the principles of transparency, and fairness were contravened. Paragraph 3(1) (p) succeeds.

(xv) The Petitioner adduced evidence to prove that contrary to sections 29(4) and 34 of the PEA Act, the 2nd Respondent through its agents/servants namely the chairman and Presiding officers in the course of their duties allowed ***people with no*** *valid* ***Voters' Cards*** to vote. Witnesses includes S. Kule, Masinde, I. Kiryowa, Ojok D. of Mbale, Kakuru Sam of Kanungu and B. Bwambale of Kasese. This affects the principle that election is for citizens. Allegations in paragraph 3(l) (q) are proven.

(vxi) The Petitioner adduced evidence to prove that contrary to section 42 of the PEA Act, the 2 Respondent through its agents/servants in the course of their duties ***allowed people*** with deadly weapons to wit, UPDF soldiers, LDU soldiers and para-military personnel and other armed people at Polling stations in the districts of Mbale, Palisa, Rukungiri, Kabale, Kanungu, Kamwenge, Soroti, Kabarole, Mbarara, Busia, Tororo, Arua, Iganga and Sembabule Those armed people had no right to be at stations. ***Their presence intimidated many voters.*** See evidence of Kyimpaire, Matsiko, Tibanyendera, Kiiza and Musinguzi's evidence. This affected the Petitioner. The principle of voting under conditions of freedom was violated. Ground 3(I) (r) succeeds.

(xvi) The Petitioner has proved that in the Districts of Rukungiri, Mbale, Kanungu, Kamwenge, Mbarara, Sembabule, Kampala, Ntungamwo, Kabale and contrary to section 47 of the PEA Act, the 2 Respondent's agents/servants in the course of their duties denied the Petitioner's Polling agents ***information concerning*** the counting and tallying process. This also contravened the principle of transparency. Ground 3(I) (s) is proven.

(xvii) The Petitioner has produced evidence by way of affidavits to prove that in the districts of Rukungiri (J. Musinguzi and Kakuru Sam) of Ntungamwo, Kabale, Kanungu, Mbarara, Pallisa, Mayuge, Soroti, Sembabule, Tororo, and contrary to section 47 of the PEA Act, the 2nd

Respondent's agents! servants, the presiding officers, allowed the voting and carried out the counting and tallying of votes in the forced absence of the Petitioner's agents whose duty was to safeguard the Petitioner's interests by observing and verifying the voting, counting and tallying process and ascertain the results. The principle of transparency was violated. Therefore, the allegations in paragraph 3(l) (t) of the petition have been proven to my satisfaction.

(xviii) The Petitioner adduced the evidence of Dr. Mukasa, to show that in the District of Kampala and contrary to section 56 (2) of the PEA Act, the 2nd Respondent declared the results of the Presidential Election when ***all the Electoral Commissioners*** had not signed the Declaration of Results Form B. But as there is no requirement in the Act to that effect, allegations in paragraph 3(l) (u) though proven have no effect on the result.

(xix) The Petitioner produced the evidence of himself, of Kakuru Sam, of Major Rabwoni Okwir, of Winnie Byanyima, J. Musinguzi, of J. Kijumba, Henry Tumusime of Mpabwoowa C. and D. Okello to prove that contrary to section 12(1)(e) and (f) of the ECA, the 2nd Respondent failed to ensure that the entire Presidential Electoral process was conducted under conditions of freedom and fairness and as a result the Petitioner's and his agents' campaigns were frequently interfered with by personnel of the UPDF, including the PPU, and the Para-military personnel such as the group led by Major Kakooza Mutale. The evidence by the first Respondent, by Chairman Kasujja, by Lt. Col. Mayombo, by Major General Odongo Jeje has not disproved this. In the result the allegations in paragraph 3(l) (v) of the petition are upheld as proved.

(xx) The Petitioner proved by evidence of Major Rabwoni, of Henry Tumusime, J. Musinguzi and Winfred Nalusiba among others, that some of the Petitioner's agents and supporters were ***abducted*** *and* ***some were arrested*** assaulted and intimidated by the army to prevail upon them to vote for the first Respondent or to refrain from voting contrary to section 74 of the PE Act. The evidence by Captain Rwakitature, Captain Ndahura, Capt. Byaruhanga, Lt. Col. Mayombo does not disprove petitioner's claim. I find that the allegations in ground 3(I) (w) of the petition have been proved to my satisfaction. The principles of freedom and fairness were violated.

(xxi) The petitioner has proved through witnesses such as Mulindwa of Pallisa, Muhairwoha, J. Birungi and J. Musinguzi of Kanungu, J. Tumusime and Kyimpaire of Kamwenge, that contrary to sections 70 (f) and (j) and S.71 (b) of the Act, some of the 2nd Respondent's agents/servants namely the ***Presiding Officers/Polling Assistants*** in the course of their duties ticked ballot papers in the 1st Respondent's favour and later gave them to voters to put in the ballot boxes; and polling officers interfered with ballot boxes and stuffed them with already ticked ballot papers. This breached the principle of fairness, freedom of choice and the scarcity of secret ballot. Ground 3(1) (x) succeeds.

In summary, evidence has established or proved that various provisions of the Presidential Election Act 2000 (and of the Electoral Commission Act which is now irrelevant for our decisions) were contravened and the non-compliance affected the result of the Presidential *Election in* ***a*** *substantial manner in so far* ***as the PEA is concerned.***

ELECTION OBSERVERS' REPORTS

In paragraph 19 of the affidavit accompanying the 2nd Respondent's answer to the petition, Chairman Kasujja deponed that foreign observers confirmed that the election was held in conditions of freedom and fairness. I have seen five reports of those observers and which were annexed to Chairman Kasujja's affidavit.

The first report is a statement by OAU observer's team. This team does not indicate how long they stayed in Uganda before the election took place. They do not mention places and districts they visited and any credible persons they interacted with to get objective assessment of the freedom and fairness of the election. I therefore attach no importance to their statement.
The second group of foreign observers is from the Nigerian National Electoral Commission. This team arrived here on 8/3/2001 and was received by our Electoral Commission officials for briefing. They appear to have thereafter attended some few rallies in Kampala and Jinja. They don't seem to have visited critical areas in the rest of Uganda, such as Rukungiri, Kanungu, Kamwenge, Mayuge, Mbale, etc. An assessment by foreigners based on a visit to the city of Kampala and the Municipality of Jinja, on the facts of this petition, does not in my assessment

give the report by the Nigerian delegation the kind of importance that satisfies me that the team's report is of any value in this petition.

The third report is by the Libyan Ambassador. H. E. the Ambassador is based in Kampala. Apparently he was able to visit only the City of Kampala areas and Jinja, just like the Nigerians. His report is not signed. He heard about reports of acts of violence and intimidation and loss of lives. He doesn't appear to have investigated these matters. If I were to attach any value to this report, I would say the ambassador supports the allegations of the petitioner regarding acts of violence, intimidation and killing. Otherwise I attach no importance to the report.

The fourth report, which is also not signed, is by the delegation from Tanzania. The delegation did not have time. They observed election process in seven Polling Stations in Kampala central. They also observed counting process in two of those seven Polling Stations. That is all. With respect, I don't know which value can be derived from or attached to their report. None, I think.

The fifth report, which is also unsigned, is by a Gambian delegation, although the team toured the Municipality of Jinja, the delegation remained in Kampala for electoral purposes. Possibly they observed election (voting) process at one Polling Station, Araya Primary School in Kampala. The delegation should have simply said, "we have no valuable report to make." Yet they made a report to which I attach no importance at all.

With respect to Chairman Kasujja, I do not share his confidence that these five reports can in all fairness be regarded as sufficient to support his views that the election was conducted under conditions of freedom and fairness.

I do not attach any significance whatsoever to these five reports of foreign observers, It is not quite clear to me why the foreign observers were unable to reach areas, which mattered in this election. I think that for any foreign and objective observer to get a fair and reasonable assessment of the election, he should have been here in Uganda from about the middle of the campaign period. While here they should travel to various part of the court. In that way they could have observed what was on the ground and might have given credible and objective reports.

CONCLUSIONS ON 3RD ISSUE

Let me conclude on the third issue. Although the idea of affecting the results of an election has revolved around the number of votes gained or lost by one candidate or the other, a study of the decisions of ***Mbowe, Kabourou*** and ***Morgan*** cases shows that other factors can and do affect election result. I think that it is possible in an election which is conducted in accordance with the election law and under conditions of freedom and fairness for the number of votes gained or lost by one or other of the candidates to be the main or one of the main considerations by a Court in deciding whether the number of votes gained or lost affected the election result. If so to what extent? But in a society, such as ours, in Uganda, where the majority of voters are simple and less enlightened about the value of their electoral rights and voting and where the registration exercise is deficient. In such a society where not only the threat to use force against dissenters is apparent and real, but also where actual force is used to suppress dissenters, both high and low; and where that force is used to intimidate or coerce the people and voters who support a particular candidate; where wide spread intimidation, assault, harassment, arrest and detention of dissenters are carried out, definitely, in my view all these circumstances and factors cumulatively go to the very foundation of a free and fair election. The factors constitute circumstances which must surely affect the result of an election not only in an ordinary manner but also, like in this petition where these factors have been proved to be present during campaign and during election of the President, in a substantial manner.

In this petition there is evidence that some high ranking officers of state are among the prominent perpetrators of intimidation, assault, violence, harassment and arrest of both the lowly and the high, who are perceived to be treacherous or dissenters. Reviewing the evidence of brutality particularly in the Districts of Ntungamo, Rukungiri, Kanungu, Kamwenge and Mbarara, the picture that emerges is that of winning the Presidential election after violation of the Constitution and the PEA provisions and principles by threat to use or by actual use of violence instead of winning by persuading and gaining the free will of the people.

We have seen that in ***Mbowe case*** there were allegations in the petition of violence and of threat to deport voters who could not vote for the Petitioner or who were not canvassing for the

Petitioner. The evidence for the Petitioner did not establish the threats and the canvassing. But Georges CJ in his judgment at page 243 G said:

'We ***now come to allegations (a) and (d) — — each of them would constitute an illegal practice contrary to the National Assembly (Elections) (Amendment) Act, 1965, S.99. In particular as far as (a) is concerned, had it been proved to our satisfaction it would have gone so deeply into the root of the whole election that it would be difficult, however large the majority might have been, to say that it did not affect the result of the election*** '

This statement answers the contentions of counsel for the two respondents that because candidate Kiiza Besigye failed to prove the number of votes he lost as a result of the various complaints made in the petition; therefore he must lose the petition.

There is one remarkable feature in this petition. That is that in areas where there was extreme brutality against the Petitioner's supporters, or representatives and agents, the Petitioner lost massively whereas in areas where there was no or less brutality, the Petitioner won. That to me is one of the obvious substantial measures of the effect on the election results, I think.

In conclusion on issue No.3, I find and hold that non-compliance with the provisions and principles of the Presidential Elections Act, 2000 affected the result of the election in a substantial manner.

ISSUE 4

I will now turn to the fourth issue which is whether an illegal practice or any other offence under the said (PEA) Act was committed in connection with the said election by the first Respondent personally or with his knowledge and consent pr approval.

This issue relates to complaints averred in paragraph 3(I)(n), 3(l)(w), 3(2)(a) to 3(2)(f) of the petition. Some of the complaints, namely, the promise to raise salaries for Medical Personnel and for the teachers, the abolition of health cost sharing, the reduction of graduated tax and the signing of contracts to tarmac or upgrade roads or the Sam Kabuga's motorcycle ceremony are

admitted. Explanation in each instance is given by or on behalf of the first respondent to justify what was done.

THE PETITIONER'S CASE

In his petition, para 3 (I) (n) alleges that contrary to section 25 of the PE Act, the 1st Respondent's agents/supporters interfered with the electioneering activities of the Petitioner and his agents.

In paragraph 3(I)(w) the Petitioner averred that the Petitioner's agents and supporters were abducted and some were arrested by the army in order to make them vote for the first Respondent or to refrain from voting, contrary to section 74(b) of the Act.

In para (2) (a) the Petitioner averred that contrary to section 65 of the Act candidate Museveni Yoweri Kaguta publicly and maliciously made ***false statement*** that the Petitioner was a victim of Aids without any reasonable ground to believe that it was true and this false statement had the effect of promoting the election of Candidate Museveni Yoweri Kaguta unfairly in preference to the Petitioner.

In his affidavits, the Petitioner swore that he is a medical doctor, that he is healthy and that he is not suffering from AIDS. Dr. Ssekasanvu in his affidavit to which was annexed scientific information on AIDS supports the Petitioner.

In para 3(2)(b) the Petitioner avers that contrary to section 63 of the PE Act, the 1 Respondent and his agents with the 1 **St** Respondent's knowledge and consent offered gifts to voters with the intention of inducing them to vote for him.

In support of the petition on gifts, there are affidavits from Oren V. and Omalla Ram, both of Tororo District, Tumwebaze A., Turiyo and Mugizi Frank all of Ntungamwo District, John Tumusiime of Bushenyi, Etetu S. of Soroti, Change Gideon of Kabale, Lucia Nagayi of Kampala and Odong Margret, to support this ground. In rebuttal, the respondent produced the affidavits of R. M. Obo, David Keya, the Hon. Capt. Mukula of Soroti, Omuge G, Major Bwende, D. Wadria, Kamya Wilson, B.Kibonero and Musinguzi S. of Ntungamo.

In paragraphs 3(2)(c) of the petition, the Petitioner averred that contrary to section 12(1) (e) and (f) of the Electoral Commission Act, the Respondent appointed Major General Jeje Odongo and other partisan Senior Military Officers to take charge of security of the Presidential Election process and thereafter a partisan section of the army was deployed all over the country with the result that very many voters either voted for the 1st Respondent under coercion and fear or abstained from voting altogether. In an effort to prove this ground the Petitioner swore his own affidavits. In so far as deployment is concerned support is contained in the affidavits sworn by the first Respondent, by Gen. Jeje Odongo, John Kisembo, (IGP) and Lt. Col. Mayombo. Support for the general conduct of members of the UPDF is in the affidavits of Baguma John and Kijumba both of Kasese, Byomanyire of Mbarara, John Tumusime of Bushenyi, Iddi Kiryowa of Sembabule, Tukahirwa D. of Mubende, James Musingunzi of Rukungiri and F. Byaruhanga. For the respondents, Captain Ndahura, Hon. Capt. Byaruhanga, MP, Capt. Rwakitatire and some senior UPDF officers swore affidavits in which they denied intimidation, coercion or harassment of the petitioner or agents and supporters of the Petitioner.

In paragraph 3(2)(c), the Petitioner averred that contrary to section 25 (b) of the PEA Act, the lst Respondent organised groups under the PPU and his Senior Presidential Adviser, a one Major Kakooza-Mutale with his Kalangala Action Plan para-military personnel to use force and violence against persons suspected of not supporting the 1st Respondent, thereby causing a breach of peace, disharmony and disturbance of public tranquility and induce voters to vote against their conscience in order to gain unfair advantage for the 1st Respondent in the Presidential election. Many witnesses have deponed to support the Petitioner. See the affidavits of the Petitioner, of D. Okello-Okello, Hon. Winnie Byanyima, Bigumuhangi Kaguta, Bashaija Richard, Byaruhanga, S. Kakuru, R Matsiko, J. Kiyimba, among others. These affidavits must be compared with those of Major Gen. Jeje Odongo, of the first Respondent, of Chairman Kasujja, of Cpt, Ndahura, of Mugisha, of Muhwezi and Major Kakooza-Mutale who have sworn affidavit to rebut the Petitioner’s claims.

In paragraph 3(2)(e) the Petitioner averred that contrary to section 25(e) of the Act the **1st *Respondent*** threatened that he would put the *Petitioner six feet deep.* The Petitioner construed this to mean that the first Respondent threatened to kill him because of pointing out grievances from and mismanagement in the UPDF and that this had the effect of scaring voters into voting

for the Respondent to guarantee their own safety. In this respect when the affidavits of the Petitioner and the first Respondent are compared, it is clear that the 1st Respondent admits that he made the statement. He however denies that it was aimed at the Petitioner. The threat may well have been made in gusto.

In para 3(2) (f), the Petitioner avers that the aforesaid illegal practices or offences were committed by the 1st Respondent personally or and his agents and supporters with his knowledge and consent or approval through the Military, PPU and other organs of the State attached to his office and under his command as the President, Commander-in-Chief of the Armed Forces, Minister of Defence, Chairman of the Military Council and High Command and Chairman of the Movement Organisation.

Some of the affidavits in support of these averments have already been alluded to when I discussed the first, second and third issues. There are others on the record. Further, there are counter-affidavits by the first Respondent, by Gen. Jeje Odongo, by Chairman Kasujja and John Kisembo (IGP) on the one hand and that of Petitioner, Major (RTD) Rwaboni, E. Bumeze and Alex Olum on the other hand.

1ST RESPONDENT'S CASE IN REPLY

The first Respondent denied that his agents/supporters interfered with the electioneering activities of the Petitioner and his agents as alleged and contended that the entire Presidential Electoral Process was conducted under conditions of freedom and fairness and that he obtained a lot "more than 50% of valid votes of those entitled to vote". As regards the Petitioner's complaint that the first Respondent alleged that the Petitioner was a victim of AIDS, the first Respondent pleaded that:

1. The statement that the "Petitioner was a victim of AIDS" was not made by the 1st Respondent publicly or maliciously for the purpose of promoting or procuring an election for himself contrary to section 65 of the Act. However, it is also true that a companion of the Petitioner, Judith Bitwire, and her child with the Petitioner died of AIDS. The 1st Respondent has known the Petitioner for a long time and has seen his appearance change over time to bear obvious resemblance to other AIDS victims that the 1st Respondent had previously observed".

I think that this type of pleading is unsafe. It makes a serious allegation on the basis of sheer perception or subjective opinions.

Here comparison of the affidavit of the Petitioner, that of Dr. Ssekansanvu E. and Major Rubaramura Ruranga on the one hand and those of the first Respondent, of Dr. Mwene Mushanga and Marita Namayanja on the other hand. It is clear that the first Respondent admits the making of the statement and believes that the Petitioner suffers from AIDS. The only question is what was the effect and consequence of this statement in the election process.

On gifts, the first Respondent said that neither himself, nor his agents with his knowledge and consent or approval offered gifts to voters with the intention of inducing them to vote for him. I have referred to the affidavits of witnesses for both sides on this question. These include the Petitioner and witness from Ntungamo, Tororo, and Arua on the one hand and the first Respondent, his NTF secretary Moses Byaruhanga, Kabonero of Ntungamo and others on the other hand.

The first Respondent denied allegations in paragraph ***3(2)(c) and (d)*** of the petition contending that the entire electoral process was conducted under conditions of freedom and fairness and secure conditions necessary for the conduct of the election in accordance with the Act and other laws. Here we have to compare the affidavits of the Petitioner, of Winnie Byanyima and other witnesses from Rukungiri, Kamwenge, Ntungamo. I have in away already discussed this matter when I discussed the third issue.

In reply to paragraph 2 of the petition, the second Respondent denied any knowledge of the allegations imputed against the first Respondent. It also denied any illegal practices or offences committed by him, his agents and/or supporters.

REPLY BY SECOND RESPONDENT

The second Respondent also denied non-compliance with the PEA, 2000 and asserted that there was no evidence of Commission of illegal practice or offences by the first Respondent. The second Respondent pleaded that the election was held under conditions of freedom and fairness

and that this was confirmed by international observers. I have already discussed the question of international observers.

SUBMISSIONS AND EVALUATION

Mr. Balikuddembe submitted that the evidence of the Petitioner proves that the first Respondent committed illegal practices as well as electoral offences. Learned Counsel also contended that agents of the first Respondent also committed illegal practices as well as electoral offences with the knowledge and consent or approval of the first Respondent.

1ST LEG OF 4TH ISSUE: AIDS COMPLAINT

With regard to this issue (number four), I have decided to first dispose of the complaint relating to AIDS. My understanding of S.65 is that if I uphold the petitioner's allegation on suffering from AIDS, I am bound to allow the petition. Mr. Balikudembe relied on the contents of paragraphs 3 to 17 of the Petitioner's affidavit sworn on 5/4/2001 in reply to the answer by the first Respondent. Learned Counsel also relied on the affidavits of Dr. Ssekasanvu and of Major Rubaramira to support the contention that the Petitioner did not suffer from AIDS. Counsel argued that the first Respondent does not deny making the statement, (this is correct: see paragraph 6 and 7 of 15t Respondent's affidavit). Counsel dismissed Ms. Namayanja's affidavit as hearsay (which is also correct) and asked us to strike it out because it offends 0.1 7 Rule 3 of CPR. He contended that the opinion of Prof. Rwomushana was based on idle talk and funeral vigil gossip. Prof. Rwomushana deponed an affidavit to support the opinion of the first Respondent to the effect that there is a common and

"Widespread practice in Uganda in lay conversations that individuals in community who lose partners and very young children presumably due to AIDS as persons suffering from AIDS"

Counsel added that because the first respondent made the statement during the critical moments of the presidential election campaign, i.e., the first week of March 2001, the first Respondent must have intended to undermine the Petitioner's presidential candidature. That this was confirmed by the statement on the eve of the election (11/3/2001) by the first Respondent that Sate House is not for invalids. That this statement is evidence of malice and that indeed the first

Respondent violated the Declaration of the Paris AIDS summit of 1st December, 1994 to which Uganda is a signatory. He referred us to ***Attorney General vs. Kabourou*** (supra) to support his other arguments. He wound up on this aspect of the issue by contending that the first Respondent committed an offence under S.23 (5) (a) and (b) and 23 (7) of PEA and that the 1st Respondent committed an illegal practice. Counsel submitted that this ground is sufficient, under S.58 (6) (c), for the election to be annulled.

Dr. Byamugisha for the 1st Respondent contended that issue No. 4 is very important. He urged us to make a firm ruling (by which I understand counsel wants appropriate ruling) because our decision will affect future elections. He submitted that annulment of an election under S.58 (6)(c) does not disqualify the candidate from participating in an election. He probably means application of the decision in our courts. Counsel contended that the section does not say that annulment is automatic. I have already alluded to this. My understanding of this law is that annulment is automatic once a Court is satisfied that a candidate committed an illegal practice or other electoral offence. Although I have quoted the law already this is what S.58 (6) (c) states:

> **"58(6)** ***The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the Court:-***
>
> ***(a)*** **…….**
>
> **(b) ……**
>
> ***(c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."***

Dr. Byamugisha further submitted that the commission of an offence does not mean that the election was not free and fair. He contended that annulling the election on the basis of the commission of an offence or an illegal practice would render S.58 (6) (c) inconsistent with Article 1 and Article 2(2) of the Constitution. Dr. Byamugisha also contended, as I indicated earlier in this judgment, that the evidence of the Petitioner and of his witnesses is bad in law because it is hearsay and contravene sections S.57 and S.58 of the Evidence Act. That the

Petitioner's documentary evidence was inadmissible by virtue of Ss.60 to 63 of the same Act. Learned counsel did not specify which of the documents were inadmissible.

Be that as it may, I dealt with the question of admissibility of the Petitioner's affidavit and those of his supporters earlier in this judgment. I should point out, though, that Mr. Nkurunzinza and the Solicitor-General mentioned only some but not every one of the deponents whose affidavits were considered defective. The Solicitor- General provided the Court with a chart tabulating the deponents whose affidavits were considered defective and in which the deponents supporting the respondents attempted to rebut the affidavit of the deponents supporting the Petitioner. I have noticed that some of the deponents supporting the Petitioner appear not to have been challenged by rebuttal affidavits. These raises the possible inference that what is contained in those unchallenged affidavits is correct.

I earlier reproduced Rule 1 4(l) of the Presidential Election (Election Petitions) Rules, 2001. For clarity's sake I will reproduce it again. It reads as follows:"Subject ***to this rule, all evidence at the trial in favour of or against the petition shall be by, way of affidavits read in open Court'*** I think that normally, subsidiary legislation should not whittle down a provision in an Act. But it appears to me that sections 57 and 58 of the Evidence Act, (which concern oral evidence) may not apply in the manner suggested by Dr. Byamugisha. I think that in the same way the sub-rule does limit the applicability of sections 60 to 63 of the Evidence Act, somewhat. Elsewhere in this judgment I have endeavoured to show that these rules are special, intended to facilitate expeditious delivery of electoral justice without undue regard to technicalities to S.56 (6) (c).

Be that as it may, and with due respect to Dr. Byamugisha, I must say that I am not persuaded by his arguments. I think that under S.58 (6) (c) of the PEA, 2000 satisfactory proof of an illegal practice or proof of an offence leads to automatic annulment of the election result. This appears to be the effect of the Kibuuka Musoke, J. decision in ***Katwiremu's*** petition (supra) where the learned judge considered S.91 (I) of Act 4 of 1996 part of which is substantially similar. There is no doubt in this petition that the first respondent made the statement that the Petitioner suffers from AIDS. The first Respondent's answer to the petition, particularly his accompanying affidavit, is clear on this. The first respondent confirmed his statement when, on 11/3/2001, he stated that State House was not a place for invalids. I am not convinced by the reasoning and

opinions of Professor Rwomusana, the hearsay views of Katarina Namayanja and the evidence of Dr. Arinaitwe that the Petitioner suffers from AIDS. I think that after the Petitioner asserted that he does not suffer from AIDS, the burden of proving that the Petitioner suffers from AIDS shifted to the first Respondent. Namayanja's affidavit with all its defects implies that the Petitioner must have had AIDS. However Namayanja's affidavit is essentially hearsay and also speculative. There is no evidence or suggestion that the Petitioner has ever been bed ridden or that he has ever been diagnosed to be suffering from diseases associated with AIDS.

Authorities given to support the Respondent's view included ***XVs.y.*** (1988) 2 ALL ER 648, ***R. vs. Registrar General*** (1990) 2 Q. B- 253 and ***Liversidge vs. Sir John Anderson*** (1942) A.C.206. These cases are about belief based on reasonable grounds. Also on reasonable cause or grounds in the 1st Respondent's authorities are included ***Katwiremu's case, Thompson vs. Thompson*** (1956) I ALL E.R.603 at P.605-606, ***Parkison vs. Parkison*** (1939) 3ALL ER.108 at P 112, ***Hicks vs. Faulkner*** (1881) 8 Q.B.D - 167 at page 171, ***Quinn vs. Leathem*** (1901) A.C. 495, at page 495, and ***H.J. Odetta vs. Omeda*** Soroti Hct Election Petition No.001 of 1 996. This last authority is one of those authorities, which support the view that the burden of proof lies on a party who asserts a fact and this is true: See S.100 to 103 of the Evidence Act.

During the trial of ***Odetta's petition,*** the affidavits of most of his witnesses (23 witnesses) were struck out because they were written in the vernacular (Eteso) language instead of the official English language. This inflicted almost an instant mortal blow to the petitioner Odetta. Further, Ntagboba, PJ, who tried the petition, found that the Petitioner had failed to prove the allegations to the requisite standard. Voters who were intimidated did not testify. Most of the petitioner's witnesses whose affidavits were struck out by the learned Principal Judge did not testify. We must always remember that each case is decided on its own facts. No two cases are exactly the same. In ***Katwiremu's Petition,*** the evidence of two of the "eye" witnesses who were found by Musoke-Kibuuka, J., the trial judge, to be truthful, proved bribery, an illegal practice. The other witnesses were not believed. The other authorities cited were decided on their own facts. In the divorce case of ***Thompson vs. Thompson*** it was held that because for seven continuous years, the respondent wife had not turned up to get maintenance from the petitioner husband, that was a reasonable ground for believing that the respondent wife was dead. That ground of presumption of death after seven years is a well- known rule of evidence in the English law. It

has its equivalent in among others sections 107 and 112 of our Evidence Act. The case of ***Quinn vs. Leathem*** (supra) arises from a suit claiming for damages because of inducing a breach of contract. The passage relied on and cited at page 524 of the report does not help the Respondents' case in these proceedings. There, Lord Brompton explained what would not constitute malice in a criminal case of malicious prosecution, if the prosecutor embarked on prosecution on the basis of the honest belief that he had a reasonable and probable cause.

In the petition before us, there is no thread of evidence from any witness suggesting that the Petitioner has been ill or sick in circumstances which strongly and reasonably suggest that he might be having AIDS. Dr. Rwomusana, an educated and enlightened medical doctor baffles me by asserting that the petitioner suffers from AIDS on the basis of unscientific assumptions about the alleged change of his appearance. This speculative evidence is in my opinion wholly inadequate.

I don't think that all the authorities cited by counsel for the first Respondent support the proposition that the first respondent had reasonable grounds for saying that the petitioner suffers from AIDS. Once the petitioner asserted on ***oath,*** in at least two of his affidavits, that as a medical person he knows and believes that he did not suffer from AIDS and that the first Respondent had not diagnosed him as such (see affidavit in reply by petitioner), the speculation upon which the first Respondent based his statement evaporated in thin air. It was now upon him **(15t** Respondent) to show by credible evidence that indeed the Petitioner suffers from AIDS. In my opinion the evidence of Prof. Romushana and Namayanja is valueless, as it amounts to no more than baseless rumours and hearsay. In view of the assertions of the petitioner and the scientific views of Dr. Ssekasanvu, the evidence of Dr. Atwiine is inconclusive. I am satisfied that Doctor Ssekasanvu's evidence, was not disproved by the speculative opinions of Prof. Rwomusana nor that of any other deponent.

Imputations of suffering from AIDS about a person are as serious, and probably more serious, than imputations of fraud. In cases involving allegations of fraud the party who relies on them must adduce evidence to prove fraud. I do not myself believe that imputations of suffering from AIDS about a person should be based on speculation because of the mere appearance or any alleged change in appearance of the Petitioner or just the death of a partner. Neither do I accept

that it is proper or reasonable to publish very serious and unfounded imputations about any person. I think that the first Respondent published a false statement of the illness of the Petitioner. According to the affidavit of the first Respondent, he has known and has been working with the petitioner for many years. The first Respondent does not say that he has ever before heard from the petitioner or suggested to the Petitioner that the Petitioner suffer from AIDS. So why wait until election time? The statement was made by 1St Respondent during the prime of campaign time for purposes of procuring his own election. I believe that the first Respondent did not have reasonable grounds for his belief. It is more likely it was a reckless statement aimed at discrediting the Petitioner about his health in the eyes of the Uganda electorate.

Learned counsel for the first Respondent referred to authorities for the view that under S 65 of the PEA, the petitioner bore the burden of proving that the statement of the 1st Respondent about AIDS was false. Other authorities relate to what is the import of "knowing" and consent or approval as appear in the same section. These authorities include ***Stoney vs. Eastbourne Rural District*** Council (1 927) I ch.367 and ***Fields Law of Evidence. Stoney's case*** merely emphasized the ordinary rule of evidence to the effect that if there is no other evidence given, the party on whom the burden lies must prove his case sufficiently to justify a judgment in his favour. This is also discussed in **Field's Law of Evidence** pages 4152 and 4153 in relation to election petitions. The issue of publication by the first Respondent was admitted. As it is correctly stated in the same book, (Field's Law of Evidence) the question whether the publication by the first Respondent was reasonably calculated to prejudice the prospects of the election of the Petitioner, is a matter of inference. And in my own view, the 1st Respondent's statement was so calculated. The same book is authority for the proposition that once the petitioner had proved publication and falsity, the burden shifted to the first Respondent to prove otherwise.

For the foregoing reasons, I find and hold that the first respondent committed an illegal practice under S.65 of the PEA. This finding is I think, sufficient to annul the election.

I do not, with respect, accept the argument by Dr. Byamugisha that S.65 is inconsistent with either Article 1 or Article 2(2) of the Constitution. I reproduced the provisions of these Articles earlier in this judgment. Suffice it to say here that Article I recognizes the people of Uganda as the ultimate source of sovereignty. The Article requires that the people of Uganda should choose

their leaders through free and fair elections. I think that S.65 seeks to enhance the process of free and fair election of a President and, therefore, the section can't be inconsistent with Art. 1. As for Art.2 (2); it outlaws any law or custom, which would be inconsistent with the provisions of the Constitution. Therefore, if the Constitution stipulates, as does the current Constitution do, that the election of leaders should be held under conditions of freedom and fairness, a law that seeks to prevent any aspiring candidates from using unfree and unfair means to ascend to or to gain or retain power, that law would not contravene Article 2(2). I think that the two Articles and S.58 (b) (c) and 65 are complementary in the advancement of democracy and democratic values.

2ND LEG OF ISSUE NO. 4 - GIFTS, ETC.

I now turn to the second aspect of issue No.4 which is whether the first Respondent personally or through his agents committed other illegal practices or offence in the form of bribes or other considerations as argued by Mr. Walubiri, on behalf of the Petitioner. This refers more about complaints in para3 (2) (b), (d) and (e) of the petition. Learned Counsel submitted that the first respondent personally or through his agents offered gifts, money and other considerations with the intention of securing voters to vote for him. That in that case he committed illegal practice. According to Counsel, the first Respondent's answer and the accompanying affidavit of the first Respondent which were to rebut the complaints of the petitioner, consist mainly of mere general denials. Mr. Walubiri categorised the giving of gifts into those given by the first Respondent personally and those given through or by his agents.

Personal Gifts: - Mr. Walubiri referred to the giving of a motorcycle to Sam Kabuga by the first Respondent on 26/1/2001, at the International Conference Centre. There the first Respondent personally and in public gave a gift of a motorcycle to Sam Kabuga in order to influence Sam Kabuga, the recipient of the cycle, and other motorcyclists to vote for him. This was widely published in Sunday Monitor of 28/1/2001 (Exh.P30 and Sunday Vision (exh.P.31) news papers which showed the first respondent handing over the motor cycle and promised loans to members of the Boda Boda Motorcycle Association. The evidence of this and other alleged illegal practices are set out in paragraphs 21 and 22, of the petitioner affidavit.

The petitioner claims that he subsequently personally heard the said Sam Kabuga on Central Broadcasting Corporation FM Radio urging his fellow Boda-boda cyclists to support Presidential Candidate Museveni Yoweri Kaguta in his bid for the Presidency of Uganda.

In paragraph **22** of the affidavit, the petition averred:-

"***That in further reply to paragraphs 8 and 13 of the Respondent's affidavit, the Respondent with the intention of inducing persons to vote for him offered the following:'***

(a) Abolished cost sharing in all Government Health Centres including those operated by Local Government.

(b) Increased the salaries of Medical Workers in the middle of the budget year.

(c) Offered to increase pay to teachers and indeed made this offer in a meeting at the International Conference Centre with all the teachers in Kampala on 5th March, 2001.

(d) Hurriedly caused his Minister of Works and campaign agent, Hon. John Nasasira, to publicly and out of the ordinary in full view of voters to sign contracts for tarmacking and upgrading of the following roads using his position as the incumbent President to execute the said contracts and deliver on his promises to the people of the beneficiary districts.

(i) Busunju - Kiboga;

(ii) Kiboga - Homa,

(iii) Arua - Pakwach;

(iv) Ntungamo - Rukungiri

And that the tarmacking and upgrading of these roads was part of the 1st Respondents campaign manifesto.

(e) That at a campaign meeting at Arua on 12th February, 2001, the first Respondent offered a gift of money to voters who attended the Rally and the record of this rally was Video-recorded-a copy of this recording is herewith submitted as an Exhibit".

Mr. Walubiri categorised what is referred to in paragraph 22 (quoted above) as the second category of gifts and contended that in making these offers or contracts, the first Respondent was soliciting for votes. Asked by Court if the alleged acts by the first Respondent or his Ministers offended any law, Mr. Walubiri referred to Articles 154 to 156 and Arts 190 to 191. The first three Articles relate to the method of raising money and authority for spending that money from the Consolidated Fund. The latter Articles relate to the same matters but these concern Local Government. In effect these Articles say that execution of work and expenditure by Government on that work should be preceded by budgeting the money for the work.

Mr. Walubiri cited ***Attorney General vs. Kabourou*** in support of the view that these hurried decisions amounted to gifts or illegal practices. Learned counsel contended that other gifts were given by 1st Respondent's agents. He relied on Gariyo's affidavit in which he stated that Mwesigwa-Rukutana, Member of Parliament, offered *shs.50001=* to voters in Ntungamwo District. Also Ssali Mukago, in his affidavit states that Daudi Kahurutuka, an agent of the first Respondent wanted to pay Ssali any amount of money so as to allow him (Kahurutuka) to "steal votes" for the first Respondent. Mr. Walubiri also referred Omalla Ram of Tororo District who swore in his affidavit, among other things, that at Poyawo Polling Station, Onyango paid money to voters in order for the voters to vote for Museveni the first Respondent. Omalla reported other malpractices to the police. Counsel submitted that these activities were conducted with the knowledge of the first Respondent and this should be inferred from the fact of appointment by the first Respondent of the agents who gave the bribes. That these agents gave bribes in the course of soliciting for votes and therefore the first Respondent, as principal, is held liable for the acts of his agents even where the agent does what he is prohibited from doing. He cited ***Page News Digest of English case law,*** 2 Edition, 1924 and Volume 20 of the ***Digest Annotated British Commonwealth and European Cases*** (1982) paragraphs 646 at page 72 where the concept of implied consent is said to be:-

"If a person were appointed or accepted as an agent for canvassing generally and were to bribe any voter, the candidate would loose his seat'

Mr. Walubiri submitted that the first Respondent personally or by his agents interfered with the Petitioner's electioneering activities contrary to S.25 of the PEA, 2001. Counsel contended that the deployment of Presidential Protection Unit (PPU) as deponed to by the Petitioner, by B. Matsiko, by Kakuru, by Koko, by Kasanyusi, by Bashaija, by Mpabwooba, by Byomuhangi Kaguta and by W. Byanyima, Captain Ndahura and other members of PPU (PPU) assaulted, intimidated and threatened very many voters to vote for 1st Respondent and caused disharmony and breach of the peace. This is also supported by Chairman Kasujja's letter already referred to, to the first Respondent.

Mr. Walubiri included among the various malpractices and offences the abduction of Hon. Rwaboni Okwir. The abduction was lead by ***Cpt. Rwakitarate*** an intelligence officer in the PPU and the other acts by Major Kakooza Mutale's Kalangala Action Group. After referring to several other affidavits such as those of Major Gen. Odongo Jeje, former IGP Kisembo, those of Kimumwe, Baguma, Kijambu, Busingye, Barimoshi, J. Musingunzi, Matsiko wa Muchoori, Major Kakooza-Mutale learned Counsel asked us to find and hold that several illegal practices and offences under the PEA, 2000 were committed by the first Respondent personally; that several were committed by his agents with his intimate knowledge and consent or approval. This, according to Counsel, was sufficient to justify the annulment of the election. Indeed Mr. Walubiri suggested that because there is evidence that criminal offences were committed; the Director of Public Prosecutions should be asked to take appropriate action.

Dr. Byamugisha, for the first Respondent, submitted on this second part of issue No.4, that because the petitioner did not call witnesses to talk about gifts; there is no proof, not even by affidavits, of giving gifts. Learned Counsel contended that Kabuga was given a motorcycle to campaign for the 1st Respondent but not as a bribe. He referred to the affidavits of Hon. Dr. Kiyonga, Hon. Benign Mukiibi and submitted that reasons have been given for the abolition of health cost sharing and salary-increase for medical personnel. That the wage bill in the budget speech included the revision of salaries for teachers and the police. He justified salary increases on the basis that as President, the first Respondent (candidate) could order for the increase of

salaries. That the increment motivates workers. That Hon. Eng. John Nasasira, explained matters relating to roads. On the petitioner's assertion that the first Respondent bribed voters in Arua, Dr. Byamugisha dismissed the evidence of video as valueless, and I agree with him on this question of the video evidence.

Among the authorities given by counsel for the 1st Respondent with regard to consent and knowledge by the first Respondent were ***Words & Phrases Judiciary, Defined Vol.1 (a) - (c) 1946 Edition,*** page 512, para 1378, ***Oppenheimer vs. Frazer & Wyatt (1907)*** 2 KB 50, at pages 59 & 68, ***Muwonge vs. Attorney General*** (1967) EA. 17, ***Sherras vs. De Rutzen*** (1895) I QB 918, ***Bell vs. A. Franks & Barlett*** (1980)1 ALL ER 356, ***The Borough of Windsor case (***1874) 3 LTR 133.

In discussing the first aspect of this issue as well as issue 3, I touched on questions arising under this part of issue No.4. For example I discussed the deployment of UPDF and PPU and the effect on the election of the conduct of personnel of the two bodies.

Issue No. 4 was answered by the first Respondent in paragraphs 8, 9 and 1 0 of his affidavit sworn on 28/3/2001 and which affidavit accompanied his answer to the petition.

The signing of contracts for tarmarcking the roads in question, the abolition of health cost sharing or reduction of graduated tax or the salary increment, become relevant not because they were made at all but because they were made during the campaign for the elections of the President. Promises or decisions like that made to Kampala teachers on 5/3/2001 were made at the most crucial moment during the campaign. If these were ordinary and normal Government business activities, it did not require the presence or the personal announcement of the first Respondent to make the announcements during his campaign for re-election. That puts the decision out of the ordinary and therefore justifies the criticism by the petitioner.

On the money hand out or bribes, let us examine the evidence of Gariyo Willington and the rebuttal by Bob Kabonero and Hon. Mwesigwa-Rukutana. The Petitioner had appointed Gariyo to oversee his election affairs in Rubare sub-county in Ntungamwo District. Gariyo says that he saw M.R Mwesigwa-Rukutana asking voters to board pickup No.UAA 005A and that he saw Mwesigwa-Rutukana give Shs.5000/= to everybody boarding the pickup as he was telling them

to vote for the first Respondent. That Kabonero, who was escorted by 4 armed UPDF soldiers, chased away Yusufu from Rwabaramira Polling Station where Yusufu was guarding the interests of the Petitioner.

Now Bob Kabonera deponed to contradict Gariyo. He denied being an agent of the first respondent and claimed that Gariyo was telling falsehoods. But in paragraph 7 of his affidavit Kabonero admits being in Ntungamo District where he voted at 7.00 a.m. He deponed that after casting his vote that early, he spent the whole day driving around Ntungamo District in the company of Hon. Mwesigwa-Rukutana. Bob Kabonero does not tell us why he was driving around the whole district. And why he accompanied Hon. Mwesigwa-Rutukana who was apparently also driving round the whole district. Is it not reasonable to infer that he was on a mission? He does not tell us why he accompanied the M.P. who was apparently also driving around the same Ntungamo District. Mwesigwa himself denies giving gift. He only drove around his constituency. Why was the MP driving around his constituency on a Presidential election day? Was he driving voters to polling stations? Was he giving money? These and many more are questions the answers to which must be that Kabonero and the MP were driving around to see and urge voters to vote for the first Respondent. Hon. Mwesigwa-Rukutana did swear an affidavit in rebuttal. He has denied driving around with Kabonero and what he was doing. Mr. Moses Byaruhanga says that Mwesigwa-Rukutana was not an agent. That he is not on the list of agents for the first Respondent. I do not believe Mr. Byaruhanga - Be that as it may, imputations against Mwesigwa must be properly proved in order to be accepted. I have not found a sound reason why Gariyo should tell lies against this Member of Parliament and Kabonero unless these two acted as agents of the first Respondent as Gariyo says. On my part, I prefer the story of Gariyo as against that of Kabonero and Mwesigwa. No reason is given why Gariyo should tell lies and why he should implicate the MP and Kabonero in the serious matters of giving money and lift to voters.

Mugizi Frank also deponed about bribery or giving money and on multiple voting. Musinguzi Siriri swore an affidavit on behalf of the 1st Respondent to contradict Mugizi. In his affidavit, Mugizi deponed that as a polling agent of the Petitioner, at Rubanga Polling Station, he witnessed massive rigging by multiple voting and when he protested, Musinguzi Siriri and other agents or supporters of the first Respondent threatened to assault him and indeed chased him

away from the Polling Station. He therefore went away but Ali Mutebi, the campaign agent for the first Respondent offered him shs.15000/= to lure him to go back to the station and sign the results declaration form. Now Musinguzi Siriri admits being at Rubanga Polling Station where he voted. In paragraph 5 of his affidavit, Musinguzi deponed that:

"———While lining up waiting— to vote, Kapere approached the presiding officer's table, and thereafter Musinguzi Frank, who was Besigye's agent, falsely referred to him as "Beteyo" who had already voted. Mr. Simon Twahirwa our LCI Chairman and I objected, as we knew the proper identity of Kapere".

Musinguzi further deponed that Kapere then voted. Mugizi then left. But Mugizi says he was chased away. Musinguzi admits that Mugizi made a complaint about Kapere voting again. There is no plausible reason given why Mugizi should have protested about Kapere's voting again. Neither Musinguzi Siriri nor anybody else gives any sound reason. I think the reasonable inference to be made is that Mugizi, as agent of the petitioner protested against wrongdoing. His going away was not voluntary. He was chased, I think. I believe him in preference to Musinguzi. I believe that Musinguzi attempted to bribe Mugizi. I believe that there was multiple voting as deponed by Mugizi. Still on bribing, Drobo Joseph, an agent of the Petitioner in Adumi Sub-county, Arua District, in his affidavit deponed that on 12/3/2001 Godfrey Asea together with Silvano Awiya, the L.C. III Chairman at polling station campaigned openly for the 1t Respondent. Drobo saw Asea give money to Inyasio Odipio at Lia Polling Station for bribing women so that they vote for the first Respondent. I have not seen rebuttal affidavit by either Godfrey Asea or Silivano Awiya or any other deponent.

The evidence of the three deponents is simple. There are other deponents from other district deponing that agents of the first Respondent engaged in giving out money to voters. Bribing was not an isolated incident in only one or two districts. I find as a fact that bribes in the form of money were given out. The next question is whether the first respondent can be associated with the giving of the money. This brings in the question of agency relationship between the givers of money or gifts allegedly on behalf of the first respondent on the one hand and the first Respondent as the principal on the other hand.

This is the convenient point to consider the question of agency. Is there evidence to support the proposition that persons who carried out bribing or who intimidated harassed and assaulted, abducted voters and or the petitioner's agents, representatives and supporters did so as agents of the first Respondent. It has to be borne in mind that the agency relationship between a candidate and his representatives or agents in relation to people carrying out the canvassing, campaigns or other electioneering activities may sometimes be too subtle and they cover areas outside the normal law of agency relationship.

It appears to me that the case of *Muwonge* (Supra) cited by counsel for the first Respondent is against the first Respondent. If I may quote Newbold, at page 18, where he stated the law on liability of a master for the acts of a servant. The learned President stated:

> ***"I think it dangerous to lay down any general test as to the circumstances in which it can be said that a person is acting within the course of his employment. Each case depends on its own facts— —as I under the law—even if the servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable."***

The Court of Appeal for East Africa held that the Uganda Government was liable for the acts of one of the policemen who shot and killed Matovu, the son of the appellant, at a time when a crowd of people were riotous and were throwing stones at the police who had been sent to the scene to restore order. Indeed the deceased appears not to have been involved in the riot at all. The policeman who killed Matovu acted irresponsibly but the court treated him as an agent of the Government of Uganda which took responsibility for his conduct.

In *Vol. 15, of Halsubury,* (4th Ed.) candidate's liability is discussed in paragraph 61 6. It is there stated that a candidate's liability to have his election avoided under the *doctrines of election agency* is distinct from, and wider than, his liability under the criminal or civil law of agency. The principles and rules with regard to agency are observed in the case of a petition questioning parliamentary election: A candidate's liability to penalties for corrupt practices committed by an agent is the same as that of a principal under the ordinary criminal law relating to agency. The

law on this subject is that the candidate is liable only on proof that the agent acted on candidate's express or implied authority or that the candidate ratified the act after it was done or appointed the agent to do all acts legal or illegal which he might think proper to support candidate's interest:
see ***Cooper v Slade*** (1858) 27 LJ0B449 at 464 see ***Norwich Case, Tillet v Stracey*** (1869) O'M & H 8 at 10.

Once the agency is established, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the act was not authorised by the candidate or was expressly forbidden, The reason for this stringent law is that candidates put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise: ***Staley Bridge case, Ogden vs. Sidebottom (1869)*** */ O'M & H.97.* In this respect the relationship between a candidate and the agent resembles that of employer and employee as in *Muwonge case.*

Under S. 58(6) (b) (c) an election of the President can be annulled where it is proved to the satisfaction of the court that illegal practice or any other offence under the PEA was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval. Does this differ from the English law referred to above? Not manual. Clearly a candidate will be held liable where he or she personally commits an illegal practice or any other offence. He is also liable where his or her agent or representative commits the illegal practice or other offence. A look at section 58(6)(c) appears to suggest that for a candidate to be held liable for the misconduct of his agent, the candidate must know and consent to the wrongful conduct or he must know in advance and approve it. However, questions may arise, like in the present petition, in relation to agents appointed by Chairman, Vice Chairman or Secretary of the candidates National Task Force. Does paragraph (c) mean that a candidate would not be held liable unless he previously knew and consented to the illegality to be committed or must he expressly approve it subsequently? Does the paragraph mean that a candidate should have prior knowledge and or give his consent or approval in advance of the commission of an illegal practice or commission of any other offence? Is it possible that a candidate can have agents without written authority? A political campaign must of necessity involve very many people, as

agents. Presidential campaign is bound to involve even very many people. It is just not practical for a Presidential candidate to meet every one of his field agents. Moreover it does not sound realistic to expect that a Presidential candidate would openly consent to or approve to the commission of an illegality since he would know that such an illegality can lead to losing the Presidency should a petition be lodged in court.

I do not think that prior knowledge and express consent or express permission or approval of a candidate is a necessary prerequisite to the commission of an illegal practice or any other offences by a representative or an agent before a candidate's election is rendered liable to annulment.

In the nature of things, no candidate would openly and in public give consent or approval to his agents to commit illegal practices or other electoral offences. I cannot see any candidate doing this and I do not think that the expectation of Parliament in enacting the law was that a candidate would expressly authorise his agents to break the law.

I think that once there is evidence of agency, gathered from the surrounding facts, the candidate should be held liable for the wrongful conduct of his agent representative. How then is agency established between a presidential candidate and another person acting on behalf of that candidate?

We have to refer to the PEA. Under S.2 (1) an agent and representative are defined. According to the Act, "Agent" by reference to a candidate includes a representative and polling agent of a candidate." Clearly this definition is unsatisfactory.

I understand that definition of an agent imply that agency relationship should be inferred from the circumstances of each case.

We know that polling agents are appointed only for the purpose of polling under S.32 (I) so as to safeguard the interests of a candidate with regard to the polling process. The Act makes references to representation of the candidate by agents: See S.19, S.20, S.22, and 23. These are general electioneering agents. I would state that a candidate's campaign agent or representative

includes a person who canvasses for support of the candidate for presidential election. Such an agent need not be appointed in writing.

Mr. Moses Byaruhanga deponed, in para 13 of his affidavit sworn on 5th April, 2001 in support of the first Respondent's answer to the petition, that:-

"Mr. ***Mwesigwa Rukutana is neither a campaign agent for the 1st Respondent nor a polling agent':***

This averment is preceded by a statement in para 5 of the same affidavit that he (Byaruhanga) participated in the preparation of documents of appointment of campaign agents by the first Respondent. He thereby implies that he would know all agents of the first respondent. I have not seen a provision in the PEA, [excepting S.19 (5)] requiring the campaign representatives or agents to be appointed in writing in order to validate or confirm a person as a campaign representative or agent of a presidential candidate. I think that written authority is only necessary in the appointment of a polling agent and of co-ordinators of consultative meetings for purposes of planning campaigns.

Attached to Moses Byaruhanga's affidavit is a sample letter by which the first respondent appointed his campaign agents and that sample letter purports to be made under S.19 (3) and (5) of the Act.

Subs. (3) does not require agents to be appointed in writing, it is only sub. (5) Which does and only in respect of coordinating other agents as already mentioned. The subsection reads:-

"(5) A candidate or a candidate's agent authorised in writing by the candidate to do so, may hold a consultative meeting with the candidate's campaign agents for the purposes of planning and organising the candidate's election campaign"

In contrast, subsection (3) reads as follows: -

"For the avoidance of doubt, a candidate's agent may carry on campaign meetings on behalf of the candidate and otherwise carry on any campaign which the candidate is allowed to do under this Act'

I have said that ordinary campaign agents or representatives need not be appointed in writing under the PEA. Let it be remembered that the Petitioner asked for a list of the agents of the 1st Respondent. The Learned lead counsel for the first Respondent resisted this saying the Petitioner must prove his case. The Petitioner has produced witnesses who say on oath that certain persons such as the Hon. Mwesigwa-Rukutana, Hon. Capt. Charles Byaruhanga, Captain Ndahura or Hon. Captain Mike Mukula, were representatives or campaign agents of the first Respondent. In these circumstances and as I have indicated already that I have no reason why Gariyo W. could have told lies about Mwesigwa Rukutana, I find that he (Mwesigwa Rukutana) was a campaign agent of the first Respondent, Indeed the same applies to Hon. Captain Mike Mukula in Soroti, (See evidence of Ochen) the Hon. Captain Charles Byaruhanga in Kamwenge, (See the evidence of Kyimpaire and Muhwezi). There is evidence of such agents in other districts.

The candidate, according to the English law on election agents, is not only liable for the acts of the agents whom he has himself appointed or authorised, but also for the acts of agents employed by his election agent or by any other agent having authority to employ others. Despite the wording of S.58 (6) (c) of the PEA, I think the misconduct of agents appointed by chairman or vice-chairman or secretary of the movement National Task Force for the election of a candidate. I would render a candidate election annulled. I have looked at the letters appointing their agents by the petitioner and the first Respondent. These letters are produced and signed in mass. It is debatable whether it would be practical for each of the candidates to call to his office, all the agents and personally insert in the letter of appointment the name of the agents after interviewing him/her. People far afield must have had letters given to them by other agents. The Petitioner's agents have suggested they received letters in this way.

It looks to me that because of the drafting of the provisions of the Movement Act, 1997, I venture to suggest that many officials of the movement are agents of the official movement Presidential candidate. There is evidence that the first respondent was officially urged, nay nominated, by the National Movement Conference to contest the presidential election.

It appears to me that if the National Conference urged the first Respondent, who happens to be its chairman, to contest the Presidential election, the structure of the movement under the provisions of the Movement Act 1997, makes all officials of the movement including, Members

of Parliament, agents of the first Respondent: See particularly sections 4, and 5. Therefore I think that wrongful conduct of such agents bind the candidate.

Again on the authorities reviewed, I am unable to say that members of the PPU and UPDF who campaigned for the first Respondent are not agents of the first Respondent for whose acts he is liable. I find it difficult to believe that the acts of intimidation and harassment meted out to agents, representatives and the supporters of the Petitioner in the districts of Ntungamo, Kabale, Rukungiri, Kanungu, Kamwenge and others by PPU could not for one moment or another reach the ear of the 1st Respondent and that he would not react and correct the situation. To hold otherwise would amount to a travesty of election justice.

For the foregoing reasons my answer to both legs of the fourth issue is in the affirmative in that the **1St** respondent committed an illegal practice when he said that the petitioner is a victim of AIDS. Second he committed offences under the Act by (a) giving motorcycle to Kabuga, (b) ordering increase of salaries, stopping cost sharing and causing the signing of contracts during campaign period.

In our decision of 21/4/2001, we ordered that each party should bear its own costs and promised to give our reasons later. I now give my reasons to justify the order of costs.

Counsel for the respondents relied on the proviso to S.27 (1) of the Civil Procedure Act and asked that the respondents be awarded costs. Dr. Byamugisha indeed asked that we should certify costs for 13 advocates. He argued that if we do not award costs to the respondents, we would be encouraging future losers to file frivolous petitions. Dr. Byamugisha was unable to provide authority for the suggestion that we can award costs for 13 advocates in a petition such as this one.

Mr. Deo Byamugisha, Ag. Director for Civil Litigation, on behalf of 2nd Respondent, argued that awarding costs would discourage losing candidates from petitioning. He asked for costs with a certificate for two counsels.

Mr. Balikuddembe, counsel for the petitioner, argued that we should order for each party to bear its own costs contending that this litigation is important, historic and unprecedented. That the

Petitioner challenged the election results in the interest of Ugandans and in the interest of the development of the electoral law. In his view the first Respondent was partly to blame and that is why the Petitioner instituted this petition. I do not seem to remember counsel elaborating on this last point.

By section 27(1) the Civil Procedure Act, this Court has power to determine how costs are to be paid. The proviso to the subsection states that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge for good cause orders otherwise. Neither counsel for the Petitioner nor for the two Respondents alluded to sub- rule (1) of Rule 23 of the Presidential Elections (Election Petitions) Rules, 2001 (S.1.2001 No.13). It reads as follows:-

> ***"All costs of and incidental to the presentation of the petition and the proceedings consequent on the petition shall be defrayed by the parties to the petition in such manner and in such proportions as the Court may determine."***

It appears to me that in this petition the order as to costs must be made under authority of this sub-rule. The sub-rule gives this Court wide discretion in regard to the orders as to costs. Incidentally the sub-rule does not suggest, nor does the proviso to S.27 (1) suggest, that costs should be awarded against any party by way of punishment. Punishment is what the submissions of the Respondents' counsel suggested.

I agree with Mr. Balikuddembe that this election petition is important in its own right. I go further and say that cases involving election petitions are important in themselves since they enable the Courts which are independent institutions in this country to make valuable decisions on the operations of the democratic principles in this country. I do not accept the views of Dr. J. Byamugisha and Mr. Deo Byamugisha that an award of costs should be made so as to discourage losing candidates from instituting petitions. Orders of award of costs must be made judicially. I think that orders for award of costs should be made depending on the facts of each case. This is implicit in Rule 23(1) (supra). In election petitions, costs must not be awarded in such a manner as to inhibit future petitioners, who may have genuine complaints that should be investigated by Courts, from taking such complaints to Courts. It is of the essence of a working democracy that

grievances arising from elections should be investigated by independent Courts. I derive support for this view from the Indian case of ***Charan Lal Sahu & Ors vs. Singh (1985) LRC (Const.) 31.*** In the election for the office of President of India, held **on 12th July, 1982, 36 prospective candidates filed nomination papers. The petitioners included Charan Lal Sahu and Nem Chandra Jam (two of the petitioners). The Returning officer accepted two nominations, excluding these two petitioners, and on 15th July, 1982, he decla**red that the Respondent had been elected. A number of petitions were filed asking the Supreme Court of India to annul the election on various grounds. Under a certain Act of Parliament of India, an election petition may be presented by twenty electors or "by any candidate at such election" and S.13 (a) thereof, provided that "candidate" means a person" who has been or claims to have been nominated as a candidate".

A preliminary objection was taken that two of the petitioners, i.e., Charan Lal Sahu and Nem Chandra Jam, had not been candidates at the election and therefore lacked locus standi to file their petitions. The petitioners submitted that, even if they were not duly nominated, they could claim to have been duly nominated and therefore to be eligible to present their petitions.

The Supreme Court upheld the preliminary objection and struck out the two petitions because they lacked a cause of action. The Court further observed that (at page 38)

> ***"it is regrettable that election petitions challenging the election of the high office of the President of India should be filed in a fashion as cavalier as the one that characterises these two petitions. The petitions have an extempore appearance and not even a second look, leave alone a second thought, appears to have been given to the manner of drafting these petitions or to the contentions raised therein. In order to discourage the filing of such petitions, we would have been justified in passing a heavy order of costs against the two petitioners. But that is likely to create a needless misconception that this Court, which has been constituted by the Act as the exclusive forum for deciding election petitions whereby a Presidential or Vice-Presidential election is challenged, is loathe to entertain such petitions. It is of the essence of the function,),g of democracy that elections to public offices must be open to the scrutiny of an independent tribunal A***

heavy order of Costs in these two petitions, howsoever justified on their own facts, should not result in nipping in the bud a well-founded claim on a future occasion."

The two petitions before the Indian Supreme Court could be described as frivolous and vexatious. And yet the Supreme Court found no need to order costs against the two petitioners.

In my view the present petition is nowhere nearly the two. The present petition was well founded. Adopting the reasoning of the India Supreme Court, I think that ordering the petitioner in these proceedings to pay costs would amount to nipping in the bud future well-founded petitions. For these reasons I agreed that each party should bear its own costs.

There have been expressions of concern why we did not give our reasons on 21/4/2001. All sorts of opinions have been put forward. My own hope is that those who have shown concern will be objective enough to understand the reasons I have given. Further I hope that those indulging in disparaging remarks about a court working on decision of a case will reflect before condemning court. Courts are expected to give considered opinions not extempore messages.

For the foregoing reasons I would uphold the prayers in the petition in that I would declare that the Respondent was not validly elected. I would annul the election. I would order that each party bear its own costs.

For these reasons I did not accept that the petition should be dismissed.

J. W. N. TSEKOOKO.
JUSTICE OF THE SUPREME COURT.

REASONS FOR THE JUDGMENT OF THE COURT BY KAROKORA. JSC

The Petitioner, Col (Rtd) Dr. Besigye Kiiza, was one of the 6 candidates who on 12th March 2001 contested election to the office of President of the Republic of Uganda. On 141h March 2001 the Electoral Commission, hereinafter referred to as the 2 Respondent, declared Museveni Yoweri Kaguta, hereinafter referred to as the 1 Respondent, as President, having polled more than 50% of the total votes. The Petitioner petitioned the Supreme Court of Uganda pursuant to Provisions of Article 104 of the Constitution and Section 58 of the Presidential Elections Act

2000, seeking an order that Museveni Yoweri Kaguta, declared elected as President was not validly elected and that the said election be annulled.

The Petition was lodged in the Supreme Court Registry on 23/3/2001. Hearing of the Petition commenced on 27th March 2001. By virtue of Article 104 of the Constitution and section 58 of the Presidential Elections Act, the Supreme Court had to inquire into and determine the petition expeditiously and declare its findings not later than 30 days from the date the petition was filed.

We perused the complaints raised in the petition, the affidavits sworn in support of the petition on one hand and the answers to the petition by respondents and affidavits sworn in support of respondents' answers on the other hand. We thereafter heard submissions of Counsel from each side. On 2ls April 2001, we gave our judgment, dismissing the petition with order that each party bears its own costs. We reserved the reasons for our judgment to be given on notice.

I now proceed to give reasons why I considered and held that the petition should be dismissed.

In the Petition, the Petitioner made several complaints especially against the 2' respondent and its agents/and or servants for the acts and or omissions which he contended amounted to non-compliance with the provisions of the Presidential Elections Act, 2000, and the Electoral Commission Act, 1 997 as well as to illegal practice and offences under the Acts.

Among the major complaints he made against the 2nd respondent are:

(1) That contrary to Section 28 of the Presidential Elections Act, 2000 the 2' respondent failed to publish a full list of all polling stations in each constituency 14 days before nomination.

(a) Creating new polling stations on the eve of polling day as a result of which the petitioner could not appoint polling agents for those new polling stations.

(2) That contrary to Section 32(5) of the Act the 2nd respondent failed to supply to the petitioner, official copy of voters register for use by his agents on polling stations after he had requested for copies on payment.

(3) Polling commencing before 7:00 am C/s 29(2)(5) of the Act. That the 2 respondent allowed commencement of voting before the official polling time of 7:00 am and allowed people to vote beyond the polling time by people who were neither present at polling station nor in the line of voters at the official hour of closing.

(4) Stuffing of ballot boxes with ballot papers C/s 30(7) of the Act. It was alleged that the 2nd respondent's agents/servants allowed voting with ballot boxes already stuffed with ballot papers and without first opening the said boxes in full view of all present to ensure that they were devoid of any contents.

(5) Multiple voting that contrary to Section 31 of the Act the 2 respondent's servant/agents with full knowledge that some people had already voted allowed the same people to vote more than once.

(6) That contrary to Section 32 of the Act the 2 respondent's servants or/ and agents failed to prevent petitioner's agents from being chased tram the polling stations.

(7) That contrary to Section 29(4)(34) of the Act the 2' respondent and its servants/agents allowed people with no valid voter's cards to vote.

(8) That contrary to Section 42 of the Act, the 2nd respondent and its agents or/servants allowed people with deadly weapons to wit: soldiers and para military personnels at polling stations - presence of which intimidated many voters to vote for the soldiers' boss and candidate Museveni while many of those who disliked to be forced to vote that candidate stayed away and refrained from voting.

(9) That contrary to Section 25 of the Act, the 2nd respondent failed to insure that the entire electoral process was conducted under conditions of freedom and fairness — petitioner and his agents/supporters were interfered with by military personnels.

(10) That contrary to Section 74(b) of the Act, the petitioner's agents or/and supporters were abducted/arrested by army who prevailed upon them to vote for the 1st respondent or to refrain from voting.

(11) That there was voting on sham and special polling stations created on 11th March 2001 without voters cards.

(12) That contrary to Section 25 of the Electoral Commissions Act 1 997, the 2nd respondent failed to display voters Registers/Rolls to each parish or ward in a public place for a period of not less than 21 days.

(13) That contrary to Section 47 of the Act, after chasing away petitioners' polling agents, the 2nd respondent's agents or/and servants allowed the voting, counting and tallying of votes in the forced absence of the petitioner's agents whose duty was to safeguard the petitioner's interests.

(14) That contrary to Section 74(b) of the Act, petitioner's supporters and agents were arrested and detained and released after elections had ended, thus denying them to exercise their constitutional rights.

(15) That the 2nd respondent's agents or/and servants pre-ticked ballot papers in favour of 1st respondent and then handed them to the voters to cast them without allowing voters themselves to make their own choice.

(16) That there was cheating of votes in a significant number of polling station.

(17) That there was intimidation and harassment of petitioner's agents and supporters on the polling day by 1 s respondent's supporters, agents, GISO, LDU, UPDF soldiers.

That in the result, the above non-compliance with the law by the 2nd respondent affected the result of the presidential election in a substantial manner, because:

(i) The number of actual voters on the voters roll/registers remained unknown and some people were disenfranchised and the number of votes cast at certain polling stations exceeded the number of registered voters.

(ii) The identity of the voters could not be verified.

(iii) The electoral process regarding the voters' registers was full of serious flaws and voters were denied the chance and sufficient time to correct those flaws.

(iv) No sufficient time was allowed for the Petitioner, his agents and supporters to scrutinise the voter's roll/register and take corrective measures regarding the same.

(v) The Petitioner's polling agents were denied the opportunity to safeguard their candidates' interests at the time of polling, counting and tallying of votes and in their absence unqualified people voted while some legitimate voters voted more than once.

(vi) It cannot positively be ascertained that the 1 respondent obtained more than 50% of the valid votes of those entitled to vote.

The complaint against the 1t respondent was that he personally or by his agents, with his knowledge and consent or approval, committed illegal practices and offence. These included that he publicly and maliciously made a false statement that the Petitioner was a victim of AIDS without any reasonable ground to believe that it was true; giving gifts to voters with intention of

inducing them to vote for him, appointing partisan senior military officers and partisan section of the Army to take charge of security during the elections, organising groups under the Presidential Protection Unit (PPU) and Major Kakooza Mutale with his Kalangala Action Plan, to use violence against those not supporting the l respondent and threatening to cause death to the Petitioner.

Therefore the Petitioner prayed that:

(1) This court declares that Museveni Yoweri Kaguta was not validly elected as President.

(2) That the election be annulled, and prayed for costs of this petition.

The petition was accompanied by affidavit sworn by the Petitioner. There was objection as to its admissibility on the ground that it offended Order 1 7 r3. The affidavit was admitted and reason is given in course of this judgment. During the respondent's submission, there were objections raised as to admissibility of several affidavits sworn before different commissioners as will be brought out in the course of this judgment.

The respondents through their Counsel have objected to the admissibility of many affidavits. I think it is proper that I dispose of this matter of admissibility of many affidavits sworn by various witnesses in support of the petition. The objection was raised by Dr. Byamugisha lead Counsel for the first respondent.

The Solicitor-General, Mr. Peter Kabatsi for the 2nd respondent supported the objection argued by Mr. Nkurunziza. Mr. Nkurunziza Didas, one of the Junior Counsel for the 1 s respondent led the attack on the admissibility of the affidavits filed in support of the petition. For purpose of the objection, he classified the affidavits in three categories.

First category is what he called inadmissible affidavits. He stated that these should have been objected to earlier but because of the need to expedite the hearing of the petition, objection was

postponed to this stage of the main submissions by his side.
Second, those affidavits specifically referred to by Counsel for the Petitioner in his address to the court.

Third, those affidavits, which were filed but were not referred to specifically by Counsel for the petitioner in his address to court.

Inadmissible affidavits — Mr. Nkurunziza submitted that since the Petitioner was represented by Counsel, the Petitioner ought to ensure that affidavits filed in support of the petition are not in breach of the law. He contended that there are affidavits which breach the law and that they should be struck out. He cited Section 7(2)(3) of the Statutory Declarations Act, 2000. He submitted that the affidavit of Major (RTD) Rwaboni Okwiri, which was sworn outside Uganda, to wit in the United Kingdom, before a Solicitor, is inadmissible for non-registration as required by s.7(3) of Statutory Declarations Act, 2000 and therefore it should be struck out.

For the petitioner Mr. Balikudembe submitted that Major Rwaboni Okwiri's affidavit was sworn by virtue of S.3 of the Statutory Declarations Act, 2000 and that the affidavit does not require restriction before it can be used in a court in Uganda.

The instrument in question and which appears significant in these proceedings is headed AFFIDAVIT immediately after the description of the parties. It prefaces the body of its contents in the following words:
" *I am a Ugandan citizen of the above mentioned particulars and do hereby solemnly and sincerely declare the following:"*

After setting out facts in eleven paragraphs, the instrument ends in these words:
"AND I MAKE THIS SOLEMN DECLARATION Conscientiously believing the same to be true by virtue of the Statutory Declarations Act, 135. Declared by the said OKWIR RWABONI MP"

On the fact of it, the instrument appears to be both an affidavit and a declaration.

Section (7) (i)(2) and (3) relied on by Mr. Nkurunziza states as follows:

"7(1) ***A person wishing to depone outside Uganda to any fact for any purpose in Uganda, may make a statutory declaration before any person authorised to take a statutory declaration by the law of the country in which the declaration is made.***

(2) Judicial and Official notice shall be taken of the signature and seal of the person taking a statutory declaration under this Section and affixed, impressed or subscribed to any statutory declaration referred in sub-section (1)

(3) A statutory declaration taken outside Uganda under this Section shall not be admissible in evidence unless it is registered with the Registrar of documents under the Registration of Documents Act.

On the other hand, Section 3 which was relied on by Mr. Balikudembe reads as follows:
(3) "after commencement of this Act, no affidavit shall be sworn for any purpose, except:
(a) Where it relates to any proceedings, application or other matter commenced in any court or referable to a court; or
(b) Where under any written Law an affidavit is authorised to be sworn."

It should be noted that the document though headed affidavit, its body talks of a Statutory Declaration and concludes as follows:-

"And I make this solemn Declaration conscientiously believing the same to be true by virtue of the Statutory Declarations Act, 135. Declared by the said Okwir Rabwoni."

So in effect it is a Statutory Declaration made in accordance with the provisions of the Statutory Declaration Act, 1 835 of the United Kingdom.

Section 7(3) of the Statutory Declaration Act, 2000 clearly states that a Statutory Declaration taken outside shall not be admissible in evidence unless it is registered with the Registrar of Documents under the Registration of Documents Act. It was conceded that it was not registered

with the Registrar of Document as required by the Law. Otherwise, the document seems to be in order.

The objection is premised on the fact that it was not registered in Uganda as required by law, but not that it did not conform to the law in the UK.

In my considered view, this objection was premised on a technicality, which, if upheld would offend Article 1 26(e) of the Constitution — which enjoins courts to administer substantive justice without undue regard to technicalities. In this case, failure to register the Statutory Declaration in Uganda as required by the act does not go to substantive justice. It seems to be a requirement designed to raise revenue. And I think it is not too late to register and pay the tees. Therefore the objection is overruled.

In the result the Statutory Declaration is hereby admitted.

Within the same category of affidavits Mr. Nkurunziza contended that, there are many other affidavits in support of the petition which are inadmissible because they were sworn in contravention of Section 5 of the commissioners for Oaths (Advocates) Act. Learned Counsel's contention is that because two advocates, namely Mr. Wycliffe Birungi and Mr. Kiyemba — Mutate swore deponents of affidavits of many witnesses for the petitioner and yet they acted as Counsel for the petition, all those affidavits have been rendered invalid and valueless and therefore they should be struck off. These affidavits include those sworn by Okello-Okello, Mugalula Joseph, W.Nalusiba, G.Luwemba, Louis Otika Edith Byanyima, Dr. Ssekasanvu, Emmanuel, Mukasa D. Buloge, F. Mukunzi, Henry Muhwezi and Major Rubaramira Ruranga.

In response Mr. Balikuddembe conceded that the affidavit were sworn before the said advocates, but he contended that the two advocates had not been on his team by the time he drew the affidavits, processed the petition and filed it. He stated from the bar that it was at the time of the first day of the hearing of the case and when he was on his feet introducing Counsel that he received a chit containing the name of the two advocates. He actually disowned the two

advocates. He then referred us to Section 5 of the Act and contended that the provision applies only where an advocate administers oath to his own client in a case.

Section 5(1) of the Commissioners for Oaths (advocates) Act reads as follows:
"***Any Commissioner for Oaths, may by virtue of his commission, administer an Oath or take any affidavit for the purpose of any court or matter in Uganda, including matters ecclesiastical, matters relating to the registration of any instrument, whether under an Act or otherwise,….***

Provided that a Commissioner for Oaths shall not exercise any of the powers given by this Section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter or clerk to any such advocate in which he interested."

The impression I get from the statements of Mr. Balikuddembe is that Mr. Birungi and Mr. Mutale were not advocates for the Petitioner at the time when the various witnesses made the affidavits before the two advocates. There is nothing on the record to controvert this. Further there is no evidence before us to show that the two advocates or anyone of them is a member of the firm of Balikuddembe and Company advocates. That being the case, I do not, with respect, accept the argument that any of the affidavits sworn before Mr. Mutale are defective by reason of client-advocate relationship and therefore inadmissible, in these proceedings. I may say that apparently the two lawyers withdrew from sharing the lime light with Mr. Balikuddembe in this case. In my view the said affidavits are on the facts admissible in evidence in as much as they were not produced in violation of Section 5 of the commissioners for Oaths (advocates) Act.

The last objection to the affidavits in support of the petition is that the various affidavits were drawn in contravention of the provisions of 0.17 Rule 3 of the Civil Procedure Rules. Mr. Nkurunziza submitted that as the petition is not an interlocutory matter, any affidavit which is not confined to such facts as the deponent is able, on his own knowledge to prove, are in breach of the Rule and should not be relied upon. He submitted that the entire offending affidavits should be rejected and that no parts of the same should be relied on. He relied on Constitutional Petition No. 3/99 ***P Ssemogerere & Olum vs. Attorney General*** Constitutional Petition No. 5 of 2001 C.

Mubiru vs. Attorney-General Kabwimukya vs Kasigwa (1978) HCB 251, and Hudani vs. Telani and brothers being ruling of the Principal Judge of the High Court in HCCS No. 712 of 1995. The last two authorities are to the effect that a defective part of an affidavit vitiates the whole affidavit. On the basis of these authorities and submissions, Mr. Nkurunziza submitted that the affidavit of Winnie Byanyima along with 28 other affidavits offend Rule 3 because they or parts of them are based only on information without grounds. Learned Counsel submitted further that 87 other affidavits are based only on beliefs which presumably have no grounds. I must say that Ssemogerere case, the Mubiru case and Kabwimukya case were all decided on their own facts, each is distinguishable. Affidavits in Hudan case were bad.

Mr. Nkurunziza promised to give the full list of the offending affidavits and this was produced in an updated chart on 13/4/2001. Mr. Kabatsi, the learned Solicitor- General concurred and submitted that Rule 3 of 0.1 7 appears to be directive in operation and does not appear to accept severance. He requested that it this court were to depart from the practice then we should not overrule existing decisions.

His opinion was that if this court rules in favour of severance, we would create a bad precedent for the court below.

Mr. Balikuddembe, for the petitioner, made his submission that under 0.17 Rule 3, the court has discretion to accept or to reject proper or improper material in the same way as courts do in regard to oral testimony. He relied on ***Reamaton Ltd vs. Uganda Corporation creameries Ltd & Kawalya Supreme Court Civil Application No. 7 of 2000 (unreported) and Motor Mart (U) Ltd vs. Yona Kanyomozi Supreme Court Civil Application No. 6 of 1999 (unreported).***

Learned Counsel urged us to consider the substance of these affidavits and decide the petition on its merits. Let me begin with the affidavit of the petitioner accompanying the petition which was also included among the defective affidavits which, allegedly offended rule 3 of 0.17. Rule 4(7) of the Presidential Election (Election Petitions) Rules 2001 directs that the petition shall be accompanied by an affidavit setting out the facts on which the petition is based, together with a

list of documents on which the petitioners intends to rely. Under Rule 3 of the same Rules, petition is defined to mean ***"an election petition and includes the affidavit required by these Rules to accompany the petition."***

The petition appears to have complied with these provisions. On the face of it, a petition like a plaint would initially make allegations which are subject to proof or disproof. Without in any way appearing to give license to any petitioner to institute any petition containing all manner of wild allegations. I cannot appreciate how, given the short time constraint, a petitioner can avoid to include hearsay matters in the affidavit accompanying his petition. He will actually base his claim on information provided by other people. I think the proper thing to do is to consider the petition and the accompanying affidavit and finally reject any matters contained in such affidavit as appear not to have been satisfactorily proved. It would be imprudent to reject the whole affidavit at once. In the result I do not agree and I am not persuaded that the accompanying affidavit of the petitioner violated 0.1 7 Rule 3 if indeed that Rule applies to this petition. Rule 1 5 which makes the Civil Procedure Rules applicable in these proceedings states as follows:

"Subject to the provisions of these Rules, the practice and procedure in respect of the petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the Rules made under that Act relating to the trial of a suit in the High Court with such modifications as the court may consider necessary in the interests of justice and expedition of the proceedings."

The import of this rule is that in whatever we do as Justices, we must conduct the proceedings expeditiously and also do justice to the parties. And that is why the trial of the petition is by way of affidavits.

I do not believe that the interests of justice and parties in this petition would be served by scrupulous observance of the requirements of 0.17 Rule 3 which applied in ordinary suits in the High Court. Without making a dogmatic statement, I suspect that because of the scheme of 0.17, the Rules would appear most relevant when a Court orders for hearing to proceed on affidavit.

Apart from the two decisions of this court, cited by Mr. Balikuddembe, there are decided cases which support the proposition that parts of an affidavit can be severed from the rest of the same affidavit if severance will not affect the merits or will not detract from the other paragraphs of the affidavit. See ***M.B of Nandala vs. Father lyding (1963) EA 706.*** Offending part of the affidavit was severed. This is a decision of Sir Udo Udoma CJ., in which 0.17 Rule 3 was considered. See ***Mayers & Another vs. Akira Ranch*** (1969)EA 690) in which the offending part was struck out. See also ***Zala vs Rail! (1969) EA 691*** which is authority for the proposition that an affidavit may be defective but not necessarily a nullity. I must here state that I have gone through the affidavits. Many of the affidavits complain of, are similar to that in ***Nandala case.*** Deponents spoke about what they saw or heard him do or say.
In my opinion, it would not be improper in the peculiar circumstances of this petition, to strike out wholesale affidavits which are found to contain hearsay evidence where the offending parts of the same affidavits can be severed from the rest of the affidavit without rendering the remaining parts meaningless. I think as I have just stated in many of the affidavits witnesses speak of what they actually saw or heard.

As it is apparent from the decision cited as authorities by both sides, judicial opinion has not been consistent as to whether affidavits containing hearsay matters should be rejected wholesale or whether affidavits should be used only in respect of the non-offending parts of the affidavit, It is clear, from as far back as 1 963 (Nandala's case (supra) that there is a string of authorities which support the view that where it is possible, offending parts of the affidavit should be severed so that the admissible parts can be relied upon and these authorities show that severance does not depend on whether the cause involved is interlocutory or substantive. In view of the existence of Article 1 26(2)(e) of the Constitution, it seems to me that the proper practice should be that whenever it is possible, court which is faced with an affidavit which contains some inadmissible matter which can be severed and discarded without rendering the remaining part of the affidavit meaningless, the court should severe the offending part and use the rest of the affidavit.

In this petition I think that any affidavit which contains only hearsay evidence should be

discarded but there may be affidavits which though contain hearsay matters are supported by affidavits of other witnesses who testify to the facts based on those witnesses' knowledge. The issue will be that of consistency.

Finally, one other small matter was the objection raised by Mr. Balikuddembe against the affidavit sworn in support of 1st respondent's affidavit sworn in support of his answers to the petition. Mr. Balikuddembe submitted that it was defective on the ground that the person before whom it was sworn was not disclosed on the affidavit as required by section 6 of the commissioners for Oaths. It was not disclosed on the affidavit that that person had powers to administer the Oath. However, subsequent to this submission, Mr. Gidudu, the Registrar of the Court of Judicature, swore affidavit stating that it was sworn before him. By virtue of the Commissioner for Oaths Act Section 4, Registrar of the High Court, he has the powers of a Commissioner for Oaths.

However, if the petitioner objected to its admissibility on the ground that the affidavit never disclosed the capacity under which the person who signed, did so, the onus was on the petitioner to prove that the person who signed was not so qualified. However, Mr. Gidudu swore an affidavit stating it was sworn before him. So that, in my opinion, disposed of the objection. However, I think, even without Mr. Gidudu's affidavit, the objection would not help, unless the petitioner brought evidence to prove that Mr. Gidudu was not the Registrar of the Court of Judicature.

In the circumstances of this case, the affidavit was not defective.

May I raise my fears which I held when I first read Rule 14 of the Presidential Election/Election Petitions) 2001. The conduct of trial of such important petition as this one, on affidavits desirable though it may appear, because it is assumed to expedite the hearing of the petition, is fraught with problems. Some of those problems have been clearly brought out by the objections to the petitioner's affidavit. One case cited from Nigeria shows that the hearing was oral testimony and the case seems to have been disposed of expeditiously. I would probably say that in future the law-makers should consider petitions of this nature to be tried expeditiously by oral testimony of witnesses.

In their respective answers to the Petition, the l and 2' respondents denied the allegations made in the Petition against them.

On the complaint by the Petitioner that the 1st respondent stated that ***"the Petitioner is a victim of AIDS"*** the respondent stated that the statement was not made publicly or maliciously for the purpose of promoting or procuring election for himself However, he admitted it was true that a companion of the petitioner, Judith Bitwire, had died of AIDS and that the child they had together had died of AIDS. That the 1 respondent had known the petitioner for a long time and had seen his bodily appearance change over time to bear obvious resemblance of other AIDS victims that the l respondent had previously observed.
On the allegation of creating new polling stations, the 2nd respondent stated that no new polling stations were created but rather that some existing polling stations were split for purpose of easing the voting process due to the big number of voters in those stations. In any case, he stated that there was no evidence that the splitting of the said polling station substantially affected the result of the election or at all.

Each of the respondents prayed for the petition to be dismissed with costs. Each respondent swore affidavit in support of his respective answer/reply to the petition. These affidavits are long and so I shall not reproduce them in my judgment but shall be referring to relevant paragraphs of the affidavit where and when need arise in the course of my judgment.

At the commencement of the hearing issues were framed for determination.

1. Whether during the 2001 election of the President, there was noncompliance with provisions of the Presidential Elections Act 2000.
2. Whether the said election was not conducted in accordance with the principles laid down in the provisions of the said Act.
3. Whether, if the first and second issues are answered in the affirmative, such non-compliance with the provisions and principles of the said Act; affected the result of the election in a substantial manner.
4. Whether an illegal practice or any other offence under the said Act, was committed, in

connection with the said election, by the 1st respondent personally or with his knowledge and consent or approval.
5. What reliefs are available to the parties?

I think that that before embarking on the task of deciding this petition on its merits, it is important that I first resolve the issue of burden and standard of proof because every issue which was raised hinges on these elementary rules of evidence. Sections 100, 101 and 105 of the Evidence Act 43 (Cap 43):-
(100) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts must prove that those facts exist. When a person is bound to prove existence of any fact, it is said that the burden or proof lies on that person.

(101) The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

(105) In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

With the above principles in mind I shall consider the relevant provisions of Section 58(6)(a)(c) of the Presidential Elections Act 2000 and Section 65 of the same Act. Section 58{6)(a)(c) of the Act provides as follows:

"(6) *the election of a candidate as President shall be annulled on any of the following grounds if proved to the satisfaction of the court:*

(a) *non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner.*

(a) that an illegal practice or any other offence under this Act was committed in connection

with the election by the candidate personally or with his or her knowledge and consent or approval."

Section 65 of the same Act provides:

" Any person who, before or during an election, publishes a false statement of the illness death or withdrawal of a candidate at that election for the purpose of promoting or procuring the election of another candidate knowing that statement to be false or not knowing or believing it on reasonable grounds to be true, commits an illegal practice."

It must be noted that under Sections 58(6)(a)(c) of the Presidential Elections Act, the burden of proof squarely lies on the petitioner to prove what he asserts. If he wants the election of the President to be annulled he must prove to the satisfaction of the court that there was non-compliance with the relevant provisions of the Act.

I think that a person seeking to set aside election result under section 58(6) of the Presidential Elections Act has heavier burden of proof than in ordinary civil suits, because he is asking court to annul l respondent's election results. In a Tanzanian case of Mbowe vs. Eliofoo (1967) EA 240 Sir George CJ., held that the reason why the Petitioner in election petition should shoulder the burden was because he was asking the court to set aside the respondent's election. Mr. Justice Kibuuka Musoke J, was of the same view in Yorokamu Katwiremu Bateqana v. Ellal Mushemeza & Anor Election Petition No. 1 of 1996. Ntabgoba PJ., in Odetta v Omeda Election Petition No. 001 of 1996 at Soroti Civil Registry emphasized that the standard of proof in election petition was to prove to the satisfaction of the court. In Ayena Odongo v. Ben Wacha Election Petition No. 2 of 1996 at Lira (G.M. Okello, J) as he then was, held that the burden of proof is on him (petitioner) and the standard is beyond reasonable doubt. Ouma J., as he then was seemed to have been of the same view in Micheal A. Ogoola vs. Akil Othieno Emmanuel Election Petition No. 2 of 1996 at Tororo. In Byakutaga Rugadva Israeri & Returning Officer Election Petition No. CM/MHI/198 1 Opu J as he then was, held that the standard of proof in election petition was on the Petitioner and that the standard of proof must be such that one had no reasonable doubt that one or more of the grounds for challenging the election had been proved. The Uganda Court of

Appeal held in Margaret Zziwa v. Catherine Naava Nabagesera civil Appeal No. 39 of 1997 that the standard of proof in election .

petition must be proved beyond reasonable doubt, because the court cannot be said to be satisfied if there was a reasonable doubt.

We were persuaded by Dr. Khaminwa, one of the Counsel for 1st respondent that the standard of proof to prove these charges is very, very high just near beyond reasonable doubt. Our Court of Appeal and some decision of the High Court of Uganda have held the standard of proof in Election petition is beyond reasonable doubt.

With respect, I do not know why we are trying to supply words to what the Act states. The Act says:

"***The election of a candidate as president shall only be annulled on any of the following grounds if proved to the satisfaction of the court"***

Are we adding proof ***"beyond reasonable doubt"*** because our Members of Parliament did not know the phrase when they were debating the bill?

In my view, I would not deviate from what Parliament stated in the Act, especially when there is no ambiguity in Section 58(6) of the Presidential Elections Act. What is required of the petitioner who is seeking annulment of the election of the President is to adduce evidence and satisfy the court that the allegations he/she is making have been proved to the satisfaction of the court.

So, having disposed of that point, I think that I must now deal with the issue of whether during the 2001 election of the President, there was non-compliance with the provisions of the Presidential Elections Act, 2000.

The Petitioner presented very many complaints against both the 1st and 2nd respondents and their agents and/or servants, for acts and omissions which he contends amounted to non-compliance

with the provisions of the Presidential Elections Act and the Electoral Commission Act 1 997 as well as to illegal practice and offence under the Act. These have already been dealt with before.

All the evidence at the trial of the petition was required to be adduced by affidavits. Accordingly, parties filed many affidavits to support their respective cases. The Petitioner filed 174 affidavits both in support of the petition and in reply to the affidavits of the 1st and 2nd respondents, in turn filed 1 33 and 88 affidavits respectively. In addition to affidavit evidence, leave was granted to call Dr. Diana Atwire who had sworn an affidavit for the 1st respondent to be cross-examined on her affidavit. I must state that I relied on a few affidavits which I considered to be relevant for the purpose of determining the petition.

Counsel for all parties read the affidavits deponed to in support of their respective cases while addressing the court.

(1) The first complaint was the 2nd respondent failed to publish a full list of all the polling stations in each constituency 14 days before nomination day of 8th and 9th January 2001.

The evidence to prove that the 2nd respondent failed to comply with the above provision of the Act is in the affidavit of Mukasa David Balonge paragraph 28 where he stated that on 11th March 2001 the 2 respondent issued a list of polling stations. On this list 11 76 were new polling stations while 303 were missing, though originally appeared on the Gazette. Earlier on, the 2nd respondent had published a list of polling stations on 19th February 2001 which was well after the nomination.

The 2nd respondent said nothing in rebuttal.

Clearly, this means that the list of polling stations issued on 11th March 2001 and on 9th February 2001 were issued after the nomination day, which was a non-compliance with section 28 of the Act.

1(a) The other complaint was that the 2nd respondent created new polling station on the eve of polling.

The affidavits sworn in support of the complaint were of the effect that there were 1176 new

polling stations created on the eve of polling day, thus, contravening Section 28 of the Presidential Elections Act where: Mr. Mukasa David Bulonge averred in his affidavit paragraph 2, 3, 28 and 29 as follows:

(2)That I was appointed to work on the National Task Force of the petitioner as Head of Election monitoring desk and electoral process from the time of nomination throughout until polling day and declaration of results.

(3) That in the course attended several consultative meeting with the Electoral Commission and always in touch with the commission officials, representing the interests of the petitioner.

(28) That on 11th March 2001, the 2" respondent issued a list of polling stations On this list 1176 were new polling stations while 303 were missing, though originally appeared on the Gazette.

(29) That while, issuing the list of the polling stations, no corresponding voter's rolls for the polling stations were issued by the 2" respondent. The affidavits of Edson Bunge and E. Bagenda Bwambale from Kasese; James Oluka from Soroti and Vincent Ebulu from Gulu corroborated the existance of new polling stations which came into existence on 11/3/2001."

The 2nd respondent averred that no new polling stations were created but rather that the existing stations were split for purpose of easing the voting process due to the big number of voters in the those stations. I must state that the polling stations on the eve of election prejudiced the petitioner because the petitioner could not appoint polling agents to safeguard his interests. Therefore, this was a non-compliance with Section 28 of the Presidential Elections Act, 2000.

(2) The second complaint was failure by the 2 respondent to compile a purported final voters' Register on 1 0/3/2001 and failing when requested to supply copies of the same to the petitioner for his agents use although the petitioner was ready and willing to pay for the same contrary to Section 32(5) of the Presidential Elections Act.

In answer to the complaint, the 2u,d respondent stated that the petitioners' request was received late on 11/3/2002 and there was no sufficient time to print the Register for the petitioner on the eve of polling day. In effect, the 2nd respondent is conceding having failed to comply with the provisions of the Act. In the premises therefore this was a non-compliance with the provisions of the Act, since the 2nd respondent admitted that he never supplied voters Rolls.

3. There was complaint that in some polling stations, polling commenced before 7:00 am. The 2nd respondent stated that neither itself not its agents or servants allowed people to vote before or after the official polling time.

Affidavit of Moses Babikinamu of Lwebitakuli village Lwebitakuli cub-county Mawongole Sembabule averred:

"(4) That I together with Kafero Anthony were appointed polling agents for the petitioner and posted at Lwebitakuli polling station.

(5) That on the polling day I reported to the station at 6:00 am. By that time people had started voting. I asked the Presiding Officer, Oliver Katirinkiza, who was also a campaigner for the 1st respondent as to why voting commenced before the stipulated time of 7:00 am. She wondered as to why I was asking. I showed her my appointment letter. She simply told me to sit and concentrate on what I was supposed to do.

(7) At around 10:00 a.m. MP for Mawogola. Sam Kutesa came and asked her the number of people who had voted. She told him it was 300 whereas for me I had counted 52.
(8) That the number of people who voted from the time I arrived to 5:00 p.m. when voting closed was 160. That however, counting all the ballot papers at the end of the exercise showed that the number of voters was 510. That I disputed the declaration but the agents of Museveni issued threats against me and my colleagues saying they were going to arrest us. The presiding officer told me to sign the documents without even reading through. I signed and left immediately as I was fearing for my life"

Affidavit of Musisi Francis of Lugolole, Baitambagwe in Mayuge District:

(2) *That I was appointed as a polling agent at Baitambagwe for the petitioner.*

(3) *That on 12th march 2001, I reported to the said station at 6:00 a.m. only to find that voting exercise which was a scheduled to start at 7:00 a.m. had already started in the absence of all the other polling agents for the different candidates."*

Affidavit of Sam Kakuru:

"(2) That I was registered to vote at Karuhinda in Kirime Kanungu District.

(12) That on 12tk March 2001 I met people singing "No change. Kaguta" who chased me back to my home at 5:00 a.m.

(14) That at 6:30 a.m. I left and arrived at the polling station where I found people already voting. I asked for my ballot paper and voted.

(16) Thereafter I showed my letter of appointment as a polling agent. The presiding officer ordered me to sit far from the agents table, saying the table was for Government people not us "rebels "

(17) That the presiding officer and other polling officials started ticking ballot papers for people on the table. I objected and was manhandled and beaten when police were looking on helplessly.

(18) I was chased away from the polling station. I went home until around 5:00 p.m. when I saw a group of Museveni supporters coming for me to go and sign. I refused to go. I entered my house. They threatened to burn my house….

Affidavit of Oliver Karinkiza states as follows:

(2)*That I was the Presiding Officer at Lwebitakuli polling station on 12/3/2001.*

(3) That I have carefully read and understood the affidavit of Moses Babikinamu in support of the petition and I respond as follows:

(4) That it is not true that I was a campaigner for the 1st respondent.

(5) That on 12/3/20011 the voting commenced at 7:00 am and not at 6:30 am as alleged by Babikinamu.

(9) That the said MP for Mawogola Sam Kutesa came to the polling station in the afternoon and not at 10:00 am as alleged.

(10) That the voting exercise was peaceful and orderly and I never heard any body complain.

(11) That the number of people who voted at the polling station were 510 and this was in the presence of polling agents for both candidates.

(12) That after counting Babikinamu confirmed the results and willingly signed.

(13) That it is not true that I threatened Babikinamu with arrest.

The affidavit of Moses Babikinamu shows in paragraph 5 that when he reported to the polling station of Lwebitakuli, in Sembabule at 6:30 a.m., he found voting had already started. When he asked the presiding officer why they started voting before official time of 7:00 am, she told him to sit and do what she was supposed to do. Between 7:00 am. and 5:00 pm only 160 people voted; but after counting all the ballot papers, the total number of voters cast were 510. Although he protested, he was forced to sign the declaration forms for fear for his life.

The affidavit of Bernard Masiko Paragraph 8 shows that he arrived at the polling station with petitioner's agents at 6:00 a.m, he found voting already in progress.

Kakuru Sam and Francis Musisi's affidavits shows voting started before 7:00 am.

Oliver Karikiza, presiding officer of Lwebitakuli denied in her affidavit that polling did not start before 7:00 am I rejected her denial as an after thought. I do accept the evidence in the affidavit of Babikinamu, because I would not expect the presiding officer to swear admitting having infringed the law.

Clearly, in certain polling stations polling commenced before 7:00 a.m and this was on infringement of S.29 (2)(5) of the Act.

4. Another complaint was stuffing of ballot boxes with ballot papers. It was alleged that this contravened section 30(7) of the Act. I must state that the petitioner never raised this stuffing of ballot boxes in his affidavit in support of his petition. However, Bernard Masiko from Rukungiri, Stanley Bugando from Kanungu and Babikinamu from Sembabule stated in their affidavits that ballot boxes at their respective polling stations were stuffed with ballot papers before voting commenced and that voting commenced without opening the boxes for public to view if they were devoid of any ballot papers. But Moses Mwesigye from Kanungu and Oliver Karinkiza from Sembabule denied such practice.

However, on 6th April 2001, the petitioner in paragraph 39 raised the issue in support of complaint of ballot box stuffing in his argumentative affidavit, after he had quoted six cases where the number of ballot papers issued, those cast and those unused do not tally or make sense. For instance, in the case of lshaka Adventist College, Igara county in Bushenyi, the number of ballot papers issued were 477. These were equivalent to the number of ballot papers counted. Yet 253 ballot papers were unused.

In paragraph 39 the petitioner concluded that the above act (acts) constituted ballot stuffing that characterised the election Countrywide.

With due respect, I think it would be difficult to conclude from such forms that there were ballot stuffing without calling one of the Presiding Officials and polling agents who filled those forms to court and throwing light on what he or they meant. I think, as I stated when I was discussing affidavits, this is one of the problems of trying a case of this magnitude relying only on affidavits.

However, in addition to Babikinamu and Stanley Bugando, there were affidavits of Bernard Masiko, Kakuru Sam and Francis Musisi which stated that voting commenced before 7:00 am when there were no petitioner's polling agents. I would in the circumstance state that the evidence of ballot stuffing given by Babikinamu and Bugando is by inference confirmed from the evidence of Masiko Bernard, Kakuru Sam and Francis Musisi who stated voting commenced before 7:00 am. In my view, the presiding officers started voting before the official time laid down by statute and in the absence of petitioner's polling agents, because they did not want the ballot papers stuffed in the boxes to be seen.

I therefore rejected the denial by Karinkiza and Mwesigye. In the result, it was proved to the satisfaction of the court that in a limited number of polling stations, there were ballot stuffing of ballot boxes before polling commenced.

5. Another complaint concerned multiple voting. It was alleged that 2' respondent's agents/servants with full knowledge permitted people who had already voted to vote again. The affidavits of the following deponents show that people who had already voted, voted again. The presiding officer was not bothered about multiple voting.

In the affidavit of one Change Gideon from Kabale he averred as follows:-

(2) That I am a registered voter in the 2007 Presidential Elections at Bubare Headquarters B polling station.

(5) That on the polling day as I was going to monitor at Ahabigungiro polling station, Mr. Dan Kaguta, the Deputy RDC of Kabale stopped and offered to give me a lift.

(6) That in the car, he asked me whether I was going to vote for Candidate Museveni and I said I was, where upon he told me that in that case, I must overlook whatever rigging I saw.

(7) That at Kaziniro polling station. I saw Kaguta distribute to each of LC 11 chairman, presiding officer and a police constable a bundle of cards and money.

(8) That at Ahabigungiro polling station the said Kaguta gave more cards to the polling officials to distribute to Museveni's supporters.

(9) That later when he found LC officials distributing these cards, he seized a stack of 6 of those cards from Kate Tumwijukye — but he was summoned by the presiding officer and ordered to stop forth-with, since the cards were for Museveni whom I had told them I supported. For fear of being harmed I refrained from complaining and so rigging continued unchecked.

Although the 2nd respondent denied knowledge of this and although respective presiding officers denied any knowledge, I know that they would not admit that they permitted such malpractice to be committed. However, the affidavit of Kiryowa ldd from Sembabule stated in paragraph 7 that:

"Kakuru who had earlier on cast his vote came back and stuffed a heap of ballot papers in the ballot box but because I had earlier on been threatened. I kept quiet"

Then Byaruhanga Yahaya of Busia stated in his paragraph 4 of his affidavit:

"That I also noted that one Birungi voted twice at Marach polling station."

Ssentongo from Ntungamo stated in paragraph 5 that soldiers at polling station allowed Museveni's supporters to vote more than once. When he complained about it, his complaint was ignored.

Then Mubarak Kirunda from Mayuge stated that within Magamaga army barracks soldiers were voting many times. He saw some civilians whom he knew, wearing
army uniform and voting when he complained soldiers chased him from the polling station.

Then the affidavit of Patrick Matsiko Wa Mucoori senior reporter with the Monitor Newspaper stated"

"(1) 1 am an adult Ugandan and a registered voter at Bihanga polling station

(2) That I work as a senior reporter with the Monitor News paper

(7) That on the polling station of the civilians where I reached first, I found several people complaining that their names were missing from the register.

(18) That in the progress of the voting I started noting that people who had already voted were voting again at this same station and I continued seeing many voters voting multiples times.

(19) That at one moment I saw a young girl of about 12 years coming to vote with voter's card and she was allowed to vote

(21) That after the incident of the 12 years old girl who voted once, other voters continued to vote several times, and in formed the presiding officer and pointed out 2 (two) men whom I was sure had already voted but had come back to vote again and asked the presiding officer to check on the names of the men on the voters cards and then ask their real names. The presiding officer declined to do that.

(22) That I again saw the Battalion intelligence officer voting more than five times by changing his clothes each time he came to vote.

(23) That when multiple voting continued I started getting scared of my safety and restrained myself from pointing out the many multiple voters.

(25) That the presiding officer asked why I was observing votes. I told him that was a journalist and I told him that it was part of my job.

(26) That the presiding officer then confiscated my personal effects mobile phone, note book — Regimental police took me to quarter guard. Later I was released.

I must state that the affidavits have shown to my satisfaction that in a limited number of polling stations, election officials permitted multiple voting. This offended section 31 of the Act.

6. Furthermore, there was complaint that 2' respondent's presiding officers failed to prevent petitioner's polling agents from being chased away from the polling stations. It was contended that this contravened section 32 of the Act. The 2 respondent said nothing to controvert this complaint.

Clearly, the affidavits of James Musinguzi, Moses Babikinamu, Sam Kakuru, Alex Busingye and Bonafice Ngaruye show that polling agents for petitioner were chased and voting continued.

In my opinion, the presiding officer having been in-charge of the polling station, he failed to stop intruders from chasing away petitioner's polling agents. Therefore, wherever it was done this was in breach of section 32 of the Act.

7. Another complaint was that the 2nd respondent's Presiding Officers permitted people who had no voters' card to vote. The 2 respondent conceded that it did, if such people could be properly identified.

With respect, I think this was in breach of sections 29(4) and 34 of the presidential Elections Act.

Sub-section 4 of Section 29 provides:

"(4) Any person registered as a voter and whose name appears in the voters' roll of a polling station and who holds a valid voter's card shall be entitled to vote at the polling station."

Clearly, the 2 respondent had no discretion to allow any person without voters card to vote merely because he was identified. Otherwise, there would be no need for registration of voters and issuing of voters' cards. I would in the circumstances find that the 2 respondent was in breach of sections 29(4) & 34 of the Act.

8. Another complaint was that C/s 42 of the Act the 2nd respondent's servants and or agents in course of their duties allowed people with deadly weapons to wit soldiers and para military personnel at polling station — a presence which intimidated many voters to vote for the soldiers' boss and candidate Museveni while many of those who disliked to be forced to vote for that candidate stayed away and refrained from voting.

The 2nd respondent denied ever allowing any unathorised armed people in any polling stations. I think that the 2t respondent had a problem of enforcing section 42 of the Presidential Elections Act, 2000 after the Army Commander and a group of other Senior Army Commander and soldiers together with other security agencies were deployed as spelt out in the affidavit of Major General Jeje Odongo, to take charge, oversee and ensure peace and security during the electoral process.

Otherwise the law was very clear. Section 41 of the Act gives power to the presiding officer at any polling station to appoint an election constable to maintain order in the polling station throughout the day, if there is no police officer. The section lays down circumstances under which an election constable can be appointed.

Then Section 42 of the Act provides as follows:

*"**(1) No person shall arm himself or herself during any part of polling day, with deadly weapons or approach within one kilometer of a polling station, with deadly weapons, unless called upon to do so by lawful authority or where he or she is ordinarily entitled by virtue of his or her office to carry arms.***

(2) Any person who contravenes sub-section (1) commits an offence."

In my view, considering the above provisions of the Act, although the Army Commander, Major General Jeje Odongo explained in his affidavit circumstances under which UPDF soldiers got involved in being deployed in the electoral process, I must state that there was no provision in the Presidential Elections Act, 2000 under which they came to be on polling stations. It appears that the nearest the armed soldiers could come to the polling station was one kilometer. Therefore, unless armed soldiers were called upon by lawful authority to be on the polling stations, they should not have been on the polling stations. In my view, for the purpose of the Presidential Elections, lawful authority appearing in sub-section (1) of Section 42 of the Act, would mean those in charge of the Electoral process.

Clearly, the evidence in the affidavit of Kakuru Sam, Kiiza Devis, Alex Busigye, Patrick Matsiko Wa Mucoori and Boniface Ruhinda Ngaruye shows that petitioners' agents who complained about any mal-practices in the voting process at the polling station were chased away by armed UPDF soldiers who were present.

In my opinion, since the law was very clear that no person shall ***arm himself or herself during any part of polling day with any deadly weapon*** or approach within one kilometer of the polling station, with deadly weapon unless called upon, and since the Electoral Commission Chairman

had written to the President disapproving of their involvement in the electoral process and had appealed to him to withdraw them from the exercise, it cannot be said that those in lawful authority had called upon the armed soldiers to be on polling stations. Moreover, the armed soldiers had their own designated polling station where they were supposed to cast their votes. Therefore, they ought not to have been on civilian polling stations because their presence could be interpreted as interference with free and fair election.

I would therefore say that soldiers and other para military personnel with deadly weapons at polling stations was non-compliance with the Act.

9.There was a complaint that the 2nd respondent failed to ensure that the entire electoral process was conducted under conditions of freedom and fairness and as a result the petitioner and his agents and campaigns were interfered with by Military including the PPU and the Para Military personnel such as that led by Major Kakooza Mutale. The petitioner's affidavit in support of the petition states in paragraph 1 5 as follows:

"That during the whole period of the presidential election campaign the respondent deployed the Army and Major Kakooza Mutale's pare Military personnel of Kalangala Action Plan all over the Country and directed the Army Commander Major General Jeje Odongo and other Senior Military Officers to be in charge of security during the whole Presidential Election process and subsequent to this, my supporters, campaign agents any myself were harassed and intimidated and a number of any supporters and campaign agents were assaulted and arrested."

There were several affidavits in support of the above complaint, but I shall cite a few.

I shall start with the affidavit of Hon. Major (Rtd) Okwir Rwaboni who stated as follows:

(1) That I was illegally arrested detained tortured and intimidated during the presidential campaigns in Uganda that run from 8th January to the 12th march at this time I was in the National Campaign Team.

(2) That on 19th January 2001 I was confronted by members of the Presidential Protection Unit (PPU) in Rukungiri district/Kanungu Trading Centre) and prevented from consulting with our supporters. I was there to meet the supporters of the presidential candidate Dr. Kiiza Besigye between 10:00 a.m. and 12:00 p.m. I was surrounded together with my colleagues and our supporters- We were then held hostage by members of PPU who were under the Commander of one Capt. Ndahura. I managed to leave the scene but the PPU and police kept the people hostage for the next two hours. They later followed me to the venue of my next meeting, Rugyendo sub-county Kihihi in Rukungiri District.

(3) That on the same day, members of the PPU surrounded me and other supporters of Col. (Rtd) Dr. Kiiza Besigye In Rugyeyo sub-county in Kinkizi ..... About 12 soldiers pulled out their guns cocked them ready to shoot, pointed them at me and ordered me to leave the District. The same soldiers under the command of the said Capt. Ndahura assaulted Dr. Besigye's supporters and arrested them.

That he was going to be treated like a rebel. This was after Henry Muhwezi had refused Capt. Byaruhanga's request to him to join candidate Museveni. After that encounter Capt. Byaruhanga's driver and bodyguard followed him, arrested others as they forcefully dispersed the gathering.

(4) On the 19th February 2001 I was made against my will to sign a document announcing my withdrawal from the elect Besigye Task Force. I was made to sign this document by two senior UPDF officers (Major General David Tinyefuza and Lt. Col. Noble Mayombo at Nile Hotel, Kampala.

(5) That on the 20th February 2001 I was unlawfully and violently arrested at Entebbe International Airport beaten and sat upon in a military police pick-up truck, in presence of journalists, diplomats and colleagues and illegally detained at the Chieftaincy of Military Intelligence (CMI) Headquarters in Kampala. During the arrest I sustained injuries to my leg, chest and still undergoing treatment for these injuries.

(6) That from 4:00 p.m. on 20th February 2007 to 5:00 p.m. on 2 1 February 1 went through a grilling six hour interrogation session conducted by such officers.

(8) That on 21st February 2007 I was again forced to make a statement disassociating myself from Presidential Candidate Dr. Besigye's Task Force. This time in presence of Major-General Elly Turn wine, Major- General David Tinyefuza, Major- General Jeje Odong and Lt. CoL Noble Mayombo a statement I later read to the Press at Parliament.

(9) That between 27th February 2001 I was under, virtual house arrest at my residence in Bbunga, guarded by officers and men of the UPDF under the guise of state protection against my own candidate and his supporters.

(10) That, on the 21 February 2007 had to leave the country as I felt my life was in danger and presently lives in the UK with my family.

(11) Consequently I did not vote in the 72 March 2001 presidential Election which is a denial of my constitutional right."

Mpwabwooba Callist stated in his affidavit as follows:

(5) I went to meet Major Okwii Rabwoni at Kambuga. There I found PPU soldiers who had Capt. Ndahura's vehicle and beat up people who had came to meet Major Okwir.

(8) As soon as they saw me, they attacked and hit me with a stick. I rode my motor vehicle. They chased me with their double cabin but failed to catch up.

(9) At Rugyeyo where Okwir was to address us, they came again ordered us to disperse despite the fact that police authorities and GISO had been notified about our meeting.
(11) On 3rd March 2001 when Dr. Besigye was coming to address a rally at Kanungu the

GISO, Baguma John and LC 11 Chairman Kanyonza went around telling people that if they turned up to the rally, they would be dealt with.

(***13) Throughout the two remaining weeks to the election, the same people went around directing people to turn up and vote for Museveni and that if they did not, their homes would be burnt.***

(14) On the day of elections, PPU soldiers were deployed throughout our village and neighbouring ones and at Gomborora Headquarters. The night of elections some soldiers were distributed at homes of some known supporters of Dr. Besigye such as James Musinguzi and Byaruhanga Benon. I found them there that night.

(17) At Kifunjo Polling station I found the presiding officer Mr. Korutokye personally ticking for candidate Museveni on the ballot papers before handing them to voters. We were counting 500 votes being ticked before we lost count and gave up. At Katojo, I found the same practice. At Kashojwa, Mwebesa Micheal was doing the same. When Kazahura came to vote, he found his ballot paper already ticked, but he insisted on ticking his own ballot paper which eventually they gave and he ticked it himself.

(22) A day after elections, Mugisha a councilor met me in presence of MP Kinyatta and the RDC and introduced me to them as the rebel who was trying to over throw them so as to become RDC in Besigye's government."

Affidavit of Bashaija Richard of Rukungiri township stated in his affidavit sworn on 20th March, 2001 as follows:

(1) That I am an adult Ugandan citizen.

(2) That I was registered voter in the Presidential Election at Butagasi polling station. I was also a co-ordinator on Dr. Besigye District Task Force.

(3) That on 27th January 2001 we were holding our candidate's meeting at Keijanga, Kirima. At 3:00 pm about 4 police men from Rukungiri came to the venue of the meeting and arrested us saying our meeting was illegal.They rounded us up At Rukungiri police station for 3 days and we were released on police bond. When we later reported back to honour the bond, they tore the bond papers and told us the case was closed.

(4) *On the 201h February 2001 at Kanungu where we were coming from checking on our agents one Owembabazi and I were arrested by the GISO of Kirima who had set up a road block. We were beaten up, thrown on a pickup truck and taken to Karengye where I was thrown in a pit and buried under soil/mud leaving only the head in the open. After they had left, Owembabazi rescued me.*

(5) *As I was trying to go to Rukungiri to report the incident the same day police fired tear gas at me preventing me from doing so.*

(6) *A day later, the GISO and police demanded that I take them to the scene. We found there the owner of the land in which 1 had been buried and he corroborated my statement to that effect. They told me to report to the police the next day, but when I did, I was locked up for 3 days. Taken to count and charged with leading a demonstration. I was released on bail.*

(7) *That on 2nd March 2001 as we were waiting for Dr. Besigye in-front of our District Campaign Office, PPU soldiers attacked us and beat us up, dispersing us and preventing us from meeting our candidate. That evening, the PPU soldiers found me in Ifumo hotel, attested me and dragged me to the streets, removed my shoes, kicked me for about 30 minutes and then released me.*

(8) *That on 3 March 2001, as we were arranging to hold a rally with our candidate, I found Capt. Ndahura of PPU in Hotel Holiday. He called me to his table, pulled out his pistol held it to my head and warned me he would shoot me if anything happened to PPU personnel in Rukungiri. The same day after Besigye's rally, the PPU soldiers went on rampage in the town shooting many bullets in the air and*

at our supporters and killing one Beronda in the precis. We had not provoked them in any way. We had not breached the peace nor were we demonstrating but were just walking back from the venue of our candidates' rally.

(9) *From then on, the PPU soldiers started actively looking for me and I went into hiding till the morning of voting day when I sneaked in and case my vote.*

(10) That the above are were examples or the kind of harassment my colleagues and on the Besigye campaign team in Rukungiri went through especially from the time the PPU and Senior District Administrators actively started on a deliberate process to prevent any form of support for Dr. Besigye in Rukungiri and Kanungu District.

Dan Okello in support of the petition stated in his affidavit as follows:

(2)*That I am a registered voter in Erute North Constituency, Aromo sub-county at Otara 111 polling station.*

(3) That Aromo UPDF detach is within my village — some 250 metres away from my home.

(4) That on the evening of 1 March 2001 while in town I learned that Lt. Col. Tonney Otoa, MP had instructed the UPDF commandant at Aromo detach to arrest me and other people opposed to Yoweri Kaguta Museveni.

(5) That I am an aspiring Parliamentary candidate for Erute North and during Presidential Elections campaigns I was campaigning for candidate Besigye.

(7) That in the morning of 12th March 2001 at around 8:30 am as I and one Saul Okor were approaching Aromo sub- county Headquarters where my polling station was located we met the commandant of Aromo LIPDF detach Sgts Sempijja was being given a lift on a motor cycle.

(18) - (14) omitted.

(15) That I and Okor took off from Lira to guard vote at Aromo but on the way we met the UPDF commandant who arrested us at 3:30 pm.

(16) That the said UPDF commandant took us to Walela polling station where I was locked in the middle seat of double-cabin vehicle and guarded by Sgts Sempijja.

(17) That we were kept at Walela polling station till 6:00 pm after which we were driven to Ayile p 7 school polling station three kilometer from Walera.

(22) That the commandant agreed to release me at 10:00 pm leaving my friend Okor behind.

(25) That on 13/3/2001 I reported to DPC and recorded my statement of my arrest and how I was prevented from voting in the Presidential Elections.

Alex Otim of Gulu stated in his affidavit sworn on 22 March 2001 as follows:

(2) ***That on the 22nd March 2001 I went to vote and also to monitor the election process in Paico Division.***

(3) That while I was at the polling station at Paico Primary School I together with other monitor found that soldiers were deployed two at each polling station.

(4) The soldiers started forcing people especially old ones to vote for their own choice.

(5) The soldiers were involved in the malpractice at the polling station

(6) That we later chased the soldiers away from the polling station. They went to a nearby barracks and came back armed and were also using army vehicle (mamba).

(7) That the soldiers assaulted me and Okello Saul and arrested us only to release us at 8:00 pm after the voting had ended.

Henry Muhwezi stated in his affidavit as follows:

(1) That I am a registered voter entitled to vote at Nyakishenyi in Church School polling station.

(3) That I was appointed a campaign agent for the petitioner in the capacity of polling secretary for Kamwenge District.

(4) That I know Capt. Charles Byaruhanga and area MP for Kibaale County and is my personal friend and was a campaign agent for the 1st respondent.

(5) That while at Kamwenge medical care which is opposite the respondent's campaign Task Force officers, I was called by Hon. Capt. Charles Byaruhanga who was standing in front of 1 respondent's Task Force offices.

(6) That I went to where he was and he told me to change from supporting the petitioner to 1 respondent, his candidate.

(7) That I replied that like so many times he has told me to change, I was not going to change.

(8) Thereafter he told me that what suits me best is the gun as I am now a rebel.

(9) That all this happened in presence of James Birungi Ozo.

(10) That later in the day at around 6:00 p.m I was abducted by Nuhu Kassim, the escort of Hon. Capt. Byaruhanga, Abdul Kareera and Kenneth Ruzinda an LDU who bundled me into a car belonging to Abdul Kareera.

(11) That I was taken to (Umoja Hotel where I found Hon. Capt. Byaruhanga who instructed my abductors to take me to Bihange Army barracks.

(12) That on the way to Bihanga Army Barracks around Kaburasoke village, the car was stopped and Kassim put me on gun point and thereafter was pulled out of the vehicle and thrown in a trench where I was beaten and tortured.

Mr. Anteli Twahirwa stated in his affidavit as follows

:"(2) ***That I am a registered voter in the 2001 Presidential Elections. 1 was registered to vote at Kigongi polling station in Kabale Municipality. I was Kabale District Chairman for the Besigye campaign Task Force.***

(3) That during the campaign the RDC Mr. Mwesigye together with LDU, Parish Chiefs, GISO kept us under constraint harassment. The harassment was widespread and occurred in almost in every part of the District.

(4) We had a wide range of complaints about the conduct of the Pre-election process which we found to be fundamental flamed. We forwarded our complaint to the EC but nothing was done to redress the situation. A copy of the complaint was attached to his affidavit.

(5) Our team was not invited to witness the delivery of election materials.

(6) That on voting day itself our agents gave me reports of widespread intimidation of votes by Government officials, forcing them to vote for candidate Museveni and many electoral mal-practices ranging from allowing people to vote when they were not entitled forcing voters to tick their votes in the open and for, candidate Museveni, forcing our agents to sign declaration forms when they had been prevented from witnessing the polling exercise and many others.

(7) That we forwarded our complaints to the NGO Election Monitoring Group and the polling official of all levels, but nothing was done to regularise the election. (A copy of their complaint was attached to the affidavit).

(8) That I have perused the declarations of results of the said election for our district and found that nearly all of them are inaccurate. They indicate total numbers of votes in the possession of polling officials which are higher than the total ballot papers officially received at the respective polling stations. (copies of the declaration forms containing these anomalies were attached to his affidavit).

(9) That in the circumstances the elections in our district were manifestly and massively rigged in favour of candidate Museveni and were not free and fair."

The following are affidavits in rebuttal Affidavit of Major-General Jeje Odongo

"(1) That I am the Army Commander of the UPDF.

(3) That my duties include the overall command and direction of the UPDF which is only assigned by the Constitution to preserve the sovereignty and territorial integrity of Uganda.

(4) That I have read the petition and affidavit of Col. (Rtd) Dr. Besigye Kiiza in support thereof and wish to respond on matters relating to the UPDF alleged therein as hereunder.

(5) That in January 2001 at the meeting of the National Security Council noted that there were indications that election related crimes were on the increase and could jeopardise the general peace and security of the Country.

(6)……

(7) That on the basis of the foregoing I briefed the President and indicated to him of the need to put a mechanism to handle the situation.

(8) That about the same time I discussed with the minister of internal affairs who pointed out

to me the inadequacies of the police force in the task ahead and requested that police be augmented by the UPDF.

(9) That I briefed the President and suggested the formation of a joint Security Task Force to oversee handle and ensure peace during the Electoral process.

(10) That a joint Security Task Force comprised of the Police, the Army, the LDU and the Intelligence Agencies was formed under the chairmanship of the Army Commander deputised by the Inspector General of Police and the Director General of Internal Security Organisation.

(11) a point command structure was in each District, DPC was the overall in charge of security and the Armed Forces were put on the alert for assistance as and when need arose.

(12) The formation of such joint security task force is not new phenomena in this country as the same course of action has been resorted to whenever need arose.

- the Currency Exchange 1987
- the 1989 expansion of the vote election
- the 1992 Local Council Election
- the 1996 Presidential Election
- 2000 Referendum
- the visiting of the US President Bill Clinton

(13) For the foregoing reasons, it is not to state in paragraph 3(2) © of the petition that the 1St respondent appointed me and other Senior Officers to take charge of the election process for partisan purposes. It is also not true to state that the army was deployed all over the

Country and that such deployment resulted into any voters voting the 1st respondent under coercion or tear or that they abstained from voting.

(14) That to the best of knowledge same for polling stations where members of the Armed Forces were ordinarily registered as voters, I can confirm that members of Armed Forces never went to any polling stations for the alleged purpose or at all.

(15) That it is not true that the 1st respondent organised groups under the PPU to use force or violence against the petitioner as alleged in paragraph 3(2)(d) of the petition. I wish to state that members of PPU were deployed in Rukungiri in advance to his visit to the area sometime in January 2001 and their stay was necessitated by his planned return to the area, having taken the safety of the person of the President and the general peace and security of the area.

(16) That the allegations about the members of PPU misbehaving against the petitioner and or his supporters are not true

(17) That in further response to paragraphs 18-29 of the petitioners affidavit, I wish to state that on 3rd March 2001, I received a report that there was a clash between groups pelted stones, bottles and sticks at the soldiers and in the process of self-defence, one person was totally wounded by a stray bullet.

(21) That throughout the election process and campaigns generally, I never met Hon. Okwir Rabwoni.

Affidavit of Mugisha Muhwezi Deputy RDC of Rukungiri states:

(3) That I have read the affidavit of Bernard Masiko and found it to contain falsehood

(4) It is not true that on 9/2/2001 I went with PPU GISO and sub-county Chief of Kayonza to the petitioner's campaign office and ordered the office attendant to remove petitioner sign posts and posters and keep them inside the office.

(7) That I have read the affidavit of Sam Kakuru Mpwabwoba Callist and found them to contain falsehood against me.

(11) The allegations that RDC and I forced Kakuru to sign the Declaration of result form is false.

(12) That I do not know Mpwabwooba Callist and never pointed a gun against him.

Affidavit of Lt. Col. Noble Mayombo:

(3) That I am a MP representing UPDF and also AG. Chief of Military intelligence and security of the UPDF.

(4) That I have perused the petitioner affidavit and of Hon. Winnie Byanyima and of Hon. Major (RTD) Okwir Rwaboni and wish to state.

(6) That it is not true as stated in para 4 of Hon. Major (Rtd) Rabwoni and para 7 of Hon. Winnie Byanyima that on 1912/200 1 he was made by myself and Major General David Tinyefuza to sign a document at Nile Hotel Kampala announcing withdrawal from the elect Besigye Task Force (EBTF).

(7) That it is not true that on 2 1/2/2001 1 forced Hon. Okwir to make a statement disassociating himself from (EBTF).

(8) That on 1/1/2001 Hon. Okwir my younger brother and very close friend had the New year celebrations at mine and in course of a political debate told me of his intention to support the petitioner.

(9) That from the time Hon. Okwir returned from Rwanda I have been using him to collect intelligence on security matters in Uganda.

(10) That he often gave me very good intelligence on security matters in Uganda.
(11) That my capacity as Ag. Chief Military Intelligence I encouraged him to join the petitioner so that he gives me information about security related plans of that group.

(13) That upon telephone call from Major General Tinyefuza concerning intelligence report from Hon. Okwir, I suggested I meet him and Hon. Okwir at Sheraton Hotel.

(15) That Major General Tinyefuza and Hon. Okwir met me at Sheraton Hotel in Room 1006.

(16) That in the meeting Hon. Okwir reported that the petitioner and Nasser Ssebagala were planning to start insurgency in the event the petitioner lost the elections. That they had link with people who were throwing bombs in the city.

(19) That he last met Hon. Okwir at the Nile Hotel where they had lunch together where he agreed to provide a pistol and security men.

(22) That after they had parted at the Nile Hotel he could not get in touch with Hon Okwir as his telephone was switched off. I got worried.

(23) That on 20/2/200 1 I approached Major General Tinyefuza and we decided to look for him as we feared the EBTF could have kidnapped him.

(24) That at 9:30 am. I received a telephone call from one of the intelligence contact in EBTF that Hon. Okwir was going to be killed in Adjuman by EBTF members.
(25) That I contacted the Director of CID and the Inspector general of police and we decided to stop him from travelling.

(26) That I am the one who deployed Capt. Rwakitarate to stop him from travelling.

(28) That I ordered him to take charge of the events at Entebbe Airport.

(29) That when the officers were obstructed by the petitioner and others I informed the Director of CID who instructed his officers at Entebbe to effect the arrest.

(31) That Hon. Okwir was subsequently arrested and brought to my office.

(35) That Hon. Okwir asked me to avail him opportunity to talk to His Excellency the President, which I provided. That he spoke to 1st respondent in my presence and requested to travel abroad for treatment, rest and adequate security as the said arrangement were being read.

(36) That I made visas arrangement with British Government and he left for UK with members of his family.

In his affidavit Captain Ndahura averred as follows.

(1) That I am and a captain in UPDF and well acquainted with allegations contained in the affidavits sworn in support of the petition concerning Rukungiri.

.

(2) That I was the commander of the few troops from the PPU that were deployed in Rukungiri in advance to the President's visit in January 2001.

(3) That because the President was soon returning for another rally we stayed and were camped at the State Lodge .

(4) That / have read the affidavit of Bernard Masiko, Kakuru Sam, Frank Byaruhanga and found them to contain falsehood.

(5) That in response to Frank Byaruhanga's affidavit, it is not true that the PPU beat up people in Rukungiri for supporting Dr. Besigye.

(6) That I can positively state that no PPU soldier moved out of station without me or my knowledge.

(8) That on 3/3/ 2001 Dr. Besigye addressed a rally in Rukungiri town. On that day no PPU soldiers moved to Bwambara.

(11) That is not true that we from PPU accompanied Deputy RDC to Kayonza when he allegedly ordered the removal of Besigye's sign posts and posters from his office.

(15) That it is not true that I chased Hon. Okwir from Rukungiri but assisted police in dispersing illegal rally.

(18) That at Rwaneyo it is not true as alleged by Mpwabwooba that PPU was distributed at homes of Dr. Besigye's supporters nor was PPU present at any polling stations.

(19) I reply to Bashaija in support of the petition, it is not true that he met me in Hotel Holliday or that I drew a pistol on his head.

(20) That the allegation in affidavit of Byomuhangi Kaguta that on 11/3/2001 he was arrested by soldiers from PPU is false.

(24) That the allegations by Mubangizi Dennis in support of the petition that he was arrested by PPU soldiers and taken and beaten in Nyabubare Barracks on 3/3/2001 are false.

(25) That in reply to paragraph 8 of James Musinguzi's affidavit, it is not true that I unleashed terror in Rukungiri and was not responsible for the death of one person and injury of 14 others which were only a result of clashes between the petitioners' supporters and the joint security force. The clashes were provoked by the violence of the petitioner's supporters.

Affidavit of Hon. Capt. Charles Byaruhanga states as follows:

"(2) That I am the MP for Kibaale county, Kamwenge District and was actively involved in the campaign for the last Presidential Election.

(3) That I know Betty Kyompaire and Henry Muhwezi.

(4) That I have read the affidavit of Betty Kyompaire, Henry Muhwezi and Moses Tibayendera.

(5) That it is not true that I threatened or harassed any one during the election campaign as alleged.

(7) That Noah Kassim on 28/2/200 1 stayed at Kyakorafu Trading Centre and did not even attend the rally.

(10) That I have not been interrogated by any police officer or Human Rights Commission about allegations of torture, Intimidation or harassment of any person and I am not aware of any.

(11) That it is true I tried to convince Muhwezi Henry to support Yoweri Museveni on several occasions but it Is not true that I did this forcefully or by way of Intimidation and threats.

Each side swore affidavits in support of their case. The petitioner had complained of violence and intimidation of his supporters and campaign agents by PPU soldiers in Rukungiri and Kanungu and in Kabale as stated in Anteli Twahirwa's affidavit. Finally on 24th February 2001, the chairman Electoral Commission wrote to the President appealing to him to intervene and save the democratic process from disintegration by ensuring peace and harmony in the electoral process. The letter went on:

"The Commission has received disturbing reports and complaints of intimidation of

candidates their agents and supporters which in some cases has resulted. In loss of life and property."

Finally he appealed and requested the President as Commander —in- Chief to instruct armed personnel not to do anything that would be interpreted as interference in the electoral process.

For instance, in his affidavit he stated that on 3/3/200 1 when the petitioner held rallies in Rukungiri and Kanungu Districts, he found his supporters striken by fear, because of intimidation and harassment. Finally he held a rally in Rukungiri Township. After the rally, when he was preparing to leave for Mbarara/Kampala he heard gunshots in the town and then saw people running. He left for Mbarara. He soon learnt that Beronda one of his supporters was killed and 1 4 people were injured.

The evidence of interference with his electioneering activities is brought out clearly in the affidavit of Hon. Major (Rtd) Okwir when he came for consultative meeting in Rukungiri and Kanungu. He stated that every where he went to, PPU under the Commander of Capt. Ndahura dispersed his meeting. At Rugyenjo, they threatened to shoot if he did not leave and go. His arrest at Entebbe International Airport when he was supposed to travel to Adjumani with the petitioner to hold rallies was evidence of interferance. The affidavits of Mpwabwooba Callist, Kakuru Sam, Harsey Kasamunyu, Byomuhangi Kaguta, Richard Bashaija Henry Muhwezi support and confirm interference with petitioner's electioneering activities by PPU soldiers especially in Rukungiri and Kanungu and Kamwenge.

The affidavits of Captain Ndahura Mr. Mugisha Muhwezi and Hon. Capt. Charles Byaruhanga though denying interference with petitioner's electioneering activities, I would not be surprised by their denial because Capt. Ndahura would obviously not admit that he had failed to control his junior officers under him. Muhwezi, Mugisha, Deputy RDC of Rukungiri would not admit that he interfered with the electoral law. Hon. Capt Charles Byaruhanga conceded that he met Henry Muhwezi and persuaded him to join **1st** respondent's camp, but stated that he never used force. And although the affidavit of the Army Commander shows that the motive of creating a Joint Security Task Force was to oversee, handle and ensure peace during the electoral process and

although previously such a Joint Security Task Force had been resorted to whenever need arose, I must state that in the instant case there was serious controversy which raised question of interference with freedom and fairness in the Elections of the President. It is to be noted that in the 2001 Presidential Elections, the 1st respondent had resisted that the petitioner could not stand against him on the movement ticket. Later, the petitioner was allowed to stand as a Presidential Candidate against the 1St respondent. Therefore the situations in the quoted previous cases were different from the instant case.

However, the affidavits of Mubangizi Dennis, Bashaija Richard, Frank Byaruhanga, Bernard Masiko, Hon. Maj (Rtd) Okwir shows that PPU soldiers arrested, tortured and beat up petitioner's supporters. Some of the people arrested were detained until after close of the election. In fact, in the course of the affidavit, Capt Ndahura conceded he released his vehicle to be used by police when they went to Rugyeyo to disperse Maj (Rtd) Okwir's illegal rally. He denied his soldiers being responsible for Beronda's death and injuring 14 others in Rukungiri.

reject his denial of what the soldiers were stated to have done. He did so to save his face and his soldiers.

Clearly, from the affidavits of both sides, I am satisfied that the petitioner has proved to the satisfaction of the court that PPU soldiers, Deputy RDC of Rukungiri and GISO from Rukungiri and Kanungu interfered with petitioner's electioneering activities. Although there is no evidence that these PPU, GISO and Deputy RDC were agents of 1st respondent, the fact is petitioner's electioneering activities were interfered with by PPU soldiers and GISO in Rukungiri and Kanungu.

However, I must state that there was not much evidence led to implicate Kakooza Mutale's Kalangala Action Plan in the interference with petitioner's electioneering activities.

Otherwise, generally speaking the petitioner's electioneering activities were not free and fair especially in Rukungiri, Kanungu and Kamwenge.

10. I come to the complaint concerning the abduction of Maj (Rtd) Okwir at Entebbe International Airport and intimidation of petitioner's supporters. The arrest of Maj. (Rtd) Okwir Rwaboni at Entebbe International Airport when he was travelling with the petitioner to Adjumani for election rally was the type of evidence which went towards proving harassment and intimidation of petitioner" supporters. The arrest was openly done and was covered by television camera men. After his arrest what happened to him depends on which affidavit can be believed. Lt. Col. Noble Mayombo CMI stated in his affidavit that they had received intelligence reports that some supporters of the petitioner had planned to kill him in Adjumani.

The petitioner and Maj (Rtd) Okwir rubbished the story. However, what is clear is that Maj. (Rtd) Okwir affidavit herein is that he never travelled to Adjumani.

The evidence of intimidation of petitioner's supporters and harassment came out clearly in the affidavits herein of Stanley Bugando, Arinaitwe Wilkens, Bernard Matsiko, Henry Muhwezi and Mpwabwooba Callist and Harsey Kasamunyu, which are part of this judgment.

There is clear evidence that a part from arresting these witnesses, in Rukungiri, Kanungu and Kamwenge, PPU soldiers and GISO went around telling people if they turned out to attend Okwir's rally in Kihihi, they would be dealt with.

Throughout the remaining two weeks to the election day some people went around directing people to turn up and vote for Museveni and that if they did not, their homes would be burnt. These arrests and intimidations culminated in what happened on 3/3/2001 in Rukungiri when Beronda was killed and 14 others injured at the end of petitioner's rally.

Although there was no evidence by the petitioner to prove that those who carried out harassment and intimidation of petitioner's supporters were 1st respondent's duly appointed agent and that they did so with his knowledge and consent or approval, the fact still remains that petitioner and his supporters were harassed and intimidated. Henry Muhwezi was told by Hon. Capt Charles

Byaruhanga since he had refused to support candidate Museveni, he was going to treat him (Henry Muhwezi) like a rebel. He was summoned and then handed to his body guard and driver to take him to Bihanga barracks. As they took him, they beat him thoroughly and abandoned him on the way at night.

Although Capt. Ndahura, Hon. Capt. Byaruhanga and Mugisha Muhwezi, Deputy RDC of Rukungiri denied harassment and intimidation of petitioner and his supporters, the evidence in support of the complaint is so overwhelming that I have accepted it as truthful. The type of harassment and intimidation exerted on the petitioner and his supporters was infringement of the principle that presidential election had to be conducted under condition of freedom and fairness. However, since there was no evidence that the 1st respondent had knowledge and consent or approval of what PPU soldiers, were doing I doubt if 1st respondent would be guilty.

Therefore all in all, I am satisfied that the petitioner's electioneering activities were interfered with, which offended Sections 74(b) and 75 of the Act.

11. Another complaint was that there was voting on sham and special polling stations created on 11th March 2001 without voters' cards.

Mr. Mukasa David Bulonge's affidavit paragraphs 2, 3, 28 and 29 herein fully explains what the 2' respondent did on 11th March 2001. The new polling stations had no corresponding voter's rolls. This means that if there were no voter's rolls, then voters did not have voters' cards. It would appear that anyone who knew of the existence of those new polling stations would go and vote. These could be the polling stations Rwanga Pastori Kwaya of Nebbi is referring to in his affidavit, James Oluka of Soroti, Central ward is talking about in his affidavit, Ongee Marino of Kitgum Town Central ward is referring to in his affidavit and Tumusime Enock of Ntungamo is referring to in his affidavit, when he stated voting was going on at 11:00 pm at Catholic Social Centre polling station which was ungazetted.

The affidavit of Nshemereza Topher, the Assistant RDC of Ntungamo does not

deny the existence of that polling station. He merely stated he never left his office on that day. Akena Kennedy, presiding officer of MaIm Obondro Home 11 polling station, Kitgum, averred that he knew that MaIm Obondro Home was a polling station before 12th March 2001.

I must state that I cannot excuse the 2nd respondent for the creation of 1176 polling stations on March 2001 when there were no corresponding voter's rolls. How did 2nd respondent expect people to vote from these new polling stations when there were no corresponding voters rolls in those polling stations. This meant that the electoral commission expected people to go and vote without voters' cards with no voters Rolls at polling stations. Clearly this meant the voting in those polling stations offended Section 29(4).

12. The other complaint was that contrary to section 25 of the Electoral Commission Act, the 2 respondent failed to display copies of the voters Roll to each parish or ward in a public place within each parish or ward for a period of not less than 21 days and as a result, the petitioner and his agents and supporters were denied sufficient time to scrutinize and clean the voters' Roll and exercise their rights under the law.

The petitioner's affidavit in support was

"That the 2nd respondent failed to display the voters Register and Rolls for each Parish or Ward in a public place within each parish or ward for period of not less that 21 days stipulated by law and as a result my agents, supporters and myself were denied sufficient time to scrutinize and clean the voters Rolls and exercise our rights under the law."

The 2nd respondent's reply to the complaint was:-

(a) That the voters Register was initially displayed countrywide for 3 days and everybody was free to scrutinize the said Register.

(b) That after consultations with and on request by agents of all Presidential Candidates

including those of the petitioner, the 2" respondent extended the time for display of the voters Register for another 2 days.

(c) That in any case the contents in the above complaints of the petition do not constitute a ground upon which the election of a candidate as President can be annulled.

It was submitted that under Section 25(1) of the Electoral Commission Act, 1997, it was mandatory for the 2 respondent to display voters' roll for a period of not less than 21 days, during which a copy of the voters' roll for each parish or ward shall be displayed for public scrutiny and during which any objection or complaints in relation to the names included in the voter' roll or in relation to any necessary corrections shall be raised or filed.

It was further submitted for petitioner that the 2nd respondent purposely failed to do so for 21 days as a result of which voters' rolls were not cleaned to remove ghost voters, people who had died, people who ought not to be on the roll, because for instance they migrated to other areas or because they are underage or are non-citizens.

For 2nd respondent it was submitted that the 2' respondent was empowered to reduce or increase the period from 21 days. On this very point, it seems to me that whereas the Electoral Commission (EC) had powers under Section 38(1) of the same Act to do anything for purpose of carrying out its functions, it had no powers to abridge the period of display of voters' Register/roll, because the section states as follows:

"***Where, during the course of an election, it appears to the commission, by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstances, any of the provisions of this Act or any law relating to election other than the constitution, does not accord with exigencies of the situation, the Commission may, by particular or general instructions, extend the time stations or otherwise adapt any of the provisions as may be required to achieve the purpose of this Act or the law ……."***

Considering the affidavit of the 2nd respondent, clearly voters' Registers/Rolls were displayed for a maximum of 5 days which contravened sub-section (1) of Section 25 of the Electoral Commission Act, 1997 which required voters roll to be displayed for a period of not less than 21 days. Although the 2r,d respondent had powers to vary the time under section 38 of the same Act, the powers given was confined to enhancement of the time, but not to decrease the period of display of voters' roll. Therefore display of voters roll for 5 days was a noncompliance with Electoral Commission Act. However, this would not cause annulment of the elections since it was not a non-compliance with the Presidential Elections Act and moreover, even if it had contravened the Presidential Elections Act, the petitioner would have the onus of proving that the noncompliance affected the result of the election in a substantial manner.

13. The other complaint was that after the petitioner's polling agents were chased away from the polling stations, voting continued and eventually counting and tallying of votes were done in the absence of petitioner's agents. Clearly, this offended section 4 of Section 47 of the Presidential Elections Act. The evidence of James Musinguzi in his affidavit sworn on 23rd March 2001 at Kampala, in particular paragraph 11, 1 2 & 1 5 state as follows:

"(11) ***That on the day of elections, I visited Kashojwa, Nyarurambi, K(fumbwe and Ntungamo polling centres in Kanungu district and at all these centres, I found that the polling agents for Dr. Besigye were chased away from the polling areas and there was no actual voting since ballot papers were being pre-ticked in favour of candidate Museveni by the polling officials who would then direct the "voters" to just put them in ballot box. I complained about this to the returning officers but 1 was disregarded. In fact the GISO of Kirima in presence of the Kirima LC111 chairman bluntly told me that my complaints were a waste of time as it had already been decided that Dr. Besigye should be allowed not more than 3 votes in Kijubwe Parish. Indeed Dr. Besigye ended up with 3 votes from that polling centre comprising of 3 polling stations, although our agents alone numbered 15.***

(12) At the said Kijubwe polling centre our agents had been chased away but after the so called vote count the said agents including one Sam Kakuru were dragged from their homes and forced to sign the declaration forms in respect of voting which had not witnessed.

(13) That when I arrived at my polling station at Ntungamo, all voters were being given pre-ticked ballot papers to cast in favour of candidate Museveni. I asked for our agents and was told they had been sent off. I traced them to their homes and they confirmed this.

(15) That in the circumstances I did not vote since it was meaningless to do by casting a ballot pre-ticked for me."

Sam Kakuru averred in the following paragraphs of his affidavit:

(16) "I then identified myself to them by showing my agents appointment letter. The presiding officer called Tindyebwa who ordered me to sit far from the agents' table saying the table was for government people not us 'rebels'

(17) Tindyebwa and other officials started ticking ballot papers for people on the table. I objected and was manhandled and beaten up. Policemen looked on hopelessly as they had been earlIer on warned that they were known to be anti Museveni.

(18) I was chased away from the polling station I stayed at home till around 4:00 p.m. eventually all our other agents were chased away.

(20) At around 5:00 p.m. stone wielding thugs led by Stephen Rugaju. Rubondo and other Museveni task force members came on two pick-ups, surrounded my home and demanded that I go and meet the RDC. I refused to go with them and entered my house. They threatened to demolish my house which forced me to go with them. They took me to the polling station where I was ordered to sign the declaration forms. I refused. I was taken to RDC, his Deputy RDC and GISO and others and I told them I couldn't sign when I had not witnessed the polling. They insisted, threatening me and I had to sign…"

The Affidavit of Bernard Matsiko of Ntungamo village averred as follows :-

(8) That on polling day I reached the polling station at 6:00 a.m. with our agents. We found out that voting had already started.

(9) That all voting was done by Museveni's agents where one Rehema Biryomu Masiko had about 200 ballot papers.

She ticked all of them and put them in the ballot box.

(10) That when I attempted together with other Besigye's agents to stop the habit we were forcefully chased away from the polling station with the help of armed personnel and our letters of appointment confiscated."

Affidavit of Alex Busingye's affidavit averred

"(1) *That I am an adult male Ugandan resident at Kakira Mbarara.*

(2)That I am registered voter and during the Presidential Elections I was in charge of overseeing the operations and welfare of the polling agents for the petitioner in Kazo county.

(3) That on the majority polling stations / visited I found the polling agents for the petitioner off the polling stations they had been assigned having been chased away by armed UPDF soldiers.

(4) That at one polling station called Nkungu I found a monitor for that station had been tied by the (UPDF soldiers and was bundled on motor vehicle Reg. 114 IJBS pick-up in which they were travelling."

Affidavit of Tindyebwa Eugini states as follows:

"(2) *That I was the Presiding Officer at Karuhinda polling station in Kinkizi East Kanungu.*

(3) *That I know Kakuru Sam of Karuhinda, Kijubwe. I have perused his affidavit.*

(4) *That the allegations in paragraphs 14, 15. 16, 17, 18 and 21 of the affidavit are not true.*

(5) *In reply to paragraph 14 I wish to state the voting did not commence until after 7:20 am.*

(6) *In reply to paragraph 15 I state that no policeman or any one at all was ordered to tick ballot papers and the GISO did not come to the station.*

(7) *In reply to paragraph 16, Sam Kakuru sat with all other agents at their table.*

(8) *In reply to paragraph 17 neither myself nor any other official ticked ballot papers for any person. Kakuru was not manhandled or beaten up by anybody.*

(9) *In reply to paragraph 18 neither Kakuru nor any agent was chased away from the polling station.*

(10) In reply to paragraph 21 the voting process at my polling station was calm free and fair."

After carefully going through the affidavits sworn in support and those sworn in rebuttal especially of Tindyebwa, I find that the presiding officer would not admit that petitioner's agents were chased from his polling station and that voting continued and that Kakuru who was chased away, was forced at the end of the voting to come back and sign the declaration forms.

I do accept that the petitioner's polling agents in a limited number of polling stations were chased from polling station after which voting, counting and tallying of votes were done in their absence. Therefore the very purpose of fairness and transparency was defeated.

In the result, I accept that in a limited number of polling stations voting , counting and tallying of votes were done in the absence of petitioner's polling agents.

14. That contrary to Section 74(b) petitioner's supporters were arrested and detained and released after elections had ended- thus denying them rights to vote.

John Hassy Kasamunyu's affidavit avers: 72
That I am registered voter (eligible) to vote in the 2001 presidential election at lbarya and also appointed campaign agent for Dr. Besigye.

(15) That on 9tI March 2001 we were holding a Besigye Task Force meeting for Kibanda parish when about 15 vigilantees of Museveni came and attacked us. They beat us up

. (16) That when we made alarm people came and we were able to arrest one of them.
(17) That we decided to take him to Kihihi police station and the victim of the beatings to Kihihi Health Centre. The next day the police and PPU soldiers came around looking for those responsible.

(18) Some of us were arrested and taken to Kanungu police station. These included Tukahfrwa, Mugisha Kwesiga, Kwiringira, Hashakimana, Ntare, Bikamye, Tusingwire and Kahima.

(19) That they were remanded at Kanungu police station till 16/3/2001. That these were Besig ye's agents. They neither voted nor monitored the voting. That as I was being hunted I never voted nor worked as an agent.

Byomuhangi Kaguta's affidavit shows that he was arrested detained and prevented from voting:
"(2) He stated that I am registered voter to vote in the 2001 presidential elections at Rashaaya and also a polling agent for candidate Besigye.

(***3) That on 17th Match 2007 on the eve of the elections I was arrested by three armed***

soldiers' of the PPU who had been deployed all over the district. I was thrown in a pit (Ndaki) in the barracks, where I spent the whole of the night and suffered a lot.

(4) That the following day Buterere and Tukahirwa, two of Dr. Besigye's agents were also brought to join me.

(5) That we spent the whole of voting day in the said pit and accordingly, we did not vote"

Affidavit of Arinaitwe Wilkens from Kabaale shows he was arrested detained and prevented from voting:

'(2) He stated that I am a registered voter in the presidential election. That I am registered to vote at Kabaale Central East polling station. I was also appointed as Dr. Besigye's co-ordinator for Bufundi sub-county.

(3) That I was involved in the said Dr. Besigye's campaign and I merely state that during the week before polling day we tried to hold a rally at Kyevu in Nyamiryango parish but we were chased by LC 1 chairman.

(6) That on 17th March 2001 as I returned from distributing appointment letters to our polling agents, I was arrested and severely beaten, stripped naked and taken to the home of LC 11 chairman.

(13) That on 12/3/200 1 at 9:00 a.m. I was taken to Kabale police station where I was detained until 14/3/200 1 when
I was released.

(14) That in the police cell I found a number of Besigye's agents.

(15) That in the circumstances, I never voted'

Clearly the affidavits of Harsey Kasamunyu, Bernard Masiko, Bashaija Richard, Arinaitwe Wilkens and Majo(Rtd) Okwir Rwaboni shows to the satisfaction of the court that because the deponents were arrested before 12th March 2001 and were detained and released after 12th March 2001, just deliberately to hinder them from voting. Clearly, from the affidavit of Kasamunyu, other persons who were arrested and detained with him were Tukahirwa, Mugisha, Kwesiga, Kwiringira, Hashakimaana, Ntare, Bikamya, Tusingwire and Kahima. From Kasamunyu's affidavit, these men were released from Kanungu police station on 16th March 2001. Also from the affidavit of Byomuhangi Kaguta paragraph 3, on the 11th March 2001, PPU soldiers deployed in his village arrested him and took him to army barracks and threw him in a trench for the whole night. On 12th March two of Besigye's polling agents, namely Buterere and Tukahirwa were brought to join him. So they never voted. Each of the deponents has some- what similar story to tell. Mere denial by Capt. Ndahura and Mugisha Muhwezi cannot be accepted, and leaves a lot wanting.

I know that they would not admit to have gotten involved in what they are accused of, because they were not employed for that purpose. I must state that after carefully considering the affidavits on the matter, I am convinced that the deponents were arrested just for purpose of impeding them from voting, given that they were detained until after the election.

15. There was a complaint that the 2nd respondent's agents and or servants pre-ticked ballot papers in favour of the 1 respondent and then handed them to voters to cast them without letting voters themselves make their own choice.

Although some presiding officers denied this, from the affidavits of James Musinguzi, Stanley Bugando, Kakuru Sam, Mpwabwooba Callist, ldd Kiryowa of Sembabule and Patrick Matsiko wa Mucoori who was a senior reporter with the Monitor Newspaper, and Change Gideon, I am satisfied that there was a malpractice of pre-ticking ballot papers in favour of 1st respondent irrespective of the voter's choice after which ballot papers were handed to voters to cast them. This was especially so in Rukungiri, Kanungu and Kamwenge and a few other limited polling stations. The affidavit of Basajabalaba Jafari in Bushenyi where 1 3 pre-ticked ballot papers were

recovered before they were cast, goes to show what the complaint is all about. Clearly this was evidence of non-compliance and negation of the due process of the law. But the affidavit of Tindyebwa, herein Kyomuhangi Allen, Moses Mwesigye and others denied such malpractices.

However, I would reject the denial of the accusation as I would not expect the presiding officers to admit that they permitted ballot papers to be pre-ticked in their presence and infront of the table for voters to cast them.

Therefore wherever this was done it was a non-compliance with the law.
16. There was stealing, cheating of votes in a significant number of polling stations.
The following affidavits go to prove this type of stealing i.e. cheating: Affidavit of Stanely Bugando states:

"(1) That I was a campaign agent for candidate Dr. Besigye for the Presidential Elections 2001.

(2) That Dr. Besigye had overwhelming support in Kihihi especially among the youths during the campaigns.

(5) That cheating and stealing of votes had commenced before my arrival and continued even during my presence at the station.

(6) That I arrived at the polling station at 5:00 am. on 12/3/2001.

(8) That the work included also shifting from the classrooms polling desks and tables for all the polling assistants agents, co-ordinator.

(9) That during the exercise I kept on seeing movements of people in the other classrooms where there were many torches flashing from place to place in midst of darkness.

(10) That when I moved closer to the presiding officer, I noticed one Moses Mwesigye, a nephew of Amama Mbabazi getting from the presiding officer 3 vote card books and taking them into opposite corner of the same classroom. I became suspicious and followed him only to find that he was with three people and one Kamugisha all busy plucking ballot papers, ticking candidate Yoweri Museveni's name and casting them into a ballot box.

(11) That all the three booklets were used up and all the ballot papers ticked and cast into the ballot box.

(12) That on my querying why they were stealing votes, James Birakwate and Moses Mwesigye warned me seriously that should I reveal the malpractice I should expect death or expulsion from the district of Rukungiri.

(13) That the two men aforesaid sought to give me Shs. 20,000/= in order to win me over to their side and rejected the offer and remained firm on candidate Besigye.
(18) That during the voting after 7:00 a.m. after the candidate agents arrived I informed candidate K112a Besigye's agents that there had been massive stealing or cheating of votes.

(19) That I also left the polling station in disgust and went to report to candidate Besigye's office at Kihihi"

Affidavit of Basajjabalaba shows attempted cheating.

He stated in his affidavit:

"(2) ***that I am a registered voter in the presidential elections of 2001 and secretary to the elect Besigye Task Force for Bushenyi District.***

(3) On the polling day of l2 March 2001 I was in charge of Bunyaruguru

(4) At Kyenzaza Trading Centre polling station I got information that one Kyomuhangi Allen had 13 ballot papers ticked in favour of candidate Museveni and that she had tried to cast them but had been intercepted and that the same had been removed from her and handed over to the monitor of the station.

(5) ***That I approached the monitor and the same were removed from her and handed over to Fr. Vincent Birungi District co-orcilnator of the NEMO GROUP who took them to Bushenyi police station and I went to the police and made a statement to that effect"***

Affidavit of Kizza Davis of Bukondere Busingye in Kamwenge averred:

"(1) ***That I am registered voter entitled to vote at Kamwenge Primary School Block 1.***

(2) That I was appointed a polling agent for the petitioner.

(3) That on Sunday 1 1th March 2001 9:00 am, I was in Kamwenge Town with Mr. Wasswa Peter, my brother and Robert when I was arrested by LDF by names of Kenneth and Friday.

(6) That at 1:00 a.m. I was transported to Kamwenge Army detach barracks.

(8) That on the election day at around 10:00am, I was taken to the polling Centre of Kamwenge Primary School Block 1 where the 2nd Lt. Richard ordered the presiding officer to tick a ballot paper in favour of Museveni Yoweri Kaguta.

(9)That I was given the ballot paper already ticked in favour of Museveni and was escorted by two armed soldiers to the ballot box where I put the same.

(11) That I was then taken back to the barracks for detention and released after 6:00 pm'"

Affidavit of Ojok David Livingstone avers

:"(1) That lam a resident of Doko cell, Namatala ward Industrial Division Mbale Municipality.

(2) That I was the chafrman of the Namatala ward Task Force for Dr. Besigye.

(3) That while at Namatala police post, we were called by our polling agent at Doko Nsambya polling station by name of Mayambala that there was a lady distributing voters' cards.

(5) That from Namatala police post we were accompanied by a police officer.

(4) We found the lady at her home. I knew her by name of Nakintu. The police asked Nakintu about the allegations that she was distributing voters cards. She admitted she had received 50 voters' cards from one councilor Wafula Charles to distribute them to candidate Museveni's supporters. That she had already distributed 11 voters cards and was still having a balance of 39 cards.

(5) She produced and handed them over plus Jik with soap she was arrested and taken to police.

(6) On 13/3/2001 I was surprised to see Nakintu back in our area boasting that nothing was going to happen to her"

Affidavit of Wafidi Amiri of Nauyo village Bumutoto parish Bugokho in Bungokho sub-county and Bungokho county stated in his affidavit:

"(1) That I was a person entitled to vote in the Presidential Elections held on 12th March 2001 I was also a member for the Task Force of Col. (Rtd) Dr. Kiiza Besigye responsible for monitoring elections in Mutoto.

(4) That on 12th March 2001 at about 11:00 am I was at Munkaga stage. The motor vehicle of Hassan Galiwango the Resident District Commissioner- Mbale came and parked at the stage facing Tororo side. The sub-county chief Nambale — Mutoto was the stage and he ran to Mr. Hassan Gallwango, RDC. The two held private discussion. Later the sub-county chief drove towards Mbale whilst RDC continued towards Tororo.
(3) After some time area movement chairman Geofrey by name came from Tororo side being driver on Motorcycle by one Sonya David and went towards Musoto which was my next destination.

(4) ***Being given a lift on motor cycle by Mr. Musongole who is vice chairman of my village, I went to Mosoto. At Musoto I found the movement chairman holding discussions with the sub-county chief Nambale — Musoto who had driven towards the town. On reaching where they were, Sonya drove his vehicle in the opposite direction carrying a black - handbag which he did not possess when he was driven to Musoto.***

(5) ***As there were rumours that there were plans to rig the election in our area I became suspicious. I told my driver to turn back and we give a chase. At the local Railway crossing his motor cycle developed a problem. On reaching him I asked what was in the black hand bag. Mr. Sonya tried to grab the hand bag and ran away but I held the bag and we struggled for it which got torn and some voters cards more than 50,000 and some official stamps plus Return Forms for the sub-county of Bugokho were poured down. I raised alarm which was answered by a crowd who assisted me to hold Mr. Sonya and retain the bag.***

(6) The movement chairman and sub-county Chief came to the scene and tried in vain to rescue Sonya with the voters card and the records I had arrested but in vain.

(71) With the assistance of the crowd I detained Sonya together with the voters cards until some police officers from Mbale police station arrived at the scene. Mr. Sonya was then taken to Mbale police station together with the voters card, the polling station Return Forms. I accompanied him to the police station. My complaint was registered as SD 18112103/2007.
(7) Two days later I saw Mr. Sonya at large in our area."

Undoubtedly, the evidence adduced in the affidavits in support of this complaint show that there were floating ballot papers which must have been released by office of the 2nd respondent, since they were the ones in charge of printing and distributing them. As a result of these floating ballot papers in a significant number of polling stations, some people were able to use them in stuffing ballot boxes and others were intercepted before casting them in the ballot boxes. This is clearly shown in the affidavits of Ojok David Livingstone, Basajabalaba Jafari, Stanely Bugando and Wafidi Amiri.

However, it must be noted that the evidence in the above affidavits were controverted by some affidavits of the persons alleged to have been involved in the mal-practices - Such as that of Moses Mwesigye from Kanungu, Allen Kyomuhangi of Bushenyi and Nakintu of Namatala of Mbale. I would therefore place no reliance on such affidavits. I must state that I am satisfied that there was cheating coupled with attempted cheating of votes in a limited number of polling stations.

17. The last complaint was intimidation of petitioner's polling agents and supporters on polling stations by the 1st respondent's supporters GISO, LDU and UPDF soldiers contrary to Sections 25(1) and 74 (a)(1) of the Presidential Elections Act, 2000.

In support of the above complaint there are several affidavits which were sworn. Some of these affidavits are — Masasiro Stephen of Bukabelyenda of Bufumbo Mbale, Mubaje Sulaiti from Bubyange of Mbale. When these deponents complained and protested of rigging, they were chased from the polling stations.

The affidavit of Niiro Suliman from Nkusi in Bugiri averred in paragraphs 3,4,5 and 6:-
(3) That soldiers from RDC's office came threatening and were forcing young children below 78 years of age to vote. We tried to refuse them but we were over powered since they were armed.

(4) That I was arrested by soldiers at Grant Street for 30 minutes.

(5) That our agents were chased away from polling station by armed soldiers.

(6) That then the soldiers started to bring children to vote and many voted.

Musasiro Stephen of Bukabalyenda village Jewa parish Bufumbo sub-county Mbale stated in his affidavit as follows:

(**5**) ***I was a polling agent for Presidential Candidate Col. DR. Kizza Besigye.***
(6) On 12/3/2001 I arrived at Nkusi Primary School polling station where at I was to officiate at 6:30 am.

(7) I found the polling station already arranged for voting exercise. My fellow polling agent, Mr. Wafuba was already at the polling station.

(8) The ballot box was opened for our inspection and It was empty. After inspection the same

was closed and locked. Voting started peacefully. There were 12 voters present who peacefully cast their votes.

(9) Then there was a disturbance started by the area country chief Abdu Mudoma the chairman President Museveni's Task Force All Mukholi, the sub-county councillor Mr. Micheal Namundi who came to the station with 4 armed soldiers. The soldiers shot in the air. We the two polling agents for Kiiza Besigye me and Mr. Wa tuba were severally assaulted. After assaulting us the sub-county chief, sub- county councilor and the chafrman of Museveni's Task Force put ballot papers on which only Yoweri Museveni's name had been ticked into the ballot box. We tried to intervene but we were assaulted further and we were removed from the ballot box as the 3 men continued putting in more ballot papers. I struggled with All Mukholi the Task Force chairman for MusevenI from whom I snatched* **5** *ballot papers on which Museveni's name had been ticked.

(10) From the polling station I ran to Mbale police station where I handed in the 5 ballot papers. I made a Police statement, which was recorded. From Mbale Police Station was given a form to take to Mbale Hospital where I was examined and treated for a bruised back. The Police reference is SD/15/12/3/2000. The Police have not called me back for further action. Sworn on 21st March 2001"

Mubaje Sulaiti of Bunewoze village, Butumbo in Bugokho Mbale stated in his affidavit as follows:

"(1) *on 12/3/2001 1 was one of the persons entitled to vote at Bukwanga polling Police Station. I arrived at the polling station at 12 noon. I was having my voter's card.*

(2) On reaching the polling station, I saw the person who was in charge of the marking ink holding 10 voters cards with which she moved towards the ballot box. She was a lady. I asked her where she was taking the ballot papers. I held her. I complained to the presiding officer, seeking for assistance as a I removed the ballot papers from her.

(9) Before I could be assisted 2 armed LDU, who were present intervened and assaulted me severely removing the ballot papers from me. One of the LD(J then put all the ballot papers into the ballot box. I was not allowed to vote and my voter's card was forcefully removed from me.

(10) I was chased from the polling station by one of the LDU who threatened to shoot me if I didn't leave.

(11) From the polling station reported Mbale police station. I made a statement. I was given a form to take to Mbale Hospital where I was examined and treated. The police reference is SD 20/3/2001.

Mulindwa Abasi from Pallisa averred in his affidavit as follows:

"(1) On the l2th March 2001 I was one of the persons supposed to vote in the Presidential Elections.
(2) I cast my vote at Kobolwa polling station at 7:00 am
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(3) I was also a monitor for candidate Col. Dr. Kiiza Besigye in Kibuku Parish. After casting my vote, I started my monitoring work within Kibuku Parish I observed the following:

(a When I was at Kibuku Trading Centre, I detected that Mrs. Mujwe the sub-county chief Kibuku was issuing around some voters cards to the crowd which was around her at the Trading Centre. I was with Gideon Kalaja who was the sub-county monitor for Col. Dr. Kiiza Besigye. We went and challenged Mrs. Mujwe but we were roughened up by the LDU personnel who were heavily armed. They told us that they together with Museveni were in power and we cannot do anything. They told us to keep quiet.

(b) There were motor vehicles which were bringing voters from villages and they were told to

vote for candidate Yoweri Museveni. Some soldiers were travelling in a mini-bus all around the Trading centre to whom the sub-county chief Mrs. Mujwi, one Hap Nangeje Abubakali, sub-county councillor Maliki Kitete and Nyalgolo Peter LC 11 chairman were telling the people that if they don't vote for Museveni the soldiers would kill them. There were 3 polling stations within the Trading Centre namely Kabolwa polling station, Kibuku secondary school polling station and ginnery polling station. Mrs Mujwi and her group were going around these polling stations giving voters cards, giving those who had already voted. I complained to the presiding officer in the 3 polling stations but in vain. Instead I was being laughed at.

(4) At all the polling stations I went to there were voters who could not vote because on reporting. they were told their names had been ticked and they were told they were not supposed to vote. When they complained they were chased away.

(5) Because of the complaints I raised during elections, my life is under threat I am being told by Museveni's supporters that I am a rebel. I am under great fear for my life.

There are, however, affidavits sworn in rebuttal, denying any intimidation upon petitioner's supporters. These are the affidavits:

Teopista Mujwi sub-county chief of Kibuku stated in her affidavit as follows:'(3) *That I have carefully read the affidavit of Mulindwa Abasi dated 2 1/3/20001 and I depone herein below as follows:*

(4) That I know Mulindwa Abassi

(5) That it is not true that on the polling day I was challenged by Mulindwa Abassi for issuing voters' cards to the crowd at Kibuku Trading Centre. I was not an issuing officer for voters' cards and have never been one. I did not tell him that I was together with Museveni who was in power and that he could not do anything."

(6) That on the polling day I did not at anytime meet either Hap Nagego Malik! Kitente or Nyagolo. I did not tell people that if they did not vote for Museven! the soldiers would kill them .

Wamae Kenneth's Affidavit in reply to contents of Amir stated that Amir's affidavit was:-
(3) (a) That on the polling day I received a report from the presiding officer of Musoto a polling station that some people had been refused to vote because they did not have voters cards. Others had voter's cards but their names were not on the voters'
registers.

(b) That I got a lift from Mr. Musonya David to go and find out the position. I carried with envelopes containing returns for voters cards, Registers Rules ink pads and pens.

(c) *That any way I was ambushed In Marare village by Mr. Wafidi Amiri who started raising alarm to the effect that the tax collector meaning me was stealing votes.*

(d) That for fear of being lynched for no reason at all I ran away.
(e) That I was not in possession of 50,000 voters cards at the time and the number of voters in the subcounty is 20,000.

(f) That the balance of voters cards which I was returning to the sub-county Headquarters were less than 3000.

(5) That Wafidi Amiri and Masongole Julius grabbed from me the balance of voters cards from 4 polling stations namely Nauyo A, Nauyo B, Nauyo C and Bunamwani Church of Uganda.

(6) That I did not engage in any election malpractice as alleged.

Nava Nabagesera averred in her affidavit as follows:"(1*) That I am Resident District Commissioner Bugiri.*

(2) That as RDC I am the Chairperson of the security committee in the District and I am under a duty to ensure that law and order is maintained.

(3) That I have carefully read and understood the affidavit of Kiwume Ibrahim dated 2Ot March 2001 in support of the petitioner and I depone herein below in response.

(4) That it is not true that on the day following election day I ordered the chairman in Charge of Bukooli South West of DR. Besigye to be released from police.

(8) That It is not true that soldiers from my office threatened people and forced young children below 18 years to vote at Bus park A polling station in Bugiri as stated by Niiro Sulaiman.

(9) That the three soldiers I have at my office were at all times during the election exercise with me. They did not go to Bus Park A Polling Station.

(10) That I am not aware and I received no reports of soldiers threatening and harassment and intimidation from anybody throughout Bugiri district"

Kasakya Hakim's affidavit in reply to Mubaje Sulaiti stated inter alia:

"(1) *That I am an adult male Ugandan of Bunawazi of Bufumbo sub-county and was the presiding officer for Bukwaya polling station.*

(3) That 5 people with valid voters cards but whose name never appeared on the register came to vote.
(4) That I could not permit them to vote when their names never appeared on the register.

(5) That Besigye's agents were not satisfied with my explanation and started assaulting me.

(7) That Mubaje Sulaiti joined in beating me until LDU at the station came to me rescue and saved me.

(8) That Mubaje Sulaiti left me and late reported to Mbale police station.

(9) That it was not true that there was a lady who tried to cast 10 ballot papers into the ballot box.

Magezi Abu stated in his affidavit in reply to Niiro's affidavit that whatever was stated by Niiro about his polling station was false. That soldiers never came to his polling station during the voting. That security on his polling station was in the hand of police and no unauthorized person voted there.

Affidavit of Dan Kaguta states as follows:

(2) ***That I have read and understood the affidavit of Change Gideon and found contents totally false.***

(3) That I never gave a lift to him in my vehicle on 12/3/ 2001 and never distributed voters cards and money at Ahabigungiro polling station or at any other polling station. So paragraph 5,6,7 and 8 of the said affidavit are false.

David Mulassanyi stated in his affidavit sworn on 3 April 2001 as follows:

(2) ***That I have read and understood the contents of the affidavit of Arinaitwe Wilkens and I find paragraph 9 to be totally false.***

(3) That on 15/3/2001 the LC 11 Chairman Mathias Arinaitwe requested me to provide transport to transport a person who had committed crimes to the sub-county prison.

(5) That it is untrue for Arinaitwe Wilkens to state that I participated in the events complained of in para 9 of his affidavit.

Haji Abubakali Nangeje affirmed in his affidavit dated 5/4/2001 as follows:-

"(2)(a) That Mulindwa Abassi is known to me. He is mentally unstable.

(C) ***That it is not true that I, Mrs. Mujwi and Malik Katente the sub-county councillor and Nyaigolo Peter went around Kibuku Trading Centre telling people, if they do not vote for Museveni the soldiers will kill us.***

(d) That it is not true that our group went around three polling stations giving voters' cards to those who had already voted.

I perused the affidavits in support of the petitioner's complaint on one hand and those sworn in rebuttal on the other hand and gave my anxious attention to each of them and must state that I accepted the affidavits sworn/affirmed in support of the petitioner.

For instance, I found the affidavit of Matsiko Wa Macoori, Kiiza Davis. Dan Okello, Alex Otim, Kakuru Sam, Arinaitwe Wilkens, Byomuhangi Kaguta, Stanley

Bugando and many others in support of the intimidation of the polling stations on one hand and the affidavit in rebuttal by Mrs. Naava Nabagesera, Mrs. Mujwi and Sqts Sempijja I must reject

the affidavits sworn in rebuttal. For instance, I would not attach any importance to the affidavits like that of Mrs. Nava Nabagesera where she stated that soldiers never intimidated petitioner's polling agents at the polling stations, because Niiro Suliman had not claimed that Nabagesera was present when her soldiers were forcing children under 18 years of age to vote against petitioner's refusal that the children were not eligible to vote. Niiro never stated that the RDC was present when the soldiers chased away the petitioner's agents. Moreover, Mrs. Nabagesera never stated she was at the polling station.

Further, Mr. Mulindwa's affidavit never stated that Mrs. Mujwi, the sub-county chief in Pallisa was the issuing officer of the voter's cards. He had stated in the affidavit that he saw Mrs. Mujwi, giving out voters' cards to even those people who had already voted. In my view, I think that, how she got those voters' cards never came in issue. Mulindwa's affidavit stated that there were LDU who intimidated polling agents for petitioner who protested against any malpractice. He stated that he saw Mrs. Mujwi and Haji Nangeje Abubakali, Maliki Kitente and Nyalgolo Peter telling people that if they did not vote for Museveni, the soldiers would kill them.

Finally, the affidavit of Dan Okello stated that he was arrested and detained and kept guarded in a motor vehicle by Sgt Sempijja merely because he was known to be supporting the petitioner and was released after the close of voting. However, Sgt. Sempijja stated in his affidavit that he had received intelligence report on 11/3/2001 that Dan Okello was mobilising voters to create insecurity during the elections. That Okello Dan came with a note from the DPC of Lira requesting to allow Dan Okello to vote. That he did not at all refuse the said Dan Okello to vote.

I must state that the affidavit of Sempijja is telling a lie about itself. Clearly if he had not been detained, there could be no reason why DPC of Lira should write to request him to allow Dan Okello to go and vote. This was clear evidence of intimidation of Dan Okello by UPDF and infringing upon his constitutional rights.

In view of the above, I am satisfied that the petitioner proved that petitioner's supporters were

intimidated by PPU, UPDF GISO and LDU on polling day of 1 2/ 3/200 *1* on various polling stations.

I would therefore state that there was a non-compliance with the Provisions of the Presidential Elections Act, 2000, nearly in every complaint that was raised by petitioner. I would in the result answer the 1st issue in the affirmative.

The next issue is whether the said election was conducted in accordance with the principles laid down in the provisions of the said Act.

These principles can be gathered from Article 61(a) of the Constitution and Section 5(1) of the Presidential Elections Act, 2000. They are that the election of the President shall be by universal adult suffrage through secret ballot using one ballot box for all candidates at each polling station. In effect, the principles laid down in the Act are that the entire electoral process must be conducted under conditions of freedom and fairness.

Mr. Kabatsi, the solicitor General for the 2d respondent submitted that whether or not the elections were free and fair would depend on what the petitioner is able to demonstrate that it was not. He submitted that if at all there were instances or incidents that could have affected the electoral exercise, these were trivial. He went on to show that the 2d1 respondent had adduced evidence showing that the Presidential elections 2001 were conducted in an atmosphere of freedom and fairness. He submitted that the 2nd respondent organised the elections according to the Electoral Commission Act, 1 997 and at the end of it, the respondent was validly and duly elected President of Uganda in a free and fair elections.
He submitted that the report by the International observers was clear manifestation of the elections having been free and fair. The report from OAU observers stated:

"During the campaign period, the team was very much concerned about certain reported acts of violence and intimidation which led to the loss of lives. Given the above-mentioned

observations and other few technical short-comings it is the view of the OAU observer Team that the exercise was conducted transparently and in a satisfactory manner"

Report from the Nigerian team had this to say:

"As ***we return to Nigeria, we hold the view that democracy has come to stay in Uganda and we pray for its sustainability."***

A report from Tanzanian observers had this to say about the presidential Elections 2001:-

"In general the processes were transparent and correctly conducted. There were no shortages of election materials; the voting atmosphere was calm and peaceful. After the announcement of results everybody moved away peacefully"

Mr. Kabatsi submitted that there were many affidavits of Returning Officers and presiding officers from Kisoro, Kitgum, Mayunge, Kasese, Rukungiri, Ntugamo and also affidavit of Francis Bwengye who participated in the presidential election race who stated that the election was free and fair. He in particular referred to affidavit of Bob Mutebi who interviewed the petitioner who was then casting his vote at Rukungiri. Mutebi, a journalist was in Rukungiri monitoring elections. The petitioner was recorded as saying:

"I don't know about far off areas, but in areas down town, I think voting so far is going on well The army presence is every where throughout this district I have not heard of any incident where the army is interfering in the polling process, but I do not know what is happening elsewhere.

On the question regarding campaign, Mr. Kabatsi submitted that the petitioner merely stated 'the campaign was tough hectic, we had little time to move throughout the Country"

Mr. Kabatsi submitted that the petitioner never complained of harassment and about problem of freedom and fairness.

He submitted that the affidavits of Major General Jeje Odongo, Mr. John Kisembo Inspector General of Police showed everything had gone well. The affidavit of Francis Bwengye, one of the presidential candidates showed election was free and fair.
He concluded that the petitioner had failed to discharge the burden on him to the satisfaction of the court that the election was not free and fair. He contended that the standard of proof was higher on the petitioner in election petition than in ordinary civil suits. In the case of Presidential Election it must even be very high near that of proving beyond reasonable doubt. He therefore concluded that the answer to issue number 2 must be in the negative.

On the other hand, Mr. Mbabazi, one of the petitioner's Counsel submitted that in order to determine the 2nd issue, we have to look at the Constitution, Presidential Elections Act and Electoral Commission Act and then determine whether the Presidential Elections were conducted within the principles. On the aspect of fairness, he submitted we cannot talk of fairness when one candidate goes to a polling station and finds another candidate already having 200 votes in the ballot box! On fairness still, he submitted that we must talk of voter's registers, display of voter's register, voters' casting ballot papers into ballot boxes and on polling stations. He submitted that election cannot be said to have been free and fair when the 1st respondent used PPU soldiers to harass petitioner's supporters during the election campaign and on the polling day. He invited us to consider the totality of all these principles which are necessary for a valid election spelt out by section 58(1) and Article 104 of the Constitution.

He further submitted that there was no freedom during electioneering activities of the petitioner, considering the evidence in the affidavits sworn in support of the petition. There was evidence of intimidation and violence of petitioner's supporters in Rukungiri and Kanungu by the 'l respondent's supporters and PPU. On one occasion one person was killed and 1 4 people were

injured at the rally of the petitioner in the town of Rukungiri. He then referred to Mr. Azizi Kasujja, the Electoral Commission Chairman's letter to the President stating that the PPU soldiers' involvement in electoral process was causing concern. The letter was appealing to the 1 s respondent to withdraw the army from the electoral process. He submitted that you cannot talk of freedom when some of the Petitioner's supporters were arrested and kept in prisons until after the close of voting.

On transparency he submitted that we cannot talk of transparency in the Presidential Elections when there were sham polling stations, where the petitioner had nobody to safeguard his interest. You cannot talk of transparency when petitioner's polling agents were chased away from the polling stations after which polling, counting and tallying of votes continued all in the absence of the petitioner's polling agents. You cannot talk of universal adult suffrage, whereby every one of and above 1 8 years of age has a right to vote under the Constitution for a candidate of his or her own choice when ballot papers on some polling stations were pre-ticked in favour of one candidate infront of the presiding officer for all the voters regardless of voters' choice. Mr. James Musinguzi stated in his affidavit that he found on most of the polling stations in Kanungu which he visited on the polling day, ballot papers were being pre-ticked in favour of 1st respondent. When he came to cast his vote at his polling station, Ntungamo, all the ballot papers were already pre-ticked in favour of the 1st respondent. He stated he did not vote since it was meaningless to do so by casting a ballot paper pre-ticked for him not in favour of his own choice.

I wish to emphasize that the principles under which the Presidential Elections must be conducted are as laid down in the Electoral Commission Act, 1 997. These included:

"to take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness as spelt out by Section 12(e) of the Electoral Commission Act."

The above provisions of the law is reflected in the extract which Mr. Walubiri, one of the Counsel for the Petitioner, cited from a book by Prof. Guy Goodwin entitled "Free and Fair

Elections. International Law and Practice" published in Geneva 1994, states in part as:
"Essence of free and fair. A successful election does not depend on what happens on ballot days. The totality of the process must be examined including preliminary issues such as the nature of electoral system, voters' registers whether voters have been able to cast their votes without fear and intimidation."

Clearly, when the above extract is examined in light of the evidence in the affidavits of several witnesses especially those from Rukungiri, Kanungu, Kamwenge and Kabale e.g. Major (RTD) Okwiri Rwaboni, James Musinguzi, Richard Bashaija, Mpwabwooba Callist, Bernad Masiko, Byaruhanga Frank and Bugando Frank all from Rukungiri and Kanungu Moses Muhwezi and Frank Birungi Ozo from Kamwenge despite the rebutting evidence of those who were being accused of having committed those offences, it is clear that the election in those areas was not quite free.

For instance, the evidence of Frank Bugando from Kabuga of Kihihi, stated that he arrived at the polling station of Kabugo between 5:00 and 6:00 am. He witnessed Moses Mwesigye get 3 ballot books from the presiding officer. He saw him plucking out ballot papers and ticking the name of the respondent. He saw him hand those ballot papers to Nathan Turyagyenda , James Birakwate and Kamugisha. He saw these people insert those ballot papers into the ballot box. He stated that when he raised the issue of cheating, they threatened to kill or to expel him from the District. He stated that this was done before the petitioner's agents arrived at the polling station at 7:00 a.m. He stated that the ballot box was not opened before voting commenced. However, he stated he reported to the polling agents of the petitioner when they arrived. He could not stay after he had witnessed that type of cheating. He went away and reported to Mr. Kazooba, the co-ordinator for Kihihi sub-county. The affidavit of Basajabalaba from Kenzaza polling station in Bunyaruguru, Bushenyi District shows the recovered 1 3 ballot papers pre-ticked, in favour of 1 **St** respondent from Allen Kyomuhangi after she had failed to insert them in the ballot box corroborates the type of cheating that is being talked about. Photocopies of the ballot papers pre-ticked in favour of the l respondent were annexed to the affidavit. These copies of the ballot papers were handed to Fr. Vincent Birungi, the District co-ordinator, who took them to Bushenyi police station. The

affidavit from Bushenyi police station does not talk much about them. However, Allen Kyomuhangi denied in her affidavit that she was found with those 1 3 pre-ticked ballot papers.

In my view, the evidence on record shows, that there was harassment, intimidation and cheating of ballot papers during the election in Rukungiri, Kanungu, Kamwenge, Kabale and to certain extent in Mbale and Mayunge. There was chasing of polling agents of petitioner from polling stations in Rukungiri, Kanungu and other areas as a result of which voting, counting and tallying of votes were done in their absence. So there was no free and transparent election in such areas. In some areas, petitioner's polling agents were arrested on the eve of polling day and detained until after the close of voting. The affidavit of Arinaitwe Wilkens where he averred that when he was taken to Kabale police station, he found a number of Besigye's agents detained in the police station which was evidence of denial of their constitutional right. Sande Wilson of Kitohwa Kaharo, Kabale averred that l respondent's mobiliser were at the same time polling officials. As a monitor for the petitioner in Muko and Bufundi at almost every polling station he visisted, he found ballot papers being preticked in favour of the 1st respondent.

In conclusion on the element of election being free, I think that it was not free in the areas I have examined.

On the issue of the election having been fairly conducted, I think that with the affidavit of Major (Rtd) Okwir Rwaboni, James Musinguzi, Sam Kakuru, Koko Medrard, Benard Masiko, Mpwabwoona Muhanguzi Dennis and Byomuhangi Kaguta who together with Buterere and Tukahirwa were detained and kept in a trench in the barracks for the whole day when voting was going on, proves there was no fairness in the manner election was conducted in Rukungiri, Kanungu and to a certain extent in Kabafe, Mbale and Kamwenge. In Kamwenge, Kizza Davis, averred that he was arrested on 11/3/2001 taken to Kamwenge army detach and put in a trench for the whole night. On 1 2/3/200 1 at 10:00 a.m. he was taken to polling station and was given a ballot paper pre-ticked in favour of the 1st respondent and escorted by two soldiers to ballot box and cast the vote. After that he was taken back to the barracks. He was released in the evening.

I have no exact words to describe that type of behaviour of those who did it and the treatment they subjected him to. It cannot be described as rigging. It was torture, crude and denial of his constitutional right to choose a candidate of his own choice. It is, however, hoped that when those in charge of the well-being of the State learnt about this type of crude treatment of Kiiza Davis and others in Rukungiri, who also suffered they will ensure that never again should our citizens be mistreated during electioneering period and on election eve/day.

Further, in my view, involvement of PPU soldiers in harassing petitioner's supporters and campaign agents offended the principle of fairness. Mr. Aziz Kasujja's (Electoral Commission's chairman) letter to the President clearly shows that the Army ought not to have been deployed in the electoral process. He stated inter alia:

"We also expect that the deployment of PPU is made where the President is expected to be as this is a facility that your Excellence is entitled to as the incumbentThe Commission therefore would therefore like to request you as commander-in-Chief of the Armed Forces to instruct armed personnel not to do anything that would be interpreted as interference in the electoral process contrary to law and thus jeopardise the democratisation principles that our country has embarked on….

Clearly, the evidence in the affidavits received from Rukungiri (already referred to) shows that PPU soldiers under Capt. Ndahura interfered with petitioner's election campaigns and those of his campaign agents and supporters. On petitioner's last rally in Rukungiri, he found his supporters stricken by tear exerted on them by PPU. At the end of his rally, one supporter was shot dead and 1 4 were injured. Yet, the respondent was not having a rally in Rukungiri and therefore, they ought not to have been in that animosity where they would have clashed with petitioner's supporters. It was submitted that whereas section 21(1) of the Presidential Elections Act permits the incumbent (President) to continue to use his facility as the President, the powers given to him to use those facilities did not extend to an area where he would use the facility to take unfair advantage over his opponent. The petitioner cited Tanzanian case of **AG *v Kabourou 1995 2 LCR at page* 776-777.** Where the Tanzanian Court of Appeal held that it would have been

unconstitutional to impose on the President who was also the Commander-in Chief restrictions which adversely affected his ability to discharge his official responsibilities. Nevertheless the principle of fairness in an election required that a President should not use Government property or employees during the election campaign in a manner which was not necessary for his personal security or the discharge of the responsibilities of the office of President or Commander-in — Chief is prohibited in accordance with the principles of fairness.

How is it in the instant case? I must point out that the Tanzanian case is not binding on us. However, it is of great persuasive authority to us and unless there is good reason to depart from it, I would apply it. In our case, the PPU soldiers are government employees in the Ministry of Defence. They are assigned to the President as his Presidential Protection Unit to provide security even when he is campaigning for re-election.
Section 21(2) provides:

"Notwithstanding sub-section (1), a candidate who holds the office of President, may continue to use during the campaign, but shall use only, those Government facilities which are attached to and utilised by the holder of that office."

In this case, the PPU were stationed in Rukungiri waiting for candidate Museveni Yoweri Kaguta to return for another rally. In his absence, it appears from the evidence that they involved themselves in the local politics of the area and assisted supporters of candidate Museveni Yoweri Kaguta in harassing and intimidating petitioner's supporters. If however, because they were left alone, they started misbehaving by harassing and intimidating supporters of the opponent of their boss, he (1st respondent) would not in my view, be vicariously liable for their acts unless there is evidence that he had knowledge and consented or approved of what they did. However, in my view, the consequences of their acts upon the petitioner's electioneering activities would seriously undermine the principle of fairness in the presidential elections.

It must be noted that although Capt. Ndahura denied having permitted PPU soldiers to harass, intimidate and terrorise petitioner's supporters and interfere in his electioneering activities in

Rukungiri and Kanungu, the evidence of Hon. (Major. Rtd) Okwir Rabwoni, Mpwabwooba Callist, James Musinguzi, Byamuhangi Kaguta was so convincing that I had no alternative but to accept it as truthful. Even Capt. Ndahura admitted having sent his vehicle to Rugyeyo to assist police disperse an illegal rally by Hon. Major (Rtd) Okwir. In my opinion, it is not surprising that Capt. Ndahura denied involvement, because he would not accept to have been involved in what PPU soldiers were accused to have done in Rukungiri and Kanungu. Otherwise, the evidence was clear that the PPU soldiers were used by supporters of the 1st respondent to intimidate and harass petitioner's supporters whom they described as rebels.

It is my opinion therefore, that their involvement in harassment and intimidation of petitioner's supporters was a breach of principle of fair play in the Presidential Electoral process.

On the issue of secret ballot using one ballot box for all candidates, this was intended to ensure that each elector gets a clean ballot paper and goes to an open space where he ticks or marks the candidate of his own choice secretly and thereafter, he or she slides the ballot paper into the ballot box when people are looking on. This can fairly be done when polling officials are neutral. However, when campaign agents of certain candidates are used as polling officials, then problems of impartiality comes in question; problem of pre-ticking of ballot papers in favour of individual candidates will crop up which was an abuse of the Presidential Elections Act. It was therefore wrong for 2 respondent to permit campaign agents for 1st respondent to act as presiding officers or elections officials.

When Section 28(1) of the Presidential Elections Act states that the Commission shall by notice in the Gazette publish a list of the polling stations in each constituency at least fourteen days before nomination that is done for purpose of ensuring fairness and transparency. The 2nd respondent was in error when it created 1176 polling stations on the eve of polling day. It ought to have known that unless the candidates were fully aware of these new stations before the nomination day, it would not practically be possible for them to appoint polling agents to safeguard their interest on 1 2/3/2001.

In my opinion, the general conclusion on whether the presidential elections was conducted in accordance with the principles laid down in the provisions of the

Act, I think that taking Uganda as a constituency for the election of the President, although principles of free and fair election were compromised in Districts like Rukungiri, Kanungu, Kamwenge, Kabale and to a certain extent Ntungamo, Kamwenge, Mbale and Mbarara, the election was partially conducted in accordance with the principles laid down in the Act, but:

(a) In some areas like Rukungiri, Kanungu and Kamwenge, the principles of free and fair election was compromised.

(b) In the special polling stations for soldiers and those announced on 1 1th March 2001, the principle of transparency was not applied, and

(c) There was evidence that in a significant number of polling stations, there was cheating.

I now turn to 3 issue of whether, if the 1st and 2nd issues are answered in the affirmative, such non-compliance with the provisions and principles of the said Act affected the result of the election in a substantial manner.

I shall now determine whether the non-compliance with the provisions of the Act affect the result of the election in a substantial manner?
The onus was on the petitioner to prove to the satisfaction of the court that the non-compliance with the provisions of the Act affected the result of the election and that it did so in a substantial manner. It was not enough to prove only that there was non-compliance but also to prove that the non-compliance affected the result of the election and that it did so in a substantial manner.

I think that it was necessary to know the number of votes the 1st respondent polled, which he would not have obtained had it not been for non-compliance with the provisions of the Act in a

substantial manner. The petitioner never adduced evidence to prove to the satisfaction of the court that the 1 respondent unfairly got votes, which should have been petitioner's votes. The petitioner had the onus to prove to the satisfaction of the court that the non-compliance with each of the provisions of the Act affected the result of the election in a substantial manner. It was not enough to allege and even prove the non- compliance with the provision of the Act without going further to prove or show that as a result of that non-compliance, the petitioner lost so many votes or that the 1 respondent got those votes which he ought not to have got had it not been for the non-compliance with the provisions of the Act; and that these votes from each of the complaint of non-compliance with the law affected the result of the election in a substantial manner.

For instance, there was an attempt by Mr. Mukasa David Bulonge in his affidavit sworn on April 2001 to prove that on the eve of the polling day 1176 new polling stations were created by the 2nd respondent.

So here Mr. Mukasa David Bulonge attempted in his affidavit to prove that the 2 respondent created new polling stations on 11th March 2001 which affected the number of polling stations and that these new polling stations announced had no corresponding voters' Rolls. What I must observe, however, is that what was required of Mr. Mukasa David Bulonge was to go further than that. There was need to prove that from these 11 76 new polling stations several thousand votes were expected or were cast, and that these were cast in favour of the respondent, (if that is what Mr. Mukasa David Bulonge intended to prove). As I have already stated, the onus was on the petitioner to prove that the noncompliance with the provisions of the Act affected the result of the election in a substantial manner.

What seems not to be clear for the petitioner is the extent to which noncompliance with the provisions of the Act had on the result of the election. Mr. Frank Mukunzi the analyst expert for petitioner appeared to have conceded that it was not possible to determine to what extent the errors affected each candidate. In his affidavit sworn on 1st April 2001, Mr. Frank Mukunzi stated in the executive summary of his work as follows:

"The analysis has revealed that whereas the electoral commission presents figures with precisions, they are grossly inaccurate. The analysis has further revealed an error margin of over 50% in the electoral commission's figures of the voter's registers. This error is so significant that the possibility of the actual poll result showing a different picture from the one given by the electoral commission cannot be ruled out. However, from the data that was availed it was not possible to determine to what extent the above errors affected each candidate. A recount and audit of the voters register would be the most accurate and precise way of establishing the practical out of the 2001 Presidential Elections."

It is, however, surprising that despite the above finding by petitioner's expert, Mr. Walubiri, one of the Counsel for petitioner, submitted that we should not base our judgment on the decision of ***Mbowe v Eliu-foo 1967 EA* 242** where the determining factor was the winning majority votes which was so large that a substantial reduction still left the successful candidate with a wide margin.

Sir George CJ., held in the above case as follows:

"But when the winning majority is so large that a substantial reduction still leaves the successful candidate a wide margin then it cannot be said that the result of the election would be affected by any particular noncompliance."

Mr. Walubiri persuasively invited us to give value judgment, because he contended that non-compliance with the law cannot in most case be arithmetically quantified. I must say with respect, Mr. Walubiri never cited any authority locally or from outside to support his argument. He instead invited us not to rely on the decision of ***Ibrahim v Shagari & Others (1985) LRC 1*** from Nigeria.

In my opinion, there is no way we can avoid considering numbers of votes a candidate got over the other. If the numbers of votes were used in determining the winner of the election, how can we hear the election petition, challenging the winner, that he unfairly won the election without considering the number& For instance, if the 1st respondent obtained 5,1 23,360 votes while the

petitioner got 2,055,795 votes, how can we hold that the 1St respondent was not validly elected without considering numbers of votes which he **(**the 1st respondent) obtained over the petitioner because of non-compliance with the provisions of the Act? We obviously have to consider the numbers of votes each candidate got from each polling station and District. In the case of ***George W Bush & others* v *Albert Gore & others Supreme Court of the United States No. 00-949*** the US

Supreme Court considered the grounds for contesting an election under US to include receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

Likewise I think in the instant case, we cannot ignore numbers of votes the 1st respondent got over that of the petitioner. I think that the onus was on the petitioner to prove to the satisfaction of this court that on each of the complaints of non-compliance with the law, the l respondent unfairly got a substantial number of votes which, if there was no such non-compliance, those votes would have gone to the petitioner. I would in that respect accept the approach of Ntabgoba PJ., in the case of ***Henry Adetta v Omeda Omax High Court election Petition No. 001 of 1996*** where he held inter alia:

"The petitioner had onus to prove to the satisfaction of the court that whatever non-compliance with the provisions of the Act, must have affected the result of the election in a substantial manner. It was not enough to allege and even prove that there was harassment, chasing away of petitioner's polling agents etc. The petitioner had a burden to go further than that and show that the result of the election was thereby affected in a substantial manner."

The above approach was independently arrived at by Musoke-Kibuka J., in ***Katwiremu Bategana v Mushemeza & others Election Petition*** *No.* ***1 of 1996*** at Mbarara Registry and by Okello J as he then was in ***Ayena Odonao v Ben Wacha Election Petition No 002 of 1996*** at Gulu.

I do agree that that is the position of the law.

However, what does not seem to be correct in the decision of ***Henry Adetta v Omeda Omax*** (supra) was where Ntabgoba PJ held while dealing with offences and illegal practices under the election law that the petitioner had onus to prove that the offence affected the result of the election in a substantial manner.

He held in his judgment as follows:

"I think I would say the same thing with regard to the second ground which alleges offences and other illegal practices under the election law. The evidence tendered on behalf of the petitioner does not remove my doubt as to their effect on the outcome of the election. I find that no proof has been made that any offence and/or illegal practices affected the election results to the detriment of the petitioner or to the advantage of the respondent."

I wish to state that under sub-section(6)(c) of section 58 of the Presidential Elections Act, 2000, the election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court.

"(c) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."

Clearly, from the above provision, if an election offence or illegal practice, as defined by Section 63 of the Act, is proved to the satisfaction of the court, there is no additional requirement of proof to the satisfaction of the court that the election offence or illegal practice affected the result of the election in a substantial manner like in the case of non-compliance with the provisions and principles of the Act under Section 58(6)(a) of the Act.

If the petitioner proves that the 1st respondent personally or with his knowledge and consent or approval committed election offence or illegal practice to the satisfaction of the court, the election of the candidate shall be annulled.

In conclusion therefore, although there was evidence of non-compliance with the law almost on each of the complaints raised by the petitioner, I must state that there was no evidence led to prove to the satisfaction of the court that that non-compliance with the law affected the result of the election in a substantial manner.

In the result the issue of whether non-compliance with the provision of the Act, affected the result of the election in a substantial manner must be answered in the negative.
The next issue is whether non-compliance with the principles laid down in the Act affected the elections result in a substantial manner. We have held herein that taking the whole country as a constituency, the Presidential Election was conducted partially in accordance with the principles laid down in the said Act, but in some areas such as Rukungiri, Kanungu and Kamwenge the principle of free and fair election was compromised and secondly in the special polling stations for soldiers and those announced on 11/3/2001, the principle of transparency was not applied and thirdly there was evidence of cheating in a significant number of polling stations.

The question we have to determine is whether the non-compliance with the principles laid down in the Act affected the result of the election in a substantial manner.

We have held that the said election was conducted partially in accordance with the principle laid down in the said Act, this is mainly because on every polling station, there were UPDF soldiers. Whenever petitioner's polling agents complained of any malpractice on the polling station, soldiers threatened to chase them away and in some cases, the polling agents were chased from the polling stations; which led to the voting, counting and tallying of votes continuing in the absence of the petitioner's polling agents.

Mr. Walubiri, Counsel for the petitioner submitted and invited us to look at the entire electoral process, starting from nomination, campaigns registration of voters, voting, counting and tallying of votes and announcement of election results. After all this has been done, he then invited us to assess the entire electoral process and look at various areas where there was non-compliance with the principles laid down in the Act and find out whether this went to the root of the principle of free and fair election.

On the question of whether non-compliance with the principles laid in the Act affected the result of the election in a substantial manner, he invited us to give a value judgment i.e. a qualitative judgment rather than giving a quantitative judgment, based on how many numbers of votes were affected by a specific non-compliance with the principle. He contended that in some cases, it was not possible to quantify the effect of terrorizing voters and people in Rukungiri and Kanungu had on the rest of the population in the country. He argued that the terror on the voters transcended into the minds of the people so that it was not possible to quantify the effect of this terror had on others. Likewise, he submitted that the abduction of Hon. Okwir at Entebbe International Airport and the effect it had on the rest of those who viewed that TV picture of his arrest could not be quantified.

Mr. Kabatsi, the Solicitor-General, who appeared for the 2nd respondent on the other hand submitted that the election was conducted under conditions of freedom and fairness. If there were instances or incidents of breaches, these were trivial and never affected election result in a substantial manner. He submitted that the OAU observers' report said the elections was conducted under conditions of freedom and fairness. The Nigerian observers stated that election went on well. The Tanzanian observers stated that electoral process was transparent. Affidavits from Returning Officers from various Districts indicated that election went on normally. Petitioner's interview with Bob Mutebi shows that he never complained of any breaches of freedom and fairness on the polling day at the polling station where he voted in Rukungiri.

Mr. Francis Bwengye, one of the Presidential Candidates, stated in his affidavit that election was free and fair. The affidavits of Major General Jeje Odongo and Mr John Kisembo, Inspector General of Police stated The election was free and fair.

Counsel for l respondent adopted Mr. Kabatsi's submission.

I wish to state that we heard the submission from each side and perused affidavits in support of each side. However, with due respect to Mr. Walubiri's submission, he addressed us as if he was a witness, because we did not have evidence from outside Rukungiri, Kanungu and Kamwenge stating that the terror unleashed on petitioner's supporters in those areas affected them. We did not get evidence to show that the abduction of Hon. Okwir at Entebbe International Airport and killing of Beronda and injuring of 1 4 others in Rukungiri transcended into the minds of the entire population resulting into those who supported him before to withdraw their support. I must state that there was no such evidence. In fact, there was no evidence before us to show that the entire population was aware of the harassment of petitioner's supporters in Rukungiri, Kanungu and Kamwenge and the killing of Beronda and injuring of 14 others in Rukungiri township on 3/32001.

It was mere speculation that because those events happened in Rukungiri, Kanungu and at Entebbe International Airport and therefore every person in the country must have known about them.

However, what has been established is that considering Uganda as a constituency, the Presidential Elections was conducted partially in accordance with the principles laid down in the Act. We have further found that in some areas such as Rukungiri, Kanungu the principle of free and fair election was compromised whilst in some special polling stations for soldiers and especially those announced on 11th March, 2001 the principle of transparency was not applied and lastly, there were a significant number of polling stations where there was cheating.

On the issue of the Presidential Elections 2001 having been conducted partially in accordance

with the principles laid down in the Act, I wish to point out that from the complaints which were raised and the evidence brought in support and in rebuttal, it is my considered view that taking Uganda as a single constituency for the election of the President what comes out prominently is that in a significant number of districts there is complaint of non-compliance with the principles laid down in the Act. It is noteworthy that major complaints of noncompliance with freedom and fairness of election, absence of transparency and cheating came out prominently in Rukungiri, Kanungu, Kamwenge, Kabale, Mbale and Ntungamo. They were not raised in Kapchorwa, Kotido, Moroto, Apac, Yumbe, Moyo, Mpigi, Adjumani, Masaka, Bundibugyo, Kalangala, Masindi and Hoima. They were raised to a limited extent in Bushenyi, Mbarar, Kabarole, Jinja, Gulu, Kitgum, Soroti, Busia, Katakwi, Bugiri, Iganga and Pallisa.

That is why in conclusion I can state the Presidential Election was conducted partially in accordance with the principle laid down in the Act.

Furthermore, we have already gone through the affidavits of Hon. Okwir, John Hassy Kasamunyu, Masiko, Kakuru Sam, James Musinguzi, Mubangizi Denis, Henry Muhwezi, Mpwabwooba Callist and Arinaitwe Wilkens and Byomuhangi Kaguta where PPU soldiers and UPDF soldiers interfered with electioneering activities of the petitioners.

Obviously where soldiers got involved forcefully, they prevented petitioner's rallies from taking place. Petitioner stated that when he went for his rally at Kamwenge, he found it impossible to go on with the rally when soldiers and l respondent's supporters organised theirs on same venue. On 3rd of March 2001 when a joint force of police and UPDF got involved in Rukungiri township Beronda was killed and 1 4 other people were injured.

Yes, there was evidence of violence upon supporters of the petitioner on the eve of election and on the polling day in Rukungiri, Kanungu and Kabale, but problem is that you cannot tell from the evidence the quantum and overall effect this violence and intimidation had on the election result. The petitioner never called evidence to show that all these affected election result in a substantial manner.

On the submission that PPU soldiers' involvement in electioneering campaign against the petitioner was infringement of principle of fairness in an election which required that a President should not use Government employees during an election campaign in a manner which was not necessary for his personal security and that the use of these soldiers was an abuse of principles of fairness in the presidential election on the authority of ***AG & Others v Kabourou*** (1995) (supra) but with respect, I think in this case the PPU soldiers in Rukungiri were there alone.

Clearly, there was no evidence that PPU, GISO and UPDF soldiers were appointed by respondent as his agents. There was no evidence that he used them or approved their actions from which agency could be inferred. It appears that PPU soldiers got involved in local politics when they were left alone in Rukungiri and Kanungu waiting for the return of the l respondent for his rally. In my view, since election campaign for 1 respondent was not part of their work, if they went out of their way and harassed and intimidated petitioner's supporters, the 1st respondent would not be liable on the principle of principal agency relationship.

However, this does not mean that their conduct in these areas did not offend the principle which required elections to be free and fair. They interfered with petitioner's free and fair campaigns. There was, however, no evidence led to prove that non-compliance with free and fair election in Rukungiri, Kanungu and Kamwenge affected the result of the election in the entire country in a substantial manner.

Further, there was evidence of arresting petitioner's agents and supporters on the eve of election and on the election day itself. These were kept in custody till after voting. The affidavits of Stanley Bugando is clear. The affidavit of Arinaitwe Wilkens Byomuhangi Kaguta and Dan Okello corroborate these arrests and detention during the time of voting. The affidavit of Byomuhangi shows that whilst he was there on 12/3/2001 Bukererende and Tukahirwa two of Dr. Besigye's agents were brought in to join him. These never voted. John Hassy Kasamunyu's affidavit shows that 9 of Besigye's agents were detained at Kanungu police station till 1 6/3/2001. For him, he was being hunted and therefore, he never voted.

On the issue of transparency, there was evidence that in a number of polling stations in Rukungiri, Kanungu, Kabale, Mbarara, Sembabule where polling agents for petitioner protested against cheating and multiple voting, the UPDF soldiers on the polling stations chased away petitioner's polling agents. After being chased voting, counting and tallying of votes continued in the absence of petitioner's agents. Clearly this was evidence of unfairness and lack of transparency and this was supported by the evidence of Mukasa David Bulonge, where he averred that on March 2001 the 2nd respondent announced 11 76 polling stations which had no corresponding voters rolls. Undoubtedly, this meant that in these 11 76 polling stations and especially those in military barracks, there were no petitioner's polling agents. No one knew names of those on the voters registers, if such registers existed and whether these were Uganda citizens, eligible to vote.

The evidence in the affidavits of Dennis Odwik of Ongee Marino, James Oluka from Soroti, Edson Bumeze from Kasese, Alex Otim and Boniface Ruhindi Ngaruye from Mbarara are instances of such polling stations which were created on 1 1th March 2001, just the eve of the polling day. Clearly this offended the principles of fairness and transparency which the Presidential Elections Act 2001 had come up to safeguard against.

However, the petitioner never called evidence to prove or show by how many votes the 1 respondent got over the petitioner through lack of transparency in the electoral process. It was incumbent on the petitioner to prove to the satisfaction of the court that lack of transparency in the election affected the result of the election in a substantial manner. I must state that he tailed to do so.

On cheating during the election, I have already held that there was evidence of cheating in the presidential elections 2001 in a significant number of polling stations. For instance, at Rwenanura polling station in Ruhama Ntungamo district, Kasigazi Noel averred that from the voters register he discovered that people like John Rugaruka, Bazubagira, Kaitita and Tinkasimire who had migrated to Rwanda after the fall of Habyarimana's government were on

voters register and their names were ticked as having voted. Further when he and Kikwekwe asked why Sibomana Amos was allowed to cast a bundle of ballot papers, LC 1 Chairman Kananura George threatened to beat him. During the argument that ensued, Turyakira, a staunch supporter of Museveni was given all the remaining ballot papers by the presiding officer which he ticked and put in the ballot box.
Idd Kiryowa of Lwebitakuli in Mawogola Sembabule averred that he saw Kakuba who had already cast his vote, return with a heap of ballot papers and stuff them in the ballot box. At Kyalajoni 11 polling station A-M, in Kiboga District, Lucia Naggayi found ballot papers stuffed in the ballot box and upon complaint she was chased away from the polling station.

As we have already seen the affidavit of Basajabalaba Jafari from Bushenyi more or less corroborates the kind of stuffing of ballot papers into the ballot boxes.

The affidavit of Bangirana James ASP/CID Bushenyi admitted that Fr. V. Birungi reported a case of possessing election materials as averred by Jafari Basajabalaba.
The affidavit of Frank Bugando from Kihihi corroborates this type of cheating.
The affidavit of Ojok David Livingstone from Mbale also corroborates the type of cheating I referred to.

So clearly the petitioner has proved that there was cheating to which the 2nd respondent's election officials willingly acquiesced in and facilitated in significant number of polling stations. In my view, cheating in this case offended the principle of fairness especially when it was done with the collusion of election officials who should have been out to combat it.

However, as I have already pointed out while discussing other complaints, the petitioner never went further to prove that this cheating affected the result of the election in a substantial manner.

Therefore, in my opinion, having made the above finding, I think there is no way we can reverse the apparent will of the people who gave the winning majority of 3,067,565 votes to the 1st respondent without getting evidence to justify reversal of the winning majority votes. There must be evidence adduced by the petitioner to prove that because of non-compliance with the principle

of free and fair election, the 1st respondent unfairly obtained so many votes, which the petitioner would have got; and that because of lack of transparency, the 1st respondent unfairly got so many votes, which he ought not to have got. If at the end of all this, it becomes clear that the winning majority of the respondent is reduced to less than what the petitioner got then we can justifiably make a finding in favour of the petitioner. Otherwise, I think, we cannot reverse the apparent will of the people.

In conclusion therefore the petitioner failed to prove to the satisfaction of the court that any non-compliance with the principles of the Act affected the result of the election in a substantial manner.

In the result issue No. 3 is answered in the negative.

I now turn to issue 4 of whether an illegal practice or any other offence under the said Act, was committed, in connection with the said election by the 1st respondent personally or with his knowledge and consent or approval. The petitioner's 1st complaint is that the respondent publicly and maliciously made a false statement that the petitioner was a victim of AIDS without any reasonable ground to believe that it was true and that this false statement had the effect of promoting the election of candidate Museveni Yoweri Kaguta unfairly in preference to the petitioner alleged to be a victim of AIDS as voters were scared of voting for the petitioner who by necessary implication was destined to fail to carry out the function of the demanding office of the President and to serve out the statutory term.

The petitioner averred in Paragraph 51 of the affidavit in support of the petition as follows:

"That I know that I am not suffering from AIDS, but the first respondent maliciously made false allegation that I was a victim of AIDS without any reasonable grounds for believing that that was true and this false and malicious promoting the election of the 1st respondent unfairly in preference to me alleged to be a victim of AIDS as voters were scared of voting for me who by necessary implication was destined to fail to carry out the function of the demanding office of President and serve out the statutory term."

In answer to the complaint in the petition, the 1St respondent had this to say:

"The statement that the 'petitioner was a victim of AIDS' was not made by the 1 respondent publicly or maliciously for the purpose of promoting or procuring an election for himself contrary to Section 65 of the Act. However, it is true that a companion of the petitioner, Judith Bitwire, and her child with the petitioner died of AIDS. The 1 respondent has known the petitioner for a long time and has seen his appearance change over time to bear obvious resemblance to other AIDS victims that the respondent had previously observed."

On complaint that he offered gifts to voters during electioneering period, the 1st respondent denied the allegation and stated:

"Neither the 1st respondent nor his agents with his knowledge and consent or approval offered gifts to voters with the intention of inducing them to vote for him"

In his affidavit paragraphs 6, 7 and 8 he stated as follows:-

(6) the statement that the petitioner was a victim of AIDS was not made by me publicly or maliciously, for the purpose of promoting or procuring an election for myself.

(7) That I have known the petitioner for a long time and I made the statement honestly believing it to be true and I still do because a woman namely Judith Bitwire with whom the petitioner cohabited and the petitioner's child died of AIDS, In addition to his bodily appearance which bears a strong resemblance to other AIDS victims, I have observed in the past.

(9) That neither myself nor my agents acting with my knowledge and consent or approval, gave gifts to voters with intention of procuring them to vote for me.

The petitioner, in reply to 1 s respondent's affidavit had this to say in his affidavit sworn on 5/4/2001 in the following paragraphs:

(1) That I am an adult of Uganda. a medical Doctor by profession, a retired Colonel in UPDF and the petitioner herein.

(3) That it is true that Judith Bitwire was my companion up to 1991 and that she died in 1999, but that I did not and I do not know the cause of her death

(4) That I had had a child with the late Judith Bit wire and this child died in 1997 but this child did not die of AIDS.

(5) *That in reply to paragraph 3 of the 7 respondent's affidavit I hereby state that the statement admitted by the 7St respondent as having been made that the 'petitioner is a victim of AIDS was meant to stigmatise me and undermine my candidate.*

(6) That the statement was false in all respects and that the 1s respondent never diagonised me or tested me and found me as an AIDS victim and has never asked me about my health status.

(7) That my appearance which is natural just like any other person cannot be used to know or make one believe that I am a victim of AIDS.

(8) That there is no obvious resemblance of AIDS victims for knowing or believing that a person is an AIDS victim and none has been given by 1 respondent.

(9) That I am not and I have not been bed ridden in my life and 1 am able to work normally and during the presidential campaigns I traversed the whole of Uganda without breaking down or feeling particularly fatigued.

(10) That the 1st respondent's said false statement that the petitioner is an AIDS victim was made publicly in an interview with a Time Magazine journalist called Marguerite Micheal for Publication in the Time magazine and Website.

(13) That the 7 respondent thereafter explained the meaning of his statement in a Press Conference held on 17th March 2001 with all journalists and reporters local and International that his statement meant that State House is not a place for the invalid. A President should be someone in full control of his faculties both mental and physical.

(21) That in reply to paragraphs 8 and 13 of the 1st respondent's affidavit in support of his answer to the petition, I know that the 15t respondent at a campaign meeting held at the International Conference Centre on Friday 26th January 2001 to solicit support from motor cyclists (Boda Boda) the 18t respondent gave a gift of a new motor cycle to one of the cyclist voters by the name of Sam Kabuga in order to influence the motor cyclists/voters to vote for him (1st respondent)."

I shall deal with the issue revolving around the allegation of AIDS before handling the issue of giving gifts to voters as alleged.

I must point out that the elementary rule of evidence in Section 100 of the Evidence Act is inflexible and applies to all cases. It provides in part as follows

"Whoever desires any court to give judgment to any legal right or liability depending on the existence of facts which he asserts must prove those facts."

Then Section 101 of the same Act makes it clear that the initial onus is always on the plaintiff and if he discharges the onus and makes out a case which entitles him to relief, the onus shifts on to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

In this petition, it is necessary to examine the facts as alleged in light of the relevant law. Section 65 of the presidential Elections Act, 2000 provides as follows:

"any person who, before or during an election, publishes a false statement of the illness of a candidate at that election for purpose of promoting or procuring the election of another candidate knowing that statement to be false or not knowing or believing it on reasonable grounds to be true, commits an illegal practice."

We have to apply the rule of evidence and the law in issue to the facts. The facts as already pointed out are that the petitioner asserted that the 1 respondent publicly and maliciously made a ***false statement*** that the petitioner was ***a*** victim of AIDS ***without any reasonable grounds to believe that it was true and that this false statement had the effect of promoting the election of*** candidate Museveni Yoweri Kaguta unfairly in preference to the petitioner alleged to be a victim of Al DS ***as voters were scared of voting for the petitioner*** who by necessary implication was destined to fail to carry out the function of the demanding office of the President and to serve out the statutory term.

It must be noted at this juncture that under Section 65 of the presidential Elections Act, 2000, the petitioner was required to prove to the satisfaction of the court the following ingredients:

"(1) That the 1st respondent's statement on which the complaint is founded was false.

(2) That It was made without any reasonable grounds to believe that it was true.

(3) That it had the effect of promoting the election of the 1st respondent in preference to petitioner.

(4) That the voters were scared of voting for petitioner who by necessary implication was destined to fail to serve the statutory term."

I shall be coming to the question of whether the petitioner proved the above ingredients later after reviewing the entire evidence of the case.

The respondent admitted in his defence and affidavit that he had known the petitioner for a long time and that he made the statement honestly believing it to be true and that he still believes it, because a woman namely Judith Bitwire with whom, the petitioner cohabited and the petitioner's child died of AIDS, in addition to his bodily appearance which bears a strong resemblance to other AIDS victims he had observed in the past.

Dr. Ssekasanvu Emmanuel of Nsambya stated in his affidavit paragraph 3, 4 and 6 as follows:

(3) ***That I have read paragraphs 6 and 7 of Mr. Museveni Yoweri Kaguta's affidavit in support of his answer to the petition of Col. (Rtd) Dr. Besigye Kiiza in respect of AIDS disease, and my professional opinion on the definition of AIDS is attached hereto and marked P.*** **23"**

(4) That it is contrary to Medical Ethics and Hippocratic Oath for a Medical Doctor to discuss or reveal the ailments of his or her patients to 3fl parties whether dead or alive.
(5) That I know that Uganda is a signatory to the Declaration of the Paris AIDS summit of December 1994 in which it is stated Political Leaders should ensure that all persons living with HI V/A ID S are able to realise the full and equal enjoyment of their fundamental rights and freedoms without distinction.

Then the affidavit of Major Rubaramira Ruranga stated as follows:

(1) ***That I have been living with HIV for 16 years but I still go about my duties normally.***

(2) That I am married to **2** ***wives — Margaret with whom we have lived for 29 years and***

produced 3 children and Jessica whom I married in 1991 and with whom we have one child aged 1 1/2 years.

(3) That I have been and continue to make love to both my wives to-date.

(4) That in spite of the fact that we interact sexually, whenever we test I-fly, I and my second wife test positive but my first wife and my 1/.4 year old child test negative.

(5) That I have sought the consent of spouses to divulge matters pertaining to their health in my testimony in this case.

Then Prof. John Rwomushana and Director of Research and policy Development at the Uganda AIDS Commission stated in his affidavit in paragraphs 4 — 1 2 as follows:

"(4) That I co-ordinate all AIDS related bio-medical and social research in the country involving the gathering of research results and research related information in the country, packing such information for dissemination for the purposes of policy development and further research in HI V/AIDS prevention care and support. I am involved in the development of research guidelines, approaches, standards and plans.

(5) That I am very conversant with the research results pertaining to both medical and social aspects of AIDS and on the basis of such research and in formation state as follows:

(6) That I have read the affidavit of Dr. Ssekasanvu Emmanuel dated 1st April 2001 in support of the petition. The contents of the affidavit are a correct statement of the medical diagnosis of AIDS.

(7) ***That research in Uganda has established that there is a concept of "Community Diagnosis" of AIDS based on community perceptions beliefs and observations concerning HI V/AIDS.***

(8) That the said concept is a useful research tool that enables research into the community awareness as to the risk and danger of the spread of HIV/AIDS.

(9) That research in Uganda has revealed that it is common, widespread practice in lay conversation to refer to individuals in community who have lost partners and very young children presumably due to AIDS, as persons suffering from AIDS. An example of such observations can be taken from research settings such as in Kyamulibwa, Masaka District where the Uganda Virus Research Institute and the Medical Research Council have undertaken community based research for a period of over ten years.

(10) ***That the said practice is common at funerals in reference to deaths of persons and is used by the community to protect families through guarding against inheritance of spouses who have lost parties and other sexual based relationships.***

(11) ***That the practice is a societal advantage, which is more wide spread in a Country where there are high levels of awareness and openness about AIDS. such as Uganda. That the practice has devolved a right upon people in the community to openly express their beliefs in matters concerning AIDS and its transmission.***

(15) ***That research has shown that it is normal practice for ordinary people to make presumptions that an individual is suffering from AIDS upon observation of skin changes and the individual's AIDS related bereavement."***

The evidence which the petitioner adduced is:

"I know that I am not suffering from 'AIDS', but the respondent maliciously made false allegation that I was a victim of AIDS without any reasonable ground for believing that was true…."

In his supplementary affidavit dated 5th April, 2001 he stated he was a medical doctor by profession and a retired Col. In UPDF. He admitted that Judith Bitwire was his companion up

to 1 991 and that she died in 1 999; but he did not know the cause of her death. He admitted that the child he had had with late Judith Bitwire also died in 1991, but that this child never died of AIDS.

I wish to point out that throughout petitioner's affidavit, there is no where there was any attempt by the petitioner to prove falsity of the statement that appeared in the Times Magazine, which is the subject of the complaint under discussion. The evidence in the petitioner's affidavit which comes nearer to proving that the statement was false is:

'That I am an adult and Medical Doctor by profession. I know that I am not suffering from AIDS, but the respondent maliciously made false allegation that I was a victim of AIDS without any reasonable ground for believing it to be true."

Question is whether it can be said that the petitioner has discharged the onus that lay on him on the strength of that evidence. In my considered opinion, according to the case of ***Dr. Fag!it Singh v Glani Kartar Singh (1966) AIR (SC)*** ZZ the Indian Supreme Court held the burden of proving that the 1 **St** respondent statement was false and that he did not believe it to be true, and that it had the effect of promoting the election of the respondent in preference to petitioner and that the voters were scared of voting for the petitioner who by necessary implication was destined to fail to serve out the statutory term, was on petitioner. Although according to the decision in ***Dr. Faciiit Sinah v Glain Kartar Singh*** (supra) the onus is light, it appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. As it was held in ***Stoney v East bourner Rural District Council (1924) CA 367*** the onus is not merely a question of weighing feathers on one side or the other, and of saying that if there were two feathers on one side and one on the other, that would be sufficient to shift the onus. What is meant is, "that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given" to contradict it.

Although the burden on petitioner is light, the evidence in the affidavit of the petitioner in this case cannot be taken to amount to prima facie case that was expected of the petitioner to prove the necessary ingredients. At one stage Dr. Byamugisha for l respondent submitted that in order to prove he was not a victim of AIDS, he should subject himself to AIDS test, but with due respect, the result of the test would not solve the problem, because it appears to me that even if the petitioner subjected himself to HIV/AIDS test and was found to be negative, that might not mean that the 1st respondent was guilty of illegal practice since his statement is based on the fact that he honestly believed it to be true on reasonable ground. The onus was therefore on the petitioner to prove, that **1st** respondent's assertion/statement was not honestly made on the ground that he believed it to be true.

In the case of ***Wilson v Inyang (1951) 2 KB 799*** the defendant was an African who had lived in England for 2 years. He had obtained a diploma of the Anglo-American Institute of Drugless Therapy. To obtain the diploma he had first undergone a course of instruction which consisted partly of a correspondence course and partly of practical training. The practical training was given to the defendant which he attended for 6 months. He then sat for examination before obtaining the diploma, and wrote about six papers. After he had obtained the diploma he obtained a certificate of membership of the British Guild of Drugless Practitioners. The Diploma and Certificate were signed by one Dr. Brown Neil.

The defendant had never treated any patient, because none ever applied to him for treatment, but genuinely believed himself, by reason of the course of instruction above referred to, to be qualified to diagnose disease and to relieve some of these in their early stages by minor manipulation and by prescribing exercises and diet.

It was contended for prosecution that even if the defendant believed that he was qualified to practice in medicine, he had no reasonable grounds for that belief.

For defendant it was contended that mens rea was a necessary ingredient of the offence and that he should not be convicted of willfully and falsely contravening the Act if he genuinely and reasonably believed that he was qualified to practice in medicine and that regard must be had to his background for that belief.

The trial Magistrate was of opinion that the use of the title or description “physician” in the advertisement would constitute an offence if used wilfully and falsely by the defendant; that he genuinely believed that he was entitled so to describe himself; and that, while no person brought up and educated in England could reasonably believe that the course of instruction and examination by the institute and memberships of the guild would authorise him to entitle or describe himself as “a physician”, the defendant, because he was an African brought up in Africa, who had only lived in England for two years, acted reasonably in believing that his course of instruction, examination, diploma and guild membership qualified him so to describe himself. Accordingly the Magistrate held that the prosecution had not discharged the burden of proof which lay on
it.

After reviewing the facts and the law the Kings Bench Division on appeal held that to commit an offence the defendant must have acted willfully and falsely and that it is for the court to decide whether he has done so, and also that he does not commit an offence if he honestly believes that he was within his rights in describing himself as he did. In other words, the case came down to the question whether the defendant was acting bona fide in describing himself as he had because he had an honest belief that he was entitled to do so.
In conclusion, it was held that in considering whether a defendant has acted honestly, the court ought to take into account the presence or absence of reasonable belief. In that case the Magistrate took certain facts into account and gave his reasons for coming to the conclusion that the defendant had acted honestly. The court relied on the ratio decidendi of the judgment in ***Younqhusband v Luftinci (1951) 2 KB 799*** which is that whether a person acted honestly is a

question of fact for the Magistrate and whether he acted reasonably or not is not the deciding feature.

In our case here the lst respondent stated:
"I made the statement honestly believing it to be true and I still do because a woman namely Judith Bitwire, with whom the petitioner cohabited and the petitioner's child died of AIDS in addition to his bodily appearance which bears a strong resemblance to other AIDS victims I have observed in the past."

My concern here is whether the 1st respondent in making the statement he is accused of having made falsely and maliciously, did honestly believe it to be true. He gave reasons as to why he honestly believed that the petitioner was a victim of AIDS.

The affidavit of Prof. Rwomushana supported the 1st respondent when he (Prof) stated that in Uganda, research has established that there is a concept of community perceptions, beliefs and observations concerning HIV/AIDS. That research has further revealed that it is common and widespread practice in lay conversations to refer to individuals in the community who have lost partners and very young children presumably due to AIDS as persons suffering from AIDS. It is also normal practice for ordinary people to make presumptions that an individual is suffering from AIDS upon observation of skin changes and the individual's AIDS related bereavement.

It was argued before us that in this age of science and technology it was not reasonable for the 1 **s** respondent to base his conclusion on his own belief which was not backed up by medical conclusion. Mr. Balikuddembe submitted that 1 respondent's statement was intended to stigmatise the petitioner so that voters shun him. He further described Prof. Rwomushana's affidavit as being based on gossip as there was no evidence of any research he had carried out on which he based his opinion.

With due respect to Mr. Balikuddembe's submission when he criticised Prof. Rwomushana's affidavit that it was based on gossip as there was no evidence of any research he had carried out on which he based his opinion, I wish to state that from the description of himself which

remained unchallenged, I think his (Rwomushana's) opinion deserves respect. We must accept that this case would have best been handled by oral evidence. This is where the Professor would have been challenged and asked if he had carried out any research, but his affidavit, remained unchallenged. I must state that I have no reason to doubt and question his capacity and knowledge of the diagnosis of AIDS based on community perceptions, beliefs and observation concerning HIV/AIDS considering his involvement in the HIVIAIDS research. Therefore I have no reason to question his affidavit when he stated inter alia.

"(3) That I am the Director of Research and Policy Development at the Uganda AIDS Commission.

(4) That I co-ordinate all AIDS related biomedical and social research in the Country involving the gathering of research results and related in formation for dissemination for the purpose of policy development and further research in H/V/AIDS prevention, care and support. I am involved in the development of research guideline, approaches, standards and plans.

(5) That I am very conversant with the research results pertaining to both medical and social aspects of AIDS and on the basis of such research and information I state as follows:

There was no affidavit sworn in rebuttal of what he stated in his affidavit. However, what is clear is that the respondent's statement appears to be consistent with
the concept of Community Diagnosis of AIDS which is based on community perceptions, beliefs and observations concerning HI VIA IDS as deponed to by Prof. Rwomushana."

In my opinion, in determining whether the 1st respondent acted honestly, we must take into account, the presence or absence of reasonable belief on which he based his statement. His evidence shows that he based it on reasonable belief that the petitioner's woman Judith Bitwire, with whom he had cohabited and the child they had had together had both died of AIDS. In

addition to the above, he stated that the petitioner's bodily appearance bore a strong resemblance of AIDS victims he had observed in the past.

In my view, I think that for the 1St respondent to be held guilty of the statement he made, it must be shown that he acted falsely and without any honest belief in the statement being true. It is settled and I agree with the decision in ***Wilson vinyanci*** (supra) and ***YounghusbandvLufting*** (supra) that he does not commit an offence if he honestly believed that he was within his rights to state as he did. In other words, the question was whether he acted bona tide in describing the petitioner to be a victim of AIDS.

On whether the statement had the effect of promoting the election of the respondent in preference to petitioner and whether voters were scared to vote for the petitioner, I must state that the petitioner never called evidence to prove that voters got scared and refrained from voting for the petitioner because of being a victim of AIDS. However, on whether the statement had the effect of promoting the election of the 1st respondent in preference to petitioner, I must state that the statement as it appeared in the Time Magazine does not appear to have had that connotation. However, on 11th March 2001 the 1st respondent explained to all journalist and reporters, local and international that his statement
meant that "State House is not a place for the invalid. A President should be some one in full control of his faculties both mental and physical."

I must state that with this explanation as to the meaning of his statement which appeared in the Monitor Newspaper of 8th March 2001, it is clear that the statement was intended to de-campaign the petitioner. However, I have already held that the statement was not proved to be false. Secondly, I have already found that it was not made without any reasonable grounds to believe that it was true. In my view, a statement which was not false, though designed to promote the election of 1st respondent, would not render the 1st respondent guilty of illegal practice under section 65 of the Act, and especially when it was not proved that it was made without any reasonable grounds to believe that it was true.

Finally, before I conclude, I wish to comment on the affidavit of Major Rubaramira Ruranga. I do not know why the petitioner found it necessary to bring this affidavit to court. Does it suggest he is conceding that he is a victim of AIDS but contending that despite his concession, he is still capable to carry out the function of the office of President?

Without attempting to give an answer, in my opinion, I think that, considering the AIDS problem which Uganda is faced with and the reasons on which the 1St respondent based his statement which was corroborated by the affidavit of Prof. Rwomushana, I would hold that the petitioner failed to prove that the 1st respondent committed illegal practice under Section 65 of the Act.

On the complaints that the 1st respondent offered gifts to voters during electioneering period, the 1s respondent denied the allegation and stated:

"Neither the 1st respondent nor his agents with his knowledge and consent or approval offered gifts to voters with the intention of inducing them to vote for him."

Then in para 21 of the petitioner's affidavit sworn on 5/4/2001 in reply to 1t respondent's affidavit stated in part as follows:—

"….I know that the 1st respondent at a campaign meeting held at the International Conference Centre on 26 January 2001 to solicit support from Motor cyclists (Boda Boda) the 1st respondent gave a gift of a new motor cycle to one of the cyclist voter's by the name of Samu Kabuga in order to influence the motor cyclists to vote for him and subsequently I personally heard the said Sam Kabuga on Central Broadcasting Service FM Radio urging fellow Bodaboda cyclists to support candidate Museveni Kaguta in his bid for the presidency of Uganda."

Section 63 under which the complaint is based provides as follows:

"*Any candidate or agent of a candidate who either before or during an election gives or provides any money, gift or other consideration to a voter with intention of inducing the person to vote for him or her comments an illegal practice."*

It must be pointed out that the law requires the petitioner to prove that the respondent did give a gift/bribe to a voter with intention of inducing him to vote for him. The evidence from petitioner is:

"I know the first respondent at a campaign meeting held at the International Conference Centre on 26th January 2001 to solicit support from motor cyclists (Boda boda) gave a gift of a New motor cycle to one of the cyclist voters by name of Sam Kabuga in order to influence motor cyclists to vote for him…"

It was not denied that 1st respondent gave a New motor cycle to Sam Kabuga. Sam Kabuga admitted he got it because he had been appointed campaign agent for 1 **St** respondent. The letter of his appointment as a campaign agent was annexed to his affidavit.

I must point out that there was no evidence to contradict Sam Kabuga's evidence.

Therefore, if Sam Kabuga was given a motor cycle to enable him to carry out campaign for the 1st respondent, that motor cycle would not be a gift within the meaning of Section 63(1) of the Presidential Elections Act 2000.

The affidavit of Sam Kabuga paragraph 3, 4, 5, 7, 8, 9 and 10 states as follows:—

(3) That when Y. K. Museveni offered to stand for the Presidential Election 2001, I decided to mobilise support for him especially my peers and colleagues of the Soda bode business.

(4) That on 9th January 2001, I went to Kololo Airstrip with my colleagues to escort our aspiring candidate and witness his nomination.

(5) That while at Kololo Airstrip I was approached by a gentleman who I later came to know as Moses Byaruhanga with a request that I should carry the 1 respondent from one corner of the Airstrip to the podium as the crowd congestion could not allow easy passage of his motorcade.

(7) That after nomination, I continued my mobilisation and was appointed a campaign agent for the 1st respondent. A copy of my appointment letter as such is attached hereto dated 20/1/2001.

(8) That later we agreed with Moses Byaruhanga that the Task Force for l respondent would give me a motor bike to facilitate my mobilisation. The said motor bike was handed over to me by l respondent on 26" January 2001.

(9)That my mobilization and campaign included advertisements which were broadcast over radio station.

(10) That it is not true as stated in paragraph 21 of the affidavit of petitioner dated 5/4/200 1 that! was given the motorbike to influence me to vote for the 7c respondent as I was already his supporter, mobiliser and agent."

In view of the above affidavit which was not rebutted the charge of giving a gift of a motor bike to Sam Kabuga on 26 January 2001 by the respondent has not been proved in order to induce him to vote for him.

There was another complaint of illegal practice raised in paragraph 22 of petitioner's affidavit where he alleged that respondent at a public rally in Arua on 1 2t February 2001 offered money to voters who attended his rally. It was submitted that there was a video tape recorded which Counsel for petitioner invited us to view.

For the 1st respondent, it was submitted that there was no evidence as to who took the video tape. Therefore Dr. Byamugisha submitted that there was no evidence to support the allegation of this bribery.

It must be noted that if the petitioner intended to rely on video tape, they ought to have laid foundation of how the tape was taken. The person who took the tape should have given evidence and tendered it in court. Otherwise, I think petitioner's Counsel was not serious when he asked the. court to receive the tape from him and view it, when he was not a witness. Without wasting time, I think this charge of gift giving to voters in Arua on 12/2/2001 was not seriously raised and no attempt was made to prove it. In the result it must fail.

We now turn to another category of gift giving by 1st respondent's agents. This type of illegal practice is governed by Section 58(6)(c) which provides as follows:

"(6) The election of a candidate* as *President shall only be annulled on any of the following grounds if proved to the satisfaction of the court.

(a) That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval"

There was allegation of bribe giving to voters by l respondent's agents. In this type of bribery, the onus is on the petitioner to prove that the person who gave out the gift to the voter in order to induce him to vote for the 1st respondent was an agent for the respondent. Secondly, he must prove that the 1st respondent was aware and consented to the agent giving the gift or gifts to voters or that he approved of the giving of gifts to voters or that he approved what gift his agent gave to voters.

We were referred to the Digest Annotated British, Commonwealth and European Cases Volume 20, 1 982 re-issue paragraph 646 which deals with this type of relationship between a candidate and his agent and situations similar to what is before us, where agents were alleged to have given gifts to voters in order to induce them to vote for the 1 respondent.

However, the Digest Annotated British, Commonwealth & European case appears to be wider than what Section 58(6)(c) of our Act states
Paragraph 646 provides as follows:

"The relation between a candidate and a person whom he constitutes his agent is much more intimate than which subsists between an ordinary principal and agent. The closest analogy is that of a sheriff and his under sheriff and bailiffs. For, as regards the seat, the candidate is responsible for all the mis-deeds of his agent committed within the scope of his authority although they were done against his express directions and even in defiance of them. There is never any difficulty or doubt as regards this preposition. An agent is a person employed by another to act for him and on his behalf either generally or in some particular transaction. The authority may be actual or it may be implied from circumstances. It is not necessary in order to prove agency to show that the person was actually appointed by the candidate.

If a person not appointed were to assume to act in any department of service as election agent, and the candidate accepted his services as such, he would thereby ratify the agency, so that a man may become agent of another in either of two ways, by actual employment or by recognition and acceptance. The next question is, If agent, what is he agent for? If a person were appointed or accept as agent for canvassing generally and he were to bribe or treat any voters the candidate would lose the seat. But if he was employed or accepted to canvass a particular class, as if a master were asked to canvass his workmen. and he went out of his way and bribed a person who was not his workman, the candidate would not be responsible because this was not within the scope of his authority. For the same reason, if a person whom the candidate had not in any way authorised to canvass at all for him, were to take upon himself to bribe a voter, the candidate would not be responsible for the wrongful act."

Likewise, Halsbury's Law of England, 4th Edition paragraph 61 6 is not so restrictive like our section 58(c)(6) of our Act. It provides as follows:

"A candidate's liability to have his election avoided under the doctrine of election agency is distinct from and wider than, his liability under the criminal or civil Law Agency. Once the agency is established, a candidate is liable to have his election avoided for corrupt or illegal practices committed by his agents even though the acts was not authorised by the candidate or was expressly forbidden. The reason for this stringent law is that candidates put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefits of their foul play without being responsible for it in the way of losing his seat, great mis-chief would arise."

Therefore, I do not think that the authorities referred to us by Mr. Walubiri are applicable, because our case here is confined to and governed by S.58(6)(c) of the Act.

In the instant case the evidence to prove this type of bribery was given by Gariyo Willington in paragraph 1, 2 and 3 of his affidavit:

"(1) I Gariyo Willington of C/o Ms Balikuddembe & Co. Advocates, Kampala do hereby solemnly state on oath as follows:

(2) That l am registered voter and during the above mentioned election, I was in charge of overseeing the operations of the polling agents for candidate Col. Dr. Kizza Besigye in Rubare sub-county.

(3) At around 11:00 a.m. I visited Kyanyanzire cell and saw Mwesigwa Rukutana loading people on a motor vehicle Rg. No. UAA 006A Nissan pick-up and he was giving shs. 5,000/= to every person who was boarding and instructing them to vote candidate Museveni Yoweri Kaguta."

I shall deal with this, because each case has its peculiar facts.

In this case, there was no evidence that Mwesigwa Rukutana was 1St respondent's agent. Mwesigwa Rukutana himself, has denied in his affidavit as being agent for respondent. In paragraph 4 of his affidavit he stated:

"That it is not true as alleged in paragraph 3 that was at Kyanzanzira village loading people on pick-up Reg. No. UAA 006A and giving Shs. 5,000/= to every person who boarded. On that day I never stepped in the said village nor did I load any body on the alleged or any vehicle at all or give any money to anybody."

Then Bob Kabonero stated in his affidavit in paragraphs 2, 3, 4, 5, 7 and 8 as follows:

(2) That I am a registered voter at Omungyenyi Parish polling station in Ntungamo.

(3) That I have read and understood the affidavit of Gariyo dated 2/3/2001.

(4) That the allegation made against me in paragraph 4 of the said affidavit are completely false.

(5) That on 12/3/200 1 I voted at Omungyanyi Parish polling station shortly after 7:00 am.

(7) That it is also untrue that I had four armed (UPDF soldiers escorting me

(8) That after casting my vote, I spent the rest of the day driving around Bushenyi and other parts of Ntungamo District in the Company of Hon. Mwesigwa Rukutana.

(9) That I did not see Hon. Mwesigwa Rukutana offering Shs. 5,000/= or any sum of money to voters as alleged in paragraph 3 of Gariyo 's affidavit.

Further more, Hon. Mwesigwa Rukutana's denial was corroborated by Asingwire Richard's evidence who stated he never saw him (Mwesigwa Rukutana) give out money to voters.

Similar charges were made against Hon. Mike Mukula of Soroti Municipality that he was seen dishing out money to voters. He denied the charges. His denial was corroborated by affidavits of Ekanya Beatrice, Elietu Paul and Angolo Martha, the Presiding Officers of Kichinjaji polling stations "B" "C" "D" respectively.

There were similar allegations of bribe giving to voters in Ayivu county with directives that the voters go and vote for candidate Museveni. However, the presiding officer denied ever seeing bribes being given to voters.

What is clear in all these allegations is that there was no evidence that the so- called bribe-givers were agents of the l respondent. There was no evidence that the 1' respondent had knowledge and had consented or approved that money be given to voters to induce them to vote for him.

In these circumstances, I find that the petitioner failed to prove the charges against the 1ST respondent to the satisfaction of the court. I therefore find no merit in this complaint.

Later, Mugizi Frank saw one Ali Mutebi, a campaign agent for 1st respondent coming to give him Shs. 5,000/= so that he could return and sign Declaration Results Form. He stated he rejected the offer and refused to go back and sign the forms. The affidavit of Ssali Mukago was that on 9th March 2001 Daudi Kahurutuka an agent of 1st respondent went to see him and requested him to demand any amount of money he wanted from Museveni Task Force, so that he could leave them alone to steal votes. Daudi Kahurutuka denied that allegation in his affidavit sworn in support of 1st respondent.

I must state that both complaints do not seem to constitute an election offence either under Sections 65 or 58(6)(c) of the Presidential Elections Act. However, if it is true that some one could promise to pay any amount of money if he was let free to steal votes, then the moral fibre of our society is on decadence. I think that, all that I can say is, that it is high time our religious leaders came out to instill a spirit of moral behaviour in our society.

Another complaint concerning bribery was in the affidavit of Omaha Ram of Tororo District who stated in paragraphs 4, 5and 6 of his affidavit:

(4)That on 12th March 2001 morning as I monitored and or oversee the voting process, one of our agents Opio Katamira, reported to me that in Poyawo polling station a councilor Onyango Wilbroad had given his father Odom money to give to people to vote for Museveni.

(5) That on hearing the report, I drove to Payewo near the polling station where Onyango 's father was with many people over the said issue, to which he denied.

(6) That on contacting the people of the area about what had transpired, they said it was not true that Odomi had been given money by On yang, his son to give and convass votes for Museveni."

I must state that that evidence does not connect the 1 s respondent with giving out gifts to induce voters to vote for him. Secondly, there is no evidence that Onyango was an agent of the 1 respondent. Moreover, the affidavit of Omaha Ram is no evidence that he was an agent for respondent as it is hearsay. Therefore the issue of whether the money was being given out with 1st respondent's knowledge and consent or approval does not arise for consideration. I therefore find no substance in the complaint raised by Omalla Ram's affidavit.

Finally, the petitioner further complained of bribery by the 1 respondent contrary to Section 63 of the Presidential Elections Act, 2000. This complaint was that with the intention of inducing voters to vote for him, the 1 respondent offered certain considerations which he set out in

paragraphs 22 of his affidavit sworn on 5th April, 2001 in reply to 1 respondent's affidavit as here under:

"(a) Abolished cost-sharing in all Government Health Centres including those operated by local Governments.

(b) Increased the salaries of medical workers in the middle of the budget years.

(c) Offered to increase pay to teachers and indeed made this offer in a meeting at the International Conference Centre with all the teachers in Kampala ,, 5th March 2001.

(b) Hurriedly caused his Minister of Works and campaign agent Hon. John Nasasira to publicly and out of the ordinary in full view of voters to sign contracts for the termacking and upgrading of the following roads using his position as the incumbent President to execute the said contracts and deliver on his promises to the people of the beneficiary districts.
(I) Busunju - Kiboga
(ii) Kiboga - Hoima
(iii) Arua — Packwach
(iv) Ntungamo — Rukungiri,
and that the tarmacking and upgrading of these
roads was part of the 1st respondents campaign manifesto."

Further in response Hon. Crispus WCB Kiyonga Minister of Health stated in his affidavit as follows:

"(4) That I have read and understood the affidavit of Col.(Rtd) Dr. Kizza Besigye dated 5tIJ April, 2001 and I respond as herein.

(5) if it is not true that Government abolished cost-sharing in Government Health Centres with the intention of inducing persons to vote for the l respondent as alleged by the petitioner.

(6) That cost-sharing had been introduced some years back to assist in filling the financial gaps in Health sector budget.

(7) That under the Constitution Primary Health Care is a responsibility of the Local Government (Districts) but the Central Government can always come in to assist and finance directly where there is need by prioritizing the sector.

(8) That in 1997, the government introduced the Primary Health Care conditional Grants. under which the Government increased finding to the sector aimed at improving the health of the population particularly the poor of the poor.

(9) That at the same time there has been an on-going debate and no consensus in government as to whether to abolish cost-sharing or not because it was blocking the poor people's access to health services.

(10) That the said Conditional Grant has been increasing over the years whereby Shs. 39 billion was budged for Primary Health Care in the financial year 2000/2001 compares to shs. 12 billion of the previous year.

(11) That of the Shs. 39 billion, one billion shillings was reserved for purchase of supplementary drugs.

(12) That the Primary Health Care conditional grant was inter ella to cater for salaries and

allowances of Health workers in peripheral health units which were previously supposed to be paid by Local Council 111 'S and the districts which have proved to have no capacity to sustain these payment.

(13) That in the month of October 2000, well before the campaigns, I addressed Donors to the health Sector and in formed them how the 1 respondent was concerned that the poor could not meet the user charges which was denying them access to health services.

(14) That by December 2000, the Central Government had disbursed half of the money budgeted for supplementary drugs in this financial year.

(15) That by February of this year, all the health units were reasonably stuffed/supplied with the drugs acquired using money from the conditional grant.

(16) That therefore it was no longer justified to deny the poor health services due to inability to pay under cost-sharing policy.

(17) That with or without elections the Government agenda on cost-sharing had already been set by the budget of the financial year 2000/2001.

(18) That it is therefore not correct to say that the respondent abolished cost-sharing to induce voters in view of the Government agenda."

Further in response, Hon. Mr. Benigua Mukiibi averred as follows:

"(3) That I am the Minister of State for Public Service in the Government of Uganda and presently holding the portfolio because the substantive Minister for Public Service is on annual leave.

(4) That the scope of this portfolio extends to making proposals for the increase, adjustment and or regulations of salaries of public servants and emoluments of pensioners.

(5) that during the National Budget for the financial year 2000/2001, the Minister of Finance made provisions for the implementation of recommendations in the pay strategy report prepared by the Ministry of Public Service to address the plight of the middle rank professionals. A copy of the Budget speech read on 15 the June 2000 was annexed.

(6) That on page 25 of the official Budget speech under the sub-heading - 'improving the performance of the public service" the Minister of Finance outlined the budget for Public Service Reform pay and Pensions.

(7) That the modalities for the disbursement of these funds were worked out between our Ministry and the Ministry of Finance to allot there excess funds to increase the salaries for different categories of mid-rank professionals.

(8) That in January- 2001 the Ministry of Public Service issued a Press Release relating to the increase of pay for medical workers. A copy of the press release was annexed.
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(9)That the increment of salaries for medical workers and teachers was a result of funds designated in the Budget under the Public Service pay Reform Program and was not done by the 1st respondent to induce voters alleged in paragraphs 22(b) and 22(c) of the petitioner's affidavit dated 5th April 2001".

In response to petitioner's affidavit Hon. Mr. John Nasasira Minister or Works Housing & Communication stated as follows:

“(3) That I have read and understood the affidavit of Col.(Rtd) Dr. kizza Besigye dated 5th April, 2001 sworn in reply to the affidavit of the 1 respondent and respond as here under.

(4) That the allegation contained in paragraph 22(d) that I publicly and out of the ordinary course of my duties as Minister signed contracts for the tarmacking and upgrading of roads stated herein, is completely false.

(5) That the road contracts referred to in paragraph 22(d) of the said affidavit were not signed by myself but were signed by Mr. Charles Muganzi, the Permanent Secretary of the Ministry of Works, Housing & Communications and I attended the functions in my capacity as the responsible Minister.

(6) That the said road contracts were part of the implementation of the Governments Ten Year Road Sector Development Program which commenced in 1996 (Copy of the executive summary of the Governments Ten Year Road Sector Development Program attached here marked annexture “A “)

(7) That the Credit Agreement between the Government of Uganda and the World Bank for the finance of the implemantation of the tarmacking and upgrading of the Busunju - Kiboga; Kiboga - Hoima and Arua - Packwach was signed in November, 1999 (copy of the Credit Agreement is attached hereto marked annexture “B”)

(8) That the advertisement for short listing contractors for the tenders for the tramacking of Busunju — Kiboga; Kiboga — Hoima; and Arua — packwach was issued in November, 1999 (Copy of the said advertisement attached hereto marked annexture “C”)

*(9) That the letters inviting the short listed contractors for the tenders for the tarmacking and upgrading of the roads referred to in paragraph 8 above were issued in July 2000 (copy of the letters attached hereto and collectively marked annexture “D “***)**

(10) That it is not true that any agreement has been signed for the tarmacking and upgrading of the Ntungamo — Rukungiri Road.

(11) That the tarmacking and upgrading of the Ntungamo — Rukungiri road is part of the Ten Year Road Sector Development Program referred to in paragraph 6 above and only the contract for tarmacking and upgrading the Ntungamo — Kagamba section has so far been signed as part of implementing this program.

(12) That the signing of contracts for tarmacking and upgrading of roads under my Minister has always been done publicly.

(13) That it is false to allege that the award and signing of the road contracts resulted from the first respondent's campaign manifesto or at all"

It was submitted for the petitioner that abolition of cost-sharing in all the Government Health Centres including those operated/run by Local Government and Increase of salaries of medical workers in the middle of the budget year and increase of teachers pay were all done to influence voters to vote for the respondent. It was contended that these were done out of Government business schedule; and that they were hurriedly made by the 15th respondent to woe votes.

It was submitted that all these had been budgeted in the budget of 2000/2001. The affidavit of Mr. Benigna Mukiibi, Minister of State for Public Service stated in his affidavit, paragraphs 5, 6, 7, 8,and 9 that the National Budget for Financial years 2000/200 1 had addressed the plight of the middle rank professionals in medical and teaching profession. He stated that the increament of salaries for medical workers and teachers was a result of funds designated in the Budget under the Public Service Pay Reform Programme and that it was not done by the 1 s respondent to induce voters to vote for him.

Dr. Kiyonga's affidavit corroborated Mr. Mukiibi's affidavit in so far as salary increase of medical workers was concerned.

On cost-sharing in Government Health Centres including those run by Local Government, Dr. Kiyonga's affidavit from paragraph 8 to 1 8 shows that abolition was not done for purpose of inducing voters to vote for the respondent. The Government was already concerned about the policy of cost-sharing as it was blocking the poor from accessing health services, and because of this concern with or without election, the government agenda on cost-sharing had already been set by the budget of the Financial Year 2000/2001.

Therefore all in all, the affidavits of Hon. Mr. Mukiibi and Hon. Dr. Kiyonga, which are not rebutted, indicate that the abolition of cost-sharing in all Government Health Centres, including those operated by Local Governments and salary increase for teachers and medical workers had been budgeted in the National Budget for the financial year 2000/2001.

In view of the above evidence, I would not accept the complaint of the petitioner, in his affidavit, that abolition of cost sharing in all Health Centres in the whole country, and increase of salaries for medical workers and teachers were made for the purpose of inducing those who benefited to vote for the respondent.

In the result I would find no merit in this complaint.

On the complaint that the 1st respondent hurriedly caused his Minister of works and campaign agents Hon. John Nasasira to publicly and out of the ordinary in full view of voters to sign contracts for tarmacking and upgrading of the roads indicated in the affidavit, Hon. John Nasasira denied the allegations, because he stated that he never personally signed the contract.

Paragraph 8 of the Hon. Nasasira's affidavit, which was not controverted states that:
"8 The advertisement for short listing contractors for the tenders for the tarmacking of

Busunju — Kiboga; Kiboga —Hoima and Arua — Packwach was issued in November 1999."

In paragraph 9, he averred that the short-listed contractors for tenders for tarmacking of the roads referred to in paragraph 8 above were issued in July 2000. On tarmacking and upgrading of Ntungamo — Rukungiri road, no agreement had been signed.

After carefully reviewing the evidence in the affidavits from both sides, there is no doubt on the issues of abolishing cost-sharing in medical services, and increase of salaries for teachers and medical workers that the timing of implementation of the budget proposals and recommendations coincided with the Presidential Elections 2001. And for that reason, the petitioner may have had cause to suspect that the announcements by the 1 respondent were made for the purpose of inducing personnel from these line-ministries which benefited to vote for him, suffice it to add that, there was no time limit within which the budgetary proposals and recommendations would be implemented. In my view, I think there was nothing wrong with the Government implementing budgetary proposal and recommendation at the time they found they were able to do so. I must say that the petitioner never adduced evidence to prove to the satisfaction of the court that the 1st respondent personally or his agents with his knowledge and consent or approval abolished cost-sharing in medical services in the central and Local Government Health Centres/Units and increased salaries with intention of inducing them to vote for him.

Further more, on the issue of the Minister of Works, Housing and Communication hurriedly signing the contract for tarmacking of the roads spelt out in petitioner's affidavit, Hon. John Nasasira stated in his affidavit in paragraph 7 that the credit agreement between the Government of Uganda and the World Bank for the financing of the implementation of the tarmacking and upgrading of the Busunju — Kiboga; Kiboga — Hoima and Arua — Packwach was signed in November 1 999 copy of the Credit Agreement was attached to the affidavit. Further a copy of the advertisement for short-listing of contractors for the tenders of tarmacking of the said roads as spelt out in paragraphs 8 of Hon. John Nasasira was attached to his affidavit. In paragraph 9 of the Hon. John Nasasira's affidavit letters inviting the short listed contractors for the tenders for

the tarmacking and upgrading of the roads referred to in paragraph 8 above were issued in July 2000. He denied that any agreement had been signed for the tarmacking and upgrading of the Ntungamo — Rukungiri road.

I have perused the affidavit in support of the petition on one hand and those in rebuttal on the other hand but have not been able to find in the affidavit of the petitioner that the tarmacking and upgrading of these roads were out of government programme like in the case ***AG v Kabourou case*** (1995) (supra) where the Tanzanian Court of Appeal held that the sudden and total intervention by the Central Government in the absence of an earthquake or similar disaster or situation affecting the Kigoma — Ujiji road was clearly way out of the ordinary course of Government business. There, the court held inter alia:

‘***In the present case the corrupt undertaking to repair the road amounted not only to non-compliance with the prohibition against electoral bribery contrary to Section 97 of the 1985 Act, but was also unfair to the political parties which were challenging CCM.”***

I must state that our case here is distinguishable from the Tanzanian case. From the affidavit of Hon. John Nasasira the programme of tarmacking and upgrading of these roads had started long before presidential elections, starting with the Government Ten Years Road Sector Development Programme which commenced in 1 996. This was followed by the Credit Agreement between the Government of Uganda and the World Bank for the financing of the implementation of the programme in November 1 999. All this is clearly spelt out in Hon. Nasasira’s affidavit paragraphs 6 — 11.

I must state here that I have no reason whatsoever to doubt the contents of Hon. John Nasasira’s affidavit, It is possible that the petitioner’s campaign manifesto included tarmacking and upgrading of these roads, but that does not mean that the Government would abdicate its responsibility to implement its programme already set in motion, merely because the petitioner had undertaken to tarmack and upgrade the same roads in question if elected the President.

In my view, I think the petitioner has failed to prove to the satisfaction of this court that the 1 s respondent personally or with his knowledge and consent or approval embarked on the

tarmacking and upgrading of the said road net-work with the intention of inducing people from those areas to vote for him.

In the result, this complaint must fail.

In conclusion therefore, issue No. 4 must be answered in the negative.

I must state that it was because of the reasons that I have given on each of the issues that led me to hold that the petitioner had failed to prove his case to the satisfaction of the court. It was because of the above reasons that the petition was dismissed.

I now turn to the 5th issue of what reliefs are available to the parties.

Dr. J. Byamugisha for 1 s respondent and Mr. Deus Byamugisha for 2nd respondent asked for costs to be awarded to them since the petition had been dismissed. They based their submission on the provision of subsection (1) of section 27 of the Civil Procedure Act (Cap 65) which provides that the costs of any action shall follow the event unless the court or judge shall for good reason otherwise order.

Dr. Byamugisha submitted that since the petition was dismissed it should be dismissed with costs. He submitted that there were two Counsel but required many Counsel to assist in dealing, researching for witnesses and authorities day and night. He asked that we should certify costs for 13 advocates. He argued that if we do not award costs to respondents we would be encouraging people who are defeated in election petition to come to court even when their cases are frivolous and vexatious.

Mr. Deus Byamugisha who appeared for 2' respondent argued like Dr. Byamugisha that normally costs follow the event, therefore since the petition was dismissed, the petitioner should pay the costs of the litigation. He asked for costs with a certificate for two.

Mr. Balikuddembe, Counsel for petitioner argued that in the interest of justice it should be ordered for each party to meet its own costs, because, this was a historic and unprecedented litigation in our legal development. The petition challenged the election on the basis of non-compliance with the election law, when the 2nd respondent had many years within which he had time to prepare the election. He contended it would not be proper and fair to award costs to 2nd respondent.

He further argued that it should be noted that the petitioner should not be penalised for having taken this step when respondent should be partly responsible for breach of the law the soldiers committed. He submitted that the fair decision should be that each party bears its own costs

.Section 27(1) of the Civil Procedure Act (Cap 65) governs award of costs in civil litigations. It provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suit shall be in the discretion of the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. So normally costs follow the events unless the court or judge for good reason shall otherwise order. Therefore, the law gives wide discretion to the judge to determine by whom the costs must be paid. However, in deciding who should pay the costs or not pay he or she must be exercised judiciously.

In the instant case, it would not be correct to say that the petition was frivolous as Counsel for both respondents appeared to suggest in their address to us on the issue of costs. It must be noted that the petition contained several allegations of non-compliance with the law

allegedly committed by the 2nd respondent or and his agents or servants. Against the 1st respondent, the complaints were that he committed illegal practices and other offences in connection with the election.

There is no doubt that these allegations of non-compliance with the law which were raised deserved serious consideration by the court. And as submitted by Mr. Balikuddembe, Counsel for petitioner, most of his allegations for noncompliance with the law were upheld. It would therefore not be correct to say that the petition had not been founded on reasonable grounds which deserved to be investigated. Although the investigation of the grounds in the petition ended in favour of the respondent, it cannot be said it was not well founded.

In my view, although the petitioner lost the petition I would not hesitate to adopt the reasoning of the Indian Supreme Court in the case of ***Charan Lal Sahn & Others v S!ngh Renorted in 1985 LRC*** (const) 31 where the court held that ordering the petitioner to pay costs in those proceedings would amount to nipping in the bud future and well-founded petition.

In the instant case, considering the nature of the allegations raised in the petition, the historical nature of the petition where the petitioner had contested against the incumbent President and decided to take the incumbent to court, challenging the election result and seeking the court to annul the election result, was very courageous of the petitioner.

So the petition was very important in legal history, because when in 1981 election — was allegedly rigged, the aggrieved party decided to go to the bush and wage war. In the instant case, the aggrieved party instead of thinking of waging a war, decided to go to court.

He came to court before us to decide the matter. We decided it. Although he lost, I must say it was not a frivolous petition. It was very well-founded petition.

In order to encourage people like the petitioner to come to court and help in the development of our legal, historical and constitutional development in Uganda,
such people should be encouraged. Costs should not be awarded by way of penalising them so that they should get scared from coming to court.

Clearly, this petition has revealed how perfunctorily the Presidential Elections were organised by the Electoral Commissioner. It is hoped that if there is another election for them to organise/arrange, citizens will have properly organised elections.
It was for the above reasons that I considered it appropriate that each party meets its own costs.

AN. KAROKORA
JUSTICE OF THE SUPREME COURT.

REASONS FOR JUDGMENT OF MULENGA JSC

The Petitioner above named, petitioned this Court seeking a declaration that Museveni Yoweri Kaguta, the 1st Respondent, was not validly elected as President in the election held on 12th March 2001, and praying that the election be annulled. The petition was heard and concluded in April, 2001. On 21st April 2001, the Court delivered judgment dismissing the petition, and intimated that the detailed findings and reasons there for would be given on a later date.

A summary of the facts and background of the case, as well as the issues framed out of the pleadings, were set out in the judgment of the Court. I will refer to them, where necessary, as and when I discuss my findings on the issues.

The trial was on affidavit evidence, and had to be expedited so as to be concluded within a short period fixed by the Constitution. In order to avoid taking up much time on preliminaries, legal issues that would ordinarily have featured in form of preliminary objections, were argued along with the framed issues, and the rulings thereon were deferred to be given with the answers to the framed issues. The rulings on those legal points were, however, not given in the judgment of the Court. I will first address them, along with some broad propositions arising from counsel's arguments, before tackling the framed issues.

Counsel on both sides addressed the Court eloquently on the significance and enormity of this petition, stressing its historical perspective, and differing only on emphasis. On the one hand Mr. Balikuddembe, lead counsel for the Petitioner, emphasised that an election petition is the mechanism put in place by the Constitution, through which the right of the people to freely elect their government can be redeemed, where that right has been defrauded through rigging of elections. Counsel recalled, and invited the Court to do the same, that when they adopted the new Constitution in 1995; the people of Uganda terminated a long history of political and constitutional instability, and in order to rid the country of tyranny and oppression, put in place a new order based on democracy and respect for human rights. For that purpose, there was entrenched in the new Constitution, institutions and principles meant to ensure active participation of the citizens in their governance, and in particular to ensure that the citizens elect

those to govern them in free and fair elections. Counsel stressed the fact that this was the first petition of its kind in this country, where the election of a President was being challenged in a court of law rather than by force of arms. He opined that the Court decision on it would have tremendous effect on the future of the new order, and therefore, on democratic governance in this country. He invited the Court to uphold the values underlying the new order, and by allowing the petition, set the proper precedent based on those values.

On the other hand, Dr. Khaminwa, second lead counsel for the 1st Respondent, and Mr. Kabatsi the learned Solicitor General who appeared for the 2nd Respondent stressed that the petition was of particular importance because it was about the election of the President of the Republic of Uganda, who is vested with the executive power of the nation. Accordingly, *"the importance of his election and the vital character of its relationship to, and effect upon the welfare and safety of the whole people cannot be too strongly stated."* Counsel argued that the provisions of the Constitution setting up special procedure for challenging the result of a Presidential election, namely vesting exclusive jurisdiction in the Supreme Court, and fixing time limit within which to decide on such challenge, underscored the importance to be attached to the Presidential election. It was also stressed that the election of the President involved the entire electorate of the country and that it should not be overturned lightly at the risk of negating or frustrating the will of the majority which, is reflected in the results of the election.

To my mind the two propositions are complimentary and not opposed to each other.

The importance of the petition lies both in its historical perspective, and in the fact that it involves dispute over the election to the highest office in the country. In that election the people of Uganda set out to exercise their power and inherent right to choose their President in accordance with the electoral law entrenched in the Constitution and the statutes enacted there under. At the end of the exercise a dispute arose as to the validity of the result. That dispute came to this Court essentially to determine two cardinal questions. First the Court had to determine whether the result was not a true reflection of the free choice of the majority of the electorate as contended by the Petitioner. If the Court found that because of the diverse irregularities alleged and proved by the Petitioner, the free will of the majority of the electorate was obscured,

defrauded or otherwise frustrated, this Court was under a solemn duty to annul the election. But if the Court found that despite the irregularities alleged and proved, the result was a true reflection of the free will of the majority of the electorate the Court was bound to respect and uphold it. That dichotomy is rooted in the provisions of S.58 (6) (a) of the Act and was subject for determination under framed issues numbers 1, 2 and 3. Secondly the Court had to determine whether the illegal practices and offences alleged in the petition were committed by the Petitioner or by others with his knowledge and consent or approval, in relation to the election, thereby invalidating the election. That question was subject for determination under the fourth framed issue. The Court had to exercise great care in determining those questions because of the gravity of the consequences, not only for the immediate, but also for the future democratic governance of the country.

Subject to the evidence brought before it, the Court had to avoid upholding an illegitimate election result as much as it had to avoid invalidating a legitimate result. Needless to say, that the Court, as enjoined by the Constitution, had to exercise that role *"in conformity with law and with the values norms and aspirations of the people"* which are embodied in the Constitution. That brings me to the next broad subject on which counsel addressed the Court, namely the burden and standard of proof.

Burden and standard of proof:

Both the Constitution and the Presidential Election Act, to which I shall hereinafter refer no *"the Act"*, provide that this Court shall *inquire into and determine expeditiously*, the petition challenging the result of a Presidential election, without prescribing the mode of inquiry. Pursuant to S.58(1 1) of the said Act, rules of procedure for the conduct of such a petition were made, prescribing an adversarial mode of inquiry for the petition, similar to the trial of civil cases, except that evidence has to be affidavits. Counsel therefore, addressed the Court on the questions of burden and standard. It was basically common ground that the burden of proof lay on the Petitioner. However there was no consensus on whether there was any shift of evidential burden in this case. I will discuss that under issue No.4 where it is more particularly relevant. There was also no consensus on the standard of proof required in election petitions. It was only

common ground that it is higher than a balance of probabilities. I will express my views on this subject at this juncture, because it affects all the principal framed issues. The argument on standard of proof in the instant case arises from the provision in S.58 (6) of the Act that a ground for annulment of the election of a candidate as President, has to be *"proved to the satisfaction of the Court."*

In their respective submissions, counsel revealed considerable divergent views on the matter particularly in regard to comparison with the standard of proof in criminal cases. For the Petitioner, Mr. Balikuddembe argued that the expression *"proved to the satisfaction of the Court"*, set the standard of proof well below that required in criminal cases. He contended that it was slightly above that of a balance of probabilities, and equated it with that required to prove fraud in civil cases. For the 1st Respondent, two views were expressed. Mr. Bitangaro, submitting on the law applicable to issue No.4, submitted that the standard to apply was proof beyond reasonable doubt, citing as authority BARTER vs. BARTER (1950) 2 All ER 458; MBOWE vs. ELIUFOO (1967) EA 240, and MARGARET ZIIWA vs. NAVA NABAGESERA Civil Appeal No.39/97 (C.A) (unreported). Dr. Khaminwa, however, modified this when submitting on issues Nos. 2 and 3 by contending that the standard was below that required in criminal cases but was very high. He also cited BARTER vs. BARTER (supra) and MBOWE vs. ELIUFOO (supra) and added KATWIREMU vs. MUSHEMEZA Election Petition No.1/96 (H.C. Mbarara) (unreported). For the 2nd Respondent, the learned Solicitor General put it dramatically saying that the standard of proof in election petitions was so high that "its leaves touched the under-belly of the standard in criminal cases.

It appears to me that there are two possible approaches to the question. One is to consider the statutory expression ***"proved to the satisfaction of the Court"*** as fixing the level of proof required. The other is to consider that by that expression the legislature left it to the Court to determine what amount of proof would satisfy it that the matter in issue has been proved. The Courts both in Uganda and outside have considered the same or similar expression. I need only refer to a few.

Let me start with decisions of the English Courts which have had persuasive influence on the interpretation put on the expression by the Ugandan Courts. They considered the statutory expression *"if* ***the Court is satisfied"*** in regard to proof of matrimonial offences. In BARTER vs. BARTER (supra) all three Lords Justices of the Court of Appeal agreed that where the Court had to be satisfied in regard to cruelty in a divorce case, it was not a misdirection to state that the Petitioner must prove her case beyond reasonable doubt. Bucknell L.J. said:

> ***"I do not understand how a Court can be satisfied that a charge has been proved (and the statute requires that the Court shall be satisfied before pronouncing a decree) if, at the end of the case it has a reasonable doubt in its mind whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind."***

The House of Lords in **PRESTON-JONES** vs. **PRESTON JONES** (1951) AC 391, considered the same expression in relation to proof of adultery in a divorce case. It endorsed the decision in **BARTER** vs. BARTER (supra). Lord MacDerrmott said:

"I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word 'satisfied' is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of parties, and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be 'satisfied' in respect of a ground for dissolution, with something less than proof beyond reasonable doubt."

However, in **BLYTH vs. BLYTH** (1966) AC 644, The House of Lords, while not departing from its earlier decision in the **PRESTON-JONES** case (supra), focused on contrast between proof of a matrimonial offence as a ground of dissolution of marriage and proof of absence of condonation. By majority it was held that although in either case the Court must be *satisfied,* a lesser degree of proof is required to *satisfy* the Court that the presumption of condonation has been rebutted, than would be required to *satisfy* it that a matrimonial offence has been

committed. The majority view was that by the use of the phrase *"Court if satisfied"* the legislature did not thereby fix a standard of proof but left it to the Court to determine the quantum or degree of proof that will *"satisfy"* it, depending on the gravity of the subject matter. The subject matter in the instant case is the validity of election of the President. Its gravity cannot be disputed. The statutory expression under consideration is *"to the satisfaction of the Court."* **MBOWE** vs. ELIUFOO (supra) was an election petition in the High Court of Tanzania, in which the expression *"proved to the satisfaction of the Court"* in the applicable Tanzania statute was considered. In the judgment of the Court, Georges C.J., agreed with the approach in BARTER vs. BARTER (supra) and held that:

"the standard of proof in this case must be such that one has no reasonable doubt that one or more of the grounds set out in S. 99(2) (a) has been established."

The High Court of Uganda in many decisions handed down since the first post- independence parliamentary elections in 1980, has followed MBOWE vs. ELIUFOO (supra). They include, the following election Petitions: **CLEMENT TIBAROKORA** vs. R.O. RUKUNGIRI &ANOTHER No. MKA 1/81; **Z.C.ILUKOR vs. R.O. &ANOTHER,** No.MM 1/89; ODETA vs. OMEDA No.NP 1/96; AYENA ODONGO vs. BEN WACHA No. 2/96 (Gulu) (all unreported). In its judgment in R.O. KAMPALA, MARGARET ZIIWA & ANOTHER vs. NAVA NABAGESERA (supra), the Court of Appeal referred to those decisions with approval and singled out for review the decision of the Principle Judge in ODETA's case with which the Justices of Appeal it agreed and then concluded:

> ***"The effect of the holding in the Mbowe case and the Uganda cases that have followed that decision is that grounds for setting aside an election of a successful parliamentary candidate set out in S.91 of Statute No.4 of 1996 must be proved beyond reasonable doubt. This is because the Court cannot be satisfied if there was a reasonable doubt."***

In the KATWIREMU Case (supra) decided before this decision of the Court of Appeal, Musoke-Kibuuka J., expressed a view which appears not to have been adverted to by the Court of Appeal, in its decision I have just referred to. The learned Judge expressed the view that if Parliament had intended proof of election petitions to be beyond reasonable doubt, it would have said so

expressly, and would not have provided for separate criminal trial of allegations proved as electoral offences in the election petition. He took a stand as follows:

> ***"....everyone seems to be agreed that, whatever name is given, the standard of proof required for an allegation to be proved to the satisfaction of the Court under S.91(1) of the Parliamentary elections (Interim Provisions) statute 1996, is proof which is higher than that which is required in ordinary civil suits. That, in my view is sufficient for disposal of the allegations made in this petition."***

In S.58 (7) and (9) of the Act it is expressly provided that when hearing an election petition, this Court has no power to convict a person for a criminal offence, and that where it appears from the facts that a criminal offence may have been committed the Court shall make a report to the DPP stating the nature of the offence and the name of the person (who committed it) for appropriate action. To my mind these provisions are not an indicator that Parliament intended the standard of proof to be lower than beyond reasonable doubt.- If at all the provisions be a reflection on Parliament's intention on the standard of proof, then, in my view, the more plausible interpretation would be that, Parliament realising that it had set up a high standard of proof, (equivalent to that in criminal cases), made it clear in those provisions that it was not thereby conferring on the Court power to convict any person of a criminal offences. The reason is obvious. It is recognition of the fact that our jurisdiction does not yet allow for a *criminal trial within a civil trial.* It is only in the recent past that our legal system introduced the possibility of an award of a civil remedy in a criminal trial. The reverse has not yet been introduced.

Furthermore, in my view it does not follow that the fact that Parliament did not use the expression *"beyond reasonable doubt"*, it could not have intended the equivalent. The expression it used is not inconsistent. The learned judge appears to hold the view that in using the expression *"to the satisfaction of the Court"* Parliament set up yet another standard of proof at a level between that of *"balance of probabilities* "and that of *"beyond reasonable doubt."* I respectfully do not share that view. I think the reason with which I agree, why the Courts have sought to fit the expression within the known standards is a desire to have an objective test as to what amount of proof ought to satisfy the court in such cases, rather than leaving it to be

subjectively determined in every case. I do share the view that the expression *"proved to the satisfaction of the Court"* connotes absence of reasonable doubt. Admittedly the word *"satisfied"* is adaptable to the two different standards. It is not uncommon for a court to hold that it is *"satisfied on a balance of probabilities"*, or that *"it is satisfied beyond reasonable doubt."* However, where the Court holds that it is satisfied *per Se*, that a matter has been proved, or that a matter has been proved to its satisfaction, without more, then to my mind there can be no room to suppose that the court harbours any reason doubt about the occurrence or existence of that matter. By requiring that the ground for annulment of an election be proved to the satisfaction of the Court, the legislature laid down the minimum amount or standard of proof required. The amount of proof that produces the Court's satisfaction must be that which leaves the Court without reasonable doubt.

To my mind it does not matter that proof in criminal cases is also required to be beyond reasonable doubt. The law provided a high standard of proof for criminal offences because of the grave consequences of a criminal conviction. Similarly, because of the gravity of annulment of an election, the law provided for a high standard for proof of the grounds of annulment. I found support for this view in what Lord MacDermott said in PRESTON-JONES Case (supra). After stressing that the standard of proof for dissolution of marriage could not be less than proof beyond reasonable doubt, he said:

> ***"I shall perhaps add that I do not base my conclusion as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard — proof beyond reasonable doubt-lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."***

In BLYTH vs. BLYTH (supra) Lord Morris of Borth —y- Gest said:

> *"…..**the jurisdiction in divorce is statutory and by statute certain duties are imposed upon the Court. There is no occasion to seek to compare or to equate the jurisdiction in divorce with jurisdiction in either criminal or in other civil matters."***

In a similar vein I would say that it is unnecessary to seek to compare or equate the jurisdiction in election petition, with jurisdiction in either criminal or in other civil matters. In conclusion from both the import of the words used in the statute and the gravity of the subject matter, I would uphold the long standing view which the Uganda Courts have held that the standard of proof must be that which leaves no reasonable doubt in the Court's mind.

Affidavit Evidence:

Pursuant to provisions of the Presidential Elections (Election Petitions) Rules (S.1 .200 1 No.13) to which I shall refer as *"Election Petitions Rules"*, the petition and the respondents' answers thereto were supported and accompanied by affidavits of the respective parties, and the evidence at the trial, in favour and against the petition, was by way of affidavits. In the course of submissions by counsel two issues were raised on the affidavits. One was in respect of affidavits that offended provisions of the law. The other is in respect of uncontroverted affidavits, and affidavits not referred to in submissions. Counsel identified four provisions of the law which some of the affidavits were supposed to have offended. I will briefly consider each legal provision and its application to the questioned affidavits.

Commissioners for Oaths (Advocates) Act (Cap. 53):

(a) Section 6

For the Petitioner, Mr. Balikuddembe, submitted that the 1st Respondent's affidavit accompanying his answer to the petition was defective on the ground that the person before whom the affidavit was sworn, was not disclosed on the face of the affidavit in accordance with S.6 of the Commissioners for Oaths (Advocates) Act (Cap.53). Counsel contended that the law required that disclosure, so that it can be ascertained if that person had the power to administer the oath.

Subsequent to that submission, an affidavit by Lawrence Gidudu, Registrar of the Courts of Judicature, was filed in the proceedings, to prove that it was he who administered the oath to the 1st Respondent, and affixed the seal of the High Court to authenticate his own signature thereon, Under S.4 of the Commissioners for Oaths (Advocates) Act, Registrar Lawrence Gidudu, as such Registrar, has ***virtue office the*** powers and duties of a Commissioner for Oaths. His affidavit however, was vigorously objected to, on the grounds that it was filed out of time, and did not cure the defect complained of.

Section 6 of Cap 53 reads as follows:

> ***"6. Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."***

Section 8 of the Oaths Act (Cap.52) makes the same provision in virtually identical terms. Neither Act, however, expressly requires the Commissioner for Oaths to state in the ***jurat*** or attestation that he or she is a Commissioner for Oaths. The form of the ***jurat*** set out in the Third-Schedule to the Commissioner for Oaths Rules, includes the expression- ***"Commissioner for Oaths",*** and it is indeed proper and common practice to include it. The provisions of the Act, however, do not make it mandatory to do so. Its omission, in my view, does not make an affidavit invalid. It becomes a matter of evidence whether the affidavit was sworn before a person empowered to take it. That evidence was provided in Lawrence Gidudu's affidavit. I was not persuaded that, that affidavit should have been rejected on the ground that it was filed after the objection was raised and argued. Owing to the peculiar circumstances of this trial, the Court took a liberal stance, and was not too strict on time for filing the affidavit evidence. I saw no justification to make this the exception. In the result I found that the Respondent's affidavit was not defective.

(b) Section 5(1)

Mr. Nkurunziza, one of counsel for the Respondent submitted that eleven of the affidavits filed in the proceedings in support of the petition were defective for offending the proviso to sub-section (1) of S5 of the same Act (Cap.53), because they were sworn before Commissioners for Oaths, namely Mr. Birungi and Mr. Kiyemba Mutale, who were on the team of counsel acting for the Petitioner in these proceedings.

The sub-section, so far as is relevant, reads:

> ***"5. (1) A commissioner for oaths may, by virtue of his commission, in any part of Uganda administer any oath or take any affidavit for the purpose of any court or matter in Uganda….***
> ***Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding ……..."***

Counsel argued that in as much as the proviso is prohibitive, a Commissioner for Oaths who acts in defiance of the prohibition acts without his powers, and consequently the affidavit is not competently commissioned and is not an affidavit. In reply Mr. Balikuddembe confirmed that he had introduced Mr. Birungi and Mr. Kiyemba Mutale to the Court as part of the team of legal counsel for the Petitioner at the commencement of proceedings. He intimated, however, that at the time the affidavits in question were sworn before them, respectively, none of them had instructions to act for the Petitioner. In the alternative, he submitted that while the proviso prohibits a commissioner for oaths from exercising his powers in the stated circumstances, it does not invalidate an affidavit taken by a commissioner who defaults.

Mr. Birungi and Mr. Kiyemba-Mutale were introduced as counsel for the Petitioner on 5th April, 2001. The one affidavit taken by Mr. Kiyemba Mutale is dated 22 March, 2001. The others were taken by Mr. Birungi. Five of them were taken on 23d March, one on 31st March and four on 1St April 2001. There is no evidence to contradict Mr. Balikuddembe's statement from the bar that on those dates neither Commissioner for Oaths was acting as advocate for the Petitioner. It cannot be said therefore, that either of them exercised the power given by S.5 (1) of Cap.53 in

contravention of the proviso. Mr. Nkurunziza did not, and in my view could not, extend his argument to make the prohibition in the proviso retrospective, so as to render the affidavits defective upon the said advocates being instructed subsequently. In view of the foregoing, I need not discuss in detail Mr. Balikuddembe's alternative argument. I should only mention, however, that I am inclined to the view that the effect of the prohibition is not to divest the power of the commissioner. I am also not inclined to the tendency to visit the fault of an advocate, on an innocent person who was not in a position to avoid or rectify such fault. In the result my conclusion was that the 11 affidavits were competently made and taken.

Statutory Declarations Act, 2000: S. 7(3):

Mr. Nkurunziza submitted further that the 'affidavit' of Hon. Maj. (Rtd) Okwir Rabwoni, M.R, made in London, U.K., on 23 March 2001, was not an affidavit, but a statutory declaration, and that by virtue of S.7 (3) of the Statutory Declarations Act No.10 of 2000, it was not admissible in evidence, because it was not registered under the Registration of Documents Act. In reply, Mr. Balikuddembe submitted that the affidavit, being one sworn for the purpose of, and related to, the proceedings in this Court, was accepted under S.3 of the said Act and did not have to be registered.

The first point of argument was whether the document was an affidavit or a statutory declaration. There is no doubt that it related to the proceedings in this Court. It was so headed, and was titled an affidavit. What raised the dispute was that it opened with the following statement:

> *"I am a Ugandan citizen……..hereby solemnly and sincerely declare the following:-"*

and concluded with the following statement:

> *"AND MAKE THIS SOLEMN DECLARATION CONSCIENTIOUSLY believing the same to be true and by virtue of the Statutory Declarations Act 735(sic)."*

To my mind, those statements, rather than the title, were what gave the document its character. Further it is noteworthy that the person before whom the declaration was made deleted the

expression “Commissioner for Oaths” printed at the space for his/her signature, leaving only the title of *“Solicitor.”* I had no hesitation therefore, in finding that the document was a statutory declaration made under the Statutory Declarations Act, 1835 of the U.K., and that it must be taken as such for purposes of Uganda.

The relevant provisions of the Statutory Declarations Act, 2000 of Uganda which affect that statutory declaration are the following:

“3. After commencement of this Act no affidavit shall be sworn for any purpose except:
(a) Where it relates to any proceedings, application or other matter commenced in any court or referable to a court; or
(b) Where under any written law an affidavit is authorised to be sworn.
4. (1) In every case to which section 3 does not apply a person wishing to depone to any fact for any purpose may do so by means of a statutory declaration.
(2) ……
7. (1) A person wishing to depone outside Uganda to any fact for any purpose in Uganda may make a statutory declaration before any person authorised to take a statutory declaration by the law of the country in which the declaration is made.
(2) ……..
(3) A statutory declaration taken outside Uganda under this section shall not be admissible in evidence unless it is registered with the Registrar of documents under the Registration of Documents Act.” (Emphasis is added)

It is obvious to me that affidavits excepted under S.3 (a), are affidavits taken in Uganda only. The wording in S.7 is quite explicit that outside Uganda, deponing *“to any fact for any purpose in Uganda”* is to be by means of a statutory declaration. If Parliament had intended to except affidavits made outside Uganda for the purpose of court proceedings in Uganda, it would have done as expressly as it did in S.3, or by reference as it did in S.4 of the same Act.
To my understanding therefore, since the document was not registered it was strictly inadmissible under S.7 (3) of Act 10 of 2000. However, the statutory declaration was not defective in itself. The deficiency could be, and would most probably have been, rectified by

registering the document, if attention had been drawn to the deficiency earlier. Upon such registration, it would have been admissible. Given the constraints which even determined the timing of the objection, I was inclined to invoke the provisions of Art. 126(e) of the Constitution. I was satisfied that in the interests of substantive justice it was proper that the document, containing material evidence as it did, ought to be admitted rather than shut out on a technicality.

Civil Procedure Rules: O.17 r. 3:

The procedure in respect of this petition was regulated by the Civil Procedure Rules, subject to the provisions of the Election Petitions Rules with such modifications as this Court may consider necessary in the interests of justice and expedition of the proceedings. On strength, of that, Mr. Nkurunziza further raised objection to numerous affidavits filed in support of the petition which offended O.17 r.3 of the Civil Procedure Rules. Sub-rule (1) of that rule reads thus:

"3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted, provided that the grounds thereof are stated."

Learned counsel pointed out that, of the affidavits filed in support of the petition, 28 contained hearsay, and 87 were based on belief of the deponent the source of which was not stated . He urged the Court to reject not only averments which were not within the deponents' own knowledge, but also to reject each such affidavit in its entirety. The learned Solicitor General for the 2nd Respondent fully supported the objection and stressed that a deponent who swears to matters which are not within his or her own knowledge is unreliable as a witness. Both contended that the position of the law was virtually settled, that an affidavit offending the rule was not severable but had to be rejected in its entirety. The Court was referred to several decisions of the Court of Appeal and the High Court, as persuasive precedents. For the Petitioner it was conceded that 0.17 r.3 of the Civil Procedure Rules was applicable and that an affidavit offending the rule was defective. Learned counsel argued, however, that such defect was not fatal as an affidavit was severable so that the Court relies only on such of the averments as were deponed from the deponent's own knowledge. Counsel relied on two decisions of the Supreme Court.

It is not accurate, as submitted for the respondents, to say that courts have consistently held that affidavits with defects are not severable. Three of the decisions cited to us, while applying the rule in O.17 r.3, were not directly on the issue of severance of affidavits. It is only in **S.C HERALI HUDANI's CASE** Civil Suit No.71 2/95 (HC) that Ntabgoba P.J. said:

> "…..***it does not matter whether some parts of an affidavit are in order while other parts are defective. The defective ones cannot be separated from the proper ones so as to render part of the affidavit acceptable. A defective portion of an affidavit vitiates the whole document."***

With the greatest respect to the learned Principal Judge, however, that is only true of affidavits whose contents are inseparable. In my view, the court can reject offending parts of an affidavit while accepting the rest of it, the same way it rejects inadmissible oral evidence, without treating the entire evidence of the witness as inadmissible. Inclusion of hearsay or other inadmissible evidence in an affidavit is not an illegality. It is an irregularity which is curable by expunging the inadmissible part. I find support for this view from 0.17 r.3 itself, which, far from rendering the offending affidavit invalid, provides a different kind of sanction in sub-rule (2) which, so far as is relevant, reads:

"3.* (2) *The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matters shall, unless the court orders otherwise, be paid by the party filing the same."

MOTOR MART (U) LTD vs. YONA KANYOMOZI Civil Application No. 6/99 (SC) cited by counsel for the Petitioner, is a decision of a bench of three Justices of the Supreme Court, on a reference from my ruling as a single judge of the Court, in Civil Application No. 8 of 1 998. The Court rejected a ground seeking to reverse my holding that an inadmissible part of an affidavit can be severed without vitiating the rest of the affidavit. In **REAMATON LTD** vs. **UGANDA** CORPORATION REAMARIES LTD & ANOTHER Civil Application No.7/2000 (SC) Tsekooko JSC held that like oral evidence, an affidavit can be relied on *"even if a paragraph*

which is severable is found to be inaccurate." I consider this to be the correct position of the law, I would only wish to add for clarity that an affidavit in which it is not clear which averments are deponed from personal knowledge and which are from information or from belief, would for that reason not be severable, and would therefore, be defective in its entirety. I have therefore, considered affected affidavits in this petition accordingly.

I should however comment especially on affidavits required under rr.4 (7) and 8(3) (a) of the Election Petition Rules to accompany the petition and the answers thereto. The said rules require that those affidavits shall set out facts on which the petition is based, and the Respondent will rely on, as the case may be. Invariably however the parties have to rely heavily on factual information they receive from their agents and other witnesses, in order to comply with that requirement. In my view therefore in relation to those affidavits, 0.17 r.3 of the Civil Procedure Rules has to be applied with such modification as permits the Petitioner and the Respondent to include in those affidavits facts which they depone on such information.

Uncontroverted Affidavit evidence:

Counsel for the Petitioner drew the Court's attention to very many affidavits in support of the petition, to which there was no reply. He invited the Court to take that as uncontradicted evidence and believe it. That is a general rule of practice applied on the presumption that what is not disputed is admitted, and is commonly resorted to in causes where facts are not very contentious. In my view, however, it would be highly inappropriate to apply that presumption to a case, such as this, where virtually all material facts are disputed. An election petition is a highly politicised dispute, arising out of a highly politicised contest. In such a dispute, details of incidents in question, tend to be lost or distorted, as the disputing parties trade accusations, each one exaggerating the other's wrongs, while down playing his or her own. This is because most witnesses are the very people who actively participated in the election contest. Let me point to an example which I think vividly demonstrates how inappropriate counsel's proposal would be. James Birungi Ozo, the Petitioner's District Monitor for Kamwenge, deponed that at Kakinga polling station at around 3.30 p.m. on polling day, he *'1found the Parish Chief removing the votes cast for the Petitioner from the ballot box, using sticks inserted into the box."* That evidence was uncontradicted, but it is as incredulous as can be. Regrettably, even election

officials who are meant to be neutral in the contest are pushed in a corner, when it comes to the petition, to defend themselves against allegations of misconducting the election process. It is remarkable that out of the hundreds of deponents in this case, there are only a few that can be correctly described as both independent and objective witnesses of the episodes described in the evidence. I have no doubt, however, that among those hundreds, there are many who honestly deponed the truth without exaggerating or suppressing facts. What I wish to underline is that it would be inappropriate for the Court to proceed on a generalisation, that either: all uncontradicted affidavits should be believed, or the persons who complained, as victims, are more truthful; or those against whom allegations were made are necessarily less truthful. In the same vein, I did not accept the submission that an affidavit which is rebutted should ipso facto be rejected. The evidence in each affidavit must be considered on its merit as to credibility. Needless to say that a trial on affidavit evidence deprives the Court of the opportunity to hear and see the demeanor of witnesses. To that extent evaluating credibility is more difficult, but it must nevertheless be evaluated judicially. Lastly I also did not accept the submission that affidavits which were not read out or referred to during counsel's submissions should be disregarded. At the commencement of the hearing it was agreed that in the interest of expediting the hearing all affidavits would be deemed to have been read for purposes of r.14(1) of the Election Petitions Rules.

I now turn to the framed issues.

ISSUE NO.1:

The first framed issue for determination was:

"Whether during the 2001 election of the President there was non-compliance with provisions of the Presidential Elections Act, 2000."

In sub-paragraphs (a) to (x) of paragraph 3(1) of the petition, there were pleaded many acts and omissions in relation to the election which contravened provisions of the Act, and of the Electoral Commission Act, 1 997, to which I will hereinafter refer as *"the Commission Act"* It is not necessary for me to reproduce the pleadings here. I will presently comment on those

seriously canvassed at the trial as I understood them. Let me; however, clarify at the outset that I intend to discuss under this issue, those allegations of non-compliance with provisions of the Act. In my view, contravention of, or non-compliance with, a provision of the Commission Act, is not a contravention or non-compliance with a provision of the Act. S.58 (6) (a) reads:

> ***"(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the Court —***
> ***(a) non-compliance with the provision of this Act if the Court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in substantial manner;***
> ***(b)……*** (Emphasis is added).

In his submission counsel for the Petitioner relying on S.2 (2) of the Act, treated contravention of a provision of the Commission Act, as if it was a contravention of the Act. S.2 (2) of the Act, reads thus:
"(2) The Commission Act shall be construed as one with this Act." "Commission Act" is defined in sub-section (1) of the same section, as the Electoral Commission Act 1997. Sub-section (2) is clearly concerned with construction of the two statutes. It means that the provisions of both Acts are to be construed in the same manner. I find support for this view in **CRAIES ON STATUTE LAW, 7th** Ed., S.G.G. Edgar, 1971 Sweet & Maxwell, London. At p. 138, the learned author says:

"It is now common practice to insert clauses which make certain Acts one for purposes of construction.... The effect of enacting that an Act shall be construed as one with another Act is that the court must construe every part of each of the Acts as if it had been contained in one Act."

The sub-section does not purport to incorporate into the Act, provisions of the Commission Act. A provision of the Commission Act which is not re-enacted in the Act cannot be referred to as a provision of the Act.

I hasten to add, however, that the complaints of contravention of provisions of the Commission Act are relevant to and will be discussed under application of principles to the conduct of the elections. In my view, this distinction which resulted into separate issues, but which in a final analysis appears to be hairsplitting, is a consequence of the complex manner in which the provision was drafted. It seems to me that it would have been more straight forward and even clearer if the provision in paragraph (a) of S.58 (6) of the Act had been drawn thus:

> ***Non-compliance with (provisions and) principles laid down in the electoral law for the conduct of the election if the court is satisfied that the noncompliance affected the result of the election in a substantial manner.***

That way non-compliance with provisions of any law governing the election would be put on the same footing vis a viz the grounds for annulment. In my view the provision as it stands isolates non-compliance with the provisions of the Act to no useful purpose. Be that as it may, I will therefore defer consideration of complaints of contravention of the Commission Act, to when I deal with the second issue. That leaves two complaints pleaded in paragraph 3(1) (a) (b) and (d).

Failure to provide copy of voters' register:
Sub-paragraph 3(1) (d) reads:

> ***"(d) That contrary to section 32(5) of the Act, the 2nd Respondent completed compiling a purported Final Voter's Register on Saturday 10th March. 2001 and failed when requested by the Petitioner to supply copies of the same to the Petitioner and his agents although your Petitioner was ready and willing to pay for the same."***

This complaint was not seriously contested. Although in its answer, the 2nd Respondent denied ever refusing any request by the Petitioner, in the affidavit in support of the answer, its Chairman, Aziz Kasujja deponed in paragraph 12:

"……..the Petitioner's request for a copy of the register was received on 11/3/2001 and there was no sufficient time to print the register for the Petitioner on the eve of polling day and I informed the Petitioner's agent verbally."

Clearly this is an admission that the 2nd Respondent did not supply official copy of the voters register to the Petitioner for his agents' use. It amounts to noncompliance with provisions of s.32(5) of the Act.

Failure to Publish Polling Stations in due time:

The other complaint I considered to be under this issue was made in sub- paragraphs 3(1) (a) and (b) of the petition which in a nutshell was that the 2nd Respondent did not publish the polling stations in compliance with provisions of the Act. Section 28 of the Act, requires the Commission to publish, by notice in the Gazette, a list of the polling stations in each constituency at least 14 days before nomination. Nominations for the Presidential election were on 8" and 9th January, 2001. On 22nd December 2000, about 1 6 days before nomination, the 2nd Respondent published the list of polling stations for the purposes of the ***"Presidential Elections 2001"*** Subsequent to nominations, it published, in the Gazettes of 19th February and 9th March 2001, an additional list of special polling stations for soldiers and alterations thereto, respectively. Finally the Commission compiled another list stated to be of ***"all"*** polling stations, and without publishing it in the Gazette, distributed it to all candidates on 11th March, 2001. According to the evidence adduced for the Petitioner that list included 1,176 new polling stations, and omitted 303 polling stations which were previously gazetted. The 2nd Respondent did not dispute those figures but explained that the apparent increase of polling stations was not a result of creating new polling stations, but of splitting some of existing ones previously gazetted; and that the splitting was for voter convenience. With regard to the omissions, the explanation was that some polling stations had to be disbanded because of movement of the people. The explanation is understandable but it does not change the fact that for all intents and purposes the number of polling stations was increased.

Under S.38 of the Act, the Commission may make special provision for, ***inter*** *alia*, the taking of the votes of persons in restricted areas, such as soldiers and other security personnel, but when it does so, it must publish in the Gazette a list of the restricted areas. In addition, under S.38 of the Commission Act, the Commission is empowered under stated circumstances to increase the number of polling stations.

The 2nd Respondent did not show what led to the late publication of the special polling stations, and to the last minute splitting of existing polling stations to justify resorting to the power under S.38 of the Commission Act. Those powers ought not to be invoked arbitrarily or at the whims of the Commission, but only in the circumstances envisaged in the section. I will comment on the exercise of those powers, as well as the powers under S.38 of the Act, when discussing the second issue. For this issue, in view of the foregoing reasons, I found that failure to publish the special voting areas for soldiers prior to nomination, and the failure to gazette the increased polling stations at all, contravened, and was non-compliance with, S.28 of the Act.

ISSUE NO.2:

The second framed issue was:

> ***"Whether the said election was not conducted in accordance with the principles laid down in the provisions of the said Act."***

This issue, like the preceding one, arises from the Petitioner's allegations in the petition, which the Respondents denied, that in the conduct of the election there were diverse violations of the election law and principles underlying that law. I will first identify the principles I took into consideration in answering the issue in the affirmative.

In construing the principles laid down in the provisions of the Act it is necessary to read the Act along with the Constitution. Apart from being the foundation of all the laws in Uganda, to which all laws in the country must conform, the Constitution relates to the Act more specifically under Art.103 which provides in clause (9): as follows:

"(9) <u>Subject to the provisions of this Constitution,</u> Parliament shall by law prescribe the procedure for the election and assumption of office by a President." (emphasis is added)

The Act is the law made by Parliament pursuant to that clause. As far as relates to principles therefore, that Act must be read together with the applicable provisions of the Constitution, to which it is subjected.

In their respective addresses to Court, Counsel were unanimous in the view, and I agree, that the major principle on which all others are hinged is that elections shall be free and fair. This is entrenched in the Constitution, particularly in Art.1 (2) and (4), and Art. 61 (a). The ancillary principles which need to be mentioned for their relevance to this petition include, registration of voters:
(Art. 61 (e)); universal adult suffrage, through secret ballot: (Arts. 17 (a), 59 and 103 (1)); transparency (Art. 68); and decision by majority vote, (Art.104 (4)). The Act reiterates some of these, and sets out rules to ensure adherence to the principles.
The concept of ***"free and fair election"*** is not defined in the Constitution or the statutes governing elections, but it is not difficult to discern. A free and fair election entails freedom of candidates and their agents to lawfully, solicit support from the electorate without hindrance or interference; and it entails the right of every entitled citizen, to vote freely in accordance with his or her will without hindrance or interference. It also entails equal opportunity among candidates to access the electorate, as well as, among the electorate, to choose between the competing candidates. For those attributes to be attained, public and private campaign meetings must be unhindered, voter registration must include only entitled voters and exclude persons not entitled to vote. Voting must be in accordance with the procedure laid down by law, and the candidates must have opportunity to observe the proceedings of voting and of counting votes, either in person or by appointed agents. It is therefore obvious that in assessing whether the election was or was not conducted in accordance with the principles; the Court must consider the entire electoral process, not the polling exercise on polling day alone.

It was the case for the Petitioner that the Presidential election was not conducted in accordance with those principles. In that regard, he sought to prove the following assertions, namely, that:
(1) intimidation interfered with free and fair campaigning and voting;
(2) voters' register included names of non-voters and excluded names of persons entitled to be voters;
(3) there was use of ungazetted polling stations and exclusion of the Petitioner's agents from polling, counting and tallying centres;
(4) there was cheating through various illegal methods of casting votes.

I will now discuss the evidence on basis of which I made findings on each of those assertions.

Intimidation:

The term intimidation is used here, to include the offences of *interference with electioneering* and that of *undue influence* as defined in SS.25 and 74 of the Act, as well as any other act that infringes on the principle of freedom in elections. What was pleaded in that regard in several sub-paragraphs of the petition may be summarised thus-
(a) that the Petitioner's election campaigns were interfered with
(i) by the 1st Respondent's agents/supporters: (para 3(1) (n) of the petition); and
(ii) by the Army, the Presidential Protection Unit (PPU) soldiers, and the para-military personnel led by Major Kakooza Mutale, all of whom violently harassed, abducted and arrested the Petitioner's agents and supporters to prevail on them to vote for the 1st Respondent or abstain from voting: (para 3(1) (v), (w)) and (y) (vii) of the petition);
(b) that the 2nd Respondent and its agents/servants allowed soldiers and para military personnel armed with deadly weapons at polling stations, which presence intimidated voters into either voting for the 1st Respondents or abstaining from voting: (para 3(1) (r) of petition); and
(c) that the Petitioner's polling agents were forcefully chased away from polling stations and did not observe the voting counting and tallying processes (para 3(1) (p), (s) and (t) of petition).
It is not practical or even necessary to review here, the evidence in each affidavit brought to prove these assertions. It will suffice to highlight what appeared to me to be the major affidavit evidence, starting with that deponed by the Petitioner.

Intimidation prior to polling:

In his main affidavit, the Petitioner described incidents where he witnessed in person, acts of violence and intimidation, by which his campaign was interfered with, and his supporters were physically harassed, assaulted, illegally abducted, and put to *"terrible"* fear. Two such incidents stood out in his affidavit. One was an incident where his campaign coordinator for the youth, Hon. Okwir Rabwoni, M.R, was abducted. The other was the occasion of the Petitioner's campaign visit to Rukungiri.

(a) Abduction of Hon. Okwir Rabwoni M.R:

On 20th February, 2001, the Petitioner was scheduled to campaign in Adjumani and Moyo District. He arranged to travel by air from Entebbe Airport, accompanied by the said Hon. Okwir Rabwoni and others. When, at about 1 0 a.m., they were going to board the aircraft hired for the trip, they learnt that the aircraft was not cleared by the airport authorities to take off. Shortly, Capt. Rwakitarate, an intelligence officer in the PPU, came with a demand that Hon. Okwir Rabwoni goes with him. The latter refused and there ensued a standoff for several hours. Finally at about 3 p.m., a large group of soldiers arrived at the airport and forcefully seized Hon. Okwir Rabwoni, dumped him on a pick-up, and drove him away, while some soldiers sat on his head, chest and legs and others were kicking him. The Petitioner was obliged to abandon his campaign trip to Adjumani. Hon. Rabwoni was detained at the Military Intelligence Headquarters in Kampala, overnight. Upon release the following day, he remained at his residence under guard until he went to the U.K., apparently for medical treatment, and eventually he remained there in exile. The Petitioner was only able to communicate with him on telephone, during his apparent house arrest, and after he arrived in the U.K. The circumstances leading to this incident are subject of conflicting evidence. The Petitioner's case portrayed the incident as one of high—handed intimidation of a high profile campaigner for the Petitioner, responsible for the all important sector of youth supporters and voters. The evidence in answer on the other hand went into detail to portray the said Hon.Okwiri Rabwoni as a spy for the Military Intelligence, planted in the Petitioner's campaign team, whose cover had been blown, putting him in mortal danger,

and who had, therefore, to be rescued, albeit by force, to save him from being killed on the trip to Adjumani and Moyo. I must say I did not find any credibility in the *"rescue version,"* particularly in light of the excessive force used to effect the arrest, and during his detention. However, I do not think that it is necessary to review the evidence on the encounters and exchanges between Hon. Okwiri Rabwoni and Maj. Gen. Tinyefuza and Col. Mayombo, because I did not find it material to the issue at hand. That evidence did not in any way explain let alone justify the illegal abduction. Whether Hon. Okwiri Rabwoni was a spy or double agent, or whether he had defected from the Petitioner's camp, and then changed his mind thereby endangering his own life, did not mitigated the facts of the incident. The blatant facts were which not disputed at all, that Hon. Okwiri Rabwoni, regarded as an important asset to the Petitioner's campaign effort, was unlawfully, ruthlessly, and in public, stopped by the Military Intelligence, a Government agency, from continuing to campaign for the Petitioner for the remaining part of the campaign. That act and the manner which it was executed, were not only interference with the Petitioner's campaign program, and violation of the victim's rights, but must also have sent out signals of fear to the electorate who witnessed the incident or came to learn about it. The incident was utterly incompatible with a free and fair election.

Violence in Rukungiri:

The second episode narrated by the Petitioner in the same affidavit is his campaign visit to Rukungiri 2nd and 3' March, 2001. He deponed that he arrived in Rukungiri Town at about 8.30 p.m. in a convoy of vehicles, and was welcomed by many town residents who came out on the streets clapping. Suddenly there was an attack which he described as follows:

> ***"I then saw many soldiers of the Presidential Protection Unit come from all directions wielding truncheons and submachine guns and started beating the people on the road side ferociously causing them to run screaming in all directions. The soldiers then attacked the people in the vehicles of our convoy and some came to attack the vehicle in which I was seated. The policemen who were detailed as my bodyguards had to threaten to open fire in order to stave off this attack."***

After this encounter, the Petitioner proceeded to his village home under police guard. That night many of his supporters who had been attacked in the town incident, stayed in his compound because of fear. The following day he held rallies in several places, but because he sensed that there was tension, and that his supporters were under terrible fear because of heavy deployment of PPU soldiers and LDLJs in their areas, he omitted going to two scheduled rallies, so as to make it possible for the main rally in Rukungiri Town, to end early enough for people to go home before dark. The main rally went off peacefully and ended at 6.10 p.m. Shortly after, while at his home, he heard gun shots from the direction of the town centre and saw people running to his home for safety. The shooting lasted for about 20 minutes. When he drove through the town at about 7 p.m. he found it deserted except for a few people wearing the 1st Respondent's campaign T-shirts, and about 10 to 12 PPU soldiers who were throwing people onto a truck. During the shooting one Baronda was shot dead, and about 15 people were seriously injured. Many others sustained minor injuries in the incident. Bashaija Richard, Coordinator on the Petitioner's District Task Force described the said shooting thus:

after the Besigye rally, the PPU soldiers went on a rampage in Town shooting many bullets in the air and at our supporters and killing one Baronda in the process. We had not provoked them in any way. We had not breached peace nor were we even demonstrating but were just walking back from the venue of our candidate's rally."

The Petitioner also deponed that the PPU soldiers were deployed in Rukungiri District as soon as the campaigns started, though the President was not there all the time.

Other intimidation in Rukungiri:

There were many other affidavits on the subject of intimidation, deponed by persons who were in Rukungiri District during the period of the electoral process, and who personally experienced or witnessed activities of intimidation by PPU soldiers and other officials in the area. The deponents, who were all agents of the Petitioner in one capacity or another, stressed that the PPU soldiers were prominently deployed everywhere in Rukungiri and Kanungu. They described incidents in which, PPU soldiers, often accompanied by government officials such as the District

Resident Commissioner (DRC), or his Deputy, the Gombolora Internal Security Officer (GISO), the Local Defence Unit (LDU) personnel and Local Council (LC) officials –

• harassed the Petitioner's agents and their landlords into closing branch offices;

• harassed the Petitioner's agents into abandoning consultative meetings,

• forcefully dispersed rallies for the Petitioner's campaign

• threatened, assaulted, and even arrested and detained known agents and supporters of the Petitioner.

I will only highlight some of those incidents described. Kakuru Sam and Mpabwooba Callist deponed in their respective affidavits, that in January, 2001 while some of the Petitioner's supporters were meeting at the house of James Musinguzi, about 14 PPU soldiers surrounded, and kept staring at, them until it became impossible to continue. The meeting was abandoned. Koko Medard and Mpabwooba Callist, deponed of another early incident which featured Hon. Okwiri Rabwoni, who was to address a campaign rally for the Petitioner at Rugyeyo in Kanungu. PPU soldiers with one Twagira a GISO, travelling in the vehicle of Capt. Ndahura, the PPU Commander, came to the area. They assaulted agents Kanyabitabo and Caapa Bakunzi for having mobilised people for the rally. They then beat up the people who had turned up and forcefully dispersed the rally. Two agents were abducted and taken away on the pickup. Bernard Matsiko deponed that in early February, PPU soldiers with Deputy RDC and GISO went to the Petitioner's campaign office in Kayonza sub-county and ordered removal of the sign-post and campaign posters, which the office attendant did out of fear. Thereafter, following threats by the LC Ill Chairman, the office was subsequently closed altogether. Bashaija Richard also deponed that on 3rd March, while he was arranging for the Petitioner's rally in Rukungiri town, Capt. Ndahura called him, and at gun point threatened to shoot him if anything happened to PPU personnel that day. One other incident on the same day was at Bikurungu in Bwambara sub-county. It is narrated in the affidavit of Frank Byaruhanga who went there with Robert Sebunya, in place of the Petitioner, to address one of the rallies the Petitioner had had to skip. On arrival, their driver, the Petitioner's Task Force Chairman, and the sub-county cashier, were taken aside by PPU soldiers and caned as punishment for mobilising for the rally. The punishment was on the pretext that no one, other than the Petitioner, was allowed to address a rally there that day. The soldiers then set upon the people, beating and harassing them, and ordering them to disperse.

As a result, the rally aborted. Mubangizi Dennis, Vice Chairman of the Petitioner's task force for Bwambara sub-county was a victim in that incident. He deponed that while waiting for the Petitioner to come to address the rally at Bikurungu he was arrested and beaten by PPU soldiers, and was taken and detained at Nyabubare barracks where he was severely assaulted. After release he was hospitalised. Byomuhangi Kaguta deponed that on 1 March he was arrested by PPU soldiers and was damped in a pit *(ndaki)* at the barracks where he spent a night. The following day Buterere and Tukahirwa were brought to join him in the pit. All three spent the polling day in the pit and therefore did not vote.

James Musinguzi was *"in charge"* of the Petitioners campaigns in South - Western Uganda. He deponed that as soon as the Petitioner announced his candidature; the PPU was heavily deployed in Rukungiri and Kanungu and remained there up to elections. According to him the PPU soldiers *"unleashed terror"* on the Petitioner's supporters. He also asserted that this terror increased, when, shortly before the Petitioner's visit, both the Regional Police Commander and the District Police Commander were made to leave the area. Hence the shooting on 3 March 2001. Koko Medard deponed that PPU soldiers were for about 3 months prominently present *"throughout Kambuga, Kihihi, Kayonza and other places."* He used to see them daily as he traveled a lot. He added:

> ***"They used to move (with) Mugisha Muhwezi (Dy DRC) who used to point out to them who of us to harass. During this period they tore Besigye's posters, would disperse any group of three or more people they met, saying we were Besigye's supporters."***

In the affidavit in support of his answer to the petition, the 1st Respondent generally denied any personal knowledge of acts of intimidation committed by the PPU and other soldiers, paramilitary personnel, or his agents. He made no specific reference to intimidation in Rukungiri, I will revert to his specific denials when I discuss the fourth issue.

Maj. Gen. Odongo Jeje, the Army Commander of Uganda People's Defence Forces (UPDF)I swore an affidavit in support of the 1st Respondent's answer to the petition. With regard to the deployment of PPU in Rukungiri, he deponed that:

"…...members of the PPU which is a specialised unit for the protection of the President were deployed in Rukungiri in advance to his visit to the area sometime in January 2001 and their stay was necessitated by his planned return to the area, having taken into consideration the safety of the person of the President and the general peace and security of the area."

He generally denied all allegations made in the Petitioner's affidavit about the activities of the PPU soldiers in Rukungiri. He then stated that 3rd March 2001 he received a report that:

"there was clash between groups of people in Rukungiri after the Petitioner had addressed a public rally and in the process some members of the groups pelted stones, bottles and sticks at the soldiers and in the process of self-defence one person was fatally wounded by a stray bullet." (Emphasis is added).

Capt. Atwooki B. Ndahura, the Commander of the PPU soldiers deployed in Rukungiri, was named in connection with some of the incidents. He swore an affidavit in which he rebutted each and every allegation made against himself and against the PPU soldiers. His reply on specific issues may be summarised as follows: In January 2001, PPU soldiers under his command were deployed in advance of the President's campaign visit to Rukungiri on 16th January, 2001, to ensure his security. They stayed in the area after that date for the same purpose, because the President was scheduled to return for another rally. He stressed that his soldiers were permanently camped at the state lodge in Rukungiri Town, and never moved out without him or his knowledge. Although they carried out reconnaissance on routes which the President was likely to use, they did not surround or enter people's houses. He denied chasing Hon. Okwiri Rabwoni from the area or dispersing his rally, but explained:

"I only assisted the Kanungu police with transport to disperse what the 0/C deemed an illegal rally which Hon. Okwiri was addressing in Rugyeyo. I also ordered my soldiers to arrest Hon. Okwiri's unauthorised escort who was a UPDF soldier in active service. The police also arrested two people for uttering abusive words against the President."

On the events of 2nd and 3rd March, Capt. Ndahura denied any involvement by PPU soldiers. He nevertheless described the incidents, without disclosing that he witnessed them in person. He said that a joint force of police and UPDF soldiers from the Garrison Battalion of 2nd Division was charged with security of Rukungiri town. On 2nd March, a crowd of the Petitioner's supporters attacked the joint force on patrol under the command of IP Bashaija, and injured soldiers and a policeman, who, as a result, had to be admitted in hospital. On the incident of 3 March, he said the joint force on patrol:-

> ***"…..intervened to disperse a rowdy and violent crowd of the Petitioner's supporters who pelted stones at civilians and also at the joint security force. The shooting was in the air and meant to disperse them to save the situation from getting out of hand. Two people had already got seriously wounded by the Petitioner's stone throwing supporters."***

Capt. Ndahura also specifically denied that on the same day he had threatened to shoot Bashaija Richard, and that any PPU soldiers had beaten and dispersed people at a rally in Bwambara which Robert Sebunya was about to address.

Before I turn to evidence of intimidation elsewhere, I think it is appropriate to conclude on this evidence concerning PPU soldiers in Rukungiri and Kanungu, since PPU did not feature in evidence from elsewhere. From the evidence I have just reviewed, two conflicting contentions emerged. The contention on the Petitioner's side was that the PPU soldiers were deployed in the area to suppress any support for the Petitioner through harassing his agents and instilling fear in his supporters, and other voters who did not support the **1s** Respondent. The contention, by the military witnesses was that the role of the PPU soldiers was only to ensure the security of the President on his visit to the area. I am constrained to express my impression at the outset, that neither side made a full disclosure on the subject. In his first affidavit, the Petitioner significantly averred (in paragraph 16) that the 1**st** Respondent deployed the PPU soldiers in Rukungiri.

'<u>to protect his supporters</u> and these PPU soldiers intimidated and harassed my supporters……"

That begs the question: *"what were the 1st Respondent's supporters to be protected from?"* That statement tends to tally with the equally flitting remarks in the affidavits of the Army Commander and Capt. Ndahura about group clashes and *"the Petitioner's stone throwing supporters"* The other contention also leaves much unexplained. According to the official campaign programme for candidates, the President was scheduled to campaign in Rukungiri on 1 6th January, and in Kanungu on 3rd February, 2001. Even if allowance is made for the PPU soldiers to go in advance of the first visit, and for them to remain in the area for a period of nearly three weeks waiting for the second visit, no legitimate reason was suggested in the evidence, for their continued stay up to beyond polling day, a period of over five weeks after the President's last visit. Additionally, even the limited admission by Capt. Ndahura that he provided assistance to the police to disperse a rally which Hon. Okwiri was addressing, and that he ordered for the arrest of Hon. Okwiri's escort, is eloquent evidence that, during their presence in Rukungiri, the PPU soldiers over-stepped the specialised duty of protecting the person of the President.

In weighing all the affidavit evidence on the subject, I took into account the apparent tendency by deponents on both sides, to over or under state facts, and of minor discrepancies on detail. However in the end from the details narrated by the witnesses and the overall consistency and corroboration, I was convinced that the evidence in support of the petition on the role of the PPU soldiers in Rukungiri was not a fabrication or exaggeration. I was also convinced that Capt. Ndahura was not a truthful witness in this regard. Whatever the initial intention for in the deployment, I satisfied that during their stay in Rukungiri and Kanungu, the PPU soldiers engaged in diverse unlawful activities of violence, harassment and intimidation against the Petitioner's agents and supporters, as well as the electorate.

In addition to evidence on the activities of PPU soldiers, there was other evidence of intimidation in the same area. Other operatives such as GISO's and supporters of the 1st Respondent, sometimes referred to in the affidavits as vigilantes, took advantage of the atmosphere generated by PPU activities, to also harass the Petitioner's supporters. However, I should point out that it appears not to have been all one way. Although evidence on unlawful activities by the

Petitioner's operatives was subdued, what surfaced was sufficient to indicate that there were incidents perpetrated by them. That however, did not mitigate but aggravated the situation. In elections, if intimidation is countered with intimation the two do not cancel each other, but increase fear thus undermining further the principle of free and fair election.

Intimidation elsewhere:

There was less evidence of intimidation in other districts. The only other incident witnessed by the Petitioner, was in Kamwenge district. He deponed that on 16th February, 2001 when his convoy of vehicles entered Kamwenge Town, he found many people carrying posters and singing campaign slogans of the 1st Respondent. They interfered with his campaign, throwing stones at the vehicles in the convoy and assaulting and harassing his supporters. The Petitioner's area coordinator, Peter Byomanyire, averred about an attack after the rally at about 5 p.m. It is not clear if this is the same or is additional to what was witnessed by the Petitioner. Hon. Winnie Byanyima also averred that she, with other Task Force Members who had gone to address a rally in Kamwenge, met a crowd of people who shouted at them and tried to block their way. She did not mention the date. Again, it was not clear whether that was a different, or the same, incident, as referred to by the Petitioner and/or by Peter Byomanyire.

There was further affidavit evidence on harassment of the supporters and agents of the Petitioner in Kamwenge. Two of the agents Patrick Kikomberwa and Evelyne Nzige averred that as a result of threats received from a Parish Chief by the former, and through an anonymous letter received by the latter, they feared to take up their appointments as polling agents for the Petitioner. The former claims that on turning up to vote he was urged by the Presiding Officer and the NEM Monitor to vote for the 1st Respondent, and because both followed him to watch as he ticked the ballot paper, he ticked for the is Respondent out of fear but against his will. The latter did not vote at all, but surrendered her voter's card to the LC Ill Chairman as an assurance that she did not vote for the Petitioner. Henry Muhwezi the Publicity Secretary and Moses Tibanyendera, the Head of Mobilisation, on the Petitioner's Task Force in Kamwenge deponed that on and 2gth February, respectively they were, at the instance of Capt. Byaruhanga the area M.R, arrested for supporting the Petitioner. The former was tortured, and he sustained, *inter alia*, a fractured arm. He annexed to his affidavit medical chits and copy of his photograph in Monitor newspaper

showing his left forearm in a bandage. He also deponed that his home was vandalised and the church where he was a coordinator was burnt down. The latter was detained for one day allegedly for abusing the LC Ill Chairman, and reporting Capt. Byaruhanga for destroying the Petitioner's campaign posters. Several other agents were arrested on the eve of polling day. Kiiza Davis, the Petitioner's agent deponed that on 11th March, 2001 he was arrested with his brother Wasswa Peter and a friend called Robert. They were arrested in Town at 9.00 am. by LDU personnel, and on instruction of 2nd Lt. Richard, were taken to Kamwenge army detach barracks, and they were detained in a ditch/trench under guard of two soldiers. There were two affidavits in response on that subject. One was from Capt. Byaruhanga who admitted having actively campaigned for the 1st Respondent, and having tried to persuade Henry Muhwezi to his camp. He, however, denied having caused any acts of violence or intimidation against the Petitioner's agents. The second affidavit was sworn by Major Kankiriho Patrick, Commanding Officer of Bihanga Barracks Ibanda. While he deponed that the affidavits in support of the petition regarding Kamwenge District contained falsehoods, he admitted that four persons including Davis Kiiza, were arrested on the eve of elections, but insisted the arrest was not politically motivated, but was because they were found meeting late in the night and were picked up for questioning- He said this was because Kamwenge was an insurgency area susceptible to suffer attacks from ADF rebels. Surprisingly, he mentioned the arrest and questioning of those people as if the army had legal authority of arrest and of investigating crime, which it does not. Apart from the obvious illegality of the action however, I did not believe that explanation. I was satisfied that the motive for the arrest and detention was to harass the Petitioner's agents and prevent them from voting. Needless to add, that the motive apart, the fact of their arrest, and its timing had a negative impact and was incompatible with a free electoral process.

Four affidavits filed for the Petitioner in relation to Kabale District contained generalised accusations against the RDC, his Deputy and his Assistant, for harassing and intimidating the Petitioner's supporters using LC officials. They did not however, refer to specific incidents, let alone contain any evidence to prove the accusations. Only one deponent, Arinitwe Wilkens, described an incident on 11th March, in which he was arrested at a roadblock set up by LC officials. He alleged that he was stripped naked and severely beaten, apparently to force him reveal the Petitioner's polling agents to whom he had taken appointment letters. He was taken to the sub-county jail and was transferred to Kabale Police Station the following day. He was held

there with an undisclosed number of other agents of the Petitioner, until 14th March 2001. He deponed that after arrest he was taken to the area M.P's house and the MP directed the captors to share his money and gave them his vehicle to transport him to the sub-county headquarters. The area M.R, Hon. Mulasanyi swore an affidavit in reply and deponed that he had been requested by LC II Chairman to provide his vehicle for transporting a person who had committed a crime, but the person was not brought to his home. I was not impressed by the evidence of Arinitwe. It seemed that much of it was exaggerated.

Three deponents narrated a couple of incidents of harassment and intimidation in Mbarara District. Peter Byomanyire and James Birungi Ozo, the Petitioner's campaign coordinators, averred in separate affidavits, that on 8th March they visited Mahyoro (Matsyoro) to meet with the Petitioner's agents and supporters but their meeting was surrounded by about 5 UPDF soldiers and dispersed at gunpoint. Later that day, in Ibanda Town they met Capt. Kankiriho, C.O. Bihange Barracks, who ordered James Birungi Ozo, to leave the area and as the latter moved to his car the officer shot at, but missed him. I was inclined to disregard the evidence of Birungi Ozo because his affidavit was infested with not only hearsay but also exaggerations and clear lies. He is the witness who alleged that he saw a Chief removing *"votes cast for the Petitioner from the ballot box using sticks inserted in the box."* However the shooting incident was confirmed by the said Capt. (later Major) Kankiriho who, however, contended that the shooting incident occurred at about 9 a.m., on l0th March, and that he shot in the air in self defence as the said Birungi Ozo with eight unruly youth surrounded him, poised to attack. Boniface Ngaruye, a member of the Petitioner's Task Force for Mbarara, deponed that in February, his effort to hold consultative meetings in Ishongororo sub-county were gravely interfered with when an LDU Commander threatened to shoot him. Out of fear for his life, he did not campaign in that sub-county. He added that on the eve of polling, there was such heavy deployment of UPDF soldiers in Mbarara Municipality that the last Task Force Planning meeting aborted.

Maj. Kakooza Mutale's group:

Despite the pleading in sub-paragraphs 3(1) (v) and 3 (2) (d) of the petition, that a para-military group led by Major Kakooza Mutale and called Kalangala Action Plan, *inter alia* interfered with

the Petitioner's campaigns, used violence against people who did not support the Respondent caused breach of peace and induced *"others"* to vote for the 1st Respondent against their conscience, there was hardly any evidence brought to Court on the activities of that group. The only incident I was able, by inference, to link with the group, occurred on February when the 1**st** Respondent went to Tororo. Oketcho Yusuf deponed that he was confronted by a male stranger, in civilian clothes, who ordered him to pull down the Petitioner's posters. Upon refusing he was dragged to a yellow bus where he was tortured with others who had been similarly arrested. He sustained cuts on the head and was taken to Tororo Police Station where he was detained for 8 hours. The link is in a letter of 26th February, 2001 annexed to the affidavit of Louis Otika, the Petitioner's National Coordinator, which was addressed by him to the Chairman of the Commission complaining about torture of people during the Respondent's visit to Tororo. The said torture was reportedly by Maj. Kakooza and his henchmen on the Movement Bus.

Correspondence on violence and intimidation:

I am constrained before leaving the subject of intimidation, to comment on correspondence annexed to affidavits of the Petitioner and the said Louis Otika. While the correspondence did not amount to evidence in proof of incidents alluded to therein, it gave the impression of much more violence and intimidation than was revealed in the affidavit evidence. The earliest was a letter dated 27th January, 2001 from the Deputy Chairperson of the Commission, to the Inspector General of Police, forwarding copy of *complaint* from the Petitioner *"on violence and harassment."* The complaint itself was not produced. Next was a letter dated 3rd February on *"Escalating Campaign Violence,"* in which Louis Otika intimated to the Commission in part:

> ***"We are particularly perturbed by the murder of a student at Makerere University Alex Adiga, which led to riots in Kampala City by University students yesterday. There have been bombings in Kampala City, and our branch office in Mbale has been razed to the ground by arsonists, and supporters have been arrested."***

No evidence was brought in Court to prove any of the incidents listed in the letter, let alone their link, if any, to the election. On 6t February, a meeting of the candidates' agents, convened by the Commission, passed a resolution, copy of which was annexed to the Petitioner's affidavit. The preamble read:

"We the undersigned candidates' agents, acting on behalf of our respective candidates, and deeply concerned about acts of violence and intimidation that are marring the presidential campaign, DO HEREBY RESOLVE AS FOLLOWS:" (emphasis is added)

They resolved to accept responsibility over their supporters and to take several measures to minimise incidences of clashes among their respective supporters.

In a letter dated 20th February 2001 concerning the Petitioner's complaint about the arrest of Hon. Okwiri Rabwoni, the Deputy Chairperson of the Commission, requested the Army Commander and the Inspector General of Police, to *"ensure that candidates' campaigns continue without unnecessary interference."* Let me quote at some length from another letter, dated February 2001, addressed by Chairman Kasujja, to the 1st Respondent because the Petitioner's counsel placed much reliance on it. It read in part.

***"Yours* Excellency,**

RE: VIOLENCE *AND INTIMIDATION OF* CANDIDATES

The Commission wishes to appeal to you, Your Excellency, as the Head of State and fountain of honour in Uganda, to intervene and save the democratic process from disintegration by ensuring peace and harmony in the electoral process.

The Commission has received disturbing reports and complaints of intimidation of candidates, their agents and supporters which in some cases has resulted in loss of life and property

In a meeting that the Commission held with candidate Dr. Kiiza Besigye on 22nd February 2001, a number of issues of public concern were raised regarding the way security matters have been handled particularly during the campaign period." (Emphasis is added)

After drawing attention to the law on the powers and functions of the Commission and to its operational limitations, and intimation that the Commission had entrusted the keeping of security to the police, Chairman Kasujja went on to write-

"We also expect that the deployment of PPU is made where the President is expected to be as this is a facility that Your Excellency is entitled to as the incumbent. We have also issued press

statements instructing public institutions including RDCs and DISO to treat all candidates equally as is provided for in the Presidential Act 2000 and we expect them to abide by those instructions.

The Commission therefore, would like to request you as Commander- in-Chief of the Armed Forces to instruct armed personnel not to do anything that would be interpreted as contrary to law and thus jeopardise the democratisation principles that our country has embarked on since the government of NRM came to power..

Your early intervention in this matter will go a long way to enable us fulfill our duties as laid out in the Constitution and other Laws of this country." **(Emphasis is added).**

The next, in time, was the letter I have just referred to, which Loius Otika wrote to the Commission on 26 February, complaining, *inter alia* that one of the people allegedly tortured by Maj. Kakooza Mutale's group that day, Isaac Katerega, was rushed to hospital in Busia where he died. The Court did not receive direct evidence in proof of the alleged torture and/or death as a fact and the surrounding circumstances.

On 7th March 2001, four candidates, including the Petitioner, wrote a letter to the Chairman of the Commission. Under the sub-title *"Security, Violence and Intimidation"*, they referred to the deployment of the Army Commander with other Senior Army Officers to take charge of security and added:

> ***The Presidential Protection Unit (PPU) has also been deployed in different parts of the country even where the security situation does not warrant it."***

After commenting on the letter the Chairman had written to the President, the candidates concluded:

> ***"Violence and intimidation by the PPU and para-military personnel has escalated of late and has resulted in loss of lives and injury to citizens of this country."***

However, the only evidence the Court received on deployment of PPU, was in respect of the deployment in Rukungiri only. And the Court received evidence in proof of only one loss of life, namely that of Baronda, the letter of Louis Otika not being such proof.

In a reply dated 8th, March, 2001, Chairman Kasujja summarised, under the same sub-title the steps the Commission had taken through correspondence. He concluded:

> ***"Following these communications, reports from the Police indicate that the security situation during the campaigns has improved and acts of violence and Intimidation have reduced considerably country wide."***

The candidates replied 9th March demanding that the deployed army be withdrawn within 24 hours or else they take drastic action, and warning that *"the Commission will bear the consequences of the confusion that may arise out of deploying different security organs."*

That correspondence left a very serious unanswered question in my mind; namely was there more widespread violence and intimidation (including more deaths), related to the election, than was disclosed in evidence, or were the contents of the correspondence, an exaggerated expression of the extent of the violence and intimidation? Needless to say, however, that whatever the answer to this question may be, this Court could only act on the evidence before it.

Intimidation on polling day:

As already noted the Petitioner pleaded that the military and para-military personnel armed with deadly weapons were allowed in polling stations and their presence intimidated voters, that during the polling exercise, the Petitioner's *"polling agents were chased away from many polling stations in many Districts of Uganda"* and the 2nd Respondent *"failed to prevent"* it; and that the agents were denied *"information concerning counting and tallying process"* so that those exercises were carried out in the agents' *"forced absence"(* para 3 (1) (g), (p), (r), (s) and ***(t).***

Armed people in polling stations:

In support of the pleading in subparagraph 3(1) (r), the Petitioner deponed in the supplementary affidavit as follows:

> ***"9. That I know of incidents in Rukungiri district where I voted from, where the 2nd Respondent's agents/servants on polling day allowed people with deadly weapons including* soldiers of the PPU to be present at polling stations and this presence**

intimidated many voters to vote in favour of candidate Museveni Yoweri Kaguta or not to turn up for voting by avoiding the militarized polling stations."

The Petitioner did not clarify if his knowledge was from having personally seen armed people in the station. Nor did he in his own affidavit or through affidavits of witnesses, particularise the incidents adequately to enable this Court assess the credibility of the assertion. Witnesses as to polling day in Rukungiri did not have much to say on this point and did not elaborate on the little they said. Bernard Masiko, Petitioner's monitor in Kayonza Sub-county deponed that when he went to Kyeshero polling station one Rwamahe who was armed with an AK 47 chased him away with the help of LDUs and some army men who were threatening voters. Koko Medard, also Petitioner's monitor, deponed that when he went to vote at Kamajune polling station at about 6 a.m. he found an army veteran called Kakombe, armed with a gun guarding one ballot box which he did not allow anyone to get near to. Mpwabwooba Callist, Coordinator for Rugyeyo, Kanungu, deponed that on eve of polling day some PPU soldiers were deployed at the homes of known supporters of the Petitioner and on polling day they were distributed in parishes where the Petitioner's support was known to be strong.

From outside Rukungiri there were scattered averments on the point. John Kijumba, Petitioner's monitor in Bukonzo deponed that at Katojo polling station he saw about 10 army men armed with guns guarding the polling station. This evidence however was refuted by Milton Wakabalya, the Presiding Officer at Katojo polling station who deponed that he had had one polling Constable who was unarmed and denied that 10 armed soldiers had guarded the station. Another was the disputed evidence of Masasiro Stephen, a polling agent at Nkusi Primary School polling station, Bufumbo Sub-county, Mbale District. He deponed that after 12 voters who had turned up cast their votes peacefully, four armed soldiers escorting the Sub-county Chief and other officials arrived at the station and shot in the air, after which the chief and his companions stuffed ballot papers into the ballot box. The Chief gave a different version denying the presence of armed soldiers.

A peculiar incident was described by Alex Otim of Gulu who went to vote and monitor the election process in Paico Division. He deponed that at Paico Primary School polling stations he

found that ***"soldiers were deployed two of them at each polling station"*** and that they were forcing people, especially old ones ***"to vote for their own choice."*** He further deponed:

> ***"……we later chase the soldiers away from the polling station and they went to a nearby barracks and came armed and were also using army vehicle (mamba).***
>
> ***……the soldiers assaulted me and Okello Saul and arrested us only to release us at 8.p.m. after voting had ended.***

Other evidence at polling stations was about soldiers coming to a few polling stations to vote or cause children to vote, irregularly, but not about their being armed with deadly weapons, let alone about causing intimidation to voters in polling stations.

Chasing polling agents:

There was admissible evidence from, and inadmissible evidence about, the Petitioner's agents who were compelled to abandon their polling stations. The former was direct affidavit evidence of polling agents who upon observing irregularities, tried to protest but were overpowered and chased away, or out of frustration or disgust left of their own accord. The latter was hearsay evidence which featured mainly in affidavits of monitors and overseers, who narrated what they were told about the agents being chased. I will illustrate the latter, with two affidavits. Sam Ndagije, the Petitioner's Monitor for Kihiihi Rukungiri listed 20 polling agents who on polling day came to him at the office complaining of being chased away. I should also mention the affidavit of the Petitioner's Kabale District Task Force Chairman, Anteli Twahirwa, who deponed to no fact he witnessed personally. He annexed two purported reports to his affidavit, which were also not evidence. The second report, made on polling day, comprised only summaries of inadmissible information he received from agents. There were however a few affidavits of direct and admissible evidence. In Rukungiri, even monitors for the Petitioner were affected Koko Medard, Petitioner's polling monitor deponed that at Kamujune polling station, he found that the polling agents for the Petitioner had been made to stand 50 metres away where they could not observe what was going on when he visited Nyarugando polling station he himself was forced to flee on his motor-cycle as a crowd of the Respondent's supporters chased him with stones. At Ruhandagaza polling station he found tension. He found that the Petitioner's polling agents had

taken refugee 150 metres away from the polling station following an assault on one of them. He himself could not venture beyond, although that was where he was supposed to vote. As a result he did not vote. Others who deponed to similar harassment were Kakuru Sam and Bernard Masiko. Karenzyo Eliphaz deponed: *"following massive harassment and after we were threatened with death we decided to withdraw our agents to save their lives."*

There was also evidence from outside Rukungiri John Kipala, the Petitioner's monitor at Magabi parish Kakuuto, Rakai, deponed that while he was at Gayaza polling station he observed pre-ticked ballot papers being handed to voters, who, after casting them would return for more. When it became intolerable, he protested to the Presiding Officer *"to assert his authority"* and stop it. Instead a group of people armed with clubs charged at him threatening to kill him. He was rescued by a colleague who whisked him away in a vehicle. There were similar incidents narrated in affidavits from Ntungamo, Bushenyi, Mbarara and Mayuge.

In support of the pleading in sub-paragraph 3(1) (s) and (t), all that the Petitioner averred in the supplementary affidavit was:

> ***"10. That I was informed by my National Coordinator Louis Otika that my polling agents in numerous places in the country for instance in Northern and Western Uganda and agents at the Electoral Commission were denied access to information concerning the counting and tallying process."***

I did not come across credible evidence by any agent that was denied access to, let alone information about, the counting and tallying process. There was some inconclusive evidence concerning access to the national tallying centre at the Commission Headquarters. Two persons were appointed on 13th March, 2001 to represent the Petitioner there. They were given an introductory letter. One of them Charles Owor, deponed that on presenting themselves, at about 1 .30 p.m., several Commission officials sought to allow them access, but a person unknown to him, who was riot an official of the Commission, but seemed to wield a lot of power, refused them entry. Out of frustration they gave up and left between 4.30 and 5.30 p.m. A second deponent, Robert Kironde, deponed that at the request of the Petitioner's Task Force, he went with Mr. Kawalya to the same tallying centre at 9.00 p.m. The Deputy Chairperson, Mrs. Florence Nkurukenda, received them and instructed Mr. Wamala, to take them around.

They observed the results coming in, and left at 10.30 p.m. Mrs. Nkurukenda deponed in reply that during the day, the letter introducing Charles Owor and another was left at the headquarters for endorsement by the Chairman. Later in the day, however, Mr. Balikuddembe, counsel for the Petitioner, with one Yona Kanyomozi, brought Robert Kironde and Bwogi Kawalya as substitutes. Counsel personally endorsed their names on the earlier letter. A copy of the endorsed letter was annexed to her affidavit. She insisted that the two substitutes were at the tallying exercise long enough to even be served food. In Court, Mr. Balikuddembe did not dispute or otherwise comment on this evidence.

Violation of secret ballot:

There was another form of intimidation which, however, was not pleaded as such but came out in evidence. Its best illustration is in the evidence of Patrick Kikomberwa of Kamwenge, who deponed that when he went to vote he was urged by the Presiding officer and the NEM monitor to vote for the 1st Respondent. Because they followed him to see what he did, he ticked in favour of the 1st Respondent to appease them, but against his will.

Another example is in the evidence of Matsiko wa Mucoori who observed voting at a special polling station for soldiers at Kanyarugiri. He deponed that the only polling agent present was the 1st Respondent's agent, who was positioned near the basin where voters were ticking the chosen candidate. He was able to see the ticking. There were a few other witnesses who deponed that they saw voters being required to tick ballots in the open.

Conclusion on intimidation:

I would summarise my conclusion on the question of intimidation as follows:

First I found that during the Presidential election campaign,

(a) the Petitioner's electioneering; particularly the campaign conducted by his campaign agents in Rukungiri District was grossly and unlawfully interfered with by PPU soldiers and some Government officials

(b) the Petitioner's agents and supporters in Rukungiri and Kamwenge Districts, were harassed and intimidated

Secondly I found that on polling day there was intimidation limited to harassment of the Petitioner's polling agents who protested against irregularities. The pleading that polling agents were chased away from many polling stations in many districts was not borne out by admissible evidence. Thirdly, I found that violation of secret ballot was proved to have occurred in relatively few polling stations. Accordingly, in view of all that I concluded that in those areas the principle of free and fair election was compromised.

With that in mind I make the following observation concerning implementation or enforcement of the principle of free and fair election. Much as the Constitution and the statutory law enacted there under, stress that election must be free and fair, the mechanism for implementing this appears to be rather wanting. The Constitution sets out diverse functions of the Commission in Art.61, and then provides in paragraph (h) thereof that the Commission shall *"perform such other functions as may be prescribed by Parliament by Law"* Under the Commission Act, Parliament prescribed in S.12 that for purposes of carrying out its Constitutional functions, the Commission shall have, the powers, *inter alia*

"(e) to take measure for ensuring that the entire electoral process is conducted under conditions of freedom and fairness; and

(f) to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this Act or other law."

It is apparent however that these powers are on paper only, as the Commission is not equipped to exercise them. This, in my view, creates a lacuna. Because of that, when the Petitioner and other candidates raised issues of security, violence and intimidation, with the Commission, the Commission had in turn to appeal to the Inspector General of Police, Army Commander, and apparently as a last resort, to the Commander—in Chief, who also happened to be a contesting candidate. If the Commission is to be the impartial arbiter, with the duty to ensure *secure conditions for elections; and also to ensure that the entire electoral process is conducted in conditions of freedom and fairness,* then it ought to be equipped to exercise these powers. It seems to me that there is urgent need for those concerned to give serious consideration to the lacuna, with a view to rectifying it.

Mismanagement of voters' register:

I have already indicated that the Petitioner made several complaints against failure to comply with the Commission Act. Some relate to voter registration. Apart from what I have already considered under the first issue, the other complaints were in sub-paragraphs 3(1) (e) and *U)* of the petition, which in a nutshell are (1) that the 2nd Respondent *"failed efficiently to compile maintain and update"* the voters' register and (2) that it *"failed to display copies of voters' roll for each parish or ward for a period of not less than 21 days."* It was argued that as a result, the voters' register contained many flaws in that, names of non-voters remained on the register while those of entitled persons were omitted. In a rolled up defence in its answer to the Petition, the 2nd Respondent denied the first allegation generally and pleaded that in any event, such failure, if any, did not affect the result, and in addition that it was not a ground for annulment of the election. In answer to the second complaint, the 2nd Respondent pleaded that it displayed the voters register for a total of five days, and that in any case, failure to comply was not a ground for annulment of the election.

It seems to me, without intending to oversimplify the matter, that the Petitioner's contention in this regard is substantially helped, if not made out, by the evidence provided by the 2 Respondent. I will illustrate shortly. First let me consider the relevant law on the matter. The Commission Act prescribes two important exercises to be done prior to holding an election. The first exercise is to update the register up-to an appointed date. The object of the exercise is twofold: (a) to enable newly qualified voters to apply for their names to be entered on the register, and (b) to remove from the register names of persons who have ceased to be eligible voters. During that exercise, a registered voter may also apply for transfer of his or her registration to another parish or ward. The second exercise is the display of a copy of the voters' roll for each parish or ward, at a public place within the parish or ward, for a period of not less than 21 days. I should reproduce here three sub-sections of S.25 of the Commission Act, to highlight and underline the object of the second exercise. Sub—sections (3) (4) and (5) read as follows:

"(3) During the period of the display of the voters' roll under this section, 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 or that the name of a person qualified to vote or to be registered has been omitted.

(4) Any objection under subsection (3) shall be addressed to the returning officer through the chairperson of the parish council of the person raising the objection.

(5) The returning officer shall appoint a tribunal comprising five members to determine objections received by him or her under subsection (4).”

From the affidavits of Chairman Kasujja it is apparent that these exercises were undertaken if they were of little importance. In the affidavit accompanying the 2nd Respondent’s answer to the petition, he deponed that the voters’ register was displayed country wide for five days and could not be displayed for 21 days or more because of time constraint. In a supplementary affidavit in reply, he deponed that the national voters’ register which had existed since 1993, was updated at village level for the 2001 Presidential election, from 11th to 22nd January 2001, and that during the update, *“Tribunals were established to handle complaints.”* He also deponed that in February 2001, the register was displayed at polling stations in form of voters’ rolls, and that for ease of scrutinising, it was displayed in four components, i.e. previously registered voters, newly registered voters, transferred voters, and voters recommended for deletion. In the said affidavit he explained:

“26. That the display was initially done for three days, and after consultations and in agreement with all candidates’ agents, the period was extended for another two days and both periods were gazetted.

27. That the time for display and update of the register was affected by a decision to have photographic voters cards which required fresh registration. This exercise was commenced but due to unforeseen delays in delivery of all the necessary equipment which had not arrived by 31 December, 2000, the 2nd Respondent was forced to revert to the old system of updating the existing register, having lost a lot of time.”

The background to the delay referred to in paragraph 27 was elaborated on, in two statements Chairman Kasujja made on 4th January, and 10th March, 2001. The first was a general public notice while the second was specifically addressed to International groups who had come to

observe the election. Both statements were annextures to Mukasa David Bulonge's affidavit. In a nutshell, Chairman Kasujja revealed that originally the Commission had planned for the exercise of general update of the voters' register to be carried out between 13th and 26th October 2000. That plan was put off when, in a speech on 9th October, 2000, the President of Uganda *"announced the government's commitment to provide funds for computerising the voters' register and issuing of photographic voter's cards."* Some efforts were made towards to achieving that objective. However *"due to delays experienced in the procurement process and release of funds from the Ministry of Finance to enable the Commission open letters of credit with various suppliers"* none of the necessary equipment and materials had arrived by 3l December 2000. Hence the decision to revert to the *"old system."*

I am constrained to make the following observations

(1) It was not explained why, and so I was not persuaded that, the so-called *"old system"* of updating the existing register could not have proceeded while the equipment and materials required for the desired new system were pursued. In my opinion, if the Commission had acted more diligently knowing, as it did, that the time for holding the Presidential election was fixed by the Constitution, and that the duration of the period for at least the display exercise, was fixed by the Act, it would not have put off the exercises until so late.

(2) By a Notice dated 23d February 2001, Chairman Kasujja announced that in exercise of the special powers conferred on the Commission under S.38 of the Commission Act, *"the display period of the Voters' Rolls for the National Presidential Election, 2001 (had) been reduced from 21 days to 3 days "*. Under that section the Commission is empowered to *"extend the time for doing any act."* However it is not similarly empowered to reduce time. I considered whether the special power to extend time included, by implication or inference, power to reduce time fixed by the Act, but I failed to put that interpretation. As I understand it, the special power is conditional. For clarity I would paraphrase the provision thus:

> ***"The Commission (may) …….otherwise adapt any of those provisions <u>as may be required to achieve the purposes of this</u> Act …….to such extent as the Commission considers necessary to meet the exigencies of the situation."*** (Emphasis is added)

Clearly, it is a condition for the exercise of that power that adapting provisions of the Act to meet the exigencies of the situation must be restricted or limited to what is required to achieve the purposes of the Act to exigencies of the situation. It follows that the power cannot be invoked to adapt a provision of the Act, if doing so would defeat the purposes of the Act. In my view reduction of the period for display of the voters' rolls was not required to achieve the purposes of S.25 of the Commission Act. On the contrary it served to defeat those purposes. In my considered opinion therefore, the reduction of the period for display was *ultra vires* the powers of the Commission.

(3) If it be true, as deponed by Chairman Kasujja, that the tribunals to handle complaints, were set up during the update exercise, that was inconsistent with the letter and spirit of the provisions in S.25 of the Commission Act. Tribunals are supposed to handle disputes generated from objections raised under S. 25(3) *"during the period of the display of the voters' roll."* In the circumstances I could not see what the tribunals he mentioned could have handled during the updating exercise. I am inclined to infer that during the short display of 3 plus 2 days no fresh Tribunals were set up to handle objections as required in sub-section (5).

The importance of the system of voter registration in a democratic election cannot be over emphasised. It is through it, that the voters to participate in the election are identified and ascertained. To ensure that only persons entitled to vote remain on the voters' register the two exercises of updating and displaying the register must be carried out diligently and meticulously. In the instant case, owing to what I must call self-imposed shortage of time, the 2nd Respondent did not execute the exercises diligently, let alone meticulously. However, there was not sufficient reliable evidence to show the overall impact of this failure.

For the Petitioner, Frank Mukunzi deponed that he carried out an analysis of data related to the Presidential election which *"revealed an error margin of over 50% in the Electoral Commission's figures of the voters' register"*. Counsel for the Respondents strongly criticised that evidence on two grounds. First, his C.V. revealed that Frank Mukunzi had no professional training in statistics, and he was therefore, not competent as an expert witness; secondly his analysis was based on erroneous or doubtful premise. I was not inclined to disregard the evidence purely on the ground that the deponent lacked formal training in statistics. The subject

of his report was one which he probably could handle from the practical experience in data analysis he claimed to have. However upon going through the report I was not impressed that it was well founded. Accordingly I did not place any reliance on it and I do not find it necessary or useful to discuss it here.

Nevertheless, there was scanty and scattered evidence to the effect that some names of deceased persons and of non-citizens who had left the country, were still on the register on polling day. And conversely there was equally scanty evidence of persons entitled to vote but who did not vote because their names were not on the register. Needless to say that this was largely a consequence of not carrying out the two exercises properly. However, the proportion of names which wrongfully remained on the voters' register was not established. Nor was the proportion of the eligible voters who were disfranchised because their names were omitted from the voters' register. I should point out that the 2nd Respondent's contention that failure to clean up the register would not *per se* be a ground for annulment is not entirely correct. If the failure translated into disfranchising a large proportion of citizens entitled to be registered as voters, it could be construed as non-compliance with the principle of voter registration which affected the result. That, however, was not the situation proved in the instant case.

Unlawful possession of voters' card:

A related irregularity the Court received affidavit evidence on was unlawful possession of voter's cards. A voter's card is the identification mark that links the voter to his registered name. The voter has to produce it to the Presiding Officer in order to be given a ballot paper for voting. Under the Commission Act it is an offence for a registered voter to hold more than one valid voter's card (see S. 26); and it is also an offence for any person to be unlawfully in possession of any voter's card which is issued in the name of a voter or which is blank (see S. 28).

There were more than a dozen witnesses who deponed that they saw different people in unlawful possession of voter's cards distributing them to persons not entitled to the cards. I will mention a few. Ojok David Livingstone of the Petitioner's monitoring team for Mbale Municipality deponed that on polling day, following a tip-off about a lady distributing voter's cards, he went with a police officer to look for Nakintu and found her at her home. She admitted that she had distributed 11 voter's cards out of 50 she had received for distributing to the 1st Respondent's

supporters. She surrendered the balance of 39 voter's cards together with a bottle of JIK, a tablet of soap and a drying rug which she said were to be used to remove marking ink from the finger of anyone who had voted. She was taken with the voter's cards and the other items to the police station. Wafidi Amiri also monitor for the Petitioner in Mutoto, Bungokho, Mbale deponed that on polling day after observing suspicious conduct of the R.D.C., the Sub-county Chief, the local Movement Chairman, and one Sonya David, he followed the Sub-county Chief who was being driven by Sonya and when he caught up with the latter he found him carrying about 50,000 voter's cards. He raised alarm and with assistance of the public arrested him to Mbale Police Station. The Sub-county Chief, Wamae Kenneth deponed in reply that he was ambushed by Wafidi Amiri. When he heard Wafidi raising alarm that the tax collector was stealing votes, he run away for fear of being lynched. He explained that he was returning the balance of undistributed voter's cards to the sub county headquarters and that they were not 50,000 but less than 3000. I did not believe the Chief's explanation. His conduct of running away showed that he knew he was in the wrong. Others witnessed less quantity of cards. Maliki Bukoli of Mbale Municipality witnessed the police arrest on Mukonge with 5 blank voter's cards. Sulait Kule, the Petitioner's monitor in Kasese received from one Kanunu 16 voter's cards with a report that they had been given to him to supply to others for voting illegally. He took them to Kasese Police Station. Kakuru Sam of Rukungiri deponed that on 7th March when he collected his one voter's card, he saw one Nshekanabo being given a stack of about 30 voter's cards. Karenzyo Eliphaz also of Rukungiri, deponed that on 6th March at Rwenyerere polling station in Kihihi, he witnessed many new voters being openly denied their voter's cards on the ground that they were the Petitioner's *"rebels;"* and later their voter's cards and those of voters who had died or migrated were given to LC I Chairmen to distribute to the owners which they never did. This offence appeared to have been spread, but the extent to which the voter's card in unlawful possession were used to facilitate non-voters to vote or to enable registered voters to vote more than once, was not established.

Irregular Voting:

In sub-paragraphs 3(1) (i), (j), (m), (o) and (x) of the petition, the Petitioner pleaded several forms of irregular voting, namely stuffing ballot boxes, multiple voting, pre-ticking of ballots, and under-age voting. Evidence brought to prove these irregularities were of two types. First

there was direct evidence of witnesses to the irregularities. Secondly there was documentary evidence which the

Petitioner contended showed, and invited the Court to infer from, that there was massive rigging through stuffing and multiple voting. I will discuss the latter first.

Copies of a large number of *"Declaration of Results Forms"* were produced in the evidence as annextures to a number of affidavits. It is important to understand the particulars on the forms on which the said contention was based. On the form, the Presiding Officer was required to enter not only the number of votes cast for each candidate, but also to record-

• the total number of votes *cast* for all the candidates

• the total number of *rejected (invalid)* ballot papers

• the total number of ballot papers *counted*

• the total number of *spoilt* ballot papers

• the total number of ballot papers *issued* to the station, and

• the total number of *unused* ballot papers

As I understood the lay out, the total ballots *"counted"* include *"valid"* ones cast and *"invalid"* ones rejected, but exclude the *"spoilt"* ones. Then the three (valid, invalid, and spoilt) with the *"unused"* balance added together give the total number of the ballot papers officially *"issued to the polling station"* However, the filling of the forms produced in evidence, did not all conform to that understanding. In many of them, the figure entered for the total ballot papers issued, equaled the aggregate of the valid, invalid and spoilt ones only, excluding the unused ones. That gave the impression that all ballot papers issued to the station had been used up, and that there were unexplained ballot papers that remained unused. Much reliance was placed on this, by the Petitioner and the several witnesses who annexed copies of those forms to their affidavits, to advance a theory to the effect that the unused ballot papers, being over and above the total *"issued to the polling station"*, were unexplained extras, and must be equivalent to ballot papers irregularly introduced or stuffed into the ballot box. To illustrate the point the Petitioner annexed

copy of one such form to his affidavit accompanying his petition, and later, he annexed to his Affidavit in Reply to the 2nd Respondent, 93 copies of similar forms from different polling stations in 19 districts. Copies of other similar forms were annexed to affidavits of other witnesses. In his supplementary affidavit, Frank Mukunzi, deponed that he had ***"analysed the Declaration of Results from 254 polling stations*** *distributed throughout the Country."* He annexed to the affidavit a summary of findings in which he concluded:

> ***"My analysis reveals that in the 254 polling stations that I have analysed approximately 34.9% of the votes tallied for a presidential candidate are "ghost votes." Due to the randomness of the process by which I selected this data for analysis, I have no reason to believe that the percentage of 'ghost votes' nationwide would differ from the percentage in my sample population — this means that approximately 2,579,802 of the 7,389,691 votes tallied nationwide for one or another presidential candidate are 'ghost votes' and should not be counted."***

The analysis was based on the same theory that the forms showed that there were more ballot papers that what had been issued to the polling stations. Frank Mukunzi did not produce the forms that were subject of the analysis. I assume that they were not different from those produced in Court, which I have carefully scrutinised. The forms produced in Court did not all show the same pattern. Some were filled in the manner I understood they were supposed to be filled, so that the figures tallied well, showing no *"extra"* ballot papers. Others showed totals that were incomprehensible. There were even a few where the section for totals was left unfilled.
My considered conclusion, after thorough scrutiny of the forms, was that the more probable explanation was that the Presiding Officers, made erroneous entries either through miscalculations or through misunderstanding of what was required to be filled especially in the space for ballot papers *"issued to polling station."* During submissions, the learned Solicitor-General, suggested that there was a misprint and that the expression should have been *"issued at polling station,"* instead of *"issued to polling station"*. With due respect, I do not agree. However, a Presiding Officer who understood it in the same way suggested by the learned Solicitor-General, could, and probably did, record the total of issued ballot papers excluding the unused ballot papers.

To illustrate that lack of understanding, or misinterpretation of the form, may be the reason behind the untallying figures, I will use four forms, two specifically referred to by the Petitioner, and two others which I picked at random from two different areas but which were produced in evidence to prove the theory. In the affidavit accompanying the petition, the Petitioner asserted that at Bukaade Primary School Polling Centre *"the number of votes cast exceeded the number of ballots issued for the polling station"*, the former being 856 votes, and the latter being 650 ballot papers. The form was in respect of results at Bukaade P/S polling station Code 04; Sub-county Bukanga: Code 01; Constituency Luuka County: Code 040; District Iganga: Code 07. The votes recorded as obtained by the candidates were: Awori and Bwengye 0 each, Besigye 60, Karuhanga 2, Kibirige and Museveni 397 each, which totals 856 votes as deponed by the Petitioner. However, the figures filled in the section for totals were:

Total number of —

• valid votes cast for candidates	459
• rejected (invalid) ballot papers	05
• ballot papers counted	464
• spoilt ballot papers	03
• ballot papers issued to polling station	650
• unused ballot papers	183

Evidently the Petitioner's assertion in the affidavit conformed with his theory. As the form stands the 183 unused ballot papers appear to be excess. However a closer look shows that the totals are incomprehensible. To start with if the numbers of votes shown for each candidate are added up, they do not come to 459, which was the figure filled in as the total of *"valid votes cast for candidates."* It becomes comprehensible as the total, only if the 397 votes recorded for either Kibirige or Museveni is deleted as a mistaken entry. If that is done then all figures fall in place. The valid cast and invalid rejected add up to the 464 counted ballot papers. Then the valid, invalid spoilt and unused (i.e. 459 + 5 + 3 + 1 83) add up to 650 as the ballot papers issued to the

station. I was convinced that this was a case of mistaken entry on the form and not evidence of ballot box stuffing.

In his affidavit in reply to the 2nd Respondent, the Petitioner also deponed that the number of ballot papers issued to the polling station at Ishaka Adventist College were 477 and were equal to the ballot papers counted, yet there were 253 ballot papers unused. The form relating to that station was, with several others, annexed to the affidavit of John Tumusiime, the Petitioner's Chairman for Bushenyi, who also averred that it showed an *"unexplained anomaly of a large number of unused ballot papers, where the ballot papers issued to the station did not exceed those actually used."* The particulars of the station are Polling Station Ishaka Adventist College: Code 02; Ward IV: Code 20; Sub-county Ishaka Town Council: Code 01; Constituency Igara County West: Code 019; District Bushenyi: Code 04. The recorded votes obtained by each candidate were: 1 for Awori, 1 44 for Besigye, 0 each for Bwengye, Karuhanga and Kibirige, and 330 for Museveni, which add up to 475 votes. The figures filled in the totals section were as follows:

Total number of:

• valid votes cast for candidates	475
• rejected (invalid) ballot papers	2
• ballot papers counted	477
• spoilt ballot papers	0
• ballot papers issued to polling station	477
• unused ballot papers	263

In his submissions to the Court, Mr. Mbabazi, the Petitioner's counsel who handled this issue, specifically referred to this form in support of his argument for the theory. He contended that the 263 ballot papers reflected the number of ballot papers which were obtained other than from the official issue, and were illegally stuffed in the ballot box. The possibility of the Presiding Officer having by mistake excluded the number of unused ballot papers from the total of ballot papers issued to the station, however, was not ruled out.

The first of the forms I picked at random, for purposes of the illustration, was in respect of: Polling Station Ngugo: Code 03; Parish Ngugo: Code 04; Sub-county Bugamba: Code 01; Constituency Rwampara: Code 03; District Mbarara: Code 27 — where the totals recorded are simply incomprehensible. The votes recorded for the four candidates were Awori and Kibirige 1 each; Bwengye and Karuhanga o each; Besigye 53 and Museveni 664 votes, which all add up to 719 votes. Yet, the totals were recorded on the form as follows:

Total number of:

• valid votes cast for all candidates	519
• rejected (invalid) ballot papers	13
• ballot papers counted	534
• spoilt ballot papers	2
• ballot papers issued to station	660
• unused ballot papers	120

I failed to find any permutation of the figures that would make sense. The form was annexed to Mary Francis Semambo's affidavit, in support of the petition, and was produced as proof of stuffing ballot boxes. To my mind, it did not prove the theory.

The second form which I picked at random was an annex to the affidavit of Anteli Twahirwa also submitted among others as proof of stuffing. It is from Polling Station Murukoro II: Code 05; Parish Butare Code 14; Sub-county Muko Code 03; Constituency Rubanda County West: Code 048; District Kabale Code 09. The candidates' votes were recorded as: 50 for Besigye; 465 for Museveni; and 0 each for the other four candidates, adding up to 515. The totals of ballots were recorded thus:

Total number of:

• valid votes cast for all candidates	515

• rejected (invalid) ballot papers	2
• ballot papers counted	560
• spoilt ballot papers	1
• ballot papers issued to polling station	518
• unused ballot papers	42

On this form although at first glance, the unused 42 ballot papers appeared to be extra, on further observation it becomes clear to me that the ***"unused"*** were included in the *"counted"* instead of being included among the *"issued"* If that error were rectified the counted ballot papers would be (515 + 2) 517 (not 560) and the issued would be 517+1 +42 (560) (not 518) and there would no extra.

It seems to me that the theory was adopted and put forward without any attempt at verification. The Commission had in use, forms on which the ballot papers issued to each polling station were accounted for, recording *inter alia* the serial numbers. If in the course of his analysis, Frank Mukunzi had taken off time to verify the figures recorded on the results forms with those recorded on the accountability forms, his analysis report would most probably have been different and carried more credibility. Similarly, my impression is that the Petitioner and the other witnesses who subscribed to the theory must have examined the results forms rather superficially. Be that as it may, I was not satisfied that the Declaration of Results Forms which were produced in Court amounted to evidence from which the Court could infer stuffing of ballot boxes or multiple voting at all.

There is, however, credible direct evidence from individuals who physically witnessed the multiple voting and ballot box stuffing. Let me highlight that evidence. Agatha Tunanukye a *"poll watcher"* of the *"Christian Joint Monitoring group"* was assigned to watch over a polling station at Kaasiro, in Kihiihi, Kanungu. She deponed, that she noticed that there were many cases of individuals allowed to come over and over again to cast votes, and others who were given several voter's cards. According to her, the Petitioner's agents were so intimidated by state security agents, that they were rendered useless and eventually left the station in protest. Stanley

Bugando was the Petitioner's campaign agent in Kihiihi. On polling day he went to the polling station at Bushere and helped at setting up the station. He deponed that while in the process of arranging the station which was at a school, he saw one Moses Mwesigye, with three others in a room plucking ballot papers from three books which Moses had just received from the Presiding Officer. He saw as they ticked them opposite the 1st Respondent's name and cast them in a ballot box. This was prior to the official opening of the station at 7 a.m. Patrick Senyonga John, deponed that on polling day at 6.30 a.m. he witnessed the same type of stuffing of ballot papers in a ballot box, at a polling station at Lwebitakuli parish, in Sembabule District.

Matsiko wa Mucoori, a journalist with Monitor newspaper visited Kanyarugiri in Nyamarebe sub-county, Ibanda Sub-district, where there were two polling stations, 500 metres apart. One was for civilians and the other for soldiers. He was permitted by the Presiding Officer to observe the proceedings at the latter station for some time. He deponed that the Presiding Officer, Charles Musinguzi, was a soldier and teacher at the barracks. There were no polling agents except one for the 1st Respondent who stood near, and continued to observe voters as they ticked ballot papers in the basin. He noticed *"the Battalion Intelligence Officer voting more than five times, changing his clothes each time he came to vote"* He also noticed many other soldiers doing the same. At one point he pointed out two soldiers to the Presiding Officer who had voted before. They were stopped from voting again. Later he landed in trouble when the Presiding Officer became weary of his curiosity. Kedega Michael averred that he saw a group of about 50 soldiers led by Lt. Peter who had voter's cards but whose names were not in the voters' register voting at Alero polling station, and later saw the same group voting at Paara. Hangiro John who was polling agent for the Petitioner at Kabunga Primary School polling station in Rwekiniro, Ntungamo District, deponed that known individual supporters of the Respondent were given many ballot papers each to vote with, and the LC 3 Chairman was given an unknown number of unticked ballot papers which he took away.

Tukahebwa Keneth, the Petitioner's polling agent at a polling station in Kyenzaza Trading Centre, in Bunyaruguru, Bushenyi District, deponed that he witnessed two attempts at stuffing the ballot box. First, one Ntare Banyenzaki Abdu, a driver of Watuwa Sikora alias *"Mama Chama"* was intercepted trying to push several papers into the ballot box. He was arrested by an armed home guard on duty at the station. However, within five minutes the said Watuwa Sikora

arrived and took away her driver and the home guard. The latter returned later having been disarmed. Later he witnessed one Kyomuhangi Allen, sister-in-law of the same Watuwa Sikora, trying to do the same thing. She was also intercepted. Thirteen ballot papers already ticked in favour of the 1st Respondent were removed from her and eventually the matter was handed over to Bushenyi Police Station under ref: SD 39/12/3/2001 and CRB 107/2001. Basajabalaba Jafari, the Petitioner's overseer for Bunyaruguru County, on receiving a report about the incident, went to the police. He deponed that he obtained photocopies of the 13 ballot papers removed from Kyomuhangi Allen. The photocopies were annexed to his affidavit. Watuwa Schola deponed that she had gone to that polling station when she learnt that her driver had had a scuffle with a vigilante (home guard) over the identity of the driver. She was with the LC III Chairman. They found that the armed vigilante was drank. The Chairman disarmed him. She denied the description of Kyomuhangi Allen as her sister-in-law. I was not impressed by her evidence. In any case she did not rebut the evidence of the intercepted ballot papers which was corroborated by production of copies of the ballot papers. Incidentally, going by the serial numbers on them, the 1 3 ballot papers must have come from the same book. I considered this evidence to be significant, not in proving the fact of the attempt to cheat, but because with it, the evidence of others who witnessed voters casting bundles of pre-ticked ballot papers, ceased to appear to be farfetched or fictitious.

Special polling stations:

A major complaint about the special polling stations for soldiers was that many of them were not published or disclosed until they were seen on the polling day or their particulars were found in the results. Counsel for the Petitioner referred to those *"as sham polling stations."* Although strictly, this was not a specifically pleaded complaint, I found it to be sufficiently linked to the pleading in sub- paragraphs 3(1) (a) and (b) of the petition, that it was inescapable to consider the evidence, which showed that some of the special polling stations were not set up in compliance with law. The evidence was also in two categories, namely direct and indirect. The direct evidence was from witnesses who deponed that on polling day they found, inside or outside army barracks, voting in progress at polling stations which were not expected to be there. The indirect evidence is in the affidavit of Mukasa David Bulonge who obtained, from the Commission, tally

sheets for the election results in respect of Kitgum, Gulu and Kamwenge Districts on which were included results from such undisclosed polling stations.

Altogether three documents, containing particulars of special polling stations for soldiers, were produced in evidence. The first was the Uganda Gazette of l9th February, 2001 read together with the amendments in the issue of 9th March. The Second was the ungazetted list of all polling stations distributed on 11th March. The third is an undated detailed list of all the special polling stations for soldiers. It does not appear to have been published or distributed. It came in evidence as an annexture to Chairman Kasujja's supplementary affidavit. For ease of reference I will call that *"the Chairman's list"*. In the said supplementary affidavit Chairman Kasujja explained that all army polling stations had been listed in the Gazette as *"Outside Quarter Guard"* but ultimately the number of soldiers had determined the ballot boxes (and therefore number of polling stations) to be used. That explanation would have been plausible if all the special polling stations were included in the list of 1lth March, 2001, since it is reasonable to assume that by that date the number of soldiers registered to vote was known to the Commission. But not all the polling stations set up for, and used by, the soldiers were included in that list, as was shown in the evidence which I proceed to summarise.

One complaint was about Upper Mbuya. It was by Ebulu Vicent, the Petitioner's polling monitor for Mbuya Barracks who deponed that on polling day, he unexpectedly found seven polling stations inside the barracks and had to send for more polling agents to deal with what he called *"this crisis situation."* Capt. Ondoga, the Division Political Commissar, while insisting that they were all outside the barracks, admitted that there were seven polling stations for Upper Mbuya. In the gazette list of polling stations for soldiers there had been listed under Mbuya Parish, one polling station *"Outside Quarter Guard."* However in the list of 11th March, this polling station was not listed, though a total of 18 polling stations were listed for Mbuya I and Mbuya II parishes. It was only in the undisclosed Chairman's list that seven polling stations for Upper Mbuya and four for Lower Mbuya appeared. It was not explained how such a large number of polling stations was omitted from the *"final"* list of polling stations. It appears to me therefore that they were not set up in compliance with the provisions of the relevant law and the principles laid down therein.

The second complaint was raised in the affidavit of James Oluka, the Petitioner's polling agent at Akisim Barracks in Soroti Municipality. He deponed that there were supposed to be only two polling stations at those barracks identified as Akisim Barracks *"A-D"* and *"E-Z"*, outside the barracks. He was surprised to find two more inside the barracks, which were later brought outside also. Two officials, namely Omuge George William, the Returning Officer for Soroti, and Cpl. Oyo James, the Political Commissar, tried to explain what happened. They deponed in their respective affidavits that there were three polling stations, i.e. Akisim Barracks A-D, Akisim Barracks E-Z, and a third one which the former called *"Akisim Barracks Outside Quarter Guard"* and the latter called *"Akisim (Outside Quarter Guard) barracks polling station."* What appeared in the Gazette and the Chairman's list under Akisim Ward of Soroti Municipality was *"Polling Station Cell II (Outside Quarter Guard)."* In the list of 11th March only two polling stations were listed and identified as *"Akisim Barracks A-D"* and *"Akisim Barracks E-Z."* The alleged third polling station was not listed in any of the three documents. As for the fourth polling station the two officials explained that an additional ballot box had been brought to Soroti barracks for use by soldiers recently transferred from Olilim barracks, in Katakwi District, It formed the fourth polling station at Akisim barracks. However I failed to trace any polling station for *"Olilim Barracks"* in any of the three documents. The only polling station bearing the name *"Olilim"* and which was included in the ordinary list gazetted on 22 December 2000, and in the list of 11th March 2001, was Olilim Primary School, in Usuk County, Ngarian Sub-county. Both the gazetted special polling stations and the Chairman' list include only two polling stations for soldiers in Katakwi i.e. *Oburatum* and *Okuliak.* My conclusion on all that evidence was that the two extra stations at Akisim Barracks were not located lawfully.

In his supplementary affidavit Mukasa David Bulonge made two points. The first was that he had found in the tally sheets in respect of Kitgum and Gulu Districts, six and eight polling stations respectively, which were neither gazetted nor included in the list of 11th March. He did not, however, disclose what he found, if any, from the tally sheets in respect of the third district, Kamwenge. Of the six he named in Kitgum tally sheets, I found that at least three, i.e. Ngomoromo *"A-E", "F-N"* and *"O-Z"* in Lamwo County, Lokung Sub-county, Pawor Parish, were on the undisclosed Chairman's list, leaving three appearing in the tally sheets only. Then of the eight in the Gulu tally sheets, it appeared that he miss-spelt the name of one, because I could not trace it in the tally sheets.

Five of them, i.e. Kasubi *"A-A", "B-L", "0-0", "114-N'* and *"P-Z"* appeared to be within the description of what appeared on the Chairman's list and on the list of 11th March. In the Gazette there appeared under Gulu Municipality, Sub-county Bar-Dege, Parish Gulu Barracks, *"Polling Station Kasubi (Outside Quarter Guard)"* The list of 11th March showed twelve polling stations under Gulu Barracks Parish. Code Nos.01 and 02 were named Airfield I and II respectively. Code Nos.03 to 12 were named Gulu Barracks and distinguished with letters *"A (A-L)"* up to *"C (0-Z)"* The Chairman's list on the other hand listed only five polling stations as they appeared in the tally sheets. The remaining two were recorded in the tally sheets as *"Bibia Outside Quarter Guard B-N and O-Z"* with a third one recorded separately without the letters. All three however were under Bibia Parish, Atiak Sub-county, Kilak County. In the Gazette there appeared only *"polling station: Bibia Outside Quarter Guard,"* and in the list of 11th March simply *"Bibia Barracks"* The Chairman's list however has all three named *"Bibia Outside Quarter Guard"* and identified as *"A-A "*, *"B-N"* and *"O-Z"* My conclusion from this evidence was also that there were set up and used (at least three in Kitgum and two in Gulu) special polling stations for soldiers which were not disclosed prior to polling.

I am constrained to observe that it remains an unexplained puzzle to me, how those polling stations, 2 in Soroti, 3 in Kitgum, and 2 in Gulu obtained polling materials when they were not reflected even on the Chairman's list.

The second point Mukasa Bulonge made with a thinly veiled innuendo was that he observed in those polling stations he named, that *"the 1st Respondent got results that sharply contrast with the pattern of results got from polling stations that were gazetted and/or in the list submitted on 11th March 2001."*

Learned Counsel for the Petitioner submitted that out of the so-called *sham* polling stations arose ballot stuffing, chasing of agents, multiple, under-age and ghost voting, and falsifying of results. Needless to say, with due respect to counsel, that his conclusion was speculation based on suspicion. A court of law does not base a decision on speculation or suspicion. However, the suspicion and speculation were understandable in circumstances where previously undisclosed polling stations were used for soldiers. That inevitably undermined the principle of transparency.

There was also an anomaly regarding separate registration of soldiers as voters. Chairman Kasujja, explaining a discrepancy in numbers of registered voters deponed in his supplementary affidavit in reply:

"28. That after the referendum of June 2000 the register on cleaning had about 9,308,173 voters, after the update referred to above the number rose to 11,093,948 voters. After display and clean up, the number reduced to 10,672,389. <u>This however did not include soldiers and adults living with them</u> and when they were included the number rose by 103,447 to 10,775,836."

29. …….

30. …….

31. That the number of registered voters rose from 10,672,389 to 10,775,836 due to inclusion of voter soldiers who had previously been registered separately to vote within the barracks and as a result the number of polling stations rose from 17,136 to 17, 308"

It is apparent that the 2nd Respondent compiled a separate *"register"* or *"roll"* for soldiers. This, in my view is another area where the 2nd Respondent misconstrued the law and principles underlying it. Section 38 of the Act empowers the Commission to make special provision *"for the taking of votes"* of the persons specified therein, including soldiers in restricted areas. The section reads:

"38. ***The Commission may make special provision for the taking of votes of patients in hospitals or persons admitted in sanatoria or homes for the aged and similar institutions and also for persons in restricted areas such as soldiers and other security personnel; but the Commission shall publish in the Gazette a list of the restricted areas under this section."***

While it is not necessary for the purposes of this petition to conclusively interpret the application of this provision, largely because the point was not canvassed, I am still constrained to observe that by virtue of the *ejusidem generis* rule, *"restricted areas"* should mean areas where the occupants, like patients in hospitals, and the aged in senatoria, are for some reason, like military operations, not able to come out of the areas readily, for voting with the rest of the community. It

does not appear to me that barracks fall within that description. Be that as it may, while the provision clearly envisages the creation of separate polling stations, it does not envisage the setting up of a separate voters' register as appears to have been done. Inevitably each polling station would have its voters' roll containing only names of voters in the restricted area served by that polling station. However, by virtue of S. 18 of the Commission Act, each such voters' roll forms part of the voters' roll for the Constituency in which the restricted area is situated, and through that becomes an integral part of the national voters' register. In my view having a parallel voters' register for soldiers, which was not integrated in the national voters register is incompatible with the law, and the principle underlying voter registration, and transparency.

Furthermore there was some other evidence which tended to portray the electoral process for the army as parallel to, rather than integrated into, the national electoral process For example in his affidavit Cpl. Oyo, the Political Commissar at Akisim Barracks, deponed that he went through the Army Headquarters at Bombo, to call for the *names of the soldiers from Olilim together with a ballot box* to be transferred to Soroti. That gave the impression that there was a role in the electoral process for the Political Commissar and the Army Headquarters which is not apparent in the law. That would probably have passed off as an innocuous administrative procedure if it did not lead to unexplained polling stations unlawfully set up. Even more glaring is the evidence of Major Nuwagaba John of Bombo Army Barracks. He deponed that at the time of the Presidential elections he was a Captain in UPDF and was *"in charge of the electoral process in the army that is organising conducting and administering the presidential elections."* He confirmed the evidence in the affidavit of one Ongee Marino that on 1 2tI March he flew to Kitgum by helicopter to deliver three ballot boxes containing electoral materials for three Ngom Oromo polling stations for soldiers. He arrived at 7.30 p.m. and held a meeting with the Returning Officer, the District Registrar and Brigade Political Commissar *"concerning the voting of soldiers in Ngom Oromo"* and thereafter flew back leaving the boxes with the District Registrar. Ongee Marino, the Petitioner's monitor for Kitgum deponed that he objected to the three additional ballot boxes being taken to Ngom Oromo and they were taken to the Police Station at about 10 p.m. However the Returning Officer refused his request to open them so as to ascertain the contents.

Further evidence on parallel treatment of the special stations is in regard to the policing. Although Chairman Kasujja insisted in his supplementary affidavit in reply that on polling day, the police and election constables appointed by the Commission, were in charge at polling stations, while the Army was in charge of national security generally, in a circular letter to Returning Officers dated 22 February he instructed them to ***liaise with local Commanders/Political Commissars*** for the latter to identify army personnel who can act as Election Constables and additional Polling Assistants. This was corroborated by John Kisembo the Inspector — General of Police who after explaining the command structure of the Joint Security Task Force in his affidavit, deponed:

"11 policing of the polling stations and tallying centres during the electoral process was only under the Uganda Police save for the army barracks for which the Electoral Commission had made other arrangement" (emphasis is added)

With the foregoing in mind, I am constrained to reiterate my earlier observation that the concept of ***"taking of the votes of persons in restricted areas"*** appears to have been misconstrued. In my opinion, the Commission ought to re-consider its application of that provision if the possible abuse of the process and the general negative impact on transparency are to be avoided. For the reasons I have endeavoured to articulate, I answered issue No.2 in a qualified negative. I was satisfied that while to a large measure the Presidential election was conducted in compliance with the principles laid down in the Act, there was non-compliance with some of the principles as I have indicated above and as summarised in the judgment of the Court.

ISSUE NO. 3

The third framed issue was:

"Whether, if the first and second issues are answered in the affirmative, such non-compliance with the provisions and principles of the said Act, affected the result of the election in a substantial manner."

My answer to this issue was that the non-compliance with provisions and principles of the Act, found to have occurred, did not affect the result of the Presidential election in a substantial manner. Before I discuss my reasons for that conclusion, I will summarise counsel's arguments

submission the issue. The argument mainly centred on the test to be applied in determining the issue.

For the Petitioner, two counsels addressed the court. First, Mr. Mbabazi submitted that in assessing if non-compliance affected the result of the election the Court had to take into account the nature of the non-compliance. He contended that there were two categories of non-compliance; namely, non-compliance which goes to the root of the Constitution, and non-compliance with provisions of the Act only. He submitted that noncompliance which goes to the root of the Constitution IS a substantial noncompliance and must be deemed to have affected the result of the election in a substantial manner. He included in that category, non-compliance with the principle of voter registration which he submitted was so substantially violated that in the end there was no final national voters' register. In the alternative, he submitted that the sum total of all the proved irregularities was so substantial that it affected the result of the election in a substantial manner. His submissions were augumented by Mr. Walubiri who, in reply to submissions by the Respondents' counsel submitted that determination of the issue involved value judgment, whereby the test is qualitative rather than quantitative. He argued that noncompliance with principles cannot be quantified in terms of numbers in the manner counsel for the Respondents demanded. He stressed that the essential principle to be adhered to in a democratic society is that elections shall be free and fair. If, therefore, in an election, non-compliance goes to the root of that principle, the court must annul the result. He invited the Court to follow the approach taken by the Court of Appeal of Tanzania, in its decision in **ATTORNEY GENERAL AND OTHERS vs. KABOUROU** (1995) 2 LRC 757, rather than the precedents relied on by counsel for the Respondents. He specifically urged the Court not to follow the approach taken by the High Court of Tanzania in **MBOWE vs. ELIUFOO** (1967) EA 240, on the ground that it is not consonant with the democratic setting and values Uganda chose and entrenched in the new order, set out in the 1995 Constitution.

On the other hand, Dr. Khaminwa for the 1st Respondent premised his submission on the elementary proposition that, a Petitioner who comes to court seeking annulment of an election, on the ground of noncompliance with provisions of, and principles laid down in the Act, must prove that such noncompliance affected the result of the election in a substantial manner. It is not sufficient to prove that there was non-compliance, or even to prove that the non-compliance was

substantial. For the Petitioner to succeed, it must be proved that the noncompliance had substantial effect on the result. He submitted that the standard of proof in election petitions generally is very high, and that it must be even higher in a petition seeking to annul a Presidential election. He argued that an election result involves figures and numbers, and contended that, therefore, in order to prove effect of non-compliance on the election result, it was inevitable to show that it affected numbers of voters or votes. Learned counsel submitted that, in the instant case, it was not proved that a substantial proportion of the electorate was prevented from voting freely. On the contrary, according to him, the high voter turn-up of 70.3% of the registered voters, and the high proportion of 69.3% and 27.8% of valid votes cast for the 1st Respondent and the Petitioner, respectively, were significant indicators that the election was free and fair and that the electorate was free to vote according to their will. Counsel pointed out the colossal margin between votes cast for the two candidates, and argued that it was not proved that the non-compliance effected that colossal margin. He submitted that far from proving that effect, the Petitioner had pleaded uncertainty and adduced inconclusive evidence. He pointed to sub-paragraph 3(i) (y) (vii) of the petition, where it was pleaded that: *"It cannot positively be ascertained that the 1st Respondent obtained more than 50% of valid votes of those entitled to vote";* and to the evidence, of Frank Mukunzi who claimed to have analysed data related to the results of the election, and concluded that *"from the data that was availed, it was not possible to determine to what extent the (above) errors affected each candidate."*

For the 2nd Respondent the learned Solicitor-General associated himself with counsel for the 1st Respondent and his submissions on the burden and standard of proof in regard to this issue. He submitted that isolated incidents of noncompliance with the principles cannot have had any substantial effect on the result of the election. He reiterated that the Petitioner had failed to prove that such non-compliance as was proved, had affected the result in a substantial manner.

Section 58(6) provides:

"(6) The election of a candidate as President shall <u>only</u> be annulled on any of the following grounds if proved to the satisfaction of the court-

(a) non-compliance with provisions of this Act if the *court* ***is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner***

(b) that the candidate was at the time of his or her election not qualified or was disqualified for election as President;

(c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval." (Emphasis is added).

Issue No.3 in this petition relates to the application of paragraph (a) of that subsection. It is centred on the meaning of the phrase *"affected the result of the election in a substantial manner."* The result of an election may be perceived in two senses. On the one hand, it may be perceived in the sense that one candidate has won, and the other contesting candidates have lost the election. In that sense, if it is said that a stated factor affected the result, it implies that the declared winner would not have won but for that stated factor; and vice versa. On the other hand, the result of an election may be perceived in the sense of what votes each candidate obtained. In that sense to say that a given factor affected the result implies that the votes obtained by each candidate would have been different if that factor had not occurred or existed. In the later perception unlike in the former, degrees of effect, such as insignificant or substantial, have practical meaning. To my understanding, therefore, the expression *"non-compliance affected the result of the election in a substantial manner"* as used in S.58(6) (a), can only mean that the votes candidate obtained would have been different in a substantial manner, if it were not for the noncompliance substantially. That means that, to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt. This is the view the learned Chief Justice of Tanzania, Georges C.J., stated differently in MBOWE vs. ELIUFOO (supra) when he said at p.242 D-E.

> ***"In my view in the phrase "affected the result" the word "result" means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved***

irregularities the contest 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 it cannot be said that the result of the election would be affected by any particular non-compliance of the rules."

Mr. Walubiri contended that the decision of the Court of Appeal of Tanzania in ATTORNEY-GENERALV KABOUROU (supra) reflects a different view. That contention appeared to be based on the following statement of the Court in its judgment at p.772 d-e of the report:

"….taking into account the principle which underlies the Constitution and the 1985 Act that elections shall be free and fair, we are of the considered opinion that an election which is generally unfree and unfair is not an election at all as invisaqed by the Constitution and the 1985 Act, and consequently anything which renders the elections unfree and/or unfair is in law valid ground for nullification of such purported election. We are further of the considered opinion that any law which seeks to protect unfree and/or unfair elections from nullification would be unconstitutional" (emphasis is added)

That statement however should not be taken out of context.

It is evidently to me that both the original court and the appellate court in coming to their decisions in ATTORNEY-GENERAL VS KABOUROU took the effect of the non-compliance in issue into account. The subject matter of the petition was the result of a by-election. The Petitioner established two major aspects of non-compliance with the principle of *"fair election"* namely-

(a) that in supporting the candidate of the ruling CCM party, the central government had, with corrupt motive to influence voters, undertaken to repair a road in the constituency in consideration of the constituents voting for him; and

(b) that a government radio gave to the CCM party's campaign, more air-time, than it gave to other competing parties combined, and had shown in its own broadcasts bias in favour of the CCM party.

In assessing whether the non-compliance affected the result in favour of the ruling party's candidate, the courts took into account the number of voters that were exposed to those acts which constituted non-compliance. Thus in respect of the undertaking to repair the road, the courts had to be, and were satisfied that, the undertaking was promised by cabinet ministers at very well attended rallies of people in the constituency. And as regards the broadcasts, the Court of Appeal took judicial notice of the common knowledge that many people in rural and urban areas in Tanzania possessed radio sets, and regularly listened to the government radio. From that the Court inferred that a large number of people in the Constituency listened to the broadcasts regarding the by-election. But the Court went further to pose the question: ***"But did these broadcasts affect the results of the by election in favour of the CCM candidate?"*** which it answered thus:

> ***"Having examined the contents of various broadcasts and bearing in mind the time tested maxim that information is power, we are bound to conclude to the effect that these broadcasts in favour of CCM must have influenced the by- election results in favour of the CCM candidate."***

I take that to be the ***ratio decidendi*** of that case, rather than the opinion that the court expressed about ***"a generally unfree and unfair election,"*** which I reproduced earlier. In my considered opinion therefore, that decision is not authority for the proposition that non-compliance with a principle laid down in the Constitution is sufficient ground for annulment of an election without proof that it affected the result of the election.

In **IBRAHIM vs. SHAGARI & OTHERS** (1985) LRC (Const.) 1, the Supreme Court of Nigeria considered a law, expressed in the negative form, stating when an election is not to be invalidated. It provided that *"an election shall not be invalidated by reason of non-compliance with Part II of the Act if it appears to the Court……that the election was conducted substantially in accordance with provisions of the said Part II and that non-compliance did not affect the result of the election."* Reflecting on that provision, Nnamani J.S.C, said in his judgment at p.21:

"……the court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act it will not invalidate it. The wording of

section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be avoided if the non-compliance so resulting and established in court by credible evidence is substantial Further the court will take into account the effect if any which such noncompliance with provisions of Part II of the Electoral Act 1982 has had on the result of the election (from that consideration) the duty to satisfy the court that a particular non-compliance with the provisions of Part II of the Electoral Act which he has averred in his petition, lies on the Petitioner."

Several relatively recent decisions of the English Courts referred to us were concerned with legislation similarly expressed in negative form, to the effect that *an election shall not be declared invalid* by reason of breach of duty in connection with the election, or breach of the election rules, *"if it appears to the Court that the election was so conducted as to be substantially in accordance with the law as to elections and that the (breach) did not affect the result."*

All those decisions revolved around the effect of the breach on the result of the election. Two of the decisions demonstrate this point very well. MORGAN vs. SIMPSON (1974) QB 344 and GUNN vs. SHARPE (1974) 1 QB 808 were decided by the Divisional Court about the same time. In MORGANS case the petitioners sought annulment of an election on the ground that 44 ballot papers had been rejected as invalid because they were not stamped with the official mark. It was proved that if the 44 ballot papers had not been invalidated for want of the official mark, the petitioner would have won with a majority of 7 votes, instead of the respondent winning with 11 votes as declared. The failure to stamp the ballot papers had therefore affected the result. However, the Divisional Court dismissed the petition, holding that since the election was conducted substantially in accordance with the law as to elections, the fact that a small number of errors had affected the result was not a sufficient reason for declaring the election invalid. The petitioners appealed. While that appeal was pending the Divisional Court on 10th April 1974 gave judgment in GUNN vs. SHARE (supra) which was based on a similar complaint, in that failure to stamp 102 ballot papers with the official mark, had similarly and demonstrably affected the result. The court chose not to follow its decision in MORGAN' case (supra) but to distinguish it on facts. The difference was that in the case of the 44 ballot papers, the failure to stamp them had been spread over 18 polling stations, whereas in GUNN'S case, out of the 102 unstamped

ballot papers from 10 polling stations, 98 ballot papers were from only one polling station, so that over half of the voters who sought to vote at that particular polling station had been disfranchised. On that account, the Divisional Court held the failure to stamp the ballot papers with the official mark, to amount ***to conduct of an election which was not substantially in accordance with the law as to election.*** And because it affected the result, the election was held to be invalid. A few months later, the Court of Appeal delivered judgment in the MORGAN vs. SIMPSON appeal, allowing the appeal. The head note of the report in (1975) 1QB 151 reads in part:

> "……..***the election must be declared invalid for although it had been conducted substantially in accordance with the law as to elections the breach of the rules in omitting to stamp the 44 papers had affected the result....***"

In his judgment Lord Denning M.R., commented on the decision of the Divisional Court in GUNN's (supra). He said at p.164:

"They (Judges in GUNN's Case) put it on the ground that the election was not so conducted as to be substantially in accordance with the law as to elections. But I think it should have been put on the ground that the mistake did affect ii result of the election."

In the later case of RUFFLE vs. ROGERS (1982)1 GB 1220, the same problem of omitting to stamp ballot papers with the official mark had led to a declaration of one candidate as elected by majority of two, whereas the result would have been a tie between the two candidates if those ballot papers had been duly stamped. Because the result was thus affected by the failure to stamp the ballot papers, the election was held to be void.

Among the English precedents referred to this Court, I did not come across any which decided to annul an election on ground of a breach of the law or rules which did not affect the result. However in MORGAN vs. SIMPSON. (supra) the Court of Appeal made observations that were supportive of that proposition. Although counsel for the Petitioner in this petition, did not seek to rely on them, the observations helped me in focusing on the interpretation to put on S.58 (6) (a) of the Act. Lord Denning M.R., after reviewing the history of the law on elections, suggested, ***inter alia,*** that if an election was conducted so badly that it was not substantially in accordance

with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. Stephenson L.J. interpreting the provision that no election shall be invalidated *"if it appears that the election was so conducted as to be substantially in accordance with the law as to elections and that the (breach) did not affect its result"* said at p.16l:

> ***"……an election will stand if there have been breaches of the law but they are not substantial or they have not affected the result.***
>
> ***We are not required to read the conjunction "and" disjunctively if we are to give effect to the intention of Parliament……. This construction seems to be in accordance with the common law and common sense and with decisions that an election which is conducted in violation of the principles of an election by ballot is no real election and should be declared void even though it may not or could not have affected the result ……There is no case cited to us which conflicts with the conclusion that such a substantial misconduct of an election must avoid it."***

The common sense view referred to me to, seems to be this: Where an election is substantially conducted in compliance with the law it is not to be invalidated because the noncompliance is not substantial. It should therefore, follow that where the noncompliance was substantial the election ought to be invalidated. That reasoning appears to fit in well with the statutory provision expressed in the negative form, because it has the effect of leaving non-Compliance open- ended as a ground of validating an election, providing only exceptional circumstances when an election will not invalidated despite noncompliance The same reasoning, however, does not appear to suit the statutory provision such as S.58(6) (a), which limits the circumstances when non-compliance will operate as a ground for annulment of the election. The limitation is the effect on the result. To my understanding, for the ground under S.58 (6) (a) to succeed, the Court has to be satisfied on two things, not on only one of the two. The Court has to be satisfied-

that the election was not conducted in accordance with the principles laid down in the provisions of the Act that the noncompliance affected the result of the election in a substantial manner.

There is only one ground set out in paragraph (a) of s.58 (6) of the Act. In my view to hold that an election could be annulled on the ground that non-compliance was substantial would be adding a fresh ground for annulment. It is in that regard that ATTORNEY-GENERAL vs. KABOUROU (supra) is distinguishable. There, the statutory provision was expressed in the negative formular which I have just described. The trial court held, and it was upheld by the Court of Appeal, that the list of grounds for annulment of an election set out in the statute was not exhaustive. Clearly the same cannot be said of S.58 (6) of the Act, where the list is expressly made exhaustive by the phrase that (the election) *"shall only be annulled on any of the following grounds."*

Those grounds defined in paragraphs (a) (b) and (c) do not include *"substantial non-compliance"* with provisions or principles in the Act. Parliament, either deliberately or inadvertently did not include it. I incline to the view that it was deliberately omitted. I am strengthened in that view by the difference in wording in paragraph (a) from that in paragraph (b) and (C). Whereas each of the latter two grounds (which relate to qualification and conduct by a candidate) is sufficient irrespective of the effect on the result, the former is conditional on the effect it has on the result of the election. This Court cannot include the ground of *substantial non-compliance either* by removing or otherwise altering the limitation in paragraph (a), or by adding it to the list as a fourth ground.

I am of course mindful of what Stephenson L.J. called an election *"which is no real election"*, in MAROGAN'S case; and also of what was described in ATTORNEY-GENERAL vs. KABOUROU by the Court of Appeal of Tanzania as *"a purported election that is not an election at all as invisaged by the Constitution."* That, however, was not the scenario presented in the instant petition. What was presented in this petition was an election invisaged in the Constitution, which, however was faulted by failure to abide by the law and principles which govern the proper conduct of elections. Moreover in the Ugandan judicial context, the appropriate court to determine and declare that a purported Presidential election was not an election invisaged by the Constitution, and is therefore, unconstitutional, would, in my considered opinion, be the Constitutional Court, moved under Art.137 of the Constitution. Similarly, whilst I respectfully share the opinion expressed in ATTORNEY-GENERAL VS KABOUROU, that *"any law which seeks to protect unfree and/or unfair elections from*

nullification would be unconstitutional", in Uganda it is the same Constitutional Court that has the competence to declare that by so seeking to protect such election, the law is inconsistent with, or in contravention of, the Constitution and therefore unconstitutional.

I now turn to the reasons for the conclusion that, in the instant petition, the non-compliance found to have occurred, was not proved to have affected the result of the election in a substantial manner. I have already indicated the reasons why I rejected the proposition that it was not necessary to prove the effect of non-compliance on the election result. I had, therefore, to consider the alternative, namely whether in absence of direct proof, the effect could have been inferred from the proved non-compliance. In my view, for the Petitioner to succeed that way, the Court would have to find that the only irresistible inference to be drawn from the evidence on the several aspects that constituted non-compliance is that the non-compliance affected the result of the election in a substantial manner. I was not convinced that the Court could so find in the instant case. I will comment on each aspect separately and finally on the overall non-compliance, in relation to the election result.

Failure to comply with ss.28 and 32(5) of the Act:

The Petitioner did not adduce evidence on the effect of non-compliance with S.28 of the Act. However, by way of arguments it was contended that because the Petitioner was not made aware of all the polling stations in time, he was deprived of the opportunity to appoint agents at the new polling stations. Even that argument was not seriously canvassed. No evidence was brought to show, in actual terms, at how many polling stations the Petitioner was not represented because he was not notified, or was belatedly notified of them. In my view that was necessary before inviting the Court to infer that the omission affected the result. But an attempt was made through Mukasa David Bulonge, Head of Election Management in the Petitioner's Task Force. He deponed in a supplementary affidavit that he selected as sample from tally sheets from Mbarara, Bushenyi, Kamuli and Pader districts, results of twenty polling stations which were not gazetted. He concluded from those results that the l Respondent *"received a far higher percentage of the votes cast in the newly created polling stations* (ranging between 72% and 100/%) *than he did nationwide (69.3%)."* Even if that conclusion had been taken as correct, and there were several reasons to suggest that it was not accurately representative of 1,176 new polling stations, it is not a fact from which any reasonable court would infer, conclusively that if the polling stations had

been gazetted and the Petitioner was represented thereat by polling agents, the voting, and consequently the result would have been different. Nor can a court of law infer from that conclusion that all or any votes cast in those polling stations were irregularly cast, as was submitted by Mr. Mbabazi in respect of what he called *"ghost"* polling stations. I venture to say that the evidence would have carried more weight if Mukasa David Bulonge had focused on new polling stations in respect of which there was evidence of irregular voting.

Similarly I did not find evidence that proved directly, or from which it could be inferred, that failure on the 2nd Respondent's part to avail copies of voters' roll for use by the Petitioner's agents as required under s.32(5) affected, or could have affected, the result of the election.

Effect of intimidation:

Intimidation in the electoral process may, as I have indicated manifest in diverse forms, from acts of violence and harassment, to invasion of secrecy of voting. It can affect the result in two ways. In one way, it may prevent fair competition between or among the contesting candidates. Secondly it may cause voters not to vote according to their free will, either by compelling them not to vote or to vote for a candidate they do not freely choose. The extent, to which fair competition is prevented by intimidation, can be proved by direct evidence. Similarly proof of the extent to which voters are prevented from voting because of intimidation, can be by direct evidence. However the Court cannot demand, and does not expect, proof of the effect of intimidation as would require a voter to disclose how, or for whom, he or she voted, as that would be a violation of the principle of secret ballot. Learned counsel for the Petitioner contended that in those circumstances, it is not possible to quantify the effect of intimidation in terms of figures and numbers of voters or votes. I agreed with that contention in as much as there is bound to be *invisible* effect of intimidation which is not seen or easily perceived. That, however, would not be reason for a court to readily conclude that any amount of intimidation affected the result. Nor, conversely, should it be ground for the court to lightly dismiss evidence of intimidation because its effect on the final result is not established in figures and numbers. Ultimately, what the court must determine judicially is whether in view of the proved intimidation, the election result is a consequence of intimidation, or whether despite the intimidation the result is a choice made freely by the majority of the voters. Needless to say

therefore, that proof of the level and extent of the intimidation is very material for that determination. On the one hand the intimidation may be so grave and extended to such large proportion of the electorate that it becomes compelling or irresistible to infer that it affected the result. On the other hand, the intimidation may have been such as would not compel an average voter to act against his or her will, or may have been confined to a relatively small proportion of the electorate. In such eventuality the court would not infer that the intimidation affected the result, except where the contest was so close that the court is led to the conclusion that this balance in the context was swung or tilted by the intimidation.

This was very clearly pointed out by Bramwell B. in the North Durhan Case 2 O'M & H. 152 at p.156 where after reference to intimidation perpetrated by a candidate or his agent he went on to say:-

> "…….there ***is another intimidation that has been called a common law intimidation, and it applies to a case where the intimidation is of such a character, so general and extensive in its operation that it cannot be said that the polling was a fair representation of the opinion of the Constituency. If the intimidation was local or partial, for instance, if in this case it had been limited to one district as Hetton is, I have no doubt that in that case it would have been wrong to have set aside this election, because one could have seen to demonstration that the result could not possibly have been brought about by intimidation, and that the result would not have been different if it had not existed. I do not mean the result of the polling in that particular district, but the general result of the majority for the Respondents. But where it is of such a general character that the result might have been affected in my judgment it is no part of the duty of Judge to enter into a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence if that intimidation had not existed, the result would have been different."***

And later he observed:

"….I think if it were otherwise, and if one were told that partial intimidation would avoid an election, although it were certain that it had affected the result of the election, the consequence would be that a few mischievous persons might upset every election-"

I respectively agree but with one necessary qualification in view of the standard proof required under S.58 (6) of the Act. The Court must be satisfied as matter of conclusion upon the evidence that the intimidation did affect the result in a substantial manner.

In this petition, as I have already indicated, intimidation was proved to my satisfaction to have occurred in a few areas. There was however scanty direct evidence on the effect the intimidation had on the voting. Only a few deponents averred that they did not vote, either because they were intimidated or because they were physically prevented as they were unlawfully detained. The evidence of intimidation in Rukungiri, however, was of such gravity and so generalised that I concluded it must have had effect on the voting there. It was not directed at the Petitioner and his agents alone, but it also reached out to the supporters and other voters who turned up to meet the Petitioner or to attend his rally, and the rallies addressed by his campaign agents, and were violently dispersed by soldiers. The violence and harassment led to personal injuries and deprivation of liberty of the victims and must have caused apprehension and fear of the same by those who witnessed the occurrences as well as the close neighbours who heard of it. As late as just over a week prior to polling day, a person was shot dead in a violence that erupted after a rally addressed by the Petitioner in Rukungiri Town. On polling day the Petitioner's polling agents were openly harassed out of some polling stations they were supposed to oversee.

In Kamwenge District intimidation was more individualised. Apart from the incident when the Petitioner went to hold a rally in Kamwenge Town, for the rest of the campaign period harassment was against the Petitioner's agents and known supporters only. Some suffered physical assault, unlawful detention and damage to property while others were subjected to threats.

The evidence adduced showed that on polling day there were two forms of intimidation generally. One was the harassment of some of the Petitioner's polling agents. Significantly apart from that this was no evidence of physical intimidation directed at voters on polling day. The other form of intimidation on polling day was the interference with the right of the voter to vote in secret. The latter form of intimidation was manifested not only in the two districts but also in few other places, particularly in the special polling stations for soldiers.

Effect of irregular voting:

It was proved to my satisfaction that an unascertained number of ballot papers were illegally cast as votes for 1St Respondent. Undoubtedly those ballots must have been counted among the total number of votes he obtained. To that extent they affected the result in the sense that the 1St Respondent obtained more votes than he would have obtained if those ballot papers had not been illegally cast in his favour. However, the Petitioner did not attempt to prove how many of such votes were included in the 1st Respondent's total. He did not even adduce credible evidence from which the Court could infer that the illegal voting was so excessive and/or widespread that it must have affected the result in a substantial manner. I noted from the admissible and credible affidavit evidence concerning irregularities of stuffing of ballot boxes, multiple voting, pre-ticking and open voting, that the number of affected polling stations were 12 in Rukungiri, 6 in Ntungamo, 3 in Kabale, 2 in Sembabule, 2 in Soroti, and 1 each in Busia, Mayuge, Mbarara and Tororo Districts. The witnesses were not able to tell with any precision the numbers of ballot papers which they saw being cast illegally. Some of the witnesses attempted to estimate, but I did not think it was safe to place much reliance on those estimates, as only a few were shown to have been made with any deliberate effort to be accurate. The number of polling stations, i.e. about 30 (if I include the attempt at Bunyaruguru), in about 10 districts, is significant enough to warrant mention. It showed that the irregularities in voting which I have described were not accidental or isolated incidents. It showed that there were electoral officials and other operatives who had little regard, if any, for the democratic principles governing elections, and who were prepared to pervert the will of the electorate through those irregularities. Nevertheless 30 polling stations is a very small fraction of 17,308 polling stations nationwide. The number of illegal votes cast and counted in favour of the 1st Respondent in those polling stations was not indicated, but cannot have exceeded the maximum possible in a polling station.

Effect of non-compliance as a whole:

After evaluating that evidence and taking into account that the burden of proof was on the Petitioner, I was not satisfied that the election result was not a reflection of the majority of the voters. The first consideration I took into account was voter turn-up. In the normal course of things, intimidation of the electorate would be reflected by low voter turn-up. Indeed the Petitioner pleaded that many voters abstained from voting due to intimidation. In the two most affected districts, however, intimidation does not appear to have had that effect. The voter turn-

up in Rukungiri was 82.5% and in Kamwenge it was 92.1% both being well over the average national voter turn-up which was 70.3% of the registered voters. I considered the possibility, but was not persuaded, that those high figures were a consequence of stuffing ballot boxes and other forms of irregular voting rather than physical voter turn-up. The numbers of polling stations, in respect of which there was evidence of irregular voting, were not so excessive as to lead to such an inference.

Secondly I took into account the fact that the result under consideration was the result of the whole national constituency, not the result in the areas affected by the irregularities. In the result of the national constituency, the Petitioner obtained 2,055,795 votes and the 1st Respondent obtained 5,123,360 votes. The other four candidates obtained a total of 210,536 votes among them. The 1st Respondent worn with an overall majority of 2,857,023 votes. Even if the Court discounted all the votes obtained by the 1st Respondent in the two districts of Rukungiri and Kamwenge, and in the polling stations where irregular voting was proved, (an extreme scenario contemplated only for illustration purposes) the 1st Respondent would still retain a huge overall majority. In Rukungiri and Kamwenge the 1st Respondent obtained a total of 317,195 votes. Although the Court was not availed actual votes he obtained in the 18 polling stations outside the two districts, where irregular voting was proved to my satisfaction, they could not have exceeded 1 8000 votes, since the total number of votes cast in any one polling station was under 1000. Clearly even in that imaginary scenario he would retain a majority of over 2.5 million votes. In the circumstances I could not hold that there was evidence on which the Court could be satisfied that non-compliance with provisions and principles laid down in the Act had affected the result in a substantial manner. Accordingly I answered issue No.3 in the negative.

Before leaving this issue, I am constrained to observe that the effort exhibited in proving the irregularities that constituted the non-compliance was not matched by that put in proving the effect of the irregularities on the result of the election. This may well have been a consequence of the preferred position of counsel for the Petitioner, that because the non-compliance *"went to the root of the Constitution"* it was not necessary to prove expressly that it affected the result. In my considered view, too much reliance was placed on the *"say so"* of eye witnesses, and inaccurate forms, when verification through cross-checking of scrutiny could or might have either strengthened such evidence of shown that it was not worth pursuing.

In his affidavit in reply to the 2nd Respondent, the Petitioner deponed in paragraph 40 thus:

> ***"40. That I know if the ballot boxes in the said districts are opened the serial numbers of the ballot papers issued to the polling stations would not match the ballot papers in the ballot boxes as they contain stuffed ballot papers."***

He reiterated this in paragraph 44 in respect of one particular form. Thus he hinted at the need for examination of ballot papers but did not apply for it. When the Petitioner was facilitated to access ballot boxes, it does not appear that the opportunity was utilised to verify the eye witness accounts of ballot box stuffing. It appears no examination of serial numbers of ballot papers in the opened boxes was done. Twinamasiko Jackson who, on behalf of the Petitioner, went to Rukungiri on that errand deponed that ballot boxes for seven polling stations were opened for him. None of the polling stations he named, however, was mentioned by the eye witnesses who saw the ballot stuffing. Indeed he did not give the impression that he went on a search for stuffed ballot papers. The substance of his affidavit was:

"6. ***That the results of four polling stations were not tallying with the register of voters roll (sic) and this was especially seen in Katoojo I"***

He did not elaborate. He only annexed copies of the voters' rolls, declaration of results forms, and tally sheets in respect of four polling stations, except the first page of the voters' roll and the declaration of results form for Katoojo I polling station. Without any elaboration, I was not able to detect in what way the results did not tally with the register of voters.

Ndomugenyi Robert went to Bushenyi and Mbarara Districts on a similar errand. At Bushenyi he had ballot boxes of three polling stations opened. He took photocopies of declaration of results forms and voters' rolls from the ballot boxes. He annexed them to his affidavit. One of the three polling stations was Ishaka Adventist College, in respect of which the Petitioner had asserted that the result form showed ballot stuffing. He did not make any comment on what he found in that box or in the other two. At Mbarara he also had ballot boxes for four polling stations opened for him. He obtained photocopies of similar documents, and in addition, tally sheets reflecting particulars for those three polling stations. He also annexed those photocopies to his affidavit. He commented on only one of the four polling stations thus:

"That at Mirongo the number of voters on voters register who voted were 687 and yet the tally sheet certified by the electoral Commission indicates that Respondent alone got 781 votes more than the number of people who voted."

I assume he determined the number of those who voted by counting from the roll, the registered names which were ticked. That however, is not full-proof. The difference of 94 votes could be a result of illegal ballot stuffing, just as it could result from omission to tick names of 94 persons who voted. The more reliable way to ascertain the cause of the discrepancy, would have been to examine whether or not the serial numbers of the ballot papers in that ballot box matched the serial numbers of the ballot papers officially issued to the polling station as had been suggested by the Petitioner in his affidavit. The opportunity was lost.

ISSUE NO. 4:

The fourth framed issue was:

"Whether an illegal practice or any other offence under the said Act was committed in connection with the said election, by the 1st Respondent personally or with his knowledge and consent or approval"

This arose from the pleading in the petition, that the 1st Respondent had committed several illegal practices and other offences under the Act, in connection with the election, which pleadings the 1st Respondent denied. I answered this issue also in the negative. Before I elaborate on my reasons, let me dispose of three general propositions made in submissions of learned counsel on both sides. The first made by Mr. Walubiri for the Petitioner, relates to liability of the 1st Respondent for illegal practices or offences committed by his agents for his benefit. Learned counsel contended that a candidate is liable for an illegal practice or offence committed by his agent in the course of promoting the candidate's election. He relied on English precedents to submit that even where an agent is expressly prohibited to do an act, but does it anyway, in the course of his agency, and within the scope of his authority, the candidate is bound because knowledge is inferred from the appointment and consent is implied. He referred the Court, *inter alia*, to The Digest: Annotated British Commonwealth and European Cases (1982, London, Butterworth's & Co.) Vol. 20 at p.72 para 646. With due respect I was not persuaded

that the annoted decisions in that work were applying law similar to the statutory provision in s.58(6) (C) of the Act. For example, in the particular paragraph learned counsel cited Lush J., is quoted as saying in HARWICH CASE. TOMLINE vs. TYLER (1880) 44 LT 187:

> ***"…….As regards the seat, the candidate is responsible for all the misdeeds of his agent committed within the scope of his authority, although they were done against his express directions, and even in defiance of them The authority may be actual or it may be implied from circumstances If a person were appointed or accepted as agent for canvassing generally the candidate would lose his seat."***

In the same work at p.71, paragraph 644 is a quotation from **Willes J. in BLACKBURN CASE, POTTER & FIELDEN vs. HORNBY FIELDEN (**1869) 20 L.T, 829, saying:

> "…….***no matter how clearly his (candidate's) character may be from any imputation of corrupt practice in the matter (election), yet if an authorised agent of his, a person who has been set in motion by him to conduct the election, or canvass voters on his behalf, is in the course of this agency guilty of corrupt practices, an election obtained under such circumstances cannot be maintained."***

To hold that those propositions fit within the ambit of the provision in S.58 (6) (c) of the Act, would, in my view, be tantamount to re-writing the provision. Under that section, it is clear that an illegal practice or other offence which was not committed by the candidate can be sustained as a ground for annulment of his election, only if it is proved to the satisfaction of the Court that it was committed with the candidate's *"knowledge and consent,"* or with his or her *"knowledge and approval."* I do not see how the Court can be so satisfied where the candidate expressly directed the illegal practice not to be done, thereby refusing to consent thereto. To my understanding the legislature chose to use those words in order to limit the application of the sanction to only such an illegal practice or offence as the candidate assumed personal responsibility for, *either* through consent where he or she had prior knowledge, *or* through approval upon subsequent knowledge, of its being committed. It is noteworthy that the operation of the provision is not tagged to the relationship between the candidate and the perpetrator of the offence, but to the candidate's knowledge of, and consent to, or approval of, the commission of

the offence. My interpretation is that the provision is not a restatement of the common law doctrine of vicarious liability or the principle of agency.

The second proposition was by Dr. Byamugisha the first lead counsel for the 1st Respondent, and can be stated briefly. He contended that the 1st Respondent, as a candidate at the election, should not be held responsible for acts of the Government or of government agents, for purposes of S.58 (6) (C) of the Act. With due respect to learned counsel, I do not find that to be tenable. The Constitution permits an incumbent President to run for a second term through contesting an election while he is still holding office. It does not thereby split him into two distinct persons. A suggestion that an act done by Government or its agents with the 1st Respondent's knowledge and consent or approval as Head of that Government, was done without his knowledge and consent or approval as a candidate, cannot be sustained as a matter of law or a matter of fact. The incumbent President is allowed by law to retain and use his facilities of office while contesting the elections as a candidate. He must also, as such candidate, take full responsibility, for what he does and what is done with his knowledge and consent or approval by virtue of that office, in connection with the election.

The third proposition was Dr. Byamugisha's contention that proof that an elected candidate committed an illegal practice or other offence, under the Act, was not *per se* sufficient ground to annul a Presidential election, unless it is shown that the illegal practice or offence rendered the election unfree and/or unfair. His premise for that contention was that an election which is free and fair, in accordance with Art. 1 (4) of the Constitution, is a valid election. He argued that the only Constitutional requirement for validity of an election was that it be free and fair. According to him any other condition imposed for validity of an election, would be inconsistent with Art.1 (4), and to that extent would be void by virtue of Art.2.of the Constitution. I was not persuaded by that argument either. Art. 1 (4) of the Constitution cannot, by any stretch of interpretation, be construed as laying down ***"specifications"*** for a valid election. The provision is a statement on how the people shall express their will and consent. It reads:

> ***"(4) The people shall express their will and consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda."***

The framers of the Constitution did not expressly or by implication mean by that provision, that once the will and consent of the people is expressed in that manner, the result would become inviolable or unimpeachable. On the contrary in Art.104 (9) of the Constitution, Parliament was, without any restrictions or conditions, mandated to make laws, *inter al/a*, for grounds of annulment of a Presidential election. Parliament, acting within that mandate made the law in S.58(6) and clearly provided in paragraph (c) that a successful candidate who committed an illegal practice or an offence in connection with the election, would, without more, be barred from taking office. This is where Parliament, if I may use the expression, *put value above all other considerations.* The effect of the legislation in paragraphs (b) and (C) of S.58 (6) of the Act, is to prohibit a candidate who may have been chosen by the majority, from taking office on grounds of personal *unfitness.* Parliament in those paragraphs provided that a person who was not qualified or was disqualified, and a person who committed an illegal practice or other offence under the Act, ought not to take the office of President, notwithstanding that the election may otherwise have been conducted in compliance with provisions and principles laid down under the Act; and irrespective of whether or not the disqualification or the illegal practice affected the result of the election.

Illegal Practices and Offences:

I now turn to the matters which were pleaded in paragraphs 3(2) (a) to (e) of the petition, as constituting the illegal practices and offences, committed by the 1st Respondent or by others with his knowledge and consent or approval. In summary they were that the 1st Respondent:

(a) made a false statement that the Petitioner was a victim of AIDS, contrary to S.65 of the Act;

(b) gave and offered gifts to induce voters, contrary to S.63 of the Act;

(c) appointed partisan military officers to take charge of security and deployed a partisan section of the army all over the country, contrary to S. 12 (1) (e) and (f) of the Commission Act;

(d) organised groups under PPU and a Senior Presidential Advisor to use force and violence, contrary to S.25 (b) of the Act

(e) threatened the Petitioner with death contrary to S.25(e) of the Act.

I found that the pleadings, under paragraph (c) (d) and (e), were misconceived and/or were not seriously canvassed during the trial. I will comment on them first, starting with the appointment and deployment of partisan officers and a partisan section of the army. There was no evidence adduced to prove that the military officers appointed to take charge of security, were *"partisan"*, and/or *"that a partisan section of the army"* was deployed all over the country. It was not even explained what was meant by partisan officers and partisan section of the army. Secondly, neither the said appointment nor the said deployment contravened provisions of S.12(1) (e) and (f) of the Commission Act, which provisions set out powers of the Commission to ensure that there are conditions of freedom, fairness and security for the conduct of elections. Apart from making the assertion in the petition and the accompanying affidavit, the Petitioner did not adduce evidence about the said appointment and deployment except annexing to his affidavit the Army Commander's press release on the subject.

The direct evidence which the Court received on the subject, was from the 1st Respondent, the Army Commander, and the Inspector — General of Police. In a nutshell it was to the following effect. In January 2001, because of apprehension that there would be a rise in election related crime, Government decided to supplement the inadequate police capability, as had been done on previous important national events. A National Security Task Force comprising the Police, Army, LDUs and Intelligence agencies, to oversee and manage security in the country during the electoral process, was set up with a joint command. At the national level it was under the chairmanship of the Army Commander. At the district level, the District Police Commander was the overall in charge of security. The Army Commander's press release dated 9th March which was annexed to the Petitioner's affidavit reiterated the foregoing and endeavoured to justify it. It was apparently reacting to what he called *"the contention by some presidential candidates."* In it, he assured that the army would not be involved in election activities but would be a stand-by force.

On basis of that evidence, Mr. Walubiri argued that a case was made out that the 1st Respondent was liable for an illegal practice or offence. Learned counsel premised the argument on two contentions. First he contended that as a matter of evidence it had been proved that the deployment of the army, far from ensuring security, had become the source of insecurity. Secondly he contended that, as a matter of law, the deployment of the army had been illegal. He

argued that the 1st Respondent was responsible for the illegal deployment, as well as for the insecurity caused by the army personnel so deployed.

In support of his first contention, (which I understood to relate to the army excluding PPU), learned counsel relied on affidavits of nine deponents. Two of those he mentioned, however, were irrelevant. Anteli Twahirwa and Sande Wilson, both of the Petitioner's Kabale Task Force, did not say anything on insecurity caused by the army. Affidavits of John Kijumba of Bukonzo West, and Kimumwe Ibrahim of Bukoli South were so trivial; I need not review them here. As for Mary Semambo, Chairperson of the Petitioner's Mbarara Task Force, despite claiming to have sworn from her knowledge, what she deponed in paragraph 6 of her affidavit, on the occurrences in *"many polling stations in Nyabushozi and Isingiro"* were clearly inadmissible hearsay gathered from agents. Suliman Niiro of Bukoli North, in Bugiri, and Baguma John Henry of Bukonzo West, in Kasese, witnessed soldiers from RDC's office or with RDC, involved in irregular voting not causing insecurity. The witnesses he referred to, whose evidence has some bearing on insecurity caused by soldiers were Alex Busingye, the Petitioner's overseer in Kazo County Mbarara, and Masasiro Stephen, Petitioner's polling agent at Nkusi Primary School polling station in Bungokho, Mbale. The former deponed that at Nkungu polling station he saw a monitor who had been tied up and bundled on a pick-up Reg. No.114 UBS in which UPDF soldiers were travelling. That evidence, however, was refuted by Mbabazi Kalinda, the Presiding Officer at that polling station who deponed that he did not witness anyone tied, and that Alex Busingye was polling agent at the station and did not report the incident. The incident at Nkusi Primary School is more serious as it involves allegation of shooting at a polling station. According to Masasaro, after 12 voters who had turned up, had peacefully cast their votes, the area Sub-county Chief, a Councilor, and the 1st Respondent's area task force Chairman arrived, escorted by four armed soldiers. The soldiers shot in the air and the said officials started stuffing ballot papers in the ballot box. Upon protesting, the deponent and his colleague were severely assaulted. That evidence was also disputed by the Sub-county Chief who deponed that he had gone to that station in response to a report that the said Masasiro was obstructing women from voting. Although I believed the evidence of Alex Busingye and of Masasiro, I did not share learned counsel's view that, that evidence supported his contention. To my mind, the incidents described, did not arise from the deployment of the army, and could hardly be described as acts of insecurity committed with the knowledge and consent or approval of the 1st Respondent.

On the contention that the deployment of the army was not authorised by law, learned counsel went to great length to show that previous deployments, mentioned by the Army Commander and the Inspector — General of Police were bad precedents, since they too had not been authorised by the law governing the events in question. He stressed that deploying the military in civilian police work, other than during emergency declared in accordance with the Constitution, is illegal. I don't find it necessary to discuss that contention here because, in my view, it was a *red herring.* Whether the deployment was unconstitutional was not subject of inquiry in this trial. What was relevant under this issue was whether deployment of the army in the manner that it was deployed, constituted an illegal practice or other offence under the Act. Counsel did not point to any illegal practice or offence under the Act that was committed by the act of the deployment; and I was not able to find any. My conclusion therefore, is that both as a matter of evidence, and as a matter of law, it was not shown that the **1st** Respondent committed any illegal practice or offence under the Act by the said deployment of the army.

The pleading under paragraph 3(2) (d) related to Major Kakooza Mutale's group and PPU. I have already noted that apart from one incident in Tororo, with oblique link, no evidence was adduced before Court on the activities by Maj. Kakooza Mutale and his group, during the electoral process. Furthermore, there was no evidence that the 1st Respondent organised that group or any group in the PPU for training in the activities, and for the purposes and/or objectives stated in *S.* 25(b) of the Act. I have also indicated, when dealing with issues Nos. 2 and 3, my findings on the unlawful activities of the PPU soldiers in Rukungiri. Under issue No.4, the Petitioner's case was that those activities which undoubtedly constituted illegal practices and offences under the Act were committed with the knowledge and consent or approval of the 1st Respondent. No direct evidence of that knowledge, consent or approval was adduced. For proof of the 1st Respondent's knowledge and consent or approval, learned counsel for the Petitioner relied on two facts. First he relied on the fact that the soldiers, being charged with the President's personal security, were under his intimate direction, so that he would know their activities, which in turn they did with his consent or approval. Secondly counsel placed much reliance on the letter Chairman Kasujja wrote to the Respondent, on February, 2001, parts of which I reproduced earlier. In effect learned counsel sought to persuade the Court to infer from the President's assumed relationship with PPU and the said letter, not only his knowledge of activities of the PPU soldiers, but also his consent to or approval of those activities. For his part the Respondent deponed in paragraph of

his affidavit accompanying his answer to the petition, that *he did not directly or indirectly organ/se groups of persons under PPU or Maj.* Kakooza *Mutale with his Kalangala Act/on Plan* and that whatever such persons were stated to have done was without his knowledge and consent or approval. He also generally denied committing any illegal practice or offence personally or through anyone with his knowledge and consent or approval. He made no reference to the letter written to him by Chairman Kasujja.

It is trite law that proof may be by direct evidence or by circumstantial evidence. In the latter case however, it is always important to avoid elevating *"suspicion"* or *"speculation" to* the status of proof. There was no evidence on the operational relationship between the Respondent and the PPU, from which inference could be derived that all activities of the PPU are known and consented to or approved by the 1st Respondent. As for the letter, even if it was presumed that he received it, I think it would be in the realm of speculation to infer from absence of response, as counsel invited the Court to do, that he consented to or approved the activities which were even not specified in that letter. For the aforesaid reasons I found that there was no proof that the 1st Respondent was liable for any illegal practice or offence committed by PPU or Maj. Kakooza Mutale's group.

The third complaint for brief comment is the pleading in paragraph 3(2) (e) of the petition, to the effect that the 1st Respondent *threatened to cause the death* ***of the Petitioner by saying he would put him six feet deep.*** The offence under S.25 (e) is constituted when such a threat is made to or in respect of "a ***candidate"*** or to ***"a voter"*** and for the purpose of effecting or preventing the election of "a ***candidate."*** In S.2 of the Act, ***"candidate"*** is defined as a person duly nominated as a candidate for a Presidential election; and ***"voter"*** is defined as a person who is qualified to be and is registered as a voter. The Petitioner did not disclose the date when the threat was made. The 1st Respondent, who denied threatening the Petitioner specifically, deponed that he uttered the words complained of, on 27th November, 2000. By that date the Petitioner was not a candidate, as he was not nominated as such, until on 8th January, 2001. It was also not shown that by that date the Petitioner was a registered voter or that the threat was made to him as a voter. The 1st Respondent's pleading which was not rebutted was that he had ***"warned that any person who interfered with the army would be put six feet deep."*** While that might be described as threatening violence under the Penal Code, it did not amount to threatening a candidate or

voter within the meaning of S.25 (e) of the Act. My view therefore is that by the utterance, the 1st Respondent did not commit the offence alleged. That leaves the more contentious matters which I paraphrased as publication of a false statement of the Petitioner's illness, and offering gifts to induce voters.

Publication of a false statement:

Publication of a false statement of the illness of a candidate is defined as an illegal practice in s.65 of the Act. It reads:

> ***"65. Any person who, before or during an election, publishes a false statement of the illness, death or withdrawal of a candidate at that election for the purpose of promoting or procuring the election of another candidate knowing that statement to be false or not knowing or believing it on reasonable grounds to be true, commits an illegal practice."***

The pleading in paragraph 3(2) (a) of the petition was encased in narrative and argument, but the substance of it was that the 1st Respondent:

> ***Publicly and maliciously made a false statement that (the) Petitioner was a victim of AIDS, without any reasonable ground to believe that it was true, and this false statement had the effect of (unfairly) promoting the election of candidate Museveni Yoweri Kaguta in preference to (the) Petitioner.***

In so pleading, the Petitioner assumed the burden of proving to the satisfaction of the court, the following components of the alleged illegal practice.

(a) that the 1st Respondent made the statement;

(b) that he made the statement publicly;

(c) that he made the statement maliciously;

(d) that the statement was false;

(e) that the 1st Respondent had no reasonable ground to believe that the statement was true;

(f) that the statement had the effect of unfairly promoting the election of the Respondent in preference to the Petitioner.

How did the Petitioner go about discharging the burden? He did not have difficulty on the components in (a), (b) and (c). On (a), the 1st Respondent had admitted that he made the statement. There was no need for further proof. On (b) it was not necessary to prove that it was made in public. What the law stipulates is that the respondent *"publishes"* the statement. It was proved without dispute that the statement was published on Internet, and in TIME, an American magazine, and that it was re-published in the Monitor newspaper. No issue was seriously raised about the 1st Respondent's responsibility for the publication or republication. Lastly on (c) the pleading that the statement was made maliciously, was superfluous because malice is not an essential ingredient of that illegal practice as defined, It was the remaining three components of the illegal practice as pleaded that were contentious.

That the statement was false:

The Petitioner asserted that the statement that he was a victim of AIDS was false. The 1st Respondent, while not asserting that it was true, pleaded, by way of defence, that he had made the statement believing it to be true. In their respective submissions, counsel for both the Petitioner and the 1st Respondent were agreed that the burden of proof to establish that the statement was false, lay on the Petitioner. The latter submitted that the Petitioner had not adduced evidence to discharge that burden. Counsel for the Petitioner maintained that the burden had been discharged by the Petitioner's own evidence that he was not a victim of AIDS. He submitted instead, that the 1St Respondent had not proved that the statement was true or that he had reasonable grounds to believe it to be true. The Evidence Act (Cap.43) provides general guidelines for determining, on whom the law places the responsibility to prove facts that need to be proved. Sections 100,101 and 102 of that Act read as follows:

> ***100. Whoever desires any court to give judgment as to any legal right or liability dependent on the existance of facts, which he asserts, must prove that those facts exist. When a person is bound to prove the existance of any fact, it is said that the burden of proof lies on that person.***

101. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

102. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existance, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The term *"burden of proof"* which is at times also referred to as *"onus of proof"* is similarly defined in PHIPPSON ON EVIDENCE 12TH Ed. p.36 para 91 and in SARKAR'S LAW OF EVIDENCE 14th Ed., at p.1338. The learned author in the latter work states:

"It has two distinct and frequently confused meanings: (1) The burden of proof as a matter of law and pleading- the burden of, as it has been called, establishing a case (2) The burden of proof as a matter of adducing evidence. The burden of proof in this sense is always unstable and may shift constantly, throughout the trial according as one scale of evidence or the other preponderates.

The learned author commenting on shifting of the burden of proof goes on to say, at p.1339:

"It is not always easy to determine at what particular point the onus shifts from the plaintiff to the defendant and then again from the defendant to the plaintiff and so on but at the conclusion of the trial when the issues come to be judged it has to be seen whether the initial onus cast on the plaintiff, has been discharged or not it would be wholly wrong to allow the burden of proof to be shifted by a redundant averment in the pleading of an issue framed upon that averment." (Emphasis is added).

The test to apply in determining the shift of the burden was put by Lord Hanworth M.R., in STONEY vs. EASTBOURNE RURAL COUNCIL (1962) 1 Ch.367 thus:

"It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one side or the other and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is that in the first instance the

party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given."

I agree with that test. In the instant case it is evident that the Petitioner had the burden as a matter of law and pleading. He had to show that the statement complained of was false in order for its publication by the 1St Respondent to constitute an illegal practice as defined under S.65, and to be a ground for annulment of the Presidential election under S.58(6) (c) of the Act. It must be in this sense that the Petitioner's counsel conceded that the burden of proof lay on the Petitioner. However, he also had the onus to adduce such evidence as would at least establish *prima fade* that the statement was false, in other words to show that he was not a victim of AIDS.

What evidence did the Petitioner produce? In his affidavit accompanying the petition he deponed in paragraph 51:

"…..I know that I am not suffering from AIDS but the 1st Respondent maliciously made false allegation that I was victim of AIDS without any reasonable grounds for believing that was true…"

I agreed with Dr. Byamugisha's submission that the assertion was no more than was pleaded in the petition, and standing alone, did not amount to proof that the statement was false, for it begged the question: how did he know that he was not suffering from AIDS? The assertion was however supplemented after the Petitioner had read the 1St Respondent's affidavit setting out the reasons that led him to believe that the Petitioner was a victim of AIDS. On 5th April, 2001, the Petitioner swore an affidavit in reply, much of which was devoted to refuting the 1st Respondent's reasons. But he also deponed, in paragraph 9:

"*.... **I am not and I have not been bed-ridden in my life and I am able to work normally and during the Presidential campaigns I travei4ed the whole of Uganda without breaking down or feeling particularly fatigued."***

And in paragraph 17 he deponed that he was not an invalid as suggested by the 1 Respondent. Presumably, though he did not indicate the necessary nexus, the new averments were in reference to signs and symptoms he would expect to find in a victim of AIDS. Meanwhile, however, two affidavits sworn on April 2001 had been filed in support of the

petition. One was sworn by Dr. Ssekasanvu Emmanuel, a Registered Medical officer of Makerere University, with 10 years experience, currently doing research in HIV infections. He annexed to his affidavit a ***"Report on case definition of AIDS."*** In the report Dr. Ssekasanvu explained:

> ***"The acronym/term AIDS in full stands for acquired immune deficiency syndrome. This is used to mean a conglomeration of signs and symptoms associated with late HIV disease."***

He then mentioned two definitions of AIDS, namely the internationally accepted full definition compiled by the Centres for Disease Control, Atlanta, Georgia, USA; and the clinical definition arrived at by World Health Organisation (WHO) experts, using signs and symptoms. But he stressed that a clinical criteria can only be used by trained medical personnel to make presumptive diagnosis; and even then after detailed examination of the person in question. He also stressed that diagnosis of HIV infection, and AIDS, cannot be made on basis of loss of a partner and/or child, because infection may not be passed onto the partner despite intimate contact.

The second affidavit, sworn by Major Rubaramira Ruranga, who deponed that he had been living with HIV for 1 6 years was defective for not distinguishing what was sworn from his knowledge and what was on information. In any event it was not of assistance to the issue at hand.

Mr. Balikuddembe submitted that in considering the sufficiency of the evidence, the Court should take into account: (a) the fact that the Petitioner was a medical doctor, and (b) the peculiarity of proving a negative. The Petitioner's evidence, however, was not stated to be from any professional examination or assessment carried out by himself or any other competent person, in the manner stressed by Dr. Ssekasanvu or at all. In my view, his evidence in that connection was, and had to be taken, on the same footing as evidence of any intelligent person describing his or her health condition, without assistance of medical professional knowledge or skills.

The question of proving a negative is more of a problem. We were referred to the decision of this Court in J.K.PATEL vs. SPEAR MOTORS LTD Civil Appeal No.4/91 where the question was

considered in a suit for breach of contract. The plaintiff claimed, and gave evidence on oath, that he carried out the work he contracted for, but was not paid. The defendant did not dispute the work, but claimed that it had paid, its Managing Director giving evidence on oath to that effect. The trial court dismissed the suit on the ground that the plaintiff's evidence was vague. The Supreme Court allowed the plaintiff's appeal holding, *inter alia*, that the defendant had not discharged the onus on it to prove payment. In the leading judgment of Seaton J.S.C., there were quotations from judgments of the House of Lords in the case of CONSTANTINE STEAMSHIP LINE LTL vs. IMPERIAL SMELTING CORP. (1941) 1 All ER 165, of several expressions of misgivings about imposing on a litigant the burden to prove a negative, because it is always difficult, and often impossible, to prove a negative. However the decision in J.K. PATEL vs. SPEAR MOTORS LTD (supra) was not that the plaintiff did not have a burden to prove the non-payment, but rather that the burden had shifted. The Court clearly accepted the view expressed by Viscount Maughan in the CONSTANTINE LINE case (supra) at p.179 as follows:

"….I think the burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is ei qui affirmat non ei qui negat incumbit probatio *(the burden of proof lies on him who affirms a fact not on him who denies* ***it). It is an ancient rule founded on considerations*** *of good sense,* ***and*** *it should not be departed from without strong reasons* In my considered opinion, the circumstances of the instant case provided good reasons for departing from the ancient rule, if indeed there was a departure. In the first place, proof of the negative, namely that the Petitioner was not a victim of AIDS, did not appear to be any more difficult, than proof of the affirmative, namely that the Petitioner was a victim of ADS. Secondly, the burden to prove that the statement was false, was imposed by statute, namely by the provision in S.65 of the Act. To prove that the illegal practice as defined in that provision was committed, the Petitioner had the onus to prove that the statement published by the 1 **St** Respondent was false, and he had to prove it so as to leave the court certain that it was false. Even if the 151 Respondent offered no evidence at all, the burden would not be any less. Whilst the illegal practice is similar to defamation in nature, it differs in the way it has to be proved. This may well appear harsh, as in the saying of *adding insult to injury,* but the illegal practice being *quasi* criminal, leads me to the conclusion that the onus of proof would shift only if a *prima facie* case had been made out. To my mind, evidence advanced by the Petitioner did not establish a *prima fade* case, sufficient to shift the burden of proof. I was therefore unable to find

that the Petitioner had proved to the required standard that the statement was false. This would be sufficient to dispose of that as a ground for annulment. However, I am constrained to make known, in brief, my views on the evidence in respect of the other components of that illegal practice.

No reasonable grounds to believe:

The next ingredient of the illegal practice as defined in S.65 of the Act, is an in- built defence, which is expressed in two alternatives. It is that the false statement must have been published by the candidate, (a) knowing it to be false, or (b) not knowing or believing it, on reasonable grounds, to be true. It seems to me that, on a proper construction, the word *"knowing"* in the second alternative is superfluous. Although one can erroneously *"believe"* something false to be true, one cannot *"know"* something false to be true. He can only know it to be true if it is true.

Be that as it may, what the instant case turned on was the aspect of *"believing"* not that of *"knowing."* The Petitioner pleaded in the petition, and repeated in the accompanying affidavit, that the 1 s Respondent did not have any reasonable ground for believing the maligned statement, to be true. The Respondent, in his answer to the petition and in his accompanying affidavit, averred that he had made the statement believing it to be true. He stated the grounds which led him to that belief to be

(a) that one Judith Bitwire, a woman with whom the Petitioner had cohabited, and a child born out of that relationship, had both died of AIDS; and

(b) that over time he had seen the Petitioner's bodily appearance change, to bear obvious strong resemblance to that of other victims of AIDS he had observed in the past.

A death certificate in respect of Judith Bitwire was produced in evidence. It was annexed to an affidavit of Dr. Diana Atwiine of the Joint Clinical Research centre. She deponed that she had signed the death certificate in the ordinary course of her duties at the said centre. The information on the certificate is as follows:

'JOINT CLINICAL RESEARCH CENTRE

DEATH CERTIFICATE

Name : JUDITH BJTWIRE
Village : KABALE
Date of Birth : 11/5/99
Date of Death : 21/5/99

Disease or condition directly leading to death
EMPYSEMA, RESPIRATORY FAILURE

Morbid condition if any leading to the above

EMPLMA ***PTB CRYPTOCOCCAL MENINGITIS***
HEPATITIS RENAL FAILURE

Other significant condition contributing to the death,
but not related to disease or condition.
BRONCHO PLEURAL FISTULA, CMV RETINITIS
ADVANCED IMMUNOSUPPRESSION

Name of Medical Doctor: ATWIINE DIANA."

In the affidavit in reply to which I have already referred, the Petitioner deponed –
(a) that his child with Judith Bitwire did not die of AIDS,
(b) that he did not know the cause of Judith Bitwire's death,
(c) that his appearance was normal and cannot be used to know or believe that he was a victim of AIDS, and
(d) that there is no obvious resemblance of AIDS victims, from which a person can be known or be believed to be an AIDS victim.

In paragraph 6 he deponed:

"6. That the statement was false in all respects and that the V Respondent has never diagnosed me or tested me and found me as an AIDS victim and has never asked me about my health status."

Professor Rwomushana, Director of Research and Policy Development at the Uganda AIDS Commission, swore an affidavit in support of the 1 Respondent's answer. He agreed with Dr. Ssekasanvu's report as "a *correct statement of the medical diagnosis of AIDS."* He however, pointed out that research in Uganda had established that there was a concept of *"Community Diagnosis of AIDS based on Community perceptions beliefs and observations concerning HIV/AIDS."* According to Professor Rwomushana, research in Uganda had revealed that it is a common widespread practice in lay conversations to refer to individuals in the community who have lost partners and very young children, presumably due to AIDS, as persons suffering from AIDS; and that it is normal practice for ordinary people to make presumptions that an individual is suffering from AIDS upon observation of skin changes.

On the application of the Petitioner, Dr. Diana Atwiine appeared in Court for cross-examination. In her testimony she confirmed that she had prepared and signed the death certificate in respect of Judith Bitwire. She said that it was not correct to say as put to her by counsel for the Petitioner that every sick person had immunosuppression. She pointed out that Judith Bitwiire was a case of advanced immunosuppression. She disclosed that she had given the death certificate to the three relatives of Judith Bitwire who came to the centre after her death, and who included her father, and the Petitioner whom she described as Judith Bitwire's former husband. She was evidently uncomfortable from professional ethics point of view about discussing the subject and was not pressed for any more details.

From all that evidence the Court had to determine if, as maintained by the Petitioner, the 1 Respondent made the statement without reasonable ground for believing it to be true. The 1st Respondent stated the grounds on which his belief was based. The existance of those grounds was not seriously challenged. Although the Petitioner deponed that the child did not die of AIDS, he did not disprove it by stating any other cause of its death. And although he claimed that he did not know what caused the death of Judith Bitwire, the evidence that he was among the three

relatives who received the death certificate tended to show that he most probably knew the cause. Lastly although he deponed that his appearance was natural, he did not dispute that it had changed over time as alleged by the 1st Respondent. The serious bone of contention, therefore, was whether the grounds stated by the 1st Respondent were reasonable grounds within the meaning of S.65 of the Act.

To my understanding, the phrase *"reasonable grounds for believing"* must refer to facts on which any reasonable person would base a belief. In this regard a reasonable person is one endowed with reason and possessed of common knowledge. It is in that context that I found the evidence of Professor Rwomushana to be more relevant on the point at hand, than that of Dr. Ssekasanvu. Dr. Ssekasanvu was concerned with facts (signs and symptoms) which lead a person trained in medical skills to conclude that someone he has examined is suffering from AIDS. Professor Rwomushana, on the other hand, referred to facts which lead a *lay/common* person in Uganda to believe that the neighbour is suffering from AIDS.

Mr. Balikuddembe criticised Professor Rwomushana's evidence as based on idle talk and gossip, because the professor did not avail to Court evidence of the research he referred to. That criticism was not justified. Even the research must have been based on the so-called *"idle talk and gossip."* In any case, the substance of the evidence is such common knowledge that even without the professor's evidence; the Court could have taken judicial notice of it. In Uganda we have been with the epidemic of AIDS for two decades. The general public in Uganda knows some basic facts about it, including the fact that it is commonly transmitted through sexual contact, and the fact that an infected woman who gets pregnant passes the disease to her baby. This is common knowledge acquired, not from superstition or speculation, but from persistent propagation by those with medical knowledge, coupled with experience of realities on the ground. The fact that there are instances where infection is not passed on, as pointed out by Dr. Ssekasanvu, is in my view, a detail that would be more in the knowledge of medical professionals, than of the lay or common person referred to by Professor Rwomushana.

To insist, as seemed to be the Petitioner's case, that the reasonable ground could only be derived from diagnosing, testing or consulting the Petitioner, would be to delude the provision in S.65 of its meaning and the in-built defence. If the 1st Respondent had done any of those things, then he

would most probably have found out the health status of the Petitioner, and would therefore, have *known* the statement to be false when he published it. The question here, however, was whether his defence that he believed the statement to be true on basis of the grounds he stated was available to him. In my considered view it was. In this regard I would point out that while in the provision the legislature intended to condemn a candidate who publishes a statement about the illness of another knowing it to be false, it also clearly intended to excuse a candidate who does so, believing on reasonable grounds, that the statement is true.

For those reasons, I found that it had not been established that the 1**st** Respondent published the maligned statement without reasonable grounds to believe it to be true.

Had effect of promoting election of 1st Respondent:

The Petitioner pleaded that the statement had the effect of promoting the 1st Respondent's election. He asserted in the petition, and repeated in the accompanying affidavit that:

> ***"…….voters were scared of voting for me who by necessary implication was destined to fail carry out the functions of the demanding office of President and serve out the statutory term."***

Later, in his affidavit in reply he added that the statement had been on a website, from where it could be accessed and down-loaded. He also deponed that in an explanation given to a press conference on 11th March, which was broadcast by various radio stations and was published the following day in the New Vision and Monitor newspapers (copies of which were annexed to that affidavit), the 1st Respondent had said that by the statement he had meant that "State *House is not a place for the invalid. A President should be someone in full control of his faculties both mental and physical"* The Petitioner reiterated:

> ***"…..as a result of the 1st Respondent's said statements, my agents... and some of my supporters expressed their concern with my health status and sought for my explanation."***

I am constrained to observe again, that the Petitioner pleaded what was not necessary to prove. To establish the illegal practice, it was not necessary to prove that the statement had the effect of

promoting the election of the Respondent. What was required was to prove that the statement was published for *the purpose of promoting or procuring* the election of the 1**st** Respondent. As it happened no evidence was produced to prove the alleged effect, and not surprisingly therefore it was not canvassed in counsel's submissions. The Petitioner's counsel instead argued that from the evidence before the Court, the only rational inference that could be drawn as to the 1st Respondent's motive in publishing the statement, was that he intended to undermine the Petitioner's candidature thereby promoting his own. He stressed that this view was confirmed by the 1st Respondent in the explanation he gave at the press conference. The 1st Respondent's counsel countered with an argument that the Respondent would not have addressed the statement to an American magazine, if its purpose had been to win himself votes in Uganda.

The 1st Respondent admitted making the statement, but did not disclose what his purpose was in making it. Ordinarily it is not difficult to discern the purpose of a statement from its context. However, the statement in this case, was not reported in its full context. Three documents, each containing a report about the original statement, were annexed to the Petitioner's affidavit, namely:

(a) the article in Monitor of Thursday, March 08, 2001 under the title *"Besigye has AIDS, Museveni tells American paper";*

(b) printout of an article also dated Thursday, March 8, 2001, under the title *"Three's a Crowd in Love and Politics"* from the website: ***http: // www.time.com.;*** and

(C) the article in Time magazine of March 12, 2001, under the title *"The Race of his Life",*

In each article the statement is put in such different setting that, but for the Respondent's admission that he made it, it might have been difficult to place reliance on any of the reports. That notwithstanding, however, there was sufficient material in the evidence before the Court from which the 1st Respondent's motive in making the statement was discernable. The statement was made in the middle of the election campaign. It was made to a journalist who was apparently covering the 1st Respondent's campaign trail, albeit for a foreign magazine. It was made about a candidate who was posing the biggest challenge to the 1st Respondent. On the eve of polling day, at a press conference, and also at a rally at Kololo airstrip the Respondent did not opt to play

down the remarks he had made to the foreign journalist, which he could have done if the remarks were not intended for the public targeted by the local media. Instead he chose to explain the statement to the media, which explanation he must have known, would reach out to the electorate by polling day. Because the making of the explanation was not disputed, I was able to rely on the newspapers as to what he said on 11th March. In its issue of Monday, March 12, 2001, the Monitor newspaper published under the heading: *"Museveni explains his AIDS remarks",* an article which read in part:

> ***"President Yoweri Kaguta Museveni has admitted that he made remarks about Col Kiiza Besigye's alleged HIV status to a Time Magazine journalist, but said he was quoted out of context.*** *'I made the remarks but my friend Marguerite (Michaels, the author) put* ***it out of context.' Museveni told journalists at State House in Nakasero. Museveni said he believed State House is not a place for the invalid. "A President should be someone fully in control of his faculties both mental and physical' he said, adding that there was no reason 'to wait for someone to get into office and fall sick'***
>
> ***Museveni drew the wrath of anti-AIDS activists when he (was) quoted in the Time Magazine of the week ending March 12 as having said that*** *'Besigye is suffering from AIDS'*
>
> ***Addressing thousands of his supporters at Kololo airstrip later yesterday Museveni said he was the best friend of people living with AIDS and that they should be grateful to him."***

If the fact that the statement was first made to a foreign journalist raised doubt as to its purpose, the 1s Respondent's explanation to the journalists at State House on the eve of polling day erased that doubt. He made it clear that his message in the maligned statement was that the Petitioner as a victim of AIDS was not a fit person to be elected President. And in so doing he was promoting his own election.

I found therefore that the last component of the illegal practice had been established. I however found, that because the other two components were not established, the illegal practice pleaded

under paragraph 3(2) (a) of the petition, was not proved. I now turn to the last illegal practice pleaded.

Offered gifts to induce voters:

In paragraph 3(2) (b) of the petition, the Petitioner pleaded:

> ***"Contrary to section 63 of the Act the 1st Respondent and his agents with the 1st Respondent's knowledge and consent offered gifts to voters with the intention of inducing them to vote for him."***

Under s.63 of the Act, a candidate commits an illegal practice of bribery if he or she *"before or during an election gives or provides any money, gift or other consideration, to a voter with the intention of inducing the person to vote for him or her."*

In the affidavit accompanying the petition, the Petitioner did not set out the facts on which that pleading was based as required under r.4 (7) of the Presidential Elections (Election Petitions) Rules, 2001. However he purported to do so subsequently, first in the affidavit in reply to the Respondent, dated 5th April, 2001, and again in the supplementary affidavit dated 6t April 2001. All in all, the Petitioner made allegations in his affidavits that the 1st Respondent had given out or offered to give, three forms of gifts to voters to induce them to vote for him. The allegations were:

(a) that he gave a new motor cycle to one Sam Kabuga in order to influence *"motor cyclists/voters to vote for the 1st Respondent";*

(b) that with intention to induce persons to vote for him, he —

(i) abolished cost sharing in Government and Local Government Health Centres;

(ii) increased salaries of medical workers, and offered to increase teachers' pay;

(iii) hurriedly caused to be signed contracts for tarmacking and upgrading several roads; and

(c) that he offered a gift of money to voters who attended his campaign rally at Arua on 12th February 2001 –

In the affidavit in reply he made on of 5th April, in which all those allegations were made, the Petitioner certified that they were true and correct to the best of his knowledge. He did not claim, however, to have witnessed the 1st Respondent handing over the gifts or making the offers. He only annexed to the affidavit, photocopies of cuttings from Sunday Vision and Sunday Monitor newspapers carrying a photograph of Sam Kabuga receiving a motor cycle from the 1st Respondent to support the allegation of that gift. But apart from an intimation that these were other affidavits to confirm the allegation on contracts for roads, the Petitioner adduced no evidence on the alleged *"gifts"* through public funds. In support of the allegation of the gift of money to voters who attended the rally at Arua, the Petitioner attempted to introduce in evidence, an alleged video recording of the rally. As the person who recorded it was not disclosed and did not swear an affidavit about the recording, the video clearly was not admissible in evidence. In the result the Petitioner did not adduce any evidence to prove the alleged acts of bribery by the 1st Respondent. Nevertheless there was evidence adduced on behalf of the Respondent in reply to the allegations, which the Court had to consider.

Sam Kabuga swore an affidavit admitting that he received a motor-bike from the 1st Respondent and narrating the background, which in a nutshell was as follows: He had always been an ardent supporter and admirer of the 1st Respondent. On 9th January, 2001, he was among colleagues who escorted the Respondent to Kololo airstrip to witness his nomination. At the request of one Moses Byaruhanga, which he gladly accepted, he carried the 1st Respondent on his motor bike through the congested crowd, to the podium at the airstrip, which the latter's motorcade could not do easily. Thereafter he continued to solicit support for the 1st Respondent, and on 20th January 2001, was appointed his campaign agent in the capacity of *"Mobiliser, Boda-Boda Task Force."* Later he agreed with the said Moses Byaruhanga that he should be given a motorbike to facilitate his task of mobilisation, and the motorbike was handed to him by the Respondent on 26th January 2001. He refuted the Petitioner's allegation that the motorbike was given to influence his voting, arguing that he was already the 1st Respondent's *"supporter, mobiliser and agent."* That version of what led to the gift of the motorbike and its purpose was not disputed or in any other way challenged. I therefore did not find any basis on which the Court could hold

that the motor bike was given to Sam Kabuga with a corrupt intent to induce him or other boda-boda voters to vote for the 1st Respondent.

In response to the Petitioner's allegations concerning abolition of cost sharing in Health Centres, increase of salaries for medical workers and teachers, and contracts for road works, three Government Ministers swore affidavits to clarify that the matters complained of in the allegations, were done in implementation of on-going Government policy and programmes, and not as ad hoc acts, to induce voters to vote for the 1 Respondent. The Minister for Public Service, Hon. Benigna Mukiibi deponed that the Ministry had in a Pay Strategy Report made recommendations to address the plight of the middle rank professionals, and the Minister of Finance had made provision in the National Budget for the Financial Year 2000/2001 for implementation of those recommendations. According to the Minister, the increment of salaries for medical workers and teachers was from funds designated in the National Budget under the Public Service Pay Reform Program and was not done by the 1st Respondent to induce voters to vote for him. She annexed to the affidavit copy of the Budget Speech, read on 1 5th June 2000, which substantially confirmed what she deponed.

In his affidavit, Hon. Dr. Kiyonga, the Minister of Health gave the background to the abolition of cost-sharing which had been introduced years back. It had for long been subject of debate, and no consensus, whether it should be abolished, because it was blocking the poor people's access to health services. His explanation, in a nutshell, was that from 1997 Government had introduced Primary Health Care Conditional Grant to assist Local Governments in the health sector; and the grant continued to grow, until the Financial Year 2000/2001 when it stood at shs.39 billion. By February 2001, it was no longer justified to deny health services to the poor due to inability to pay under the cost-sharing policy. The agenda on cost-sharing had been set by the Budget for the Financial Year 2000/2001. He denied the Petitioner's allegation, that cost-sharing was abolished to induce voters to vote for the Respondent.

The Minister of Works, Housing and Communications, Hon. John Nasasira also swore an affidavit. He clarified that the alleged contracts were signed by the Permanent Secretary, but in his presence. He pointed out that tarmacking the several roads, was part of the implementation of the Government Ten Year Road Sector Development Program which commenced in 1 996. He

annexed to his affidavit, copy of an executive summary of the program. He detailed the back ground to the signing of the contracts. Signing of the Credit Agreement with the World Bank for financing tarmacking and upgrading three of the roads, and advertising for short listing contractors, and for tenders for them, were done in November 1999. Letters inviting the short listed contractors were issued in July 2000. Copies of the advertisements, and the invitation letters were annexed to the affidavit. The Minister also explained that in respect of the fourth road which was also part of the same program, only the contract for tarmacking and upgrading one section had so far been signed.

The 1st Respondent did not put forward any evidence in regard to the alleged money gift to voters who attended the 1st Respondent's campaign meeting/rally at Arua on 12th February 2001. The allegation was, however, indirectly challenged, in regard to the date of the alleged incident. Moses Byaruhanga annexed to his affidavit, the official programme for Presidential campaigns in which it was indicated that on 12th February 2001, the 1st Respondent was scheduled to campaign in Masindi not Arua.

When, on 6th April, 2001, the Petitioner's Counsel addressed the Court on issue No.4, and in particular on the alleged illegal practice of bribery, the affidavits of Sam Kabuga and the three Ministers were not yet on record, as they were received on 7th and on 9th April 2001. Understandably therefore, he did not comment on them. However, even during the address in reply, well after those affidavits were filed and referred to by the 1st Respondent's counsel in argument, counsel for the Petitioner did not comment on them. He did not abandon his earlier submission based on the Petitioner's affidavits. He had contended that the decisions to abolish cost-sharing, to increase salaries, and to sign contracts for tarmacking the four roads, were made hurriedly without budgetary provision, and were not done in ordinary course of business of Government but rather in abuse of the office of 1st Respondent as Head of Government. Counsel invited us to follow the decision of ATTORNEY-GENERAL vs. KABOUROU (supra) and hold that the 1**st** Respondent had committed the illegal practice as alleged.

It seems to me that there was a very serious lapse in the handling of this aspect of the petition. Apparently there might have been anticipated supportive evidence at least in respect of the allegation on tarmacking roads which did not materalise. This is apparent from what the

Petitioner said in his supplementary affidavit, where, after he deponed in paragraph 1 5 that he knew the 1st Respondent offered to cause repair of the roads *"in a manner"* which was out of the ordinary, with a view of inducing voters to vote for him, he certified that what was stated in paragraph 15, (among others,) was *"further confirmed by the various affidavits filed in support of this petition."* No such confirming affidavits were filed. In those circumstances, it would have been more appropriate to concede that the allegation could not be proved, rather than appear to hold to submissions that did not fit the facts before the Court. I need only mention that the facts of this case are not comparable to those in ATTORNEY-GENERAL vs. KABOURDU (supra) where it was established by evidence, to the satisfaction of the court, that the repair of the road *"had been undertaken by the central government not in the ordinary course of government but (with a corrupt motive) as a reward to voters for voting for the ruling party as promised by prominent cabinet ministers at well-attended rallies/n the constituency."* (see head-note (4) at p.759 h-i of the report).

In the result I did not find that the abolition of cost-sharing or the implementations of the salary reform and/or the road development program were done with a view to corruptly induce any voter to vote for the 1st Respondent.

Bribery of voters by agents:

The last aspect on the complaint of bribery was that the 1st Respondent's agents, committed the illegal practice with his knowledge and consent or approval. Apart from the general pleading in the petition which I have already reproduced, the Petitioner did not, in any of his affidavits, allude to any evidence of acts of bribery by the 1st Respondent's agents. However, there were allegations of bribery made by nine witnesses who swore affidavits in support of the petition. Counsel for the Petitioner Mr. Walubiri made reference to only four of them in his submissions. I have had to disregard six of those allegations either on the ground of the hearsay rule, or because they did not disclose the illegal practice as defined in s.63 (1) of the Act. Let me briefly allude to those six first.

Omalla Ram of Tororo, (one of those referred to by Mr. Walubiri) who was the Petitioner's coordinator for Veterans in Eastern Region; Olwenyi Victor. Petitioner's Election Monitor in

Tororo Municipality; and Lucia Naggayi, Petitioner's Head of Monitoring Team for Kiboga, deponed about alleged bribery reported to them by their respective agents. That was inadmissible hearsay. Mugizi Frank and Ssali Mukago both referred to by Mr. Walubiri and resident of Rubaare Trading Centre, and Idd Kiryowa of Nabiseke Sembabule, deponed about alleged offers of money made to themselves not as inducements to vote for the St Respondent or anyone else, but for other purposes. The offer to Mugizi was to lure him to return to the polling station (from where he had been chased during the day) to sign the Declaration of Results forms. The offer to Ssali was allegedly made on 9th March on behalf of the 1st Respondent's Task Force so that he *7'can leave them to steal votes."* Kiryowa was offered money so that he ceases to act as the Petitioner's agent. All those alleged offers were turned down, but more to the point, they were not offers, let alone gifts ***to a voter with intention of inducing the voter to vote for anyone.*** That left three allegations which I reproduce here as told by the witnesses in their affidavits. Gariyo Willington, (relied on in Mr. Walubiri's submission) was the Petitioner's Overseer of polling agents in Rubaare Sub-county. He deponed:

"At about 11 a.m. I visited Kyanyanzire cell and saw Mwesigwa Rukutana loading people on a motor vehicle Reg.No. UAA 006A Nissan pick-up and he was giving Shs.5,000/= to every person who was boarding and instructing them to vote Candidate Museveni Yoweri Kaguta." Three persons refuted this evidence. Mwesigwa Rukutana a Member of Parliament and one of the counsels for the 1st Respondent in this petition swore an affidavit in which he refuted that evidence. He deponed that on polling day he did not go to Kyanyanzire village, that he did not load any people on any vehicle, and that he did not give money to anyone as alleged by Gariyo Willington. He deponed further that he spent the day with his driver Asingwire Richard, and one Bob Kabonero driving around his constituency in a Prado vehicle Reg.No.UAA 91 5S. He was corroborated by Asingwire Richard and Bob Kabonero, on the facts that he did not go to Kyanyanzire village, and did not give out money as alleged by Gariyo and also that they were with him throughout the day. I was not impressed by the concerted denials.

Etetu John Stephen deponed that he was a voter at Kichinjaji polling station, Soroti Northern Division. He deponed —

"2. That at this polling station Hon. Mike Mukula was present from around 8 a.m. to 12 noon moving among the buildings asking people to vote the 1st Respondent and dishing out money to voters.

3. That after voting I moved home which is about 120 metres from the polling station and that is where Hon. Mike Mukula was." (Emphasis is added)

Captain George Michael Mukula, M.R, made an affidavit, in which he denied being at Kichinjaji Polling Station between 8 a.m. and 12 noon on 12th March 2001, dishing out money to voters. Ekunyu Beatrice, Elietu Paul and Angolo Martha, the Presiding Officers for Kichinjaji Polling Stations ***"B", "C"*** and ***"D"*** respectively, averred in separate affidavits that Hon. Mike Mukula did not visit their respective polling stations on polling day and that they did not see him dishing out money to voters. Omuge George William, the Returning Officer for Soroti District averred that on polling day he visited Kichinjaji Polling Station between 11 a.m. and 12 noon. He did not find Hon. Mike Mukula there, nor did he get any complaint that he had been there dishing out money to voters. One other person, however, saw Hon. Mike Mukula at Kichinjaji. Obela Lawrence, the Presiding Officer of Kichinjaji *"A"* polling station, deponed that Hon. Mike Mukula called at that polling station at about 10 a.m., waved to people at a distance of about 3 metres, inquired how the voting was progressing and left shortly after. But he did not see, nor hear of, Hon. Mukula dishing out money to voters and/or telling them to vote for the 1st Respondent. This evidence corroborates that of Etetu in a material particular, namely the presence of Hon. Mukula in the area, which the latter denied. The failure of the others to see him was not very material particularly in view of the evidence of Etetu that he saw Hon. Mukula moving among buildings not in the polling stations.

Joseph Drabo, the Petitioner's mobiliser, of Mite parish in Ayivu County, Arua, deponed that on 12th March 2001 he saw Godfrey Asea, the LC I Chairman of Ndru sub-parish, Mite parish *"giving out unspecified amounts of money to one Odipio Inyasio, at Lia polling station with directives that the same be given to all the women so that they vote for Yoweri Kaguta."* The Presiding Officer of Lia B (Panduru) polling station, Awita John Bosco, confirmed in an affidavit that Drabo visited his polling station but averred that Odipio did not come there and that he did not see any money changing hands at that polling station, nor did he receive any report about it.

My observation on the evidence from the three witnesses to the alleged incidents of bribery is that though I believe the witnesses, each was lacking in particularity. I would have looked for some corroboration, before acting on the evidence. However the major deficiency, for purposes of establishing that the 1st Respondent was liable for any of the alleged bribery is that there was no shred of evidence that Mwesigwa Rukutana, Mike Mukula and/or Odipio Inyasio had each done what was alleged with the knowledge and consent or approval of the 1st Respondent.

For the reasons I have outlined I answered issue No.4 in the negative.

ISSUE NO. 5:

The last issue was on what reliefs were available to the parties. Upon dismissing the petition, we invited the parties to address us again on the question of costs specifically, in view of the holdings on the other issues. After hearing counsel the Court by unanimous decision, ordered each party to bear its own costs. The reasons for that decision were also reserved, to be given along with the reasons for the rest of the judgment.

Dr. Byamugisha had prayed for costs on the principle under S.27 of the Civil Procedure Act, that costs shall follow the event. He maintained that the case was very important. It had been very involved both on facts and the law, but it had to be conducted in a very short time. That had necessitated hard work and engaging many advocates. He prayed that for the 1st Respondent the award of costs should include instruction fees for 13 counsels. He recalled that counsel for the Petitioner had in his original submission prayed for costs for 10 counsels in the event of the petition being successful, and argued that he (Petitioner's counsel) should not be heard to renage from the principle. Learned counsel urged the Court not to encourage frivolous litigation by denying costs to the successful parties. For the 2nd Respondent, Mr. Deus Byamugisha, submitted that there was no good reason for not following the principle in S.27 of the Civil Procedure Act. He maintained that an unsuccessful candidate at an election should weigh his chances of success before petitioning the Court and thereby compelling other parties to incur litigation costs. He also prayed that the 2nd Respondent be awarded costs as a successful party.

Mr. Balikuddembe for the Petitioner reiterated that the case was very important and submitted that the petition had been brought in the interest of the country. He stressed that the Petitioner

had not been wholly unsuccessful since he had scored some success on some of the issues. Learned counsel also maintained in particular that *"it would not be proper to award costs to the 2nd Respondent for failure to conduct the elections in compliance with the law"*

It is trite that as a general rule, in civil litigation, the successful party is awarded costs of the litigation. It is also trite that in awarding costs, the Court has very wide discretion, which needless to say, it must exercise judicially, having regard to the circumstances of the case.

To my mind the first and main consideration was the importance of, and public interest in, the case. Here I mean public interest, not in the sense of curiosity, but in the sense that the country needs to ensure that the election of its President is a free choice of the citizens, made in accordance with the Constitution and the laws enacted to regulate the election. That interest is of particular significance in Uganda today, given her history that is not noted for democratic election of the political leaders. In that sense, in addition to the Petitioner and the Respondents as the obvious parties, the public was the un-participating and silent party in the case, seeking a just pronouncement, according to the law, on whether the election of the President was a free expression of the will of the majority. I agree with the submission that it is important for the Court, in the exercise of its discretion, not to do so in a manner that would encourage frivolous litigation. However it is equally, if not even more important, for the Court to avoid discouraging would-be petitioners with substantial causes of action, from petitioning the Court for fear of being crippled by orders for costs. In its discretion the Court should assess the merits and demerits of the particular case before it. That brings me to the second consideration in the instant case.

The Petitioner brought to court a tangible case, which deserved to be inquired into. Although some issues that came up during the trial may have been farfetched or even trivial, the case as a whole could not be described as frivolous as suggested by counsel for the 2nd Respondent.

I agreed with the view expressed in the extract from the Guildford Case:

Elkins vs. Onslow (1896) 19 LT 729, cited in The Digest: Annoted British, Commonwealth and European Cases Vol. 20 at p.71, para. 642.

"Where the case as disclosed under a petition is proper for examination and the petition is founded upon strong prima fade grounds and attended with reasonable and probable cause for pursuing the inquiry to termination the Petitioner will not be condemned in the costs of the respondent although the result may be in favour of the latter."

I hasten to add however that each case has to be considered on its own merits. For the reasons I have indicated I found it appropriate for the court to order each party to bear its costs of the petition.

I wish to add my expression of gratitude to counsel for all parties for tremendous assistance they rendered to the Court. Given the enormity of the task and the severe time constraint, the industry and skill put in the preparation and presentation of the cases of their respective clients was highly commendable.

I think they have set a good precedent and confirmed that the special procedure adopted for the undoubtedly special case can achieve the results.

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

DATED at Kampala this 21st day of April, 2001