**THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA

AT MENGO

***(CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.SC).***

ELECTION PETITION APPEAL NO. 04 OF 2009

**BETWEEN**

**BAKALUBA PETER MUKASA :::::::::::::::: APPELLANT**

**AND**

**NAMBOOZE BETTY BAKIREKE :::::::::::::: RESPONDENT.**

***[Appeal from the Judgment of the Court of Appeal at Kampala, (S.G Engwau, C.K, Byamugisha and SBK Kavuma, JJ.A) dated 26th March 2009 in Election Petition Appeals No. 1 and 2 of 2007].***

JUDGMENT OF KATUREEBE, JSC.

This is a second appeal to this Court by Bakaluba Peter Mukasa (the Appellant), his election to Parliament having been nullified following a Petition in the High Court by Nambooze Betty Bakireke (the respondent) and his subsequent appeal to the Court of Appeal having been dismissed by majority decision of that court.

The background of the Appeal is that the Appellant together with the Respondent and one Kawadwa Dawood Katamba participated as contestants in the Mukono North Constituency Parliamentary Election held on 23rd February 2006. The Electoral Commission declared the Appellant the winner of the election with 22,680 votes. The respondent obtained 22,232 votes and Kawadwa Dawood got 627 votes.

The respondent was dissatisfied with the results and petitioned the High Court which annulled the election because it found that the election had been marred by malpractices. The Appellant was dissatisfied with that decision and appealed to the Court of Appeal. By a majority decision of two to one, the Court of Appeal upheld the decision of the trial judge, hence this appeal.

The appellant filed two grounds of appeal. The first ground states that:-

> ***"The learned majority Justices of Court of Appeal erred in law and fact when they failed to make a finding on whether the appellant was denied a right to a fair trial by reason of non disclosure of specific particulars of alleged bribery".***

Both parties filed written submissions in this court and dealt with both grounds seriatim. I intend to consider them in like manner.

In arguing the first ground of appeal, counsel for the appellant, Mr. Ssekaana Musa of Ssekaana Associated Advocates & Consultants, submitted that in so far as the issue of fair trial had been raised as a ground in the Court of Appeal and submitted upon by the parties, it was imperative for the Court of Appeal to deal with that ground and make specific findings on it. By failing to even refer to the ground and failing to make findings thereon, the Court of Appeal had misdirected itself in both law and fact. Counsel further argued that since the question of fair trial had not been resolved as an issue by the trial court in its judgment, the Court of Appeal could not agree with a finding over which the trial court had not made a pronouncement. Counsel pointed out that whereas the majority judgment did not deal with the issue, in his dissenting judgment, Kavuma, JA, resolved the issue in favour of the appellant. Learned counsel relied, inter alia, on ***Interfreight Forwarders (U) Ltd –Vs- E.A. Development Bank (1990 – 1994) E.A. 117 and Esso Petroleum Co. Ltd –Vs- South Port Corporation (1956) A.C. 218***.

In response, Mr. Lukwago Erias, counsel for the respondent contended that the appellant did not raise the issue of fair trial in his pleadings but only alluded to it in his submissions in the trial court. Learned counsel argued that the Court of Appeal considered the evidence on the record of appeal before it (by majority) upheld the trial judge.

In my view, there are two aspects to this ground. The first is the failure of the Court of Appeal to deal with the issue of fair trial and to make specific findings, thereon. The second aspect is

the more substantive issue whether indeed there was a denial of fair trial and hearing in the trial court.

With regard to the first aspect, I am in agreement with learned counsel for the appellant that since the matter had been raised as a ground of appeal and an issue had not only been framed on it but both parties had made submissions thereon, it was imperative on the court to deal with it and make specific findings on it. Simply to ignore it was a misdirection both in law and fact.

The dissenting Justice of Appeal did the right thing to consider the ground and to make findings thereon.

Be that as it may, the more substantive issue is whether indeed there was a denial of a right to fair hearing. Counsel for the appellant argued that the Parliamentary Elections (Election Petitions) Rules, S1 141 – 2, clearly spelt out that an election petition had to contain a statement of the alleged facts giving rise to the petition. The petition had to be accompanied by an affidavit containing the particulars of the alleged offences or misconduct. If the affidavit accompanying the petition was lacking those particulars, then it was not an affidavit envisaged by the Rules and therefore the petition could not be entertained by Court. Counsel argued that the purpose of the above Rule was to ensure that a respondent to the petition knew before hand the nature of the case against him to prepare his defence. Where the party was not served with a proper petition and proper affidavit, he was in fact being ambushed by a case he had not prepared for and that denied him the right to fair trial. Counsel argued that the right to fair trial is so fundamental that our Constitution gives it in Article 44 as one of those rights that are non-derogable**.**

In this case, counsel argued, although the Petition contained a statement about the commission of illegal practices, the supporting affidavit did not contain any particulars thereof. These were to be found in other affidavits filed later. Counsel claims that the appellant was not given enough time to respond to and rebut all the allegations, having been given only 21 days to reply. All these, he submitted, amounted to a denial of fair trial. He cited the cases of ***INTERFREIGHT FORWARDERS (U) –Vs- EAST AFRICAN DEVELOPMENT BANK EALR [1990 – 1994] EA 117*** where this court pronounced itself on the importance of pleadings and the effect of departure from pleadings. He also relied on the case of ***ESSO PETROLEUM COMPANY LTD –Vs- SOUTH PORT CORPORATION [1956] AC 218.***

In reply to this aspect of the first ground, Mr. Lukwago Erias counsel for the respondent, supported the decision of the majority Justices of Appeal. First he pointed out that the petition had originally been filed against two persons: the appellant and the Electoral Commission. Most of the findings, he contended, both by the trial Court and the Court of Appeal were against the Electoral Commission which had decided not to appeal to the Supreme Court. It is therefore not a party to this appeal. Counsel therefore argued that this appeal is rendered nugatory in that even if the appellant were to succeed, the decision of the lower courts could not be set aside since the findings against the Electoral Commission are not challenged.

But on the issue of fair trial counsel argued that the petition and the accompanying affidavit complied with the Rules and that the appellant knew the case he had to answer, and he actually did answer it by his affidavits in rebuttal, by cross examining the respondent's witnesses, and by himself testifying in court. Counsel further points out that the issue of denial of fair trial came in as an after thought during submissions before the trial court. The appellant had not raised any issue with regard to inadequacy of the pleadings or the inadequacy of the time within which to file his reply or affidavits in reply. No issue of fair trial was ever framed and the court consequently did not pronounce itself on it.

According to counsel, the respondent in her petition had properly pleaded the issue of bribery in paragraph 7(a) which stated that the appellant had committed illegal practices contrary to section 68(1) of the Parliamentary Elections Act 2005. To counsel this complied with the requirement in Rule 4(2) of SI 141 – 2 that ***"Every petition shall state the holding and result of the election together with a statement of the grounds relied upon to sustain the prayer of the petition"***.

With regard to Rule 4(8) which requires the petition to be accompanied by an affidavit setting out the facts and particulars upon which the Petition is based together with a list of any documents on which the petitioner intends to rely, counsel argued that there was nothing in the Rule that excluded more than one affidavit from being filed with the Petition. He argued that paragraph 9 of the petition stated that her petition was supported by her affidavit together with other affidavits of various deponents. He also sought to rely on paragraph 6 of the respondent's affidavit in support of the petition which stated as follows:-

> ***"THAT the polling agents and the election supervisors reported to me that numerous electoral malpractices, illegal practices and offences, were committed by the 1st***

***respondent, his agents and supporters, the officers of the Uganda People Defence Forces (UPDF) together with the polling officials and agents of the 2nd respondent in respect of which several persons have made affidavits as evidence in support of my petition".***

To counsel this was sufficient since any reference to a document in pleadings incorporates the contents of that document in the pleadings. He cited the case of ***CASTESTELINO –Vs-RODRIGUES [1972] EA*** 232 to support that view. Counsel further argued that since this was not an interlocutory application, matters deponed to in the affidavit had to be confined to facts which the deponent is able of his or her own knowledge to prove. Since she herself had not personally witnessed the malpractices, she was in order to make reference to the affidavits of these persons who had witnessed the malpractices and incorporate them as affidavits in support of the petition.

Counsel contended that it was as a result of the petition and the affidavits filed with it that the appellant was able to file affidavits in rebuttal and to give evidence and to cross-examine the witnesses of the respondent. In those circumstances, counsel submitted, one could not possibly say that the appellant had been denied the right to fair trial. He prayed court to dismiss the ground of appeal for lack of merit.

I wish to now deal with the issue of fair trial and hearing and whether indeed there was a denial of that right to the appellant. Fair trial, as rightly asserted by counsel for the appellant and by Kavuma, JA, in his dissenting Judgment, is one of the fundamental rights guaranteed by the Constitution. Article 28(1) on the right to fair hearing states:-

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

This right is so fundamental that it is given in article 44 of the Constitution as one of those rights that are non-derogable. The Constitution appears to only give the salient features of what constitutes fair trial, i.e., it must be before ***"an independent and impartial Court or tribunal established by law."*** It does not define the term *"fair trial."*

Because of its very importance, it is my view, that allegations of denial of the right of fair hearing or trial are very serious indeed and should not be made lightly or merely in passing. They impact on the very core of our trial system. I note in this case that at least there is no

contention that the trial court was not independent or impartial or not established by law. The contention was that there was a failure to strictly abide by the Rules of pleading in an election petition, and that that failure had prejudiced the appellant in the preparation of his case in reply to the petition filed against him, thereby denying him a fair hearing.

As observed above, the Constitution does not clearly define fair hearing or trial. However the definition as given in ***BLACK'S LAW DICTIONARY (6th Edition)*** is illustrative and helpful. It defines ***"fair and impartial trial"*** as follows:-

> ***"A hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole."*** (Emphasis added). The learned authors add that it is also a basic Constitutional guarantee contained implicitly in the Due Process Clause of Fourteenth Amendment, U.S. Constitution**.** The same Dictionary then defines "Fair hearing" as follows:-
>
> ***"Fair hearing. One in which authority is fairly exercised: that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine, and to have findings supported by evidence."*** (Emphasis added).

Although the concept of fair trial or hearing is established by the Constitution, it is the Statutes and Rules or Regulations that establish the procedures that are meant to ensure fair hearings for the parties. In this case one has to look at the Parliamentary Elections Act, the Parliamentary Elections (Election Petitions) Rules and the Civil Procedure Rules to be able to establish whether there was denial of a right to fair hearing to the appellant.

Having set out the Constitutional background, it is now necessary to examine the facts in this case. It is a given fact that the respondent filed a Petition in the High Court against the election of the appellant on grounds, inter alia, of commission by the appellant or his agents, of illegal practices under section 68 of the Parliamentary Elections Act. It is also true that the affidavit of the respondent supporting the petition did not contain detailed particulars of the allegations of bribery or illegal practices contained in the petition. For clarity, I should set out the relevant parts of the petition and supporting affidavit. Paragraph 5 of the petition states:-

***"Your Petitioner ……. that the entire electoral process in Mukono County North Constituency, beginning with the campaign period up to the polling day was characterised by acts of intimidation, lack of freedom and transparency, unfairness and commission of numerous electoral offences and illegal practices contrary to the provisions of the Parliamentary Elections Act, 2005, the Electoral Commission Act, Cap. 140 and the Constitution of the Republic of Uganda, 1995, as hereunder:-***

There then follows up to 19 subparagraphs numbered "a – s", setting out various allegations. With regard to the issue of bribery of voters, paragraph 7 states, in part, thus:-

***"Your Petitioner contends that the 1st respondent personally and /or through his agents with his knowledge, consent or approval committed the following illegal practices and offences:-***

**(a)** ***Bribed voters contrary to section 68(1) of the Parliamentary Election Act, 2005."***

The Paragraph 9 states:-

***"This Petition is supported by the Petitioner's affidavit, together with other affidavits of various deponents to be filed herein."***

This apparent failure to set out particulars of the allegations of bribery in the respondent's own affidavit accompanying the Petition forms cornerstone of the appellant's ground of denial of fair hearing. In his written submissions counsel states as follows:-

***"The right to a fair hearing is enshrined in the Constitution of Uganda Article 28 which is further protected by Article 44 which lists it among the non-derogable rights. Similarly, the Parliamentary Elections (Election Petitions) Rules SI 141 – 2 , sets out what an election petition that is supposed to be lodged in court must contain. This clearly is intended to ensure that a fair trial is conducted. The role of pleadings should not be underscored especially in our adversarial system of litigation."***

Counsel then cites the ***INTERFREIGHT FORWARDERS*** case and the ***ESSO PETROLUM COMPANY*** case (supra).

Having argued that the Petition as filed offended Rule 3 which defines Petition to include the affidavit supporting it, and having argued that the petition also offended Rule 4(8) which requires the affidavit supporting the Petition to set out the facts on which the Petition is based

together with a list of documents on which the petition intends to rely, Counsel for the appellant submitted that this had denied the respondent the opportunity to adequately prepare his case, as the evidence of bribery contained in other affidavits could not be used to support a case that had not been stated in the Petition. Therefore, according to Counsel, this had denied the appellant his right to fair hearing.

The value of pleadings cannot be understated. I fully agree with what Oder, JSC, (RIP) stated in the ***INTERFREIGHT FORWARDERS CASE*** at page 125. He stated:-

> ***"The system of pleading is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which, the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will determine at the trial……. Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with which he alleged in the pleadings except by way of amendment of the pleadings."*** (Emphasis added).

In this particular case, can it be said that looking at the Petition and the affidavits supporting it as a whole the appellant did not know the case he had to answer?

Rules of procedure are very important but they are not an end in themselves. They are often referred to as the hand maidens of justice, but are not justice themselves. Rules form the procedural framework within which a fair hearing is conducted. Having received the Petition, the appellant set out to answer it. He proceeded to file his own reply together with affidavits where he specifically rebutted many of the allegations made by the Petition and its supporting affidavits. Right at the beginning of the trial, counsel for the respondent is the one that

requested for extra time – one week – within which to file "the remaining affidavits." There then followed a discussion between the Judge and all the parties as a result of which the court gave out a time table within which all the affidavits were to be filed and the hearing of the case to start. At no point did the appellant or his counsel object to the competence of the Petition or apply for any extension of time within which to file any other affidavits or other documents. Subsequently the parties agreed on the agreed facts, agreed issues, agreed documents and witnesses for cross-examination.

It is important to recall the words of Oder, JSC, (supra*) that issues are framed on the basis of the case made out from the pleadings of the parties.* Thus one of the three issues agreed, No.2, was *"whether the 1st respondent committed any illegal practices and or offences either personally or by agents with his knowledge and consent or approval."* It is my view that it would have been impossible to frame this issue if the appellant did not know the case. At this point, the appellant could have objected to the competence of the Petition and moved to strike it out if he felt that it did not disclose a case for him to answer. He did not.

In his reply to respondent's submissions, counsel for the appellant referred to an Article entitled ***"THE JUDICIAL APPLICATION OF ELECTION AND COURT PRACTICE DIRECTIONS 2007)*** by ***CHIJIOKE OGHAM EMEKA***. This article discusses what is known in Nigeria as the *"front loading regime,"* in election petitions. This refers to provisions in their Rules which are similar to our own, requiring that certain matters have to be contained in a petition. In some of the cases discussed therein, the Nigerian courts have held that failure to include the information as required by the Rules may be fatal to the competence of the petition as it would impinge on the right to fair hearing. But I must note that in those cases there was either an application to strike out the petition, or there was application for extension of time within which to file documents.

In this case, as already observed, the appellant and his counsel never raised this matter at any time during the trial except when counsel was making final submissions. Even then, he did not make any specific prayer to the court as to what he wanted the court to decide or what remedy he sought. The appellant could at the beginning of or during the trial have sought further and better particulars of the petition under Rule 8(5) and 8(6) of the Rules. He did not do so. The appellant argues that the period of 21 days within which he was to file all his affidavits was not sufficient. Yet there is nothing on record to show that he made an application for enlargement of time under Rule 19.

At the trial itself, the appellant not only gave oral evidence denying the allegations of bribery, he filed several affidavits in rebuttal. In her judgment, the learned trial Judge did consider the fact that the petition and the petitioner's supporting affidavit lacked particulars, but seems to have looked, quite rightly in my view, at the case as a whole by looking at all the affidavits filed by the petitioner and replied to by the respondent. She stated thus in her judgment at page *2***:-**

> ***"The Petitioner deponed a lengthy affidavit in support of the Petition. Other affidavits were filed by witnesses testifying to the various allegations contained in the petition. They were bound in volumes I to IV.***
> ***The 1st respondent in his answer denied engaging in any illegal activities or any electoral offences. He also filed an affidavit in support of his answer and a supplementary affidavit dated 18/9/2006. He filed twenty other affidavits in support of his answer by various witnesses. They were bound in volumes I and II".***

On the specific issue of bribery, the learned trial Judge observed as follows at page 101:-

> ***"There is no specific averment in the Petitioner's supporting affidavit. She however makes a general statement on offences in paragraph 6. <u>Specifics are given by her witnesses who named various villages where alleged acts of bribery were committed</u>***
> ***<u>including</u>……..."*** (Emphasis added).

The learned judge makes reference to a number of villages where allegations of bribery were made by named individuals in their affidavits in support of the petition. She also, in great detail, gives the affidavits which were filed in rebuttal on behalf of the appellant. The judge also notes that the appellant was cross-examined in court, and his counsel cross-examined the witnesses of the respondent

It is to be noted that in his argument about the importance of pleadings and fair trial, counsel for the appellant has not contended that the respondent departed from the case she had pleaded. His contention is that the particulars of bribery should have been contained in the respondent's own affidavit and not the supporting affidavits of her witnesses. But does that mean that at the trial the appellant did not know the case he had to answer with regards to bribery when he had all those affidavits in his possession?

The failure to put particulars of the bribery in the affidavit of the respondent appears to have been regarded both by the parties and the court as an irregularity which did not go to the core of the case. In the peculiar circumstances of this case it is to be noted that the Petitioner did state in her own affidavit that she would rely on the affidavits of other persons who had witnessed the bribery. Their affidavits were duly rebutted by the appellant and his witnesses. To raise the issue of pleadings and fair trial at the very end of the trial would seem to indicate an afterthought on the part of counsel for the appellant.

In the Interfreight Forwarders case (supra) Wambuzi, CJ., (as he then was) cited the case of ***SEGAMULL -Vs- GALSTAUN [1930] AIR PC 205***, where an issue was framed but certain particulars had not been pleaded. He said, at page 129:-

> ***"It is true that in SAGAMULL –Vs- GALSTAUN [1930] AIR PC 205, a case in which the variation of an agreement was not pleaded, but was nevertheless put in issue, contested and proved the Privy Council said:***
>
> ***'Their Lordships are satisfied that notwithstanding the form of the Plaint the suit was fought by the parties deliberately upon issues substantially as framed by the trial Judge and ought upon that footing to be determined'*** (Emphasis added).

The learned CJ, then distinguished that case from the one before him. The instant appeal, however, seems to be the case where an issue was framed by agreement of ***parties*** based on the petition and the supporting documents that were before the court. The affidavits in rebuttal were before the court. The case proceeded and was argued on the basis of those issues without at any one time the appellant seeking to strike out the petition or indeed applying to court for extension of time to file new or other affidavits. In ***RAILWAYS CORPORATIION -Vs- E.A ROAD SERVICES LTD [1975] E.A 128***, The East African Court of Appeal held that an unpleaded issue but made an issue at trial without objection may be decided by Court.

It is my opinion that the appellant ought to have shown that either the respondent had departed from her pleadings or that he, the appellant, had not known the case that he had to answer. Oder, JSC (RIP) in ***UGANDA BREWERIES LTD –Vs- UGANDA RAILWAYS CORPORATION*** [2002] 2 E.A. 634, elaborated on the issue of departure from pleadings and what the test is in determining whether a complaint should be allowed to succeed, He put it thus at page 643:

> ***"To my mind, the questions for decision under ground 2(i) of the appeal appears to <u>be whether the party complaining had a fair notice of the case he had to meet; whether the departure from pleadings caused a failure of justice to the party complaining; or whether the departure was a mere irregularity, not fatal to the case of the respondent</u>, whose evidence departed from its pleadings.*** (Emphasis added).

The learned Justice went on to reiterate the principles he had set out in his judgment in the ***INTERFREIGHT FORWARDERS*** case and continued thus:

> ***"In GANDY –Vs- CASPAR AIR CHARTER LIMITED*** (supra), Sir Ronald Sinclair said:-
>
> ***'The object of pleadings is of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.'***
>
> I agree with that view."

The Uganda Breweries Ltd case establishes that even where there is irregularity in pleadings or a departure from pleadings, but as long as the opposite party has fair notice of the case he has to answer and he does answer it and adduces evidence accordingly, and has not suffered injustice, the court will not allow such irregularity or departure to frustrate the determination of the case.

In this appeal, bearing in mind the principles involved under the concept of fair hearing and trial, given that the appellant did have fair notice of the case which he duly responded to, I am unable to find that the irregularity of not putting the particulars of bribery in the body of the respondent's affidavit unduly prejudiced the appellant in any way. The Court must also bear in mind the direction of Article 126(2)(e) of the Constitution that subject to the law, substantive justice must be administered without undue regard to technicalities. In the peculiar circumstance of this case, it would defeat justice to hold that a case that had gone through a full trial be defeated by a technicality particularly when the appellant did not raise that technicality before, and there is no evidence that he suffered any prejudice I find no basis to find that there was a denial of his right of fair hearing. This ground therefore must fail.

Ground two of appeal states:

> ***"The learned majority Justices of the Court of Appeal erred in law and fact when they failed to re-appraise the evidence of the case before the trial court thereby arriving at wrong conclusions and finding."***

Counsel for the appellant bases his arguments on this ground on the following passage from the lead judgment of Engwau, JA,:

> ***"In compliance with the provisions of Rule 30(1) of the Rules of this court, this being the first appellate court, I have re-appraised the evidence on record as a whole, before coming to conclusions. Bearing in mind that this court had neither seen nor heard the witnesses. It should make due allowance in this respect to the learned trial Judge. I have subjected the entire evidence on record regarding an election offence of bribery in this case to strict scrutiny …..I have perused carefully the evidence adduced in connection with allegations of bribery in this case."***

It is counsel's contention that the learned Justice in fact does not show on record that he re-evaluated the evidence himself, notwithstanding his statement that he did so. In counsel's view, with some justification in my view, the learned Justice of Appeal merely noted the various allegations and then considered counsel's submissions on them and the conclusions of the trial judge thereon. It is counsel's submission that as a first appellate court, the Court of Appeal should have re-appraised the evidence and, where it found a material irregularity or where conclusions were based on inadmissible evidence, conjecture and surmises, the Court ought to interfere with findings of fact by the trial court.

According to counsel, the Court of Appeal failed in its duty to re-appraise the evidence and therefore failed to find that there were several affidavits which had been sworn by "defectors" and which should not have been relied upon to make findings of fact by the trial judge. Counsel cited the cases of ***UGANDA BREWERIES LTD*** (supra), ***RATILAL GORDHANBHAI PATEL –Vs- LALJI MAKANJI [1957] EA 314 and NELSON –Vs- ATTORNEY GENERAL & ANOTHER*** [1999] 2EA 160 which spell out the duty of the first appellate court to re-evaluate evidence and come to its own conclusions where there has been a

material failure by a trial judge to do so. According to counsel, the Nelson case is good authority for the proposition that evidence by defectors ought to be treated with a lot of caution. The trial judge had failed to do so and relied on such evidence to reach wrong findings and conclusions.

Counsel further criticised the Court of Appeal for not making reference to ground 2(a) of the Consolidated Memorandum of Appeal which had been argued together with ground 1. The Justice of Appeal merely stated:-

***"In the premises, ground 1 of this appeal must fail."*** To counsel this went to show that the court had not re-evaluated all the evidence in respect of the other findings by the trial court. Counsel cited the following passage in the judgement to further support his contention:-

> ***"After perusing the evidence on record and considering the submissions of counsel for the parties, I entirely agree with the above findings. I have no justification to fault her on those findings."***

On the other hand, counsel for the respondent supported the judgement of the majority, arguing that there was no particular format by which the Court of Appeal was to be taken to show that it re-evaluated evidence. The Appellant had not shown which evidence had not been re-appraised or the wrong conclusions or findings that the majority Justices had made. Counsel submitted that both the trial judge and the majority Justices of Appeal had carefully appraised the evidence on such issues as bribery, and disenfranchisement of voters at various polling stations and come to the right conclusions. He submitted that there was no ground for this court as a second appellate court to interfere with the concurrent findings of both lower courts.

The duty of the first appellate court and the principles governing the re-evaluation of evidence by the first appellate court are well set out in various decisions of this Court. In ***UGANDA BREWERIES LTD*** (supra), Oder, JSC (RIP) stated as follows (at page 641):

> "***There is no set format to which a revaluation of evidence by a first Appellate Court should conform. The extent and evaluation may be done depends on the manner in which the circumstances of each case and the style used by the first appellant court. In this regard, I shall refer to what this court said in two cases. In SEMBUYA –Vs- ALPORTS SERVICES UGANDA LIMITED [1999] LLR 109 (SCU) Tsekooko, JSC, said at page 11:-***

***'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first appellate Court is expected to scrutinise and make assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'*** (Emphasis added).

In ***ODONGO AND ANOTHER –Vs- BONGE*** ……..Odoki, JSC (as he then was) said: ***'While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.' I agree with the views expressed by the learned Justices of this court in the two cases immediately referred to above."***

This case also establishes that the Court of Appeal as a first appellate Court after re-evaluating the evidence on record, must not interfere with the findings of the trial court merely because it is doubtful that it would have arrived at the same decision had it been sitting as a court of first instance. The Court of Appeal can only interfere with findings of fact if it is satisfied that the trial judge was wrong.

The above principles are relevant to this case. Although there is no given format to re-appraise evidence, I think the Court of Appeal has a duty to show to some degree that it had itself specifically addressed important aspects of the evidence and chosen to agree with the trial judge's evaluation. As pointed out above, the court should show that it scrutinized the evidence and made assessment thereon. In this case Engwau, JA, outlined the various allegations and considered the submissions of both counsel thereon and the conclusions of the judge. It is true that the submissions of counsel included counsels' assessment of the evidence. But in my view, the learned Justice of Appeal ought to have examined the evidence and made his own assessment before coming to the conclusion that he could not fault the trial judge. Although he states that he duly re-valuated the evidence, and I have no reason to doubt that he did, nonetheless the record should show what aspect, of the evidence and to what extent he had really re-evaluated the evidence. I think this was an omission on the part of the majority Justices of Appeal.

The principles upon which this court as second appellate court will re-evaluate evidence are stated in several decisions of this court which Oder, JSC (RIP) refers to in his judgment in the Uganda Breweries case. He states:

> ***"In KIFAMUNTE –Vs- UGANDA [1997] LLR 72 this court said:***
> ***"It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like a first appellate court. On second appeal it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principle. See PANDYA –Vs- REPUBLIC [1957] EA, KAIRU –Vs- UGANDA [1978] HCB 123. <u>This Court will no doubt consider the facts of the appeal to the extent of considering the relevant part of law or mixed law and fact raised in any appeal.</u> If we re-evaluate the facts of each case wholesale, we shall assume the duty of the first appellate Court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal as a first appellate Court, the Court of Appeal misapplied or failed to apply the principles set out in such decisions as PANDYA** *(supra)* ***RUNALA*** *(supra)***……"**

It is my view that this instant case is one where this court should re-appraise the evidence itself if satisfied that the Court of Appeal did not do so.

I should first note that this was an election petition where, under Rule 15, all evidence at the trial is by way of affidavit except where a person who swore an affidavit is cross-examined by the opposite party or re-examined or where the court of its own motion examines any witness. I have scrutinized all the affidavit evidence and that given by those witnesses that were cross-examined in court including the appellant. With that in mind, I have read the judgment of the trial judge. I note the very meticulous manner in which the trial judge set out to consider the evidence. She stated the allegations and then considered the evidence in support and in rebuttal. She pointed out the contradictions if any and came to her own conclusions. Some allegations were not proved and she dismissed them. Those which, according to her analysis of the evidence, were proved, she said so.

Suffice to give some examples of her evaluation of the evidence. On the issue of disenfranchisement of voters, it had been pleaded that the Electoral Commission had disenfranchised voters by deleting their names from the voters roll and denying the petitioner's supporters the right to vote. It was also alleged that the officers of the Electoral Commission connived with the appellant's agents to deny some supporters of the respondent their right to vote. These wrongs were allegedly committed at Gwafu I and Gwafu II and other polling

stations. A total of nine affidavits were sworn to support those allegations. I have read those affidavits, and the way the trial judge dealt with them at pages 9 – 10 of her typed judgment. The trial judge then dealt with the affidavits which were sworn in rebuttal including that of the chairman of the Electoral Commission, Engineer Kigundu, and the returning officer one Makki Ibrahim. She considered the evidence of the latter under cross-examination thus:

> ***"During cross-examination, Makki was asked and he admitted that Gwafu is not among the polling stations. He stated that they did not have any people registered to vote at that polling station. That he was not sure if there was anyone in MNC with voter's cards reading Gwafu I and Gwafu II. He admitted that he did not carry out a search to find out if there were any such people, although he had read the petitioner's letter where she complained of people being disenfranchised at Gwafu I and Gwafu II, he answered the complaint, it is in his affidavit. He stated that Gwafu 1 and Gwafu II did not exist among the gazetted polling stations. This evidence clearly shows that the Petitioner notified the second respondent about the absence of the said polling station well in time, at 11 a.m on polling day but posted to other polling stations. Makki was silent on this issue in both affidavits, however, during cross-examination and re-examination he admitted that Gwafu 1 and II did not exist among the gazetted polling station in Mukono North Constituency."***

The learned judge then considered Makki's evidence when confronted with the letter of complaint about missing names at Gwafu 1 and 11 which the court found to be evasive. The learned judge was able to conclude, quite rightly in my view, that in fact the Petitioner had complained as averred to the returning officer who took no steps to rectify the situation. After considering all the evidence on this issue, the learned judge was able to conclude thus at page 15 of the judgment:-

> ***"After perusal of the evidence on this point, the court also finds that the allegation that a number of voters who were issued voters cards to vote at Gwafu I and II did not vote because they were told on polling day that their stations were non-existent in proved."***

Having re-evaluated the evidence myself, I am in full agreement with the trial judge. She could not have reached any other conclusion on the evidence. The returning officer can only be described as an evasive witness.

On the issue of alleged intimidation of voters, at Buyuki polling station by soldiers, the learned trial judge equally exhibited thoroughness in the way she evaluated the evidence. She considered the Petitioner's affidavit evidence as well as those of her supporters Wafula Mangeni, Kakembo Jamil, Sengendo Moses and Mukasa Bakireke all of whom swore affidavits. The judge then considered the evidence in rebuttal in particular that of Sengendo Kefa who testified that he was an L.C.5 Councillor and a Campaign Manager of the appellant. He deponed that he was the owner of the truck that had been alleged to carry soldiers involved in the alleged intimidation but denied that his vehicle had carried any soldiers that day. He had been driving the vehicle himself. The judge dealt with the evidence on this allegation thus:

> ***"I have evaluated this evidence and the court finds that the truck exists….and it belongs to Kefa Sengendo. It is possible that the said truck passed ……..the polling station with soldiers at 11 a.m. However, Wafula's evidence needed corroboration by for example the other agents of the petitioner or supporters ……..whom the soldiers caused a stampede. Sengendo averred that he left the polling station at 8.30 a.m. after voting and did not return until 11.00 p.m. In order to prove their allegation, the petitioner's witness needed to adduce concrete evidence place him at Buyuki Polling Station any time between 8.30 a.m and 11.00 p.m. They made no attempt to do that. This allegation therefore fails."*** I fully agree with the trial Judge in her evaluation of the evidence on record on this point.

In similar manner the learned trial Judge considered other allegations and made considered findings on them.

On the issue of the allegations of bribery, as already pointed out, counsel for the appellant argued strongly that these were allegations that were grave and needed to be proved, citing the NELSON case (supra). In any case, the acts and particulars of bribery had not been included in the supporting affidavit of the respondent to her petition.

The learned trial Judge dealt with it in the following manner. First she set out the law on bribery by quoting section 68 of the Parliamentary Elections Act. She then stated:-

> ***"There is no specific averment in the Petitioner's supporting affidavit. She however makes a general statement on offences in paragraph 6. <u>Specifics are</u>***

***given by her witnesses who named various villages where alleged acts of bribery were committed including:…..”*** (emphasis added).

She goes on to name Nakumbo Village and the affidavit and oral evidence that was adduced to prove allegations of bribery at the village. She cites the affidavit of Muwonge George who claimed to have seen the appellant take money from his pocket and hand it over to one Semyalo Patrick who in turn gave it to Namwandu Zziwa who counted it and declared it to be Shs. 250,000= meant for them to buy drums for their drums group. The people promised to vote for the appellant. At the home of one Birato more money was allegedly given by the appellant to various named individuals with some people getting Shs.1,000/= and others like the witness getting Shs. 500/=. The witness claimed to have reported this to the respondent who advised him to report the matter to police which he did. This evidence was rebutted by a supplementary affidavit from the appellant who denied the allegations entirely. He specifically denied giving any money to anybody. Also in rebuttal was the affidavit of Patrick Semyalo who admitted going with the appellant to Nakumbo village where there was a meeting of Mukono North Constituency village committee. He also rejected the allegations of the appellant giving money to anybody. Namwandu Zziwa also swore an affidavit in rebuttal, and she was cross-examined thereon by counsel for the respondent. Under cross-examination she admitted receiving shs.10,000/= from the respondent for fuel and boda boda for disabled voters. She admitted that she distributed this money to the disabled persons gathered there. Three of them whose names were not on the voters register, refused the money. She herself took Shs. 1,000/=. This witness stated that she knew the people she gave money to be voters. Three whose names were not on the Register, refused to take the money.

The learned trial Judge dealt with this evidence thus at page 105 of her judgment:-

***“The 1st respondent and both his witnesses knew Muwonge. They all admit that there was a meeting at Namwandu Zziwa’s home on the said date. They all say it was for NRM village Committee. They do not state why it was held at Zziwa’s home in particular and what position she held on the committee. The 1st respondent and Semyalo do not mention any disabled. Zziwa says it was a meeting to assist the disabled. Semyalo and the 1st respondent are silent about the Shs. 10,000/= Zziwa said he gave her to facilitate the disabled. This is a grave contradiction in the 1st respondent’s evidence and cannot be ignored by this court because they point to a deliberate untruthfulness. The***

***fact of receiving money from the first respondent is not denied by Mrs. Zziwa. She only disputes the amount. In law a bribe is a bribe. The amount is immaterial. I therefore believe the evidence of Muwonge that the 1st respondent gave out money to bribe disabled voters at Nakumbo village on the 21st February 2006, two days before the election. This finding is enough to nullify the election under section 68(1) of the PEA."***

I believe here the Judge had in mind section 61(1)(c) of the Parliamentary Elections Act which, for clarity, states thus:-

61 (1)

***"The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court.***

***( c) that <u>an</u> 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 judge was satisfied on the evidence on record that an illegal practice had not only been committed by the appellant but it had been proved to the satisfaction of the court. Having considered the affidavit evidence and the evidence under examination in court, I am unable to find fault with the learned trial judge in her findings on this issue. The record shows that the appellant was evasive and untruthful when cross-examined on this matter. His witness Semyalo seemed more interested in covering up what had taken place. And as the judge quite rightly observed, this finding alone was enough to nullify the election.

There were several other allegations of bribery of voters at various places which were considered by the court. There was for example the alleged bribe of Shs.150,000/= by the appellant to the residents of Walusubi village, Naama sub-county. It was alleged in the affidavit of one Mugambwa Hamza that the appellant had at a rally offered the residents Shs.150,000= and asked them to vote for him. The deponent claimed that the money was delivered by one Godfrey Balikuddembe, an agent of the appellant, at a village meeting on 21st February 2006. The deponent claimed to have attended the meeting at which the money was handed to the village chairman, one Asadi.

These allegations were purportedly rebutted by the said Balikuddembe and Asadi who stated that the allegations of Mugambwa were false. Balikuddembe categorically denied receiving

and delivering Shs.150,000= or any money to Asadi. Asadi himself, in his first affidavit, denied the allegations. The appellant, in his supplementary affidavit also denied the allegations.

However, Asadi then swore a second affidavit by which he retracted his earlier affidavit. This time Asadi claimed that having read the affidavits of Balikuddembe, that of the appellant and of Mugambwa, he had come to realize that the truth had not been told. This time he claimed that he had actually been involved in asking for and receiving the Shs.150,000= which they wanted to repair the village bore holes. He stated that subsequently the appellant had called him on phone and threatened him that he would be arrested and imprisoned for receiving a bribe unless he cooperated with the appellant.

Since Asadi's affidavit in rejoinder became the focal point in the consideration of evidence on this matter, I find it useful to set out some paragraphs in full.

> ***"2. THAT with assistance of the counsel for the petitioner, I have read and understood the contents of the affidavit I signed in support of the 1st respondent's answer to the petition dated 20th September 2006, of Godfrey Balikuddembe in support to the 1st respondent's answer to the Petition and that of Mugambwa Hamuzan in support of the petition and would wish to state as hereunder.***
>
> ***3. THAT the truth of the matter is that Hon. Bakaluba – Mukasa called me on phone and invited me to Namawojjolo where he told me that I shall be arrested and imprisoned for receiving a bribe because the petitioner was directly complaining against me; and that he should cooperate to overcome this problem***.
>
> ***4. THAT I verily believed Hon. Bakaluba that I was in danger since I had actually been one of the people who had got involved over that money and I was aware that the petitioner had complained about it.***
>
> ***5. THAT it is true that Hon. Bakaluba Mukasa offered Shs.150,000= to the residents including myself on the 20th day of February 2006 at the campaign rally. This he did in answer to our complaint that the village two boreholes had broken down and in addition he also requested us to pay him back by voting for him on the 23rd of February as our member of Parliament.***

***6. THAT the money Shs.150,000= was delivered through Hon. Bakaluba-Mukasa Peter's agent, councillor Godfrey Balikuddembe and the National Resistance Movement Chairman Nama Sub-county, Katuuka which was used to repair the village two boreholes, one of them being at John's place.***

***7. THAT the affidavit of Mugambwa Hammuzah in support of the Petition is factual only that although the residents had shouted that the money be handed over to me, it was finally handed over to Katuuka who was near Hon. Bakaluba-Mukasa when he got it out and I was standing at a distance.***

***8. THAT I was misled to sign the affidavit in support of the 1st respondent's answer to the petition. I never went to Kampala to sign it and I had no interpreter by the names of Florence Kabenge. I signed that document at night on 17th September 2006 at my home and it was brought by Hon. Bakaluba-Mukasa and I did not read through since I do not know English and my belief was that I was signing to deny having handled the money personally."***

This affidavit, if believed, says a lot about the way some witnesses are made to sign affidavits during election petitions. It contains very serious allegations about the appellant, and one would have expected the deponent to be subjected to rigourous cross examination. He was not. The learned trial Judge considered the affidavits in this matter and concluded as follows, at page 109:

***"No affidavit in rebuttal was filed by the 1st respondent or Katuuka, let alone Balikuddembe. Asadi was not cross-examined. I therefore find that the 1st respondent offered Shs.150,000= to Walusimbi village on 20/2/2006 and that money was delivered to the village by his agents and was used to repair the village boreholes. This clearly amounted to gratification which was intended to induce the villagers to vote for him on 23rd February 2006."***

In my view, the learned trial judge once again here did properly evaluate the evidence and came to a conclusion. I agree with her conclusion. It has been argued by counsel for the appellant that the offence of bribery involves the bribing of an individual voter, not a group or a village. Therefore, according to him, money given to a village cannot amount to bribery under Section 68 of the PEA. In my view, such a restrictive interpretation of the law would be counter productive and negate the very purpose for which the law was intended. It is common knowledge that during campaigns for elections, many candidates try all ways to induce voters

to vote for them. In a village there will be people who are voters, and these are the people that will be targeted even if the money benefits the village as a whole including non-voters.

It would, in my view, be too narrow to say that one is guilty of bribery if one gives Shs.1,000/= to an individual voter to vote for him, but he is not guilty of bribery if he gives Shs.100,000/= to a group of voters to buy or do something for their common use so that they vote for him. The appellant went to the village two days before the election asking the voters in that village to vote for him. The people set their terms, i.e. he had to give them money to repair their boreholes before they could vote for him. He obliged. This was bribery envisaged by Section 68 of the PEA. As already indicated above, proof of one act of an illegal practice is enough on its own to annul an election. But the learned trial judge went on to consider all the allegations and made findings thereon.

I am satisfied that the learned trial judge carefully and properly evaluated the evidence, addressed herself to the law and came to the correct conclusions and decision. Although the Court of Appeal did not indicate in detail how it had re-evaluated the evidence, in view of my findings above, this ground of appeal in substance must fail.

In the result, I would dismiss the appeal with costs in this Court and in the Courts below. I uphold the decisions of the lower courts.

Dated at Kampala this **31st** day of **March, 2010**.

**Bart M. Katureebe**
**JUSTICE OF THE SUPREME COURT**

**THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

***CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.SC.***

ELECTION PETITION APPEAL NO. 04 OF 2009

**BETWEEN**

**BAKALUBA PETER MUKASA :::::::::::::::: APPELLANT**

**AND**

**NAMBOOZE BETTY BAKIREKE :::::::::::::: RESPONDENT.**

**[Appeal from the Judgment of the Court of Appeal at Kampala, (Engwau, Byamugisha and Kavuma, JJA) dated 26th March 2009 in Election Petition Appeals Nos. 1 of 2007and 2 of 2007*].***

JUDGMENT OF J.W.N TSEKOOKO, JSC.

I have the advantage of reading in draft the judgment prepared by my learned brother, Katureebe, JSC. which he has just delivered. I agree with his reasoning and with his conclusions that the appeal be dismissed with costs here and in the two courts below.

As the other members of this court agree, it is ordered accordingly.

Delivered at Kampala this **31st** day of **March 2010**.

**J.W.N. TSEKOOKO**

**JUSTICE OF THE SUPREME**
**THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

***(CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.SC).***

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***[Appeal from the Judgment and orders of the Court of Appeal at Kampala, (S.G Engwau, .K, Byamugisha and S.B.K Kavuma, JJA) dated 26th March 2009 in Election Petition Appeals Nos. 1 and 2 of 2007].***

JUDGMENT OF OKELLO, JSC.

I have had the privilege to read in draft the judgment of my learned brother, justice Katureebe, JSC, just delivered.

I agree with his reasoning and conclusion that this appeal must fail. I also concur with the orders he has proposed.

I have nothing useful to add.

Dated at Kampala this 31st day of March, 2010.

**G.M OKELLO**
**JUSTICE OF THE SUPREME COURT**

**THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA
AT KAMPALA

***CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.SC).***

ELECTION PETITION APPEAL NO. 04 OF 2009

**BETWEEN**

**BAKALUBA PETER MUKASA :::::::::::::::: APPELLANT**

**AND**

**NAMBOOZE BETTY BAKIREKE :::::::::::::: RESPONDENT.**

***[Appeal from the Judgment and orders of the Court of Appeal at Kampala, (Engwau, Byamugisha and Kavuma, JJA) dated 26th March 2009 in Election Petition Appeals Nos. 1 and 2 of 2007].***

JUDGMENT OF TUMWESIGYE, JSC.

I have had the benefit of reading in draft in advance the judgment of my learned brother, Justice Katureebe, JSC. I agree with his reasoning and conclusions and the orders he has proposed.

Delivered at **Kampala** this **31st** day of **March 2010**.

**J. TUMWESIGYE**

**JUSTICE OF THE SUPREME COURT**

**THE REPUBLIC OF UGANDA**

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

***(CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE AND KISAAKYE, JJ.SC).***

ELECTION PETITION APPEAL NO. 04 OF 2009

**BETWEEN**

**BAKALUBA PETER MUKASA :::::::::::::::: APPELLANT**

**AND**

**NAMBOOZE BETTY BAKIREKE :::::::::::::: RESPONDENT.**

***[Appeal from the Judgment and orders of the Court of Appeal at Kampala, (S.G Engwau, C.K. Byamugisha and S.B.K Kavuma, JJ.A) dated 26th March 2009 in Election Petition Appeals Nos. 1 and 2 of 2007].***

JUDGMENT OF DR. E.M KISAAKYE, JSC.

I have had the privilege to read in draft the judgment of my learned brother, Justice Katureebe, JSC.

I concur with the orders he has proposed and I have nothing useful to add

Dated at Kampala this **31st** day of **March, 2010.**

.....

**DR. ESTHER M. KISAAKYE**

**JUSTICE OF THE SUPREME COURT**