THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

ELECTION PETITION APPEAL N0. 39 OF 2011

(Arising from Election Petition No. 28 of 2011)

1. ACHEING SARAH OPENDI
2. ELECTORAL COMMISSION :::::::::::::::::::::::::: APPELLANTS

VS

OCHWO NYAKECHO KEZIAH:::::::::::::::::::::::::::::::::::: RESPONDENT

Coram: Hon. Deputy Chief Justice A.E.N. Mpagi Bahigeine, DCJ.
Hon. Justice A. S. Nshimye, JA.
Hon. Justice Remmy Kasule, JA.

JUDGMENT OF A. S. NSHIMYE, JA

This is an appeal from the judgment of the High Court at Tororo (Rugadya Atwoki J.) dated 23rd September 2011 in Election Petition No. 28/ 2011.

The Background of the appeal;

The 1st appellant and 8 others including the respondent contested as candidates for election to the seat of a Woman Member of Parliament for Tororo District. The 2nd appellant organized the elections which were held on 18th February 2011.

The 2nd appellant declared the 1st appellant the winner with 41,165 votes against the respondent who polled 33,486 votes. The winning margin between the two leading candidates namely the appellant and the respondent was 7,679 votes.

The results from a total of 17 polling stations were not included in the final tally of results. It was because cast votes from one polling station were found to exceed registered voters and in the second, results for only two candidates were received, thus resulting in cancellation of results from those two polling stations. Ballot boxes from 15 polling stations were found not to contain sealed

envelopes containing Declaration of Results Forms (DR Forms). For that reason also, results from those 15 polling stations could not be ascertained.

Aggrieved by the results of the election, the respondent petitioned the High Court at Mbale which petition was heard at Tororo and allowed. The election was nullified and a new election ordered.

Being dissatisfied with the said decision, the 1st appellant appealed to this court on four grounds which during conferencing culminated in the following issues:

1. ***Whether or not the bribery allegations proved against Onyango Obbo alias Jacob Obbo, an agent of the appellant, was with her knowledge, consent and approval.***

2. ***Whether there was disenfranchisement of voters, and if so, such disenfranchisement of voters affected the results in a substantial manner.***

3. ***Whether on the finding of the trial judge, the appellant was entitled to costs in the court below.***

4. ***Whether the appellant is entitled to any remedy.***

At the hearing, Mr. Babigumira Blaze appeared for the appellants while Mr. Ambros Tebyasa, Mr. Candia Alex and Mr. Owundo Wandera appeared for the respondent.

Submissions for the appellants.

Counsel for the appellants adopted the brief facts in his scheduling notes.

On the 1st issue of bribery, he submitted that the offence has 3 ingredients. The trial judge found an incidence of bribery to Agnes Ochwo by Onyango Obbo an agent of the appellant. All she told court was that she was going to vote and that she voted. The Trial Judge never considered if Ochwo was a registered voter. Counsel cited the case of **Col. (Rtd.) Dr. Besigye Kizza V. Museveni Kaguta & Anor**, **Election Petition No. 1 of 2001** in which B. Odoki , CJ enlisted the 3 ingredients of bribery as being:-

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

3. ***It was given with the intention of inducing the person to vote.***

Mr. Babigumira submitted further that there was nothing to show that Ochwo was a registered voter, which could have been proved by a voter's card. He made reference to the authority of **Amama Mbabazi & Anor. V. Musinguzi Garuga James, Election Petition Appeal No. 12 of 2002** in which it was stated that, bribery required cogent evidence, which was missing in this case.

In his view, the trial judge erred to have reached the conclusion that Agnes Ochwo was a registered voter or that he was an agent of the appellant.

In respect of the issue of disenfranchisement, learned counsel faulted the trial judge for having included cancelled votes in the total results or for using the yard stick of the total number of registered voters because not all of them would turn up to vote, or vote for only the respondent. The judge did not even consider that there would be spoilt votes.

While the trial judge blamed the returning officer for using the total number of votes in 17 polling stations, in his judgment he used the same votes in calculations. The returning officer having cancelled the results in the 2 polling stations, it was irregular for the trial judge to have considered them because their inclusion would affect the results in a substantial manner. To support his argument, he cited the case of **Edward Byaruhanga Katumba V. Electoral Commission & Siraje Nkugwa Kizito, Election Petition Appeal No. 17 of 2002.**

In conclusion, counsel submitted that the learned trial judge did not take into account the registered voters who did not come to vote. Even if the total number of voters in the 15 polling stations were included, the respondent did not prove that failure to include votes in the 15 polling station affected the results in a substantial manner. He generally referred us to his scheduling notes and prayed that the appeal be allowed with costs here and in the High Court.

<u>Submissions for the respondent;</u>

In reply, Mr. Ambrose Tebyasa, counsel for the respondent submitted that he was in support of the decision of the lower court. The learned trial judge properly evaluated the evidence before he reached his decision. Proof of one incident of bribery may be sufficient to annul the results. The judge evaluated various allegations of bribery and dismissed all except the bribery committed by Alex Onyango Obbo to Ochwo Agnes. The trial judge was satisfied that Ochwo Agnes was bribed

by Onyango Obbo with 2000/= this is evident in the affidavit of Agnes Ochwo especially paragraph 2-5.

The allegation of bribery to Agnes was corroborated by Ogutu Simon who by affidavit, in particular paragraph 6 depones to having witnessed Onyango Obbo handing the money to Agnes Ochwo. Counsel stated that although Onyango Obbo denied ever bribing her and put up a defence of alibi, there was however sufficient evidence by 3 witnesses which destroyed that alibi thereby placing him at the scene of the crime.

The 1st appellant also in her two affidavits does not deny specifically that Onyango Obbo was her agent and that he bribed Agnes Ochwo with her knowledge or approval. She generally denies that she said that neither she nor her agents bribed voters. The trial judge found that evidence was available to prove that Agnes Ochwo was bribed by Onyango Obbo which was not rebutted. Agnes Ochwo testified that she was given money when she was going to vote and that she indeed voted for the 1st appellant.

Counsel Tebyasa argued further that Agnes did not have to move with a voter's card to prove that she was a registered voter because Section 34 (3) of the Parliamentary Elections Act **(PEA)**, allows a person without a voter's card also to vote, so long as that person's name appeared on the register. The fact that she voted at Akadot Primary School presupposes that she was a registered voter and there, the burden shifted to the appellant to prove that she was not a registered voter. To support his argument, he relied on the cases of **Mukasa Anthony Harris V. Dr. Bayiga Michael Phillip Lulume, S.C.C.A No. 18 of 2007.**

In his view the trial judge correctly applied the law of agency and relied on the decisions of **Besigye Kiiza V. Museveni Yoweri Kaguta (supra) and Kaija William V. Byamukama K. James, Election Petition Appeal No. 12 of 2006.** Onyango Obbo admitted that he was the agent of the 1st appellant and therefore there was no necessity to prove that instructions were given expressly or by implication.

In respect of the second ground, learned counsel submitted that the trial judge was justified in concluding that the 2nd respondent failed to discharge its statutory obligation when it disallowed DR Forms for 15 polling stations. The returning officer stated that he received and cancelled results from 2 polling stations because in respect of the results from Bendo Nursery polling station, the

numbers were exceeding the actual voters and those for Kanyagazi, results for only two candidates were forwarded. Counsel submitted that this evidence was never adduced in court. Therefore the claims of the returning officer could not be verified.

The explanations given by the retuning officer were that he had not yet got the results from the 15 polling stations. These were contradictory.

Further, the returning officer stated that he later got the DR Forms but never produced them in court. Counsel relied on Section 53 of the **P.E.A** and submitted that the returning officer failed to exploit an opportunity under the above section and wondered then where the returning officer got the DR Forms for the 15 polling stations after declaring the results. The returning officer was required to annex the DR Forms but did not do so. Counsel wondered where he kept them and why did he refuse to produce them. Section 52 of the P.E.A provides for the safe custody of voting materials until all election disputes are concluded. Counsel suggested that DR Forms were withheld for fear of discovery of discrepancies and manipulations.

He gave examples of discrepancies in the respondents' affidavit, she complained of the results being reduced to 0 belonging to one Constance Obonyo, the appellant got 76 but was given 113 and the results of Ayo Jacinta Ochwola who got 01 vote was given 76 of the appellant at Mission of Hope polling station. On the tally sheet this was not a mere mistake but complete inter changing of results, falsification and manipulation.

At Nyasirenge polling station, the respondent got 27 votes and on the tally sheet, she was given 21. At Mulisha Polling Station, Jacinta got 150 votes and on the tally sheet she was given 5votes, hence the findings of the trial judge were justified, counsel concluded.

Counsel complained that the 2nd appellant failed to avail DR Forms to the respondent and her agents for verification. There are 185 affidavits stating that there were no sufficient DR Forms. The respondent deponed that she and her agents were deprived of DR Forms, which was a genuine complaint. Counsel relied on Section 50 (1) (d) of the **P.E.A** which enjoins the 2nd respondent to avail a copy of the DR Forms to the agent of the candidate or any other voter who may be interested in the same. Failure to do so was a contravention of the law. Therefore, the forms of the constituency cannot be said to have been verified for the tally sheet. There was a prerequisite and without them, one cannot create a tally sheet, counsel concluded. In further support of his

submission, learned counsel Tebyasa cited the case of **Dr. Oboth Markson Jacob V. Dr. Otiam Otalla, Election Petition Appeal No. 38 of 2011,** which is to the effect that a party to the election may produce genuine forms for consideration of court. Reference was also made to the supporting affidavits of Owino Festo, affidavit of the respondent and Nkare Paul the Regional Police Commander.

Counsel contended that it was inconceivable that the tally sheet was inconsistent with the DR Forms and that the results did not represent the will of the people of her constituency. The respondent was cheated of votes and the total was **352 not 307** as stated by the trial judge on page 225. The mistake could be traced, the trial judge gave 47 to the respondent, yet on the tally sheet she had been given 0. Mr. Tebyasa cited the case of **(Col.) Dr. Besigye Kizza V. Museveni**, (supra) in particular the judgment of **J. Mulenga JSC,** who stated that the victory of the appellant must be put in doubt.

In counsel's view the 2nd respondent was enjoined to conduct free and fair elections and that figures are very important. Wrong entries made in the tally sheet, resulted in victory to a wrong candidate. In their written submissions on pg. 17-18, they tried to distinguish the case of **Edward Byaruhanga Katumba V. Electoral Commission & Siraje Nkugwa Kizito** (supra) which related to 1 polling station and 1 parish. In that case the box was snatched by unknown people and taken before counting. While in the instant case, there were 17 polling stations, the votes were counted and declared but disappeared in the hands of the 2nd appellant, hence it is the party to blame as the trial court found.

Finally, counsel prayed that the appeal be dismissed with costs here and in the court below with a certificate of 2 counsel and that the appellant be found guilty of bribery.

Submissions in rejoinder.

Counsel Babigumira with leave of court filed in written submissions

In respect of disenfranchisement, he faulted the learned trial judge because the yardstick he used to determine the effect of failure to include results from all the polling station was wrong.

He submitted further that the results from the two polling stations were rightly cancelled and could not have been included in the calculations. However, for the fifteen polling stations, even after the learned trial judge had included them in the calculations, the appellant remained in the lead.

Counsel contended that the respondent did not state how many votes she got from the fifteen polling stations which were denied. The respondent was entitled to request for the opening of the ballot boxes from the fifteen polling stations and conduct a recount but she did not. Had the ballot boxes been opened, the DR Forms would have been accessed.

He clarified that there were no DR Forms at all and that the 2nd appellant was joined in accordance with the law.

As regards errors in preparing DR Forms, he relied **Hon. Oboth Markson Jacob V. Dr. Otiam Otaala, Election Petition No. 38 of 2011 (supra)** on the manner of subtraction.

The duty of the 1st appellate court.

The duty of the first appellate court as was stated in the case of **Father Nasensio Begumisa & 3 Others V. Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002,** is to subject the evidence adduced at the trial to a fresh and exhaustive reappraisal, scrutiny and then decide whether or not the learned trial judge came to correct conclusions, and if not then this court is entitled to reach its own conclusions.

Learned counsel for respondent argued that under ground 1 the appellants were accepting the fact of giving a bribe. This is not the case because the court's duty here is to look at all the pleadings from the start of the case to the end and make its own findings without isolations.

In doing so this court must be conscious of the fact that it had no opportunity to observe the demeanor of witnesses at the trial stage. See also rule 30 of the rules of this court (Judicature Court of Appeal rules) Directions SI 13-10.

The burden of proof and standard of proof.

The burden of proof is cast on the petitioner to prove the assertions to the satisfaction of the court that the irregularities or malpractices or non-compliance with the provisions and principles laid down in the relevant laws were or is committed and that they or it affected the results of the election in a substantive manner in the election petition.

The evidence must be cogent, strong, and credible.

The standard of proof is on a balance of probabilities but slightly higher though lower than beyond of reasonable doubt.

See **Mukasa Anthony Harris V. Dr. Bayiga Michael Phillip Lulume, (Supra) S.C.C.A No. 18 of 2007and Matsiko Winfred Komuhangi V. Babihuga J. Winnie, Election Petition Appeal No. 9 of 2002.**

In Blyth V. Blyth [1966] AC 643, Lord Denning observed as to the import and meaning of the word ‘’satisfied’’, he said

> ***‘’ …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 be a judge or juror would in fact be ‘’satisfied’’ if he was in a state of reasonable doubt…’’.***

Odoki C.J in Col. (Rtd) Dr. Besigye Kiiza V. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2006, agreed and applied the above observations of Lord Denning. He stated;

> ***’’…it is true that court may not be satisfied if it entertains a reasonable doubt, but the decision will depend on the gravity of the matter to be proved…’’***

In a recent decision of **Paul Mwiru v. Hon. Igeme Nabeta & Others-Election Petition Appeal No. 06 of 2011** this court said*:*

> **“Section 61(3) of the PEA sets the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the Supreme Court in the case of Mukasa Harris v Dr Lulume Bayiga (supra) when it upheld the interpretation given to the subsection by this court and the High Court.”**

Decision of Court;

Issue 1.

Whether or not the bribery allegations proved against Onyango Obbo alias Jacob Obbo, an agent of the appellant, was with her knowledge, consent and approval.

Bribery during an election is defined in **Black's Law Dictionary, 6th Edn**. 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.

The offence of bribery is contrary to Section 68 of the **P.E.A.**

When dealing with this issue of bribery by Onyango Obbo, the trial judge had this to say;

> ***"…court does not require a multiplicity of incidents of bribery in order to annul an election… several allegations of bribery were made. Andriko Rose Mary deponed that she saw Nyandoi Sarah who was said to be an agent of the 1st respondent giving money to voters in Rubongi A Village. Alfred Onyango Oyum deponed that he saw Okoth Peter and Okiria Joseph giving shs. 2000 to each voter. Agnes Ochwo deponed that she received shs. 2000 from Onyango Obbo, an agent of the 1st respondent and that she voted for the 1st respondent on that account. There was no person who testified that he or she received a bribe from the 1st respondent personally. Apart from Agnes Ochwo, there was no person who testified that he or she received money from people who deponed that they only saw agents of the first respondent giving money. Proof of the allegation of bribery requires more than merely seeing one person give money to another. There was no evidence of what that money was for. There was no evidence that the people who received the money voted for the person in respect of whom they received the money. The evidence was speculative at best… I find***

that the evidence before court proved to court's satisfaction that Onyango Obbo, an agent of the 1st respondent gave out money to voters and in particular to Agnes Ochwo at or near Akadot Primary School in order that she should vote for and she indeed voted for the 1st respondent…"

Counsel for the appellant rightly referred us to the case of **Col. (Rtd). Dr. Besigye Kizza V. Museveni Yoweri Kaguta & Anor. Election Petition (supra) No. 1 of 2001,** which outlined the 3 ingredients of the offence of election bribery. There ought to be evidence that;

- A gift was given to a voter,
- The gift was given by a candidate or his agent and that
- It was given with the intention of inducing the person to vote.

Agnes Ochwo's affidavit appears on page 106 of the record of appeal.

In paragraph 2, she stated:-

"That on 18th February 2011, I got up early in the morning to go to Akadot Primary School polling station to cast my vote".

In paragraph 3:

"That when I was nearly reaching the said polling station, I met Onyango Obbo, an agent of Sarah Achieng Opendi giving out money to people who were going to vote with instructions to vote for Sarah Achieng Opendi".

In paragraph 4:

"That the said Onyango Obbo offered me Ug. Shs. 2000/= which he removed from a huge bundle of 2000/= notes".

In paragraph 5:

"That I accepted the offer and took the money and I had to vote for the said Sarah Achieng Opendi because I feared that I would be witch- hunted if I did not vote for her because I had taken their money but without that money, I would not have voted for her".

In her affidavit in rejoinder on page 137 of the record of appeal, under

paragraph 2, she stated that:

"That I know a one Jacob Obbo Alias Onyango Obbo very well because we are residents of the same village called Akadot village, Akadot parish, Mukujju sub-county, Tororo county, Tororo District".

In paragraph 3 she stated:-

"That …Onyango Obbo met me near Akadot Primary School polling station and he gave me a note of 2000/=".

A gift of Ug. Shs. 2000/= is claimed to have been given by Onyango Obbo an agent of the 1st appellant to Agnes Ochwo.

According to Agnes Ochwo, she went ahead to receive it despite the fact that she knew or ought to have known that accepting a bribe is an offence. She did not report to any authority that Onyango Obbo was bribing voters and being a resident of that village, she should have mentioned some of the names of other persons who received bribes from Onyango Obbo as alleged in order to provide corroborative evidence to her allegation.

The offence of bribery is committed by two people. The giver and the receiver. Both Onyango Obbo and Agnes Ochwo would be criminally equally liable.

Section 68 (1) of the P.E.A provides that,

"A person who either before or during an election with intent either directly or indirectly to influence another person to vote or to

refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or to imprisonment not exceeding three years or both".

Subsection (2) provides that;

"A person who receives any money, gift or other consideration under subsection (1) also commits the offence under that subsection".

I find an inconsistency and or falsehoods in the evidence of Agnes Ochwo. She stated in paragraph 3 of her affidavit that she was nearly reaching Akadot Primary School polling station when she met Onyango Obbo an agent of the 1st appellant giving out money to people who were going to vote with instructions to vote for the 1st appellant. In her affidavit in rejoinder, she stated in paragraph 3, that Onyango Obbo met her near Akadot Primary School polling station and he gave her a note of 2000/=. This evidence leaves a hanging question as to who actually met the other. Is it Agnes Ochwo who met Onyango Obbo on the way to the polling station? Or it is Onyango Obbo who met Agnes Ochwo near Akadot Polling Station.

According to the judgment of the learned trial judge on page 225 of the record of appeal, stated that Andriko Rose Mary, Alfred Onyango Ouma and Paddy Oguti Simon saw the agents of the 1st appellant bribing voters.

On analysis of the affidavits, Andirko Rose Mary and Alfred Onyango Ouma make general depositions to the effect that they saw the agents of the 1st appellant giving out money to voters with no specific reference to Onyango Obbo, hence, are of no evidential value and are rejected.

Paddy Oguti Simon whose affidavit appears on the record of appeal stated that;

Paragraph 3:

"That I was appointed by Ochwo Nyakecho Keziah as the election supervisor of Tororo District in the just concluded Woman Member of Parliamentary Elections".

In paragraph 6, he stated that:

"That I saw physically Obbo Onyango an agent of the Sarah Achieng Opendi giving out money to Agnes Ochwo to influence her to vote for Sarah Achieng Opendi in Akadot Primary School polling station".

Unfortunately, this witness who was a supervisor for the respondent does not say where he saw Onyango Obbo bribe Agnes Ochwo. Was it on the way to the polling station as Agnes claims or at the polling station as he seems to suggest.

If Paddy Oguti Simon was diligently carrying out his assignment of a supervisor at Akadot Polling Station then, he could not at the same time have been able to see what was happening at the road before reaching the actual polling station.

In election matters, partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations, it is necessary to look for 'other' evidence to confirm whether a particular witness is telling the truth**.**

Apart from the evidence of Agnes Ochwo, there is no other piece of evidence to corroborate Agnes Ochwo's evidence. The allegations made by Agnes Ochwo required some 'other' evidence from an independent source to confirm the truthfulness or falsity of her allegation.

The names of other persons who were allegedly given Shs. 2000/= were not recorded. They would have come up to corroborate the evidence of Agnes Ochwo. My view is that such evidence is lacking because there was no recorded complaint for example with the Polling Constable regarding the bribing of voters by Onyango Obbo.

When the above evidence is subjected to exhaustive scrutiny, it does not conform to the ingredients of bribery, hence the offence of bribery was with due respect to the learned trial judge not proved.

Having come to a different conclusion from that reached by the trial judge, that bribery to Agnes Ochwo by Onyango Obbo was not on the balance of probabilities proved; there is no need of answering whether Agnes Ochwo was a registered voter. It is equally unnecessary to make a finding that Onyango Obbo was an agent of the appellant (which is not denied) and that he bribed Agnes Ochwo with the knowledge or approval of the appellant.

Nevertheless, I have no doubt that Agnes Ochwo was a registered voter and voted on the polling day. What I am not sure of is who she voted for because she is a non committed and untrustworthy voter. At first she was for the respondent. When she was given Uganda shillings 2000/= as she claimed, she shifted to the appellant because she feared to be haunted.
When she heard the respondent was looking for evidence to pin the appellant on bribery, she shamelessly came forward to give evidence against a person who allegedly bribed her thus also committing the same electoral offence.

Issue two.

Whether there was disenfranchisement of voters, and if so, such disenfranchisement of voters affected the results in a substantial manner.

I considered whether the failure by the returning officer to include the results from all polling stations or non compliance with he law, affected the result of the election in a substantial manner.

In her petition and supporting affidavit in the High Court, the respondent alleged that the results from 17 polling stations were not considered in the final tally of results for Tororo District Woman MP. According to the returning officer, results of two polling stations were cancelled and those of the remaining 15 polling stations were not added before declaring the 1st appellant as the winner with a total of 41, 165 votes and the respondent with 33, 486 votes.

According to the evidence of the returning officer, because of the irregularities in the 2 polling stations of Bendo Nursery and Panyangasi whereby in the former, the votes cast exceeded the total number of voters and in the latter, the results received were for only two candidates, he decided to cancel results from those two polling stations.

The principles of equal suffrage, transparency of the vote and secrecy of the ballot were undermined by multiple voting and staffing. In my view the returning officer was justified under

Section 12 (1) (e) of The Electoral Commission Act, cancel the results of the said two polling stations.

The results from the 15 polling stations were not included in the final tally because the envelopes from those polling stations did not contain DR Forms. The total number of the registered voters in the 15 polling stations was 7,305.

Section 50 (1) (c) of the Parliamentary Elections Act provides that results from a polling station for purposes of declaring a result are not those in a polling box but the ones already counted and certified in a separate DR Form, sealed in an envelope at the polling station and dealt with.

The role of a returning officer is to tally the results from different polling stations from the DR Forms which are filled by the presiding officer. These forms are supposed to be sealed in an envelope but where they are unavailable; the returning officer has no option other than ascertaining them from the forms, this is as per Section 53 (3) of the Parliamentary Elections Act.

The returning officer did not produce the DR Forms for the 15 polling stations on the ground that they were not available; hence the only inference one can draw from this is that these forms were mysteriously tampered with which compromised safe keeping of electoral materials hence a non-compliance with the electoral law.

I now consider the effect of this non-compliance on the results of the election.

Article 126 (2) (e) of the Ugandan Constitution, 1995 Provides that,

> ***"In adjudicating cases of both civil and criminal nature, the courts shall subject to the law, apply the principle, among others, that substantive justice shall be administered without undue regard to technicalities".***

Section 61 (1) (a) of the Parliamentary Elections Act requires proof of substantial effect on the result of the election as one of the grounds of setting aside such an election.

The effect of the non-compliance with the law must be substantial.

In the case of **Amama Mbabazi & Anor. V. Musinguzi Garuga James, Election Petition (supra) Appeal No. 12 of 2002, Odoki CJ** said**,**

> ***"… what is a substantial effect? This has not been defined in the statute or judicial decisions but the cases of Hackney & Morgan V. Simpson 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, court has to evaluate the whole process of election to determine how it affected the results and then assess the degree of the effect. In the 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 adjustment for irregularities''.***

It is not sufficient that there have been irregularities, but the petitioner must go further and show how they affected the result of the election.

Ground 3 (a) (i)-(viii) of the petition stated 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 assertion was followed by items showing how the result was said to have been affected.

In the case of **Gunn V. Sharpe (1974) 1 Q.B 808,** it was stated that,

> ***"…An election is not to be upset for 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.

The principle is that elections should not be lightly set aside simply because there have been informalities and errors.

It was the respondent's contention that the 2nd appellant failed to avail DR Forms for the respondent and her agents for verification, however, in the case of **Kakooza John Baptist V. Electoral Commission & Anor. Supreme Court Election Petition Appeal No. 11 of 2007, Justice Kanyeihamba on pg. 14** stated that,

> ***"… I do not agree that it is obligatory that each candidate or his or her election agent must first be supplied with or receive a copy of every declaration form before all the results are declared and validated…"***

The learned trial judge should have considered that the total number of voters in those 15 polling stations was 7, 305 as compared to the wining margin of the appellant of 7, 679 without the said 15 polling stations. Even if all the voters in the 15 polling stations were to vote for the respondent which is impossible, still the appellant would have had a winning margin of 374 votes.

For the 2 polling stations whose results were cancelled, the respondent failed to adduce evidence showing how many of the 1115 registered voters cast their votes. And how many of these voted for her. This could be ascertained from the DR Forms which her polling agents must have signed and retained after voting and counting votes at the two polling stations. One imagining or thinking that the respondent could have obtained more votes from these two polling stations than her 8 contestants so as to upset the clear and un doubtful wining margin of the appellant would be to say the least speculative.

It was the contention of the returning officer that the results in the tally sheet were not correct. The respondent attached DR Forms for Mission of Hope Polling station where she was shown as having 145 votes yet the tally sheet credited her with only 45 votes. At Akworot Polling station, the DR Forms showed the respondent as having 230 votes while the result tally sheet showed that she got only 30 votes. The DR Forms for Nyasirenge polling station showed the petitioner with 27 votes while the tally sheet gave her 20. In total the learned trial judge stated that, these were 307 votes denied to the respondent.

After careful perusal of the DR Forms attached by the respondent and with particular reference to page 223 of the record, when I calculated the votes denied to the respondent, they add up to 402 and not 307.

I have verified the above evidence of the returning officer which was accepted by the trial judge. Even if the 402 votes are added to those polled by the respondent, the winning margin still remains too high.

It was wrong to have added the number of the registered voters in the 17 polling stations to any of the candidates because that was speculation as to who voted for whom and it cannot be said that all of them voted for only the respondent. Hence the trial judge erred when he added the total number of registered voters in the 17 polling stations to the respondent alone.

I find like the trial court did, that the non–compliance did not affect the elections in a substantial manner.

In the result, I hold that the appeal has merit and succeeds. The judgment of the lower court and the orders made therefrom are set aside and in their place substitute an order dismissing the petition with costs.

Although the appeal for the second appellant also succeeds, the Electoral Commission did not show interest in prosecuting the appeal and was absent. The lower court and this court found non-compliance of the electoral law by the Electoral Commission. If the elections had been managed in accordance with the electoral laws mentioned in this judgment, there would have been nothing wrong with the results from the 17 polling stations; most probably the respondent would not have challenged the results in court.

While the respondent would have had a reasonable cause of action based on non-compliance, she is to blame for alleging acts of bribery by the appellant, which, she could not prove. I would in the circumstances order that the costs of the 1st appellant, be borne by the 2nd appellant and the respondent, whereby, the Electoral Commission, shall pay 2/3 and the respondent 1/3 of the taxed costs here and below.

Dated at Kampala this …03rd ….Day of…July….2012.

HON. A. S NSHIMYE,
JUSTICE OF APPEAL

JUDGMENT OF A.E.N.MPAGI BAHIGEINE, DCJ

I agree with the reasons by my brother A.S.Nshimye, JA and wish to add nothing.

Since my brother R.Kasule, JA also agrees, the appeal succeeds with orders as stated in the lead judgment.

The 1st appellant Achieng Sarah Opendi retains the seat of Woman Member of Parliament for Tororo District.

A.E.N.Mpagi-Bahigeine
Deputy Chief Justice
03/07/12

JUDGEMENT OF REMMY. K. KASULE, JA

I have had the benefit of reading in draft the judgment of my brother A.S. Nshimye and I too agree that this appeal must succeed.

There was hardly any evidence adduced before the trial court that the 1st appellant authorized, consented to, let alone was in any way aware that her agent Onyango Obbo alias Jacob Obbo was bribing any registered voter(s).

The evidence of Agnes Ochwo, a respondent's witness that she received the money from Onyango Obbo, the agent of the 1st appellant, and there and then she (Agnes Ochwo) switched from voting for a candidate of her choice and voted for the 1st appellant, was very suspicious, to say the least. She gave no plausible explanation for her deplorable conduct if at all this was the truth. She did not also report this alleged bribe to any officials conducting the elections or the Police, who were readily available which, too, was very strange.

In the circumstances the learned trial judge was not justified to hold that the only inference to be drawn from the evidence that was before him on this point was that Onyango Obbo paid the alleged bribe to Agnes Ochwo with the knowledge and approval of the 1st appellant.

Having re-appraised the evidence that was adduced on this issue, and after making allowance that I had no opportunity to see the demeanour of the witnesses at trial, I all the same come to the conclusion that given the weak evidence that was adduced, the bribery allegation was not proved against the 1st appellant.

On the issue of disenfranchisement of voters and whether the same affected the results of the election in a substantial manner, I find that it was proved as a fact that voters from 17 polling stations with a total number of 8,844 registered voters were disenfranchised.

Proof of the above fact however was, per se, not enough for the results of the election to be set aside. **Section 61 (1) (a)** of the **Parliamentary Elections Act** required the respondent to prove on a balance of probabilities to the satisfaction of the court that the disenfranchisement affected the result in a substantial manner.

It is significant to appreciate the fact that when the total number of registered voters of 8844 from the 17 polling stations had been excluded from the total number of the votes cast, the 1st appellant remained with 41,165 votes, while the respondent had 33,486 votes. This means that exclusive of the results of the 17 polling stations the 1st appellant had a winning majority of 7,679 votes from the electorate of Tororo District.

This winning majority would most likely grow higher if the results from the 17 polling stations were to be taken into account. It was also a fact that the exclusion of the results from the 17 polling stations affected all the candidates in the election equally as none of them enjoyed any votes from any of the said stations.

This fact therefore made it incumbent upon the respondent to prove to the satisfaction of the court that given the votes she got from the 15 polling stations,(having excluded the two where the number of registered voters was less than those who voted) she would have the 1st appellant's winning majority reduced to such an extent that the 1st appellant would cease to be the winner or that the ultimate result would be so uncertain that it would not be possible to tell as to who exactly is the winner of the election.

It was incumbent upon the respondent to avail to the court the number of votes that she got at each of the 15 polling stations through the declaration of results forms of her polling agents at each of the

polling stations or otherwise. If the number of votes the respondent got out of these 15 polling stations significantly reduced the winning majority of 7,679 votes of the 1st appellant, then the respondent would have rightly succeeded in her petition to set aside the election and to have a bye-election held. The respondent failed to provide this evidence, and in its absence, it was most unfair to the 1st appellant and the District electorate at large to have her winning majority done away with by the trial judge, the way it was done. The learned trial judge was not justified to just compare and aggregate the number of registered voters from the 17 polling stations of 8,144 together with the winning majority of the 1st appellant and then conclude by washing away the 1st appellant's winning majority. This approach overlooked the fact that each candidate at this election suffered equally from the decision of the Electoral Commission to exclude the votes from the 17 polling stations from the final tally of the results. The respondent therefore had to discharge the burden that she would have got the majority votes if the votes from the 15 polling stations had been taken into account. She had the requisite evidence to prove or disprove this. She did not adduce it and thus she failed to discharge this burden. The learned trial judge ought to have approached this issue on the basis of the approach set by this court in **Election Petition Appeal No.17 of 2002: Edward Byaruhanga Katumba Vs Electoral Commission & Siraje Nkugwa Kizito.** The learned trial judge erred by not so approaching the issue.

I would allow the appeal and I concur with the Orders as to costs proposed by my Lord A.S. Nshimye.

Dated at Kampala this …**03rd** …day of …**July**….2012.

Remmy. K. Kasule

JUSTICE OF APPEAL