THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

ELECTION PETITION APPEAL NO. 44 OF 2011

(Arising from the judgment and order of His Lordship Hon. Justice V. F. Musoke Kibuuka in Election Petition No. 018 of 2011, at Kampala)

KIKULUKUNYU FAISAL::APPELLANT

VERSUS

MUWANGA KIVUMBI MOHAMMED::RESPONDENT

CORAM: HON. JUSTICE S. B. K. KAVUMA, JA;
HON. JUSTICE M. S. ARACH AMOKO, JA;
HON. JUSTICE REMMY KASULE, JA.

JUDGMENT OF HON. JUSTICE M. S. ARACH AMOKO, JA AND HON. JUSTICE REMMY KASULE, JA

This is an appeal against the judgment and orders of the High Court at Kampala (V. F. Musoke Kibuuka, J.) wherein the election of the appellant as a Member of Parliament was annulled for commission of bribery.

The facts of the appeal are not in dispute. On 18th February 2011, Parliamentary elections were held throughout the country. The appellant, Kikulukunyu Faisal and Muwanga Kivumbi Muhammed, the respondent were among the candidates for Butambala Constituency. At the end of the exercise, the appellant polled 13,188 votes or 48.21% against 12, 453 votes or 45.53% polled by the respondent. The other two candidates,

namely, Kasule Massy Moses obtained 859 votes or 3.14% and Sserunjogi Edirisa Kawadwa bagged 854 votes or 3.12% of the total votes, respectively. Consequently, the Electoral Commission declared the appellant the winner.

The respondent was dissatisfied with the outcome of the election and filed Election Petition No.018 of 2011 in the High Court of Uganda at Kampala against the Electoral Commission and the appellant challenging the results for non compliance with electoral laws. In particular and of relevance to the instant appeal, the respondent cited 22 incidences of illegal practice in support of his allegation that:

> ***" i) The respondent (now appellant) personally or through his agents, with his knowledge, consent or approval, offered or caused to be offered to registered voters various gifts including, but not limited to, money, cosmetics, steamers, foodstuffs, cows and footballs with a view of procuring voters to vote for him."***

Both the Electoral Commission and the appellant denied the allegations and contended that the election was conducted in accordance with the electoral laws. They pleaded in the alternative that, if there were any non-compliance with electoral laws, they did not substantially affect the outcome of the election. The Respondents thus prayed for dismissal of the petition with costs.

During the course of the proceedings before the High Court, the claim against the Electoral Commission was abandoned. Consequently, there were only two issues for determination by the Court, namely:

1. **Whether the appellant committed any illegal practices or election offences personally or through his agents, with his knowledge, consent or approval; and**

2. **Whether the respondent was entitled to the reliefs sought.**

The learned judge, after evaluating six out of the 22 allegations of bribery, found that five of them had been proved to the satisfaction of the Court. He thus deemed it futile to

proceed with evaluation of the evidence in respect of the rest of the allegations in the circumstances. That being the case, the learned judge, answered both issues in the affirmative and in accordance with sections 61(1) (c) and 63(4) (c) of the Parliamentary Elections Act 2005, (hereinafter referred to for brevity as the "PEA"), set aside the election of the appellant and ordered a fresh election. He also ordered him to pay the costs of the petition.

The appellant was aggrieved by the judgment and orders of the judge and instituted this appeal on four grounds, namely, that:

1. **The learned trial Judge erred in law and fact when he found that the 1st appellant committed illegal practices and electoral offences in connection with the election personally or through his agents, with his knowledge, consent or approval;**
2. **The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record in respect of the incidents of bribery alleged by the respondent in the petition and arrived at wrong conclusions;**
3. **The learned trial Judge erred in law and fact when he failed to fairly, justly and properly evaluate all the evidence on record thereby coming to the wrong conclusions.**
4. **The learned trial Judge erred in law and fact when he engaged in conjecture and speculation and reached the wrong conclusions.**

The appellant sought the following reliefs and orders:

1. That the appeal be allowed.
2. That the judgment of the High Court be set aside and substituted with judgment in his favour.
3. That the costs of this appeal and those of the court below be granted to him.

From the above grounds, the only two issues agreed upon by the parties for determination by this Court were:

1. **Whether the trial Judge erred in law and fact when he found that the appellant committed illegal practice of bribery personally or through his agents with his knowledge, consent and approval;**

2. **Whether the appellant is entitled to the reliefs sought.**

At the hearing of the appeal, the appellant was represented by Mr. Okello Oryem assisted by Mr. Tio Jonathan. Hon. Medad Lubega Segona and Mr. Chrysostom Katumba represented the respondent. They supplemented their legal arguments filed in court with oral submissions.

ISSUE NO.1

Whether the trial Judge erred in law and fact when he found that the appellant committed illegal practice of bribery personally or through his agents with his knowledge, consent and approval;

This was the key issue. In his submissions on the issue, Mr Oryem re- stated the duties of this Court as a first appellate Court namely, to re-evaluate the evidence and subject it to a fresh scrutiny. He also summarised the ingredients of the offence of illegal practice as set out under section 68(1) of the Parliamentary Elections Act, which are:

1. That money or gift was given personally or through an agent.
2. That the recipient is a registered voter.
3. That the giving must have been with the intention to influence votes.

He then submitted that in an election petition where bribery is alleged, such as this one, the law requires that each allegation must be subjected to an exhaustive scrutiny and all

the ingredients must be proved by cogent evidence. The trial judge must also be cautious that witnesses in an election petition are prone to lying in order to promote the interest of their preferred candidate.

A court should therefore not make a decision under the provisions of section 61(1) of the PEA unless it has, before it, substantial and cogent evidence compelling it to do so. In other words, the evidence must not only raise suspicion, but it must prove the allegations of bribery under section 68(1) (c) of the PEA to the satisfaction of the Court, although that suspicion need not be beyond reasonable doubt. (See: **Hon. Mukasa Anthony Harris vs. Dr. Bagiya Lulume; Court of Appeal Election Petition Appeal No. 14 of 2006).**

Whilst acknowledging that a single incident of illegal practice or bribery once proved to the satisfaction of the court suffices and the weight or significance of the incident is irrelevant, counsel Oryem contended that in order to meet the required standard, there must be proof that the purpose of the bribe was to influence a voter to vote for the candidate or to refrain from voting for another candidate.

Lastly, Mr Oryem asserted that in such cases, the Court must take into account the fact that the receiver of the alleged bribe is an accomplice to the illegal practice, therefore, his or her evidence cannot be safely relied on to overturn an election. Hence, in a case where the only evidence before the court is that of an accomplice or accomplices and the same is denied or rebutted by the candidate or his supporters and agents, there must be independent and cogent evidence to prove the allegation.

In the instant appeal, Mr. Oryem argued, it is the appellant's contention that the trial judge was aware of the above principles as well as the law but failed to apply them to the case before him. He instead engaged in speculation and conjecture and ended up arriving at the wrong conclusions.

In a bid to illustrate his point, Mr. Oryem pointed out firstly, that the respondent, who is the principal complainant, told blatant lies and his entire case was based on lies in that he

told different stories in his affidavit in support of the petition and in his supplementary affidavit. In the circumstances, the petition had no supporting affidavit as no amount of evidence could corroborate lies. The petition ought to have failed for that reason alone.

Secondly, Mr. Oryem submitted that, being a newly created district, the election in Butambala was, according to the evidence of the Chairman Electoral Commission, a unique one. The Electoral Commission had, accordingly, to re-organise the polling stations, with the result that most of the data such as names, sizes and location of polling stations changed. So, it was only the voters' register which was finally used. Therefore, in order to prove that his witnesses were registered voters, the respondent had to produce the voters register before court. However, the respondent did not adduce the voters register in evidence at all. There was thus no proof that any of the witnesses who allegedly received bribes were registered voters.

Thirdly, Mr. Oryem submitted that in respect of all the five incidents of bribery on which the judge based his decision, both parties adduced evidence in support of the allegations and in rebuttal. In other words, there were merely accusations and counter accusations. There was, in his view, clearly no independent evidence. In those circumstances, the trial judge should have called for independent evidence before reaching his conclusions. (See**:** **Mbayo Jacob Robert vs. The Electoral Commission and Talonsya Sinani, Court of Appeal Election Petition Appeal No. 07 of 2006).**

Issue No. 2:

Whether the appellant is entitled to the reliefs sought.

Mr. Oryem contended that the appellant was entitled to the reliefs sought in light of his arguments on issue No. 1. The appeal should be allowed as prayed.

In his reply, Hon. Segona, learned counsel for the respondent, agreed with the principles of law set out by Mr Oryem but contended that the trial judge also correctly applied them

to the case before him and arrived at the correct conclusion. The decision of the learned judge should therefore not be interfered with by this court in the premises.

Regarding the respondent's affidavits, Hon. Segona contended that the respondent never lied and there was no contradiction at all between the respondent's affidavit in support of the petition and the supplementary affidavit as Mr Oryem alleged, as the latter affidavit merely clarified the former.

In respect of proof of voter registration, counsel Segona asserted that the evidence on record was actually more than sufficient to prove voter registration since the said evidence clearly brings out the fact that the deponents were registered voters. He argued that it would in any case be too onerous to expect the witnesses to produce the voters register as proof of registration. In his view, if the appellant had any doubt concerning the registration of the respondent's witnesses, it was up to the appellant to request the Electoral Commission which was also a party to the petition to produce the voters register which was in its custody. The Commission had been put on notice through the pleadings and had ample time to verify the voters' cards and registration numbers which had been given by the respondent's witnesses. The Commission was ably represented by Counsel Okello Oryem in the High Court and therefore, there was no excuse for failing to verify the information given by the respondent's witnesses regarding their registration.

Regarding independent evidence, Hon. Segona submitted that it is a well known principle of law that there is no specific number of witnesses required to prove a given fact. That this court has previously held that bribery in an election petition can be proved even on the strength of evidence of a single witness. (See: **Hon. Mukasa Anthony Harris vs. Dr. Bayiga Michael Phillip Lulume,(supra) and Hon. Kirunda Kiveijinja vs. Katuntu Abdu, Court of Appeal Election Petition Appeal No. 24 of 2006).**

Issue No. 2:

Whether the appellant is entitled to the reliefs sought.

On the basis of his submissions on issue No.1, Counsel Segona's contention was that the appeal lacked merit and ought to be dismissed with costs to his client.

The principles governing election petitions generally and allegations of bribery in particular set out above by Mr. Oryem are not in dispute. It is also common ground that the trial Judge was alive to the law as well as the principles aforesaid. What is disputed is whether or not he applied the same to the case before him.

In determining this issue, we are guided by the well settled principle that this court, being a first appellate court, has a duty to re-consider the evidence by subjecting it to a fresh and exhaustive scrutiny, weighing conflicting evidence and drawing its own inferences and conclusions from it. The court should, of course, bear in mind that it has neither seen, nor heard the witnesses at trial and should, therefore, make due allowance in that respect. (See: **Pandya vs. R [1957] E.A 336).**

The first complaint is that the respondent told a blatant lie and gave contradictory evidence in his affidavit in support and the supplementary affidavit. According to the record, the affidavit in support of the petition is dated 20th March, 2011. We reproduce the relevant parts below:

"6 .THAT I have been informed by various registered voters in various parts of the said constituency that the 2nd Respondent personally and through his various agents did offer and or caused to be offered bribes to registered voters and these endearments include among others;

(a).....

(b).....

(c).....

(d).....

(e) **Other endearments**

Hon. Kikulukunyu donated a foot ball to the village at Kyabadaaza which was received by the LC 1 Chairman Mr. Mustafa Mulimbo.

Hon. Kikulukunyu donated 2 cows after the football tournament held on the 25/12/2010 at Kyabadaaza."

The respondent later on filed a supplementary affidavit dated 24th June, 2011 and the relevant part of his affirmation is inter alia, set out in paragraphs 3 to 5 as follows:

> ***"3. That I have since received information from Katende Edward, Lubega Charles and Wampamba Abdu Nasser, who have all informed me which information I verily believe to be true, and have confirmed it to be true that on the 25th day of December final matches for both football and netball teams were played at Lugala Play ground.***
>
> ***4. That I wish to clarify that from information that the final matches for both the football and netball tournament were held on the 25th December at Lugala Play ground where Kyabadaaza Football club won the final football match while Kyabadaaza Netball Club won the final netball match. The inclusion of Kyabadaaza as the venue where the final games were played was an excusable mistake based on the fact that both winners were Kyabadaaza teams.*** (Underlining is added for emphasis).
>
> ***5. That I have also confirmed that the two cows were donated by the 2nd respondent together with Hon. Namirembe Bitamazire to the winning team."***

The above clearly demonstrates the fact that the supplementary affidavit was not only intended to supplement but to clarify and correct some mistakes which the respondent had made in the earlier affidavit such as the venue of the matches from Kyabadaaza to Lugala. We accordingly find no contradiction here, but a genuine mistake that the respondent had made possibly due to over zealousness and the short period prescribed by

electoral law within which he had to gather information in support of his petition and to file the same in court.

There is also no indication that this was a blatant lie as alleged by Mr. Oryem. A **"lie"** is defined in Oxford Dictionary of Current English as an ***"intentionally false statement".***

Further, counsel Oryem did not persuade us that the respondent intentionally made a false a statement in order to mislead court. In any case, the long accepted maxim is ***"falsa demonstratio non nocet"***, whose English translation is that if a part of a description is true and a part false, if the true part describes the subject with sufficient certainty, the untrue part will be rejected or ignored. In other words, the maxim is that a false description does not necessarily vitiate a document.(see: **Osborne's Concise Dictionary, 4ᵗ Edition**, **page 142** and **Ratilal Nanchand SHETH vs. Dr C.L.K Sali, [1995] KALR 626**)

Finally and most importantly, according to the record, the allegation of bribery using a football or cows contained in the above quoted paragraphs was not among the six incidences that the learned trial judge considered in reaching his decision. Therefore, even if the averments were contradictory or false as alleged by Mr. Oryem, that part of the affidavit could be severed and it would still have had no effect on the final outcome of the case. **[**see: **Col. Dr Kizza Besigye- Vs- Museveni Yoweri Kaguta and the Electoral Commission, Presidential Election Petition No. 1 of 2001**]

By way of a reminder the six incidences which the learned judge considered were:

1. A bribe of Shs. 100,000 at Gombe Mosque.
2. A bribe of 6 crates of soda at Kabasanda Mosque.
3. A bribe with a steamer lamp at Kitimba B village.
4. Bribing voters with steamers at Ngongwe "A" village, Bukandaganyi Parish, Kalamba Sub-county.
5. Bribing voters at Nsozibirye "A" Village of Kumaduuka with shs. 50,000.

6. Bribing voters at Tabaruzinga, Kamugombwa and Kikeera villages with steamers.

Out of the six, as earlier stated, the judge found that the respondent had proved, to the court's satisfaction, on the balance of probabilities, all allegations except No.2.

Turning to the contention that the respondent's witnesses failed to prove that they were registered voters, we have carefully perused the court record and established that nearly all of them deponed in their affidavits that they were registered voters and had voter's registration cards or voters ID numbers. The numbers were clearly indicated in their affidavits which they filed in court as the evidence to be relied on by the respondent in support of his petition. The affidavits were served on the appellant as well as the Electoral Commission which was the 1st respondent to the petition, which was also represented by Mr. Oryem.

Under Section 1 of the PEA, a ***"voter's card"*** means a voter's card ***issued under Section 26 of the Commission Act to a voter whose name appears in the voter's register."***

"Voters' register" means the National voters' Register compiled under Section 18 of the Commission Act."

It is a notorious fact that the Electoral Commission is the custodian and has custody of the voters register at all times. Section 106 of the Evidence Act provides that:

"In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person".

As Hon. Segona pointed out in his submissions, if the appellant had wanted to prove that the witnesses in question were not voters and never voted since they were not registered voters, he should have, with the assistance of the Electoral Commission, tendered a copy of the official register used on the polling day indicating who had voted and who had not. The Electoral Commission had the time and opportunity to do so and Counsel Oryem had

ample opportunity and indeed cross-examined a number of the witnesses relevant to this issue. However, it is clear from the record of proceedings that he did not use that opportunity to question any of the witnesses about the authenticity of their respective voter's cards. That being so, their evidence remained unchallenged under the law and the learned trial judge was right, in his view, to rely on them as proof of voter registration in the absence of any evidence to the contrary.

The above notwithstanding, we also note the fact that the voters' cards in Butambala Constituency had the words **"Mpigi District"** written on them. This, as the Chairman of the Electoral Commission, Eng. Dr. Badru Kiggundu (RW 61) explained, was because Butambala District was curved out of Mpigi District after the registration of voters had been completed. Therefore during the re-organisation some voters were transferred from one polling station to another within Butambala. Because of this the voter's register which had photographs and names of the voters became of cardinal importance for a registered voter to identify the exact polling station of voting within Butambala District.

In our appreciation of this piece of evidence we conclude that the voter's register became of cardinal importance in Butambala first and foremost so as to enable a voter who had been issued with a voter's card with the words **"Mpigi District"** on it to determine and locate within the new Butambala District, the exact polling station where the said voter was supposed to cast his/her vote.

It follows therefore that a person claiming to be a voter in Butambala District, but whose voting particulars were not shown in the voters Register as being allocated to vote at a particular polling station could not be allowed to vote.

We are unable to reach the conclusion that because Butambala was a new district therefore on the day of voting of 18.02.2011, the voter's card issued to a particular voter resident within the district, became useless to that voter and that the only record that mattered for the purpose of voting was the voters' Register. The voter's card is a legal document to which every registered voter is entitled by law to have and use at an election. It can only be withdrawn by the Electoral Commission from the holder if that holder

ceases to be a voter. **(**See: **Section 26 and 28 of the Electoral Commission Act, Cap 140)**. Possession of a voter's card is prima-facie evidence that the holder is registered in the National voters' Register.

We also note that the witnesses whose evidence was accepted by the learned trial judge as proving the bribery allegations against the appellant clearly stated on oath/affirmation not only their respective registered voter's cards and numbers, but also the exact locations of polling stations where they voted. Their evidence was collaborated by the fact that the respective campaign rallies following the approved campaign schedules between the candidates and the Electoral Commission, where the alleged acts of bribing took place were in geographical areas of those polling stations within Butambala District.

Indeed the witnesses themselves who testified in proof of the bribery allegations or in rebuttal of the same appeared to have been residents and voters of the respective geographical areas where the stated rallies took place and where the polling stations at which they respectively voted were also situate.

It is significant that no evidence was adduced at all at trial to the effect that a particular witness whose evidence at trial was in proof of or in rebuttal of the bribery allegations, was found not to have been a registered voter at any particular polling station in Butambala District at this election.

We are therefore satisfied that those witnesses to the bribery allegations whether in support or whether in rebuttal of those allegations, who produced their respective voters cards and stated on oath/affirmation that they voted at such and such polling station(s) within Butambala, and there was no evidence adduced in rebuttal of their being registered voters and having voted, provided appropriate proof to court that each one of them must have had his/her names on the voters Register as a registered voter hailing from Butambala District. Otherwise such a person would never have been allowed to vote by the polling officials of the Electoral Commission.

It is our conclusion that in this particular election in Butambala District the voter's card was as equally important as the voter's Register was. One was not exclusive of the other in importance as evidence of proof of one being a registered voter in the District.

In our considered view therefore, the submission that because the witnesses of the respondent on the bribery allegations did not produce in court at trial the voters' Register for Butambala District to show that each one of them had his/her names and pictures thereon, made such witnesses to having failed to prove that they were registered voters in Butambala District, lacks validity. In absence of any evidence to the contrary, we conclude that each of these witnesses' particulars of being a registered voter were first checked and verified first by their producing to the election officials their voters' cards followed by confirmation of what was on the voters' cards tallying with the voters' Register.

In the premises, we reject Mr. Oryem's submission on this point.

Lastly, the argument by Mr. Oryem that the judge had to summon independent evidence is also untenable. The well known principle in law is that there is no specific number of witnesses required to prove a given fact. Even one witness can prove a case as long as he or she is credible. (See: **Hon. Mukasa Anthony Harrison vs. Dr. Bayiga Michael Phillip Lulume (supra).**

Regarding the complaint that the witnesses gave insufficient or contradictory evidence which the judge should not have relied upon to base his decision, we have subjected the evidence on record in respect of those incidences to a fresh scrutiny and our findings are as follows:

(a) Bribery at Gombe Mosque:

The allegation found in the evidence of the key witness Ssegirinya Mohabuba PW8, was that the appellant went to Gombe Mosque where the witness was with some other people. It was in 2010, around Christmas time. The appellant addressed the gathering, after which

he gave the witness 100,000/= to distribute to them so that they vote for him on polling day. The witness said he wrote down the names of those present including himself. They were 101 in total. He then gave each one Shs. 1,000.

One Haji Sulaiman missed because he had left the Mosque at the time of distribution. This evidence was corroborated by Namutebi Aziza, who stated that she was one of the recipients of the Shs 1,000. She testified that the appellant told them that he was giving them the money as a Christmas gift.

Other witnesses who corroborated the evidence of Ssegirinya Mohabuba included Mutesasira Ahmed, PW 55; Kalyango Abdul, PW50 and Lubowa Hamdan who testified that they also witnessed the incident and received the Shs. 1,000 donation.

The judge then evaluated the evidence in rebuttal from Nalongo Nabulya Afuma PW14 when she claimed that the appellant never donated the Shs. 100,000 at the Mosque as alleged since he never stepped in Gombe ward the entire month of December 2010 for campaigns.

He found that Nalongo Nabulya Afuma had lied in her evidence because during cross-examination, she was shown the appellant's approved campaign programme indicating that on the 22nd and 23rd December 2010, the appellant had to campaign in Gombe ward in Gombe Town Council. The judge reasoned that she was not so close to the appellant to know details of his movement during that period.

He found the witness to have testified as she did because she was the campaign argent of the appellant. She had to support him. Consequently, the judge preferred to believe the evidence of Ssegirinya Muhabuba on this incident.

We have perused the record and we find that the evidence supports the judge's findings. Consequently, we do not accept the argument by Mr. Oryem that the witnesses were not clear. It is only common sense that in general, the expression "*Around Christmas*"

particularly in this country means the period in December to early January and in this case, includes the period 22nd and 23rd December 2010. This is confirmed by the campaign programme which indicates that the appellant was scheduled to campaign in Gombe Ward on the 22nd and 23 rd December, 2010. Further, the appellant's own testimony is that he stuck to the campaign programme.

The figures also add up to shs. 100,000 since the evidence of Ssegirinya that Haji Suleiman missed the bribe, having left the mosque at the time of distribution, was not controverted by the appellant. The judge rightly in our view did not consider Nalongo Nabulya Afuma to be a truthful witness.

We did not find the alleged inconsistencies or contradictions in the evidence of the respondent's witnesses regarding this particular incident.

(b) The bribe at Kitimba "A" village with a steamer lamp:

The allegation was that sometime in January 2011, the appellant campaigned at Kitimba B village at a rally which was held in the compound of Hasifa Nansubuga PW5. That the appellant at the rally donated a new steamer lamp to the residents of the village. That the steamer was handed to Aisha Nsonyiwa, the LC1 Secretary for Women Affairs (PW9).

Aisha Nsonyiwa not only filed an affidavit but attached the steamer to the affidavit with the price tag of Shs. 50,000 on the container. The Judge found that the evidence of the other witnesses namely, Hasifa Nansubuga (PW5), Mariam Nantume (PW4) and Imelda Namubiru (PW43) on this allegation adds up well and there were no inconsistencies or contradictions.

He also found that Aisha Nsonyiwa was a credible witness after being subjected to cross-examination.

He found that the appellant in his rebuttal never denied holding the rally in question. He only generally denied donating any steamer lamps to the voters as alleged.

He found that the affidavit of Nyenje Zefania also confirmed that he attended the said rally with the other four witnesses of the respondent but only denied witnessing the acts of bribery.

The judge found that another witness for the appellant Lubyai Donozio had indicated that he was replying to the affidavits of Aisha Nsonyiwa, Hasifa Nansubuga and Mariam Nantume; but had failed to address the allegation in issue.

The Judge ruled out the possibility that the witness had purchased the steamer to exhibit to court as very remote.

We think the judge was right. The evidence was not rebutted and the motive for the donation was well brought out in evidence.

(c) Bribery at Ngogwe B village:

The allegation was that the appellant donated to the villagers another steamer.

The key witness, Tebusweke stated in his affidavit dated 19/5/2011 that he was the Chairperson LC1 of Ngogwe B village; Butambala County, Butambala District. That at a rally held in that village by the appellant at the beginning of January 2011, the appellant called him and one Walakira to his car and gave him a steamer which they showed to the voters as donation from the appellant.

The appellant asked them to vote for him. He kept the steamer in the village until the village NRM Secretary for information (Maama Nameere) who doubles also as the NRM Chairperson requested for it, and he gave it to her.

Other witnesses who deponed affidavits in corroboration were: Walakira Stanley PW21, Mukwaya Ali, PW65 and Namuyimba David, PW66.

The only affidavit in rebuttal was the one dated 23/6/2012 of Nabukenya Sepiranza (alias Maama Nameere), PW47.

Nabukenya denied that she received a steamer from the appellant meant to bribe her or any other voter in the said parish. The judge however found that she agreed having taken a steamer from Tebusweke. (See paragraph 5 of her affidavit).

However, Tebusweke swore a supplementary affidavit also dated 23rd June 2011 stating that Nabukenya had since returned the said steamer, which he attached as exhibit.

The trial Judge observed the demeanour Tebusweke when he appeared for cross-examination and he gave the impression that he was not the kind of person who could have bought a steamer, made up a story contained in the affidavit and boldly appear before the court with the confidence and clarity he demonstrated. He was, to the judge, a truthful witness who knew what he was talking about. The judge also found that Tebusweke was, quite like Aisha Nsonyiwa, never challenged on the subject matter of his evidence, namely the donation of the steamer to the residents of Ngogwe B village. The judge was left with a lasting impression that there was a deliberate avoidance of opening the can of worms even wider.

This conclusion is also supported by the evidence on record. We cannot fault it.

(e) Bribing at Nsozibirye village, Kamaduuka with Shs. 50,000:

Here the judge relied on the affidavit of Kamulegeya who testified that the appellant, during his address at a rally, gave Shs. 50,000 to the LC1 Chairman, one Nsozibirye Ssekanjako Baker to buy a steamer as an appreciation for their support. The Chairman showed the money to the people and the appellant requested for their votes and promised to give them more if they voted for him as their MP. The witness stated that the Chairman has since bought a steamer which is being used on various functions in the community.

The judge found that the affidavit of Siraje was never challenged by any affidavit in rebuttal. He noted that the affidavit was read in court but Siraje was not cross-examined on its contents by the appellant. The judge wondered why the LC1 chairman; Mr. Nsozibirye Ssekanjako Baker did not swear an affidavit in rebuttal, if the allegations were untrue.

In the circumstances, the judge drew an inference and rightly so, in our judgment, that the contents of Mr. Kamulegeya's affidavit were accepted as being true by the appellant.

(f) Bribery at Tabaluzinga, Kamugombwa and Kikeera villages with steamers:

The witnesses stated that the appellant donated a steamer at each rally in the three villages while asking for votes.

Kyalimpa Nicholas (PW58) stated that he was present at all three rallies: At Tabaluzinga, the steamer was handed to Noah Kambagira.

At Kamugombwa, it was handed to Mukyala Nganda while at Kikeera, it was received by Ssalongo Musisi.

The judge found that the two affidavits filed in rebuttal by Kambagira Noah and Babirye Rukia (alias Mukyala Nganda) did not answer the averments contained in both affidavits of Kyalimpa and Kisegerwa. He noted further that they actually rebutted the affidavit of Gingo Frank Kibirige, which the petitioner withdrew for failure to produce him for cross-examination. He also found that the averments by Kibirige did not relate to the allegation of donation of the three steamers. He further found that Ssalongo Musisi who is stated to have received the steamer at Kikeera village did not file any affidavit denying receipt of the alleged steamer for Kikeera village.

The judge further noted that Kyalimpa Nicholas was not cross-examined. He also noted that although Kisegerwa Mundu was cross-examined, no questions were put to him

during cross-examination on the allegation of the donation of the 3 steamers by the appellant.

The Judge also observed that the appellant himself did not specifically deny those allegations. In his view therefore the evidence of the two witnesses remained unrebutted substantially. The Judge assessed Kisegerwa as a truthful witness whom he had no reason to disbelieve.

We are accordingly satisfied that the learned trial judge carefully and properly evaluated the evidence adduced before him by both parties, addressed himself to the law and the principles governing election petitions of this nature and came to the correct conclusions and decision.

We note, however, the fact that in the petition and at trial 22 (twenty two) allegations of bribery were pleaded and covered by the evidence adduced. The learned trial judge, after evaluating 6 (six) out of the 22 (twenty two) allegations of bribery, found five of them had been proved to the satisfaction of the court. He did not deal with the rest of the allegations in his judgment. It is appreciated that an election petition must be expeditiously dealt with given its public importance. This, at times, puts pressure on the trial court to complete the trial in the shortest time possible.

We feel that, where parties to an election petition have framed issues and adduced evidence in proof of or in disproving those issues, justice demands that the court expresses itself one way or the other in resolving those issues. A party to the dispute is entitled to receive a verdict on a particular issue in respect of which evidence has been adduced in submissions made. The learned trial judge should have done this in respect of all the 22 (twenty two) allegations in this case. However, his failure to do so did not cause any injustice in our view, and there is no basis in law to set aside his decision as he was entitled to reach the decision he reached.

For the reasons given, our answer to issue No. 1, which is the key issue, is negative.

ISSUE NO. 2:

Whether the appellant is entitled to the reliefs sought.

Having found that the judge was justified in reaching his decision, it follows that the appellant is not entitled to the reliefs he sought in the appeal.

In the result, we dismiss the appeal. We uphold the decision and orders of the High Court, namely that the election of the appellant as Member of Parliament, Butambala Constituency is set aside and a bye-election is ordered to be held in that constituency.

As to costs, the respondent is awarded the costs of this appeal and those in the court below as against the appellant.

Dated at Kampala this.....20th.....day of ....July.....2012.

.....

HON. JUSTICE M. S. ARACH AMOKO

JUSTICE OF APPEAL

.....

HON. JUSTICE R. KASULE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.44 OF 2011

(Arising from Election Petition No.018 of 2011)

KIKULUKUNYU FAISAL…….....APPELLANT

VERSUS

MUWANGA KIVUMBI MOHAMMED…….....RESPONDENT

CORAM: HON. JUSTICE S.B.K.KAVUMA, JA
HON. JUSTICE M.S.ARACH AMOKO, JA
HON. JUSTICE REMMY KASULE, JA

JUDGMENT OF S.B.K KAVUMA, (DISSENTING)

Introduction

This is an election petition appeal from the judgment and orders of the High Court at Kampala (*V.F.Musoke Kibuuka J.),* in Election Petition No.018 of 2011, delivered on the 13th day of October 2011.

Background

The background to the appeal is that on the 18th February 2011, parliamentary elections were conducted by the Electoral Commission, (EC), for Butambala Constituency in which the appellant, the respondent and two others were candidates.

The EC declared and gazetted the appellant winner of the elections. The respondent was dissatisfied with that declaration and filed Election Petition No.018 of 2011. He sought a declaration that the appellant was not validly elected and an order setting aside the elections. The petition was heard and allowed by the High Court to the dissatisfaction of the appellant, hence this appeal.

Grounds of appeal

The grounds of appeal as set out in the Memorandum of Appeal are:

> **"1.The learned trial judge erred in law and fact when he found that the 1st appellant committed illegal practices and electoral offences in connection with the election personally or through his agents, or with his knowledge and consent or approval.**
>
> **2. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record in respect of the incidents of bribery alleged by the respondent in the petition and arrived at the wrong conclusions.**
>
> **3. The learned trial judge erred in law and fact when he failed to fairly, justly and properly evaluate all the evidence on record thereby coming to the wrong conclusions.**
>
> **4. The learned trial judge erred in law and fact when he engaged in conjecture and speculation and reached the wrong conclusion."**(sic)

Representation

At the hearing of the appeal, the appellant was represented by Mr. Alfred Okello Oryem, who appeared with Mr. Jonathan Tiyo, (hereinafter together called counsel for the appellant). The respondent was represented by Mr. Medard Lubega, Sseggona and Mr.Chrisostom Katumba, (hereinafter together called counsel for the respondent).

The Issues

The two agreed issues are:

1. Whether the trial judge erred in law and fact when he found that the appellant personally committed the illegal practice of bribery in connection with the election.

2. Whether the appellant is entitled to the reliefs sought.

The case for the appellant

Arguing the first issue, counsel for the appellant submitted that it was the duty of this Court to re-evaluate the evidence before it and make its own inferences. They cited the cases of **Pandya v R [1957] EA 336** and **Banco Arabe Espanol v Bank of Uganda, SCCA No.8 of 1998**. Counsel emphasized, that the evidence in the instant appeal ought to be treated with caution and with a high level of scrutiny. They criticized the learned trial judge for having failed to do that at the trail before arriving at the conclusions he did. Counsel cited the case of **Winnie Matsiko Komuhangi v Babihuga Winnie, Election Appeal No.9 of 2002** in support of those submissions.

Counsel submitted, further, that the respondent swore two affidavits in respect of the petition but the second practically rebutted the first one. To counsel, therefore, there was no affidavit in support of the petition and consequently, no evidence in support of the same.

Counsel contended that the law on bribery requires that each of the ingredients of that illegal practice must be proved. They cited the cases of **Kizza Besigye vs. Kaguta Museveni, Supreme Court Election Petition No.1 of 2001** and **Mukasa Anthony Harris vs. Dr. Bayiga Michael Lulume, Election Petition Appeal No.18 of 2007. SC.**

Counsel argued that the evidence on record showed that the Butambala Constituency elections were unique Butambala being a new district curved out of the old Mpigi District. They relied on the evidence of the Chairman of the EC and emphasized that according to that evidence, the Voter's Register, was the only document to rely on to prove that one was a registered voter from Butambala Constituency. Counsel pointed out that the Voters' Register was not adduced in evidence.

Counsel submitted that all the evidence relied on by the respondent required corroboration but that there was no such corroboration. They relied on the case of **Mbayo Jacob v EC & Anor, Election Petition Appeal No.7 of 2000.**

He criticized the learned trial judge for relying on a claim of a steamer having been given as a bribe to Kitimba 'B' village in December 2010 which remained new and unused until the time of the hearing of the petition. He also criticized the manner in which the steamer itself was introduced in evidence by merely attaching it to one of the affidavits in support of the petition and contained evidence in support thereof.

Counsel prayed that court be pleased to allow the appeal, grant the remedies sought and award costs in this court and in that below to the appellant.

The case for the respondent

Counsel for the respondent opposed the appeal. They submitted that the learned trial judge thoroughly evaluated the evidence before him and came to the correct conclusion.

On the two affidavits affirmed by the respondent in support of the petition, counsel submitted that the purpose of the second affidavit was to, *inter alia*, clarify some matters which appeared as errors in the respondent's first affidavit. To counsel, these were excusable mistakes by the respondent. Counsel contended that each of the other affidavits filed for the respondent was an affidavit in support of the petition.

On the status of voters, counsel submitted that there were two distinctive factors to identify them as voters. These were the voters' cards and the photographs on them. Counsel argued that all voters' cards were issued by the EC and the presumption was that such evidence was guaranteed. Counsel contended that the voters' identification numbers (IDs), were in the EC's custody and that since it was in court, it had ample opportunity to check its records to confirm whether the voters' cards and IDs submitted in this case were genuine or not. In their view, it was erroneous to require the respondent to go and get the Voter's Register from the one who kept it, the EC, which should produce it as evidence in the suit.

To counsel, in an election contest, one does not expect video or photographic evidence. Once a bribe is given, one does not have to establish the motive and bribery is established.

He contended that bribery should not be given a restrictive interpretation. Counsel further contended that because the gifts and money were allegedly being given to villages, it was safe to presume that these were voters since a candidate would be targeting the voters in that village.

Reply

By way of reply, counsel for the appellant argued that the contents of the respondent's second affidavit could not be said to be innocent mistakes. To him, they were fatal lies. He also contended that the holding that every village has voters and therefore, there was no need to prove the status of a recipient of a bribe as a registered voter was wrong in law.

The Duty of Court

This being a first appeal, the parties to the suit are entitled to this court's own consideration, review and scrutiny of the evidence as a whole on record and its own inferences there from taking into account the fact that it did not see the witnesses testify. See Rule 30 of the **Judicature (Court of Appeal Rules) Directions S1 13-10.**

In **Figgis v R. (1), 19 K.L.R. 32,** on appeal from a conviction under the Supreme Court of Kenya *(SHERIDAN, C.J.,* and *THACKER,J.)* set out the true legal view of court's duty as a first appellate court. We here below quote the following passages from the judgments cited and applied by the said Supreme Court. In *The Glannibanta (2) (1876), 1 P.D. 283, the Court of Appeal (JAMES* and *BAGGALLAY, L.JJ.* and *LUSH, J.)* said (at P.287):

> ***"Now we feel, as strong as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a judge of first instance who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."***

In **Coghlan v Cumberland (3), [1898] 1 Ch. 704** the Court of Appeal *(LINDLEY, M.R.RIGBY* and *COLLINS, L.JJ.*) put the matter as follows:

> ***"...Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case and the Court must consider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from,***

but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than other and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

Elucidating further on the duty of a first appellate court, the then East African Court of Appeal in **Peters vs Sunday Post Limited 1958 EA 424** held;

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved , or has plainly gone wrong, the appellate court will not hesitate so to decide."

See also **Pandya v R** and **Banco Arab Espanol v Bank of Uganda** (supra)

With the above in mind, I will now proceed to subject to a through re-appraisal, review and scrutiny of the facts, evidence and materials on record as a whole and in totality as required by law.

The evidence

1. Alleged bribe of Shs. 100,000/= at Gombe Mosque

According to the evidence of one, Segirinya Muhabuba around Christmas time the appellant went to Gombe Mosque where the witness was with a number of other people.

The appellant addressed the gathering asking for their votes, then got out Shs.100,000/= and gave it to the witness to distribute to each of those present so that they would vote for the appellant. The witness wrote down the names of those present and found that they were, in all, 101, people including himself. He stated that he gave each person, including himself, Shs.1000/=.However, one, Haji Sulaiman Kitaka missed out because he had left the place for a while before the distribution was made and when he returned, all the money had been given out.

Namutebi Aziza, Mutesasira Ahamed, Kalyango Abdul and Lubowa Hamdan also gave evidence that they witnessed the same event and were each beneficiaries of the shs1,000/=donation.

In rebuttal, one, Nalongo Nabulya Afuwa, in her affidavit, refuted the evidence of the petitioner's witnesses claiming that the appellant never donated the Shs.100,000/= as, according to her, he never stepped in Gombe ward during the entire month of December,2010 for campaigns.

The learned trial judge found that both Segirinya and Nalongo were subjected to cross-examination and that Segirinya's claim that the 2nd appellant gave him money to distribute was not challenged. Questions were only put to him about the jurat of his affidavit. Court found him a credible witness.

Upon cross-examination, Nalongo's claim that the appellant never campaigned in Gombe ward during December 2010 was considered a lie. The learned trial judge, therefore, did not consider her a truthful witness and he preferred to believe the evidence of the petitioner's witnesses. To the learned trial judge, therefore, Segirinya had proved that he was a voter, so had the other four witnesses who, according, to the judge, corroborated Segirinyas' evidence. The judge, therefore, found that the allegations had been proved to the court's satisfaction.

2. Alleged bribe of 6 crates of soda at Kabasanda Mosque on 17th February, 2011.

Gingo Alawi stated in his affidavit that he was at Kabasanda Mosque on 17th February, 2011 at about 6.00pm when he and other people were mobilized by one, Farouq Byuka, to go and listen to the appellant who was with many colleagues. That after talking to the gathering, the appellant sent his driver to his car and the driver brought 6 crates of soda and gave one crate to Gingo to distribute to those present.

Farouq Kisitu swore an affidavit in rebuttal stating that there was no person called Farouq Byuka at Kabasanda. Court could not understand why the appellant would have ordered his driver to bring 6 crates of soda when only one was enough to cover all those present. It also observed that the fact that by 6.00pm, on 17th February, 2011, parliamentary election campaigns had to stop 24hrs prior to polling time and must have already come to an end. It was, therefore, court's view that the respondent's evidence failed to prove the allegation to its satisfaction. We agree with this finding of the learned trial judge for the reasons he gives.

3. Alleged bribing of voters of Kitimba B Village with a steamer lamp.

Aisha Nsonyiwa, Hasifa Nansubuga, Mariam Nantume and Imelda Namubiru stated in their affidavits that sometime in January, 2011, the appellant campaigned in Kitimba village. That at a rally, which was held in the compound of Hasifa Nansubuga, the appellant donated a new steamer to the residents of the village. The steamer was handed over to Aisha Nsonyiwa, the LC1 Secretary for Women Affairs. Aisha Nsonyiwa attached the alleged steamer to her second affidavit in support of the petition. The attached steamer was brandy new with its price tag of Shs.50,000/= still showing on its container.

The appellant, according to the evidence on record denied donating any steamer lamp to voters. One, Nyenje Zephania, in his rebuttal affidavit confirmed that he and the four witnesses for the respondent attended the rally at Hasifa Nansubuga's home. He, however, emphasized not to have witnessed any acts of bribery as alleged or at all.

The learned trial judge, considered Aisha Nsonyiwa to be an honest and innocent witness and in his view, this allegation was proved upon a balance of probabilities and to the satisfaction of court.

4. Alleged bribing of voters of Ngogwe B village, Bukandaganyi Parish Kalamba Sub-county.

Tebusweke Erias swore two affidavits in support of this allegation. His evidence was supported by the affidavits of Walakira Stanley, Mukwaya Ali and Namuyimba David. To the learned trial judge, the status of all those witnesses as registered voters was not in doubt.

In rebuttal, one, Nabukenya Sepiranza, alias Maama Nameere, swore an affidavit in which she denied having taken a steamer from the appellant but agreed to have taken it from Tebusweke Erias. Tebusweke had averred that Maama Nameere had borrowed the steamer donated by the appellant to the village. The judge found that the affidavit of Nabukenya Sepiranza did not rebut the main allegation that the appellant donated a steamer to Ngogwe B village during a campaign rally in that village. He did not agree with counsel for the appellant that annexing the steamer to the affidavit and not exhibiting it in court was not enough. To the learned trial judge, ordinarily, anything annexed to an affidavit, presented before the registrar, as the steamer in issue was, properly formed part of the evidence before court as part of that affidavit.

With regard to the affidavit of Nabukenya Sepiranza which we have carefully studied, we find that contrary to the learned trial judge's finding that she did not object to a steamer have been donated as alleged, she actually did so in paragraph 4 which reads ***" I did not receive a steamer, or any gift from the second respondent meant to bribe me or any other voter in the said parish."*** We have also read paragraph of 5 her affidavit which states ***"That I did take away a steamer, money or any other item from the said Tebusweke Erias as alleged in his affidavit."*** *(*sic) She avers in paragraph 6 thus: ***"That the affidavits of the said person are full of falsehoods and lies"*** Those paragraphs read together

do, in our view, support the version that other than admitting having taken a steamer, money or any other gift as a bribe for herself or for any voter, Nabukenya in fact denies having done so. That is the only reasonable interpretation of those paragraphs some slight confusion in expression in paragraph 5 notwithstanding. Tebusweke's two affidavits on this incident also are not convincing as the second affidavit was, as he confesses in his evidence, sworn to after consultations with, and in order not to annoy, Nameere.

I am, therefore, unable to accept the learned trial judge's finding on this witnesses' evidence on the alleged bribery at Kitimba 'B'.

I find the said finding unsustainable.

5. Alleged bribing of voters at Kamaduuka village with Shs. 50,000/=.

Kamulegeya Siraje stated in his affidavit that during an address, to the people, the appellant gave Shs.50,000/= to the LC1 Chairman, Nsozibirye, Ssekanjako Baker, to buy a steamer as an appreciation of the villagers' support. The Chairperson showed the money to the people and the appellant requested for their votes and promised to give them more if they voted him as their Member of Parliament. That the Chairperson bought the steamer and the people in the village were using it.

According to the learned trial judge, Kamulegeya's affidavit was never challenged with any affidavit in rebuttal and the witness was not cross-examined on its contents on behalf of the appellant. The judge held that the inference he drew from that scenario was that the contents of Kamulegeya's affidavit were accepted as true by the appellant.

6. Alleged bribing of voters of Tabaluzinga, Kamugombwa and Kikeera villages with steamers.

Kyalimpa Nicholas and Kisegerwa Mundu averred in their affidavits that they attended the appellant's rallies in each of the above three villages during the first week of January 2011. They stated that the appellant donated a steamer at each rally while asking for votes from those attending it.

In the view of the learned trial judge, the allegations by the two witnesses remained substantially unrebutted as the affidavits in rebuttal failed to address those allegations.
However, one Babirye Rukia, in rebuttal, swore that she was the person referred to as Mukyala Nganda (Ms Nganda).
She stated that she did not receive a steamer, or any gift or money from the second respondent meant to bribe her or any other voter in the parish.
This, in our view, effectively rebutted the above evidence.

7. Alleged bribing of voters of Mpanga trading centre, during January 2011 with a steamer.

Wasswa Hassan, Namwanje Florence, Lunkuse Rosemary and Kayongo Peter swore affidavits to show that the appellant gave them a steamer. Wasswa averred that in January, 2011, while at Hon. Kikulukunyu's rally at Mpanga trading centre, the appellant introduced himself and later gave them a steamer in the LC1 Vvunda Bubondo. He stated that the steamer was handed over to the Chairman NRM, Mr. Sabasaba. The appellant then requested and told them to vote for him as the Member of Parliament of Butambala County.

In rebuttal, Afuwa Nakasi swore an affidavit stating that she was the person referred to in the affidavits. She averred that she did not receive a steamer or any gift or money from Hon. Kikulukunyu meant to bribe her or any other voter in the said parish. To her, the affidavits of the said persons were full of falsehoods.

The learned trial judge, it is clear, did not specifically address this incident but somehow came to the conclusion that on a balance of probabilities, that allegation had been proved to the satisfaction of court.

8. Alleged bribing of voters with a football donated to Gombe Black Boys Football Club, one week before polling day.

Lubowa Hamdani and Kalyango Abdal deponed that the appellant went to their village and promised to give balls to the village football team, Gombe Black Boys FC. That about a week later, he took the balls and handed them to the captain saying he was fulfilling his pledge and that he then requested for votes.

One, Mukasa Batte, who swore an affidavit in reply stating that during the elections he monitored the ongoing activities but did not witness any bribery to any registered voter as alleged, rebutted this allegation. The learned trial judge chose not to consider the evidence on this alleged incidence of bribery, just as he did not consider the subsequent other alleged incidences in Nos. 9 to 22.

9. Alleged bribing of voters at Gombe Mosque with Shs.30,000/= during the month of January, 2011.

Namutebi Aziza swore an affidavit stating, *inter alia*, that sometime in January 2011 the appellant went to her and others soliciting for votes as a parliamentary candidate. He was on his way to Kinoni, but stopped at Gombe Mosque and pulled out Shs 30,000/= which he handed over to one, Nalongo Nabunya, who distributed the same amongst the people around and each got shs 1300/=.

In rebuttal, one, Segirinya averred that the appellant was only passing via Gombe and did not campaign there on the alleged occasions.

10. Alleged bribing of voters of at Kyanajjanja village, with money during the month of January, 2011.

Nakigula Fatuma averred in her affidavit that while going for the burial of her relative, she, together with Aisha Nabunya and Nakabuye Rukiya, met a motor vehicle saloon registration no UAG 604 E, which used to be driven by the appellant during the campaigns. That the vehicle had the appellant's posters on it and its occupants were distributing Vaseline to people who showed their voters cards to them. She attached a photograph of the Vaseline on the affidavit and stated that the Vaseline was given to them to vote for Y.K.Museveni, Hon. Bitamazire and the appellant.

In rebuttal, one Banaddawa Ali, swore an affidavit and averred that during the elections, there was no one distributing cosmetics in the village. That he knew Aisha Nabunya and Fatuma Nakiguli personally as they were residents of his village but none of them received cosmetics from any agents of the appellant. That he followed the campaigns closely and there were no incidents of bribery of voters at all.

11. *Alleged* b*ribing of voters at Kayenje Kito village, with money during the month of December, 2011.*

In his affidavit in support of the petition, Ssalongo Juuko Christopher stated that sometime in February 2011, the appellant went to their village in Kayenje parish to hold a campaign rally. That as he gave his speech, the appellant said that he had brought along a small gift, which was a box of Vaseline called *'sivo chair'* for the ladies. That the witness was given a box which he started distributing amongst the ladies. That later on he went to Kasekere village where the residents asked him for a saucepan which he promised to give to them. That the appellant also gave a fifty thousand shilling note to the village LC1 Chairman for buying a steamer for the village. That the appellant asked for votes.

This evidence was, however, rebutted by one, Nansamba Afua, who stated in her affidavit in reply that the appellant never went to their village within those days and she witnessed no money being distributed by any person and neither did she witness the handing over of a steamer to any person during the campaign period as alleged.

12. Alleged bribing of voters at Kayenje Church of Uganda during the victory party for Kabula Football Club on 6th February 2011.

Mutesasira stated in his affidavit in support of the petition that when Kabula FC won a championship match, the team organized a victory party where they invited Hon. Bitamazire who did not turn up. That the appellant, who also attended the party, when he stood up to speak said that voters should remember him and give him votes and this he said while dropping a fifty thousand shilling note in a basket for the football club.

Ntulume Fred rebutted this evidence stating in his affidavit that although the appellant attended the victory party, he did not at all give the team fifty thousand shillings as alleged. He simply congratulated the team in his speech.

13. Alleged bribing of voters at Lugala Football ground together with Hon. Bitamazire by donating a cow to Kyabadaaza football club and another cow to Kyabadaaza women netball club on 25th December 2010.

One, Wampamba Abdul Nasser, affirmed an affidavit to the effect that on 25th December 2010, a football tournament to wit: *"NAMIREMBE TOURNAMENT"* was organized and he participated in the said tournament. Hon. Bitamazire, together with the appellant presided over the ceremony and implored all the people present to vote for them as it was them who were able to organize tangible developments and substantial donations. That on that day, the two donated a cow to Kyabadaaza FC which won the match against Budde FC and another one to Kyabadaaza women who had defeated the Lugala women in netball.

In reply, one Abisagi Namusoke averred in her affidavit that it was not true that the tournament was presided over by the appellant. She stated that the appellant did not donate any cow or anything at all and that he left the function before the match was over and before any speeches were made.

14. Alleged bribing of voters on 15th February, 2011 through agents, to wit, Bijodolo, Nandigobe, Musomesa Sulait, Hamidu Namiryango, Sheik Kiwuwa, Nakku Kirimira,

Mrs. Lukoba, Councilor Kiyaga, all led by one Mustafa Malimbo, with money distributed throughout the village in Budde sub-county.

Wampamba gave evidence on this alleged incident in his affidavit in support of the petition in which he stated that the appellants' campaign agents distributed money to residents of Budde Sub County. However, one Senyonjo Sulait, in his affidavit in rebuttal refuted the allegations stating that neither the appellant nor any of his agents gave any money to any person in Budde sub-county meant to bribe anybody.

15. Alleged bribing of voters at Kyerima Kabungu, at Masitoowa, in December, 2010, with Shs.50,000/= with which the village is alleged to have resolved to purchase cups for use during community or social functions in the village.

Kawere Akimu, Kyaluzi Geoffrey and Lozio Masunzu stated in their affidavits that sometime in December 2010, the appellant went to address a rally at Kyerima Kambugu where his campaign agent, Mr. Lule, gave them fifty thousand shillings to buy a steamer but they decided to buy cups for community use. Kawere Akim stated that he voted for the appellant because the respondent had not given them anything.

Sempala Fremark Kiwanuka in reply to these allegations swore an affidavit and averred that he was the campaign manager for the appellant in Kyerima Parish and was with him during all his campaigns in that area and that all the above affidavits were full of lies.

16. Alleged bribing of voters at Kikira zone, Kyerima parish, with shs.50, 000/= towards the end of December, 2010; money allegedly used to purchase plates for village use.

John Mirembe, Kasamba Paul and Mutebi John Bosco in their affidavits in support of the petition stated that the appellant gave Shs.50,000/= to the Movement Chairman, Kanyentore Godfrey for community development so that they could vote for him as a Member of Parliament.

One, Lule Raphael, swore an affidavit in which he averred that he knew that the appellant did not give any money or gifts to the Movement Chairman, Mr. Kanyentore or any leader from the said area or any other person meant to bribe the voters in Kyerima parish.

17. Alleged bribing of voters of Kinoni village, a few days to polling day, with a sum of Shs. 50,000/= money allegedly handed over to Busulwa Sulaiman who distributed it among voters present.

Matovu Joseph, swore an affidavit in support of the petition stating that about a week towards the polling day, the appellant went to their village at Kinoni for a rally at a born again church together with Mr. Busulwa Salim, the Movement Chairman in the village. That the appellant handed over to the Chairman Shs.50, 000/= to distribute amongst the people. That the deponent himself got about Shs.600/= and the appellant requested the people to remember him come the polling day and that they should vote for him.

One, Nabukeera Mary swore an affidavit in reply and stated that she was the Head of Finance, LC1 Kinoni village but she did not witness the said distribution of money at the said rally as claimed in those affidavits. She had attended that rally.

18. Alleged bribing of voters at Bujumba, Kabalamba during the month of February, 2011, with sodas allegedly purchased by him from one, Ms. Nambooze's shop at Kabalamba trading centre.

Kulumba Musa, averred in his affidavit that sometime in February 2011, a week before the voting, the appellant found him and others at Kabalamba and told them that he was just passing by but decided to stop and say hullo to his people. That he bought sodas for everyone who was around from Miss Nambooze's shop and the deponent got one bottle. That he went ahead to thank them for having paid attention to him and he kindly requested them to vote for him as Member of Parliament.

Bbossa Siraje disputed these allegations in his affidavit stating in rebuttal that as the Chairperson of the village, he would have known of such, if the same had happened.

19. Alleged bribing of voters at Bujumba Catholic Church, during the month of February 2011 with money.

In his affidavit in support of the petition, one, Serunkuuma Badru stated that the appellant went to Bujumba Catholic Church and gave out money to people who were there. He stated that he did not receive any of that money because most of the people around knew him as a supporter of the respondent. He further stated that he left the place, went to Kabalamba town, and found the appellant with his supporters and sodas were being distributed among the people while they cheered *"Faisal Agabudde"* meaning that Faisal has donated to them. He stated also that while at the said town, the appellant distributed money to men who were around and he gave out lotions called *"Sat's skin lotion"* to women.

Sebulime John, however, refuted these allegations stating in his affidavit in reply that as an LC1 official of Bujumba, he would have been informed of such an incident and that he did not witness the appellant give out money to voters in his area.

20. *Alleged bribing of voters with sodas at Kabalamba trading centre, during the month of February, 2011.*

This, has been covered in the consideration of no.19 above and the response thereto.

21. Alleged bribing of voters at Ngando trading centre, with four crates of soda allegedly distributed to the people attending a rally by one Mulindwa Asadu, alias Muddu wa Allah, to the people attending a rally.

Nkutu Shaban stated that on 11th February 2011, the appellant held his last rally for all the people in Ngando sub-county at Ngando Trading Centre. That while the appellant addressed the rally, his campaign agents, led by Mulindwa Asadu, popularly known as

Muddu wa Allah started distributing sodas totaling to four crates amongst all the people who attended the rally. That as the people took the sodas, the appellant begged them not to forget him at the poll.

One, Kugumikiriza Livingstone, swore an affidavit in which he averred that during the appellants' last rally at Ngando he was one of the people that canvassed for votes for the appellant and all the rallies ended by 6.00pm. That the appellant did not bribe any voters as alleged.

22. Alleged bribing of voters of Kayenje village, in particular one, Muyomba Joseph, with money, to wit, Shs.1,000/= allegedly given out by the appellant while moving from house to house throughout the village, just a few days to polling day.

One, Muyomba Joseph, swore an affidavit and stated that a few days to the poll, the appellant went to his village giving out Shs.1,000/= to everyone and soliciting for votes. That he personally saw him and he still had the said money. He stated that the appellant gave him the money so that he could vote for him.

One, Keeya Musa, on the other hand, swore an affidavit stating that he did not witness any bribery of any kind or any distribution of any money to any person at Kayenje village by the appellant or by any other person as alleged.

As seen from the above, at the hearing of the petition at the High court evidence about 22 incidents of alleged bribery was presented to court. The learned trial judge, however, considered the first six, found five of them as proved and rejected one. He decided not to consider the rest.

In his judgment at Page 38 the learned trial judge stated:

"...Court could go on and on to cover all the 22 allegations involved in the evidence on record. It appears to be futile to do so in the circumstances. It suffices to say that the petitioner has proved his first general allegation in his petition, that the second respondent committed illegal practices during the campaign period."(sic)

The law

It is trite that when a matter is brought before court, that court must consider all the evidence and facts brought before it before making a finding. This is what the parties who go to court expect and that is what they are entitled to. Random sampling of evidence is unacceptable.

In the Nigerian case of **Osuona v the State (2010) LPELR-CA/OW/150/2009,** the court stated:

> **"A trial court, no doubt, is a court of law and facts. It has no other sources of generating its decision except from the solid facts established before it and from the law governing the subject matter of litigation before it. It is its primary role thereof to <u>even handedly evaluate the evidence placed before</u> it by the parties not only through witnesses but including evidence by affidavits. <u>A trial court, in other words, has the primary duty to fully and consciously consider the totality of the evidence preferred by all the parties before it in whatever way, ascribe probative value to it and put it on an imaginary scale of justice in order to determine the party in whose favour the balance tilts</u>. ....It is trite law in civil and criminal proceedings that if there is failure by a trial court to properly appraise the evidence placed before it, the result is that whatever findings and conclusions arrived at by that trial court would be perverse**." (Underlining added).

I consider this authority of strong persuasive value and relevant to the instant case.

In **Matsiko Winfred Komuhangi vs Babihuga .J. Winnie, (**supra**)**, this Court held:

> **"It is the duty of the court to evaluate and subject to an exhaustive scrutiny all the evidence presented to it during the trial. Random sampling is too speculative. ....It must be emphasized that in courts of law issues in controversy between parties are decided on the basis of evidence before them....."**

Further and more importantly in our view, the learned trial judge, in adopting a method of random sampling over the evidence before him and in taking a decision on the core issue

of controversy between the parties to the suit in total disregard of part of that evidence, acted in contravention of both the letter and the spirit of the Constitution. **Article 28(1)** of the Constitution provides:

28. Right to a fair hearing.

> **"(1) 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."**

That article is by, virtue of **Article 44(c)** of the Constitution, underogable. It is sacrosanct.

After emphasizing the fundamental nature and importance of the right of fair hearing, the Supreme Court in **Election Petition Appeal No.4 of 2009, Bakaluba Peter Mukasa and Nambooze Betty Bakireke,** basing on Black's law Dictionary, 6th Edition, defined the right thus:

> ***"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."*** (Underlining ours for emphasis).

Black's Law Dictionary continues:

> ***Fair hearing. "One in which authority is fairly exercised: that is, consistent 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).

The same dictionary, 9th Edition at page 676 emphasizes that fair trial is:

> "***A trial by an impartial and disinterested tribunal in accordance with regular procedures..."***

Two important points raised in the above definitions deserve emphasizing. Fair hearing requires court to take a decision only after due consideration of the evidence in its totality and the facts and materials as a whole placed before it. It also encompasses both

substantive and procedural law guarantees. Emphasizing this later point, the **Lawyers Committee for Human Rights**, in its **Basic Guide to Legal Standards and Practice, March 2000,** a document of significant persuasive authority, observes:

> **"The right to a fair hearing as provided for In Article 14(1) of the 1CCPR encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15. However, it is wider in scope as can be seen from the wording of Article 14(3), which refers to the concrete rights enumerated as minimum guarantees. Therefore, it is important to note that despite having fulfilled all the main procedural guarantees laid out in paragraphs 2 to 7 of Article 14 and the provisions of Article 15, a trial may still not meet the fairness standard envisaged in Article 14(1)."**(Underlining mine)

The contents of the above articles are substantially similar to **Article 28(1)**, read together with **Article 45** of the Constitution.

Considering the above, I find that the learned trial judge by adopting a method of random sampling in considering the facts and evidence that was placed before him on all the 22 alleged incidences of bribery acted in contravention of the provisions of **Article 28(1)** of the Constitution. It is trite that once principles of natural justice have been infringed, any decision thereby reached is no decision in law. Such decision is null and void abinitio and cannot be allowed to stand. It is a complete nullity.

In De **Souza Vs Tanga Town Council, Civil Appeal No. 89 of 1960** reported in **1961 EA 377** at page **388** the East African Court of Appeal held;

> **"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."**
>
> See also **Hon. Kipoi Tonny Nsubuga v Ronny Waluku Wakata and Others, Election Petition Appeal No.07 of 2011.**

It is no excuse for violation of **Article 28(1)** of the Constitution to argue either that such violation may not have been fully canvassed in the instant Election Petition Appeal and in the Election Petition at the High Court from which the instant appeal arises, or that a party did not suffer any injustice after all. It is trite law that once an illegality is brought to the notice of court, and illegality here was brought to the notice of court on the face of the learned trial judges' judgment, a court of law will not, in any way, sanction the same. See **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor (1982) HCB 11.** The situation is more serious where, like in the instant case, the illegality is of an unconstitutional nature.

Further, it is no defence to such violation of that article of the Constitution that by the provisions of the PEA, proof of one incident of an electoral malpractice/offence or evidence of a single witness in proof of such allegation is enough to justify an annulment of an election. My understanding of those provisions, therefore, is within the context that after the court has duly evaluated and considered all the facts, materials and evidence in totality as presented to it, even if only one incidence of the electoral malpractice/offence alleged is proved, and even if the evidence in proof thereof is from a single witness, that is sufficient to justify court in nullifying the entire election concerned. The provisions are not intended to absolve court from its duty to consider, in totality, all the evidence, facts and materials presented to it. To allow such interpretation would amount to unconstitutional derogation from the provisions of the underogable **Article 28(1)** of the Constitution. The aspirations of the parties who take their matters to court for adjudication are to leave court contented or with reason to be contented that on due consideration by court of all the evidence, facts and materials before it and in totality as presented justice is not only done but is also seen to be done. This is irrespective of the question of in whose favor the judicial scale has tilted. It may very well be an onerous task for the judicial officer before whom the parties appear to go through and consider all the facts of the case and the evidence, whether oral or by affidavit adduced by the parties but that is the inescapable duty of such judicial officer entrusted to him or her to do justice to all manner of people without fear or favor, affection or ill will, in accordance with the Judicial Oath he/she takes before assuming office and in observance of the constitutional provision that judicial power is derived from the people to be exercised in

their name and in conformity with the values norms and aspirations of the people as commanded by **Article 128 (1)** of the Constitution.

By virtue of **Article 2(2)** of the Constitution, the Constitution is the Supreme law of the land binding on all persons and authorities in Uganda and it takes precedence over all other laws of this country. Therefore, although some 5 of the 6 of the alleged incidences of bribery in the instant case were found proved by the trial court, it was not futile and unnecessary for that court to go on and on in considering the rest of the evidence on the others. The Constitution commands so both by letter and in spirit.

On this ground alone, therefore, this appeal would succeed as a fundamental procedural safeguard was fatally infringed.

Having carefully scrutinized all the evidence adduced on all the incidences of bribery and as alleged by the respondent in his petition at the High Court, and having fully and carefully studied the affidavits in support thereof and those in reply and in rebuttal, I find it appropriate to, at this juncture, make the following general observations.

First, all the evidence on record is sourced from partisan witnesses from either side. Second, it is evidence presented by witnesses who are also accomplices in the commission of the alleged incidences of the electoral malpractice/offence of bribery. Third, many of the affidavits on record are full of obvious lies. Fourth, none of the affidavits in support of the petition contains conclusive evidence in proof of the commission of the electoral malpractice/offence of bribery by the appellant. Fifth the legal principles of the burden and standard of proof are central to the determination of the question, in whose favor will the judicial balance finally and conclusively tilt? Six, it must, throughout the consideration of this appeal, be borne in mind that the instant suit belongs to that peculiar category of civil litigation dealing with elections and election related matters. This Court in **Electoral Commission and Moses Ali vs. Piro Santos Election Petition Appeal No.2/2011** amply elucidates that category thus:

> **"...election petitions are governed by this Act with its rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to**

others laws and procedures governing other types of dispute*s*, unless it says so itself."(sic)

I shall now proceed to deal with, *inter alia*, these factors as they relate to the evidence on record and in its totality, as required by law, as we resolve the agreed issues.

Court's resolution of the issues

Issue one

The gist of this issue is whether the learned trial judge erroneously found that the electoral offence of bribery had been properly proved against the appellant.

At the beginning of the hearing, counsel for the appellant submitted that the two affidavits affirmed by the respondent and filed in support of his petition were contradictory and mutually self-destructive. There was, therefore, in counsel's view, no evidence in support of the respondent's petition.

I agree with counsel for the respondent that the second affidavit was intended to correct and clarify on mistakes in the first one. Any discrepancies between the two are excusable mistakes. I am in further agreement with counsel, that all the other affidavits in support of the petition are sworn or affirmed in an effort to furnish the necessary evidence in support and proof of the allegations in the petition.

The Burden and standard of proof.

It is trite that a petitioner has the duty to adduce evidence that proves his or her case to the satisfaction of court. See **Matsiko Winnie Komuhangi vs. Babihuga .J. Winnie**, (supra)

The standard of proof required of the petitioner, though on a balance of probabilities, is higher than that in ordinary civil cases but not to the level of beyond all reasonable doubt as is called for in criminal cases. Nevertheless, it must be to the satisfaction of court.

That standard is indeed high because of the importance of the matter before court, in an election petition. See **Fred Badda and Another vs. Prof Muyanda Mutebi Election Petition Appeal No. 25 of 2006.** That standard must be attained basing on credible

evidence properly adduced before court and not on suspicion, suppositions, presumptions conjecture or fanciful theories.

It is also an established principle of law that even in civil cases, the standard of proof required is not necessarily the same and will vary according to the gravity of the matter to be proved. As pointed out by **H.F.Morris** in his book, **Evidence in East Africa,** published as **No.24** in the series of **Law In Africa** at page **150**, in a case where something akin to a crime is alleged by the plaintiff, something more than the usual standard will be required. See also **Henry Hidaya vs. Manyoka [1961] EA 705.**

The electoral offence/malpractice of bribery, no doubt, is akin to a crime and a grave crime at that.

Its gravity is testified to, *inter alia*, by the sanctions it attracts being not only of setting aside the election of the culprit but also a possible heavy fine of up to seventy two currency points or imprisonment for a long term of up to 3 years or both. This principle is, therefore, applicable to it.

The standard of proof for the electoral malpractice/offence of bribery, therefore, in my view, must be something slightly higher than that required in election related suits in which electoral offences/malpractices, not akin to crimes, are alleged.

In the persuasive Nigerian case of **Waziri Ibrahim v Shagari (1983) CLR 9(d) (SC)**, commenting on proof of allegations of crime in electoral petitions the Supreme Court held:

> **"... If of course there are specific allegation of definite criminal offences such as that children under age voted (which would be a criminal offence) the standard required would be proof beyond reasonable doubt though not beyond any shadow of doubt."**

In determining election matters involving bribery allegations, therefore, the law must require and it requires, extreme caution on the part of court to subject each allegation and each ingredient of the offence/malpractice to thorough and high level scrutiny as stated, and correctly so, in our view, by the learned trial judge in his judgment. Court must also be alive to the fact that in an election petition in which the prize is political power, witnesses who, in almost all case, are partisan, as the case is in the instant case, may easily resort to telling lies, even on oath and may exaggerate their evidence in order to

secure judicial victory for their preferred candidate. See **Mbayo Jacob vs EC & Another** (supra).

S.68 of the Parliamentary Elections Act, (PEA) provides:

> **"(1) 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 imprisonment not exceeding three years or both."**(sic)
>
> In **Kizza Besigye v Kaguta Museveni, SC Election Petition No.1 of 2001**, Odoki CJ held:
>
> **"I accept the submission of Mr. Bitangaro that the petitioner must prove the following ingredients to establish the illegal practice of offering gifts:**
>
> - **That a gift was given to a voter**
> - **That the gift was given by a candidate or his agent**
> - **That the gift was given to induce the person to vote for the candidate"**(sic)

These ingredients are inclusive and not in the alternative. To establish whether a bribe was given to a voter, the law, therefore, requires, *among other things*, proof that the person alleged to have received the bribe was a registered voter at the material time and that the bribe was intended to influence his/her voting or nonvoting. The motive for the bribe must, therefore, also be proved. See **Kizza Besigye vs. Kaguta Museveni** (supra).

S.1 of the PEA defines a registered voter as:

> **"A person whose name is entered on the voters register"**

The conclusive proof of a registered voter, therefore, is by evidence of a person's name or names and other relevant data having been entered on the National Voters Register. It is not the voter's card or any other election document but the National Voters Register.

I am mindful of the provisions of S1 of the PEA which defines a Voter's Card as:

> **"....a voters card issued under S26 of the Commission Act <u>to a voter whose name appears in the Voters' Register</u>."**(Underlining mine for emphasis)**.**

This section defines a Voters Card. It does not define a registered voter. I do not, therefore, take the section to mean that every person carrying a voter's card has conclusive evidence in that document as proof of that persons' being a registered voter. Certainly not in the peculiar circumstances of Butambala Electoral District as we shall shortly show. The role of a voter's card, in our view, is clearly stipulated in Ss.34 and 39 of the PEA, which we shall consider later on in this judgment.

In the instant case, there is a unique dimension in the aspect of proving who was a registered voter in Butambala Constituency, which makes the Voters Register even more crucially important. The Chairman of the EC in his evidence stated that Butambala was a new district curved out of Mpigi District. As a result of that development, the entire constituency had to be restructured as an electoral district. Various new polling stations were created, others reorganized, and some voters were transferred. People who had 'voters' cards', according to him, carried voter's cards of Mpigi District. It is evidentially clear, therefore, there were no Voters Cards issued for Butambala Electoral District for that election.

The Chairman also emphasized that it is possible for a person to have a voter's card when actually that person is not a registered voter. For those reasons and the above developments in Butambala Constituency, acting under Ss.34 (1) and 39(1) (a) and (b) of the PEA, and S26 (4) of the Electoral Commission Act, the EC took a decision that for election purposes during the elections in issue, the cardinal and only document to be used in determining the status of registered voters was the Voters Register and not voters cards. This was also because the Voters Register and Voters Rolls for Butambala Constituency, which had just been updated, had all the comprehensive and only accurate data on every registered voter including, *inta alia,* the voters' name, his/her photograph and his/her

polling station. This decision of the EC rendered the voters cards held by voters in Butambala Constituency while still part of Mpigi Electoral District completely irrelevant to the elections in issue. The Voters Cards had been effectively recalled by the EC from their holders exercising its power under S26 (4) of the Electoral Commission Act.

The evidence of the Chairman of the EC was not shaken. He remained firm and steadfast about it despite the strenuous cross-examination he was subjected to. This unique aspect about proof of the status of registered voters in the instant appeal is of paramount importance and cannot be overlooked.

Our scrutiny of all the voters' cards, the voter registration receipts and the application forms for registration as voters presented in evidence on behalf of the respondent shows none of such documents as being from the electoral district of Butambala. They are all, without exception, from Mpigi Electoral District. They are, therefore, of no evidential value whatsoever with regard to the proof of the status of those who possessed them as registered voters from Butambala Constituency of Butambala Electoral District. Those cards had been recalled by the EC.

The provisions of **Ss 34** and **39** of the PEA are also very instructive on the importance and role of Voters Cards. We reproduce here below parts of the two sections.

> **34. Procedure for handing ballot paper to voter**
>
> **"1. A voter wishing to obtain a ballot paper, for the purpose of voting, shall produce his or her voters' card to the presiding officer or polling assistant at the table under paragraph (a) of subsection (5) of section 30.**
>
> **2. If the presiding officer or polling assistant is satisfied <u>that the voter's name and number indicated in the Voters card correspond to the voter's name and number in the register for the polling station</u>, he or she shall issue a ballot paper to the voter.**

3. Where a person does not have a voter's card but is able to prove to the presiding officer or polling assistant that <u>his or her name or photograph or both is or are on the voter's register</u>, the presiding officer or polling assistant shall issue him or her with a ballot paper.

4. .....

5. Subject to section 39, a person shall not be permitted to vote at a polling station <u>unless the person's name appears in the voter's roll for that polling station</u>.

6. .....

S.39. Factors which may not prevent a person from voting.

"1.The claim of a person to vote at

any election shall not be rejected by reason only,

a) **.....**
b) **of the entry in <u>the voters' register or in the voters' roll</u> of a wrong village or of a wrongly spelt name, if, in the opinion of the presiding officer, the person is sufficiently identified.**

2. The claim of a female voter to vote at any polling station shall not be rejected by reason only that she has changed her surname by reason of marriage and that the change has not been reflected in <u>the voter's register or the voter's roll</u> for the polling station.(underlining ours).

It is clear, according to the above provisions, that holding a voter's card is an important step in the process of enabling a registered voter to access voting materials to enable him/her to vote but only as long as that person's name and other necessary data is duly entered and appears on the Voters Register. A voter's card is not, even in normal circumstances, conclusive evidence of proof of the status of the holder thereof as a registered voter. Such proof can only be derived, with certainty, from the Voters' Register/Voters Roll. This was more so in the case of Butambala Constituency where

there were no Voters Cards at all and as correctly observed by *C.K Byamugisha JA* in **Kirunda Kivejinja Ali vs. Katuntu Abdu and the Electoral Commission Election Petition Appeal No. 24 of 2006, Court of Appeal of Uganda**, each case must be determined on its facts.

Given the above provisions of the law and the evidence of the Chairman of the EC on the question of identifying registered voters in Butambala Constituency, it was not enough for those who claimed to be registered voters in the instant case to merely produce voters cards of Mpigi Electoral District, their numbers or serial numbers of their application forms to be registered as voters. Nor was it enough either to state, even on oath, that they were voters, or to merely confess to have voted. More needed to be done.

It had to be proved that actually such person's names and the other required particulars of registered voters appeared on the Voters' Register/Voters Rolls as registered voters hailing from Butambala Constituency. The respondent, with regard to the only three witnesses in the names of Kisegerwa Mundu Isa; Kawere Akim and Namwanje Florence, who sated in their evidence that they voted, had to prove that their names were ticked off the Voters Rolls of their polling stations. That, in my view, was part of the caution and careful scrutiny that had to be exercised by court in the instant case and the Voters Register/Voters' Rolls offered the only cogent and compelling evidence that was necessary to conclusively prove the status of the registered voters of Butambala Constituency and to the satisfaction of court that the malpractice/offence of bribery was committed by the appellant with regard to the elections in issue.

On the allegations that the appellant bribed voters the learned trial judge had this to say.

"…Learned counsel, Mr. Okello Oryem, has challenged the voter status of the four petitioner's witnesses. However, court has no doubt that they were registered voters. The numbers of their voter cards were disclosed. In any case the alleged steamer was not claimed to have been donated to any one of them as an individual. It was alleged to have been donated to the residents of a village called Kitimba A, at a public rally for them in their village. Court cannot believe that village had no voters in it or that all those who attended the rally were not voters... Court cannot doubt that the gathering at the rally,

which was a campaign rally, was composed of non-voters only. There were, of course voters at the rally."

We have hereinabove dealt with the question of Voters Cards exhibited in the instant case. We shall now proceed to consider the question of bribing a group.

Counsel for the respondent sought to rely on **Bakaluba Peter Mukasa vs. Namboze** (supra) where their Lordships the Justices of the Supreme Court of Uganda held:

> **"...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 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 illegal practice is enough on its own to annul an election…"** (sic),

I do not understand their lordships in the above quotation to have ordained away the need for a party alleging bribery to have been committed to adduce cogent and compelling evidence to prove that the recipients of the alleged bribe, or at least some of them in a group, were registered voters. Their lordships in fact emphasize the requirement that a bribe must be given to a proven registered voter or to a group of proven registered voters or to a group, which consists of both proved registered voters and non-voters. As this court pointed out in **Kamba Saleh Moses Vs Hon. Jennifer Namuyangu, Election Petition Appeal No. 0027 of 2011,** in both **Bakaluba Mukasa vs. Nambooze** and **Anthony Mukasa vs. Dr. Lulume** (supra), there was concrete evidence proving some of the recipients of the gifts from the candidates being registered voters. There is no such evidence in the instant case. In any case the principle in **Bakaluba Peter Mukasa** (supra) was not bribing a village or group but a voter in a village or a group of voters and emphasizing the fact that proof of one illegal practice is enough to annul an election. We,

therefore, find the case of **Bakaluba Peter Mukasa vs. Namboze** (supra), distinguishable on facts from and not applicable to, the instant appeal.

Further with the greatest respect, I am not persuaded that it was enough for the learned trial judge to rely on mere presumptions and assumptions or suspicion, however strong it may have been, as he evidently did, that in an entire village or in a football team or in a netball team or in campaign rallies or in groups of trading centre dwellers, or in groups of worshippers in mosques, or whatever groups of people, there were surely registered voters. To hold so would be nothing but speculative.

The Legislature in enacting the PEA did not provide for bribes to be given to any person who does not answer the description of a registered voter by law as sated above. Anything outside that definition is alien to the law of the electoral malpractice/offence of bribery. The Legislature does not make mistakes. It is presumed to know what situation it legislates for and what words and terminology it uses. A court of law should resist the temptation to assume the function of amending the law by introducing therein words and terminology the Legislature did not use. To legislate is, by this country's constitutional arrangement, the preserve of the Legislature.

As stated in **Halsbury's Laws of England, 4th Edition Vol. 15 at page 534 paragraph 695**, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and even the confession of the person alleged to have been bribed is not conclusive.

The finding pronounced by the learned trial judge as above quoted is, therefore, in our considered view, not supported by any cogent and compelling evidence. It is trite law that courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning, or fanciful theories.

See **Okala vs. Republic 1965 EA 555,** and **Kanalusasi vs. Uganda [1990-1998] HCB 10.**

Counsel for the respondent contended that it was not for the respondent to adduce in evidence the Voters Register since the EC was in court and had the custody of that document. This argument is unsustainable in light of the law on the burden of proof. Section 101 of the Evidence Act, Cap 6 of the Laws of Uganda provides:

101 Burden of proof

1. **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.**
2. **when a person is bound to prove the existence of a fact, it is said that the burden of proof lies on that person."**

Section 102 of the same Act provides**:**

102 On whom burden of proof lies.

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 103 of the same Act further provides:

103 Burden of proof as to a particular fact:

"The burden of proof as to any fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Whereas it is undisputed that the EC is the custodian of the National Voters' Register, it had no obligation whatsoever to adduce the same in evidence in the instant case. The legal burden to prove that the persons allegedly bribed were registered voters was entirely on the respondent. In his book **'Evidence'**, third edition, at page 7 **Rupert Cross, DCL** stated, *inter alia,* on the burden of proof:

"(i) "The peculiar duty of him who has the risk of any given proposition on which parties are at issue, who will lose the case if he does not make this proposition out, when all has been said and done."

The legal burden to prove one's case never shifts especially in such a case where the matter to be proved is a core issue in proving one's case except where the law otherwise provides.

Further it is important to appreciate that the electoral offence/malpractice of bribery is a limitation to the individual's rights under **Directive Principles of state Policy No.11 (i) and (ii)** and **Article 38** of the Constitution to participate in the governance of this country. According to the persuasive Malawian cases of **Friday Jumbe & Humphery Mvula v Attorney General Constitutional case Number 1 of 2005**(unreported) and **Maggie Kaunda v Republic Criminal Appeal Number 8 of 2001** (unreported):

> ***"the burden does not lie on the one whose right is being limited, restricted or derogated from to show that they are entitled to the exercise of their right. Rather it is for those seeking to limit, restrict or derogate from the right to show that the limitation, restriction or limitation they are seeking to place on a person's enjoyment falls within the accepted levels of restriction, limitation or derogation."***

I am not, therefore, persuaded by the submission of counsel for the respondent that the provisions of Section 106 of the Evidence Act apply to the instant case to have required the EC to produce the Voters Register in evidence to ascertain whether those alleged to have been bribed by the appellant were registered voters. That would be to erroneously shift the legal burden of proof from the respondent to the appellant.

In any case, it is on record, and in very clear terms of the judgment of the learned trial judge, that the EC, on the orders of court, was withdrawn as a party from the petition. To this, the learned trial judge had the following to say:

"…Learned counsel for the petitioner agreed to withdraw the petition, in as far as it related to the first respondent. Court now takes the final order in that regard. As against the first respondent, this petition stood withdrawn as at 9th August 2011.The first respondent and the petitioner shall each meet its own costs in that regard."(sic)

It would, in my view, do gross injustice to the appellant for court to consider the EC as a non-party to the instant case for all other purposes except for defeating his case on the ground that the EC did not adduce in evidence the Voters Register.

The EC could not, following the withdrawal of the petition against it, pursuant to the above court order, continue to be a person duty bound to produce the Voters Register, at

any rate not on its own volition. That withdrawal was total not partial and was effective as right from the inception of the Petition from which the EC was ordered to be withdrawn. Section 106 of the Evidence Act operates as between parties to a suit and the EC was not such a party. **Rupet Cross DCL on Evidence** (supra) **at pages 79** and **80** and **James Yonathan Obol Ochola** in his **"The East Africa Law of Evidence", (1972)** at page **234** clearly make this point. At its withdrawal from the petition the ECs status in the matter was that of a mere witness and if the learned trial judge had properly directed himself on the question of the withdrawal of the EC from the petition, he should have no doubt recognized it as such. If the EC had to produce the Voters Register, an appropriate party to the petition needed to take the initiative to cause the EC to do so. That would, logically and legally, have been the respondent who had the legal burden to prove his allegations of bribery.

The Voters Register is, and was, a public document, which any party who wished to access was free to initiate the move to do so.

The way to access that Register and adduce it in evidence in the instant case was, therefore, for the respondent to invoke the provisions of Ss 73, 75 and 76 of the Evidence Act.

Counsel for the respondent submitted that since the Voters' Card attached on the various affidavits in support of the petition were printed by the EC, then the presumption was that the evidence in them was guaranteed. I reject this submission. I have hereinabove already shown that the EC had withdrawn or recalled the exhibited Voters Cards and in any case, those cards were not produced by the EC from its proper custody.

The respondent could also have proceeded under Ss 24 and 25 of the Electoral Commission Act.

Under those sections information about Voters Register and the Voters Register Rolls, is made public and given extremely wide publicity and possible accessibility right from the District headquarters to the polling stations in the villages where people reside. The sections provide:

24. Inspection of constituency voters rolls, printing of the rolls and use of the rolls.

"(1) The voters roll for every constituency shall be open to inspection by the public, free of charge, at the office of the returning officer during office hours and shall also be made available at the sub county headquarters and at each polling station within the constituency.

(2) A person inspecting the voters roll for a constituency may, without payment of any inspection fee, make copies of the roll or make extracts from it in each case at his or her expense during office hours but without removing the roll from the office of the returning officer.

(3) The commission shall cause the voters roll for each constituency to be printed and any person may obtain from the commission, on payment of such charges and subject to such conditions as may be prescribed, copies of any voters roll for the constituency or for a parish or ward within it.

(4) ....."

25. Display of the voter's rolls; objections to the rolls.

"(1) Before any election is held, the commission shall, by notice in the Gazette, appoint a period of not less than twenty-one days and during which any objections or complaints in relation to the names included in the voters roll or in relation to any necessary corrections shall be raised or filled.

(2) The display of a copy of the voters roll referred to in subsection (1) shall be carried out in a public place within each parish or ward.

(3) .....

(4) .....

(5) .....

(6) .....

(a) .....

(b) .....

(i) .....

(ii) .....

(7) .....

(a) .....

(b) .....

(c) .....

(8) .....

As a matter of fact and by law, the Voters Register or Voters Rolls are readily available at all polling stations on voting day and registered voters who turn up to vote are ticked off the same as they go through the process of voting. This is a notoriously known fact that can be appropriately taken judicial notice of.

The information in the Voters Register/Voters Rolls, therefore, cannot be taken as that especially or peculiarly or exclusively within the knowledge of the EC. That information is common knowledge to all who care, as and when they wish, to access and use it, the respondent in the instant appeal inclusive. We are not persuaded, therefore, that it was an onerous task for the respondent to have the Voters Register to be adduced in evidence. The respondent chose not to benefit from the relevant provisions of the law and he must live with the full consequences of failing in his duty to do so.

Since, in the instant case, none of the alleged recipients of the money, gifts or other consideration was proved to be a registered voter, no motive to influence the voting or nonvoting of a registered voter was proved against the appellant. This as an ingredient of the electoral malpractice/offence of bribery had, of necessity, to be proved. I reject the respondent's contention that it was not necessary to prove motive in the alleged bribery in the instant case.

See **Kizza Besigye vs. Kaguta Museveni** (supra).

Further, in the absence of the Voters Rolls used on the voting days, no registered voter has been conclusively proved to have voted or to have refrained from voting by reason of any influence through bribery by the appellant or through any of his agents. That

ingredient of the electoral offence/malpractice of bribery, too, therefore, remained unproved.

Further still, my careful scrutiny of all the evidence on record clearly reveals that that evidence consists of accusations and counter accusations traded between the witnesses of the appellant and those of the respondent. I have no doubt that this would, most probably, have become clearly apparent to the learned trial judge too, had he not chosen to adopt a method of random sampling and selective evaluation of the evidence put before him by the parties to the instant case. Clearly, that evidence is a continuation of the efforts by each side of partisan witnesses eager to win victory for their preferred candidate even at the expense of telling lies on oath in what was, obviously, a hotly contested election. The **Mbayo** case (supra) fits in very well with this case in that respect. Such evidence, including that of Siraje Kamulegeya, needed other corroborative evidence, from an independent source. Such is totally lacking.

Further, as earlier on intimated in this judgment, I find that all the respondent's witnesses are accomplices in the alleged bribery by virtue of the provisions of Section 68(2) of the PEA. The section provides in part:

68 Bribery

1.....

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

(a).....

3. .....

(a) .....

(b) .....

4. An offence under subsection (1) shall be an illegal practice.

5. .....

6. .....”

Such witnesses' evidence must be taken with extreme caution. It is greatly unsafe to rely on such evidence without other evidence from an independent source to corroborate it. *C.K Byamugisha JA,* in **Kirunda Kivejinja Ali vs. Abdu Katuntu** (supra) held so. **Sarkar** in his **Law of Evidence vol. 2 at page 1909**, too authoritatively observes that an

accomplice is unworthy of credit unless he is corroborated in material particulars. Again there was no such corroborative evidence here.

Counsel for the respondent submitted that there was corroborative evidence in the campaign programme followed by the parliamentary election candidates in Butambala Constituency. I reject that submission. That programme is clearly a document of the EC duly signed as such by the Returning Officer, Butambala District. The respondent in his supplementary affirmation in support of his petition in paragraph 10 acknowledges that fact. He, however, attached a copy of the programme as annexture 'A' to his said affirmation. That programme was never introduced in evidence by its author, the E.C. It is settled law that the rules of evidence in the Evidence Act do not necessarily apply to affidavits.

The campaign programme for Butambala Constituency being a public document had to be adduced into evidence in the instant case by the E.C. This was not done. Further, the appellant's following of that programme can only testify to the fact that he was at the places indicated therein but, *per-se*, is not sufficient proof that he bribed any registered voters.

In the result and consequent upon my careful and thorough re-appraisal, review and scrutiny of the pleadings and the evidence as a whole on record, in totality, and my application of the relevant law to the instant case, I find myself unable to uphold the findings of the learned trial judge on issue one that there was proof, to the satisfaction of court, that the appellant personally committed the electoral offence/malpractice of bribery. I find no cogent and compelling evidence to support that holding. Further and more importantly, I find that the whole decision of the learned trial judge is untenable at law by reason of the trial court having reached it in total contravention of fundamental principles of natural justice as expounded earlier hereinabove. That decision is a nullity. I, therefore, would find in the affirmative on issue one.

Issue two

This issue is on remedies. Having found, as I have, on issue one, I would allow this appeal. I would set aside the learned trial judge's orders nullifying the election and

requiring a by election to be held for Butambala Constituency. The appellant would be entitled to costs at this Court and at the High Court. However, since M.S Arach Amoko and Remmy Kasule JJA do not agree, I have no option but to order a dismissal of the appeal by a majority of two to one in the terms and orders proposed in the majority judgment.

Dated at Kampala this…**20th** ..day of…**July**….2012.

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S.B.K.Kavuma,

Justice of Appeal