THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA, AT KAMPALA
ELECTION PETITION NO. 7 OF 2006

HONOURABLE KATUNTU ABDU :::::::::::::::::::::::::::::::: PETITIONER

:VS:

1. HONOURABLE KIRUNDA KIVEJINJA ALI
2. THE ELECTORAL COMMISSION :::::::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE V.F. MUSOKE KIBUKA.

JUDGMENT.

INTRODUCTION.

National elections were held throught Uganda on the 23rd day of February, 2006. The Petitioner and the first respondent were candidates for election to the Parliamentary seat for Bugweri County Constituency, in Iganga District. It was a duo race. The Petitioner polled 16,496 as opposed to the first respondents's 17554 votes. The second respondent, upon the basis of that result, declared the first respondent winner of the Parliamentary seat. The first respondent has since assumed that seat in Parliament.

PLEADINGS:

The Petitioner filed this petition, in this honourable court, upon a number of allegations or grounds. Broadly, he alleged:

- That electoral process in Bugweri was conducted not in compliance with the provisions and principles of the Parliamentary Elections Act, 2005 (PEA, 2005).

- That the failure to conduct the election in compliance with the Provisions and Principles in the electoral law benefited the first respondent and affected the final result in a substantial manner.

- That the first respondent personally or through his agents, with his knowledge, consent or approval, committed numerous election offences and illegal practices.

The Petitioner seeks, from this honourable court, orders:

- ***Either declaring that the first respondent was not validly elected or setting aside his election as the member of Parliament for Bugweri County Constituency****;*
- ***Declaring the Parliamentary seat for Bugweri County Constituency Vacant and requiring a fresh election to be conducted in the constituency***; ***and***
- ***Requiring the respondents to pay the costs incurred by the Petitioner in respect of this Petition.***

The first respondent, in his answer to the petition, denied that the election was conducted in contravention of the provisions of the PEA, 2005. He contended that if any contravention of the PEA, 2005, had occurred, then it did not affect the result of the election in a substantial manner. The first respondent denied that the electoral process was riddled with violence and lack of freedom, stating that the few incidents of violence were caused by the petitioner's supporters but that the police took action and the law took its course. The first respondent denied that he personally or his agents with his knowledge, consent or approvals, committed any election offences or illegal acts.

The second respondent in its answer also denied all the allegations made against it in the petition. It contended that the election of the member of Parliament, for Bugweri County Constituency, was conducted in accordance with the provisions of the Constitution of the Republic of Uganda, 1995, the Electoral Commissions Act Cap. 140, and the PEA, 2005.

ISSUES.

All counsel involved in this petition agreed upon five issues. They are set out below in their original form.

01. Whether there was non-compliance with the Provisions of the PEA,
2005;
02. Whether there was failure to conduct the election in accordance with the principles laid down in those provisions.

03. If the answers to issues 1 and 2 are in the affirmative, whether the non compliance and the failure affected the result of the election in a substantial manner;

04. Whether any illegal practice or election offence was committed by the first respondent personally or by his agents with his knowledge, consent or approval; and

05. What remedies are available and to which party?

The Parliamentary Elections (Election Petitions) Rules, 1996, make no provision for the framing of issues in election petitions. However, under rule 15 of those rules, the Civil Procedure Rules are applicable where the Parliamentary Elections (Election Petitions) Rules make no specific Provision. Court, therefore, under Order 13 rule 5, of the Civil Procedure Rules, has decided to amalgamate issues one and two into the following new formulation as issue number one:

01. "Whether there was non-compliance with the provisions and principles set out in the PEA, 2005."

Similarly, court has renumbered issues three, four and five as two, three and four, respectively. The issues to be determined in this petition, therefore now are:-

01. Whether there was non-compliance with the provisions, and principles set out in the PEA, 2005;
02. If, so, whether the non-compliance affected the result of the election in a substantial manner;
03. Whether any illegal Practice or election offence was committed by the first respondent personally or by his agent with his knowledge consent or approval; and
04. What remedies are available and to which party?

THE LAW.

Section 61(1) of the PEA 2005, specifies the grounds upon which the election of a member of Parliament may be set aside. That provision reads:

> ***"61 (l) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court: [Emphasis Added].***
>
> a) ……
> b) ……
> c) ……
> d) ……."

It is now settled law that the burden of proof in an Election Petition lies upon the Petitioner. He or she is required to discharge that burden by proving the allegations, made by him or her in the petition, to the **satisfaction of the court.**

The standard of proof, in an election petition, is also now a matter of statutory regulation. It is regulated by sub-section (3) of section 61, of the PEA, 2005. The subsection provides to the effect that the standard of proof required election petition is proof upon the **balance of probabilities.**

The question for the degree of probability required in order for the court to be satisfied that an allegation in an election petition has been proved to its satisfaction also appears to be well settled. The Supreme Court of Uganda, in the land mark Election Petition of ***Col. Rtd. Dr. Besigye Kizza .Vs. Museveni Yoweri Kaguta and The Electoral Commission,*** appears to have put an end to the judicial debate, which had raged in this court since 1996, upon whether the statutory formulation "***if proved to the stisfaction of the court"*** meant proof *beyond reasonable doubt* or merely proof upon the balance of probabilities. Odoki, C.J., in his *leading majority judgment*, The learned Chief Justice agreed with the majority interpretation of the statutory phrase "if proved ***to the satisfaction of the court," by the House of Gods, in Blynth . Vs. Blynth (1966) A.C. 643,*** which was to the effect that the standard of proof was by a preponderance of probability the degree of probability defending upon the importance of the subject matter. Summed up the position in the following words:

> ***"An Election Petition is not a Criminal Proceeding…… (The High standard of proof in Criminal cases is intended to protect the liberty of the citizens. If the legislature intended to provide that***

the standard of Election Petition shall be b beyond reasonable doubt, it would have said so. Since the legislature chose to use the words "Proved to the satisfaction of the court", it is my view that that is the standard of proof require in an Election Petition of this kind. It is a standard of proof that is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance. "(At pages 13 and 14 of the Reasons).

The subject matter of setting aside the election of a member of Parliament is of great importance to me though it may not measure to the same degree of importance as that of setting aside the election of trying the President of the country. The court trying an Election Petition such as this one, has the duty to ensure that before issuing an order for setting aside the election of a member of Parliament, it is duly satisfied, by the evidence before it, that the allegation made, in the petition, has been proved to that high degree of preponderance.

FIRST ISSUE - Whether there was Non-Compliance with the Provisions and **Principles set out in the PEA, 2005** All allegations relating to this issue are contained in paragraph 4 of the Petition:

Disenfranchising Voters – Paragraphs 4 (a) and (j) of the Petition.

In Paragraph 4(a), of the petition, the petitioner alleges that contrary to section 19(3) of the Electoral Commission Act, the second respondent disenfranchised voters by deleting their names from voters' roll and also denying the petitioner's registered supporters the right to vote. In paragraph 4 (j), the petitioner alleged that contrary to section 34(3) and (5) of the Parliamentary Elections Act, 2005, the second respondent's officers, in connivance with the first respondent's agents, denied the petitioner's open supporters the right to vote by denying them the opportunity to check their names in the voters register or roll for the purpose of being issued with ballot papers.

To prove that allegation to the satisfaction of the court, the petition averred in paragraphs 21 and 22 of his affidavit in support of the Petition, PA1 that at Idudi market polling station, there was no queuing by voters as is required by subsection (3) of section 30 of the PEA. He averred that instead, the presiding officer used a roll call system calling out those voters he chose to call and that, as a result of that unlawful voting procedure, by 2.30 p.m. only 200 voters had cast their votes at that polling station which had some 1323 registered voters. That after the petitioner reported the unlawful procedure to the second respondent, the Returning Officer intervened but only denoted the Presiding Officer to a polling assistant and the roll call system continued.

Corroboration to the petitioner's averment is found in affidavit P.A.4, by Babala Yakubu, who avers that there was no lining up by voters at Idudi market polling station. There are also corroborated by

affidavit P.A.2.8, by Rehema Babirye. She names Mukyala Bagaaga, Ayub and Mukyala Karim, as some of the voters who had voters cards for the polling station but were denied the right to vote.

The averment of the petitioner in relation to the voting procedure at Idudi market is rebutted by the first respondent. It is also partly rebutted by the Returning Officer, Mr. Ssempiima Godfrey, in his affidavit, R2A.2. He avers that voters at the polling station had lined up until mid-day when rain intervened. He agrees that he was called upon to intervene and that he restored the voter lining stem upon his intervention late on polling day.

Court is, therefore, satisfied the provisions of section 30 (3) of the PEA, 2005, were not followed at least for some period of time at Idudi market polling station on polling day.

The Petitioner, however, does not state how many voters were denied their right to vote as a result of the adoption of a roll call. System by the Presiding Officer . A part from the three persons named by Rehema Babirye, not registered voter at Idudi. Polling station has sworn any affidavit stating that he or she was disenfranchised as a result of the Presiding Officer's illegal voting procedure. It is, however, true that the voter turn up at Idudi market polling station was far below average for the constituency. It was a large polling station of 1323 registered voters. The DR form for Idudi Market Polling station is exhibit R2.99. It shows that only 684 valid and invalid votes were cast at the polling station. It also shows that the petitioner polled 46 votes to the first respondent's 192 votes. If

the voter population at the polling station was 1323, as the petitioner avers; The DR form tends to confirm that figure as 1400 ballots were sent to that polling station. Clearly, some 639 registered voters at Idudi Polling Station did not either turn up to vote or if some of them did, they were not able to cast their votes.

Court concludes from the evidence before it, that the selective roll call by the Returning Officer was most probably one of the disabling factors to those voters. Court is therefore satisfied that the provision and principle under section 19 (3) of the Electoral Commission Act, were compromised and as a result some voters at that polling station were denied their right to vote.

The second set of incidents of the alleged disenfranchisement of voters are contained in affidavit A4.3, by Namudiba Falida is PA4.3. She avers that she was the petitioner's supervisor for Buwoya Parish. She visited Buyanga junction polling station where she found the Presiding Officer one Nkulegga Ramathan, was using roll call. The voters were gathered very far from the Presiding Officer's table. There was no line of voters. The witness avers that at Naluswa polling station, where she arrived at 2.30 p.m., she found the Presiding Officer absent from the Polling Station. The Polling Assistants were issuing ballot papers only to voters who raised the NRM sign of the thumb. There was no checking of the voter's names in the voters' roll.

The averments of Namudida Farida, relation to Buyanga junction polling station, are rebutted by Nkulega Alamanzani in affidavit

R1A.6. He avers that he was the Presiding Officer at that polling station and that the voting procedure under section 30 (3) of the PEA, 2005 was followed by him by requiring voters to form a line. He denies ever using a roll call. Similarly, Nelson Lukooya, in affidavit R1A.8, avers that he was the Presiding Officer at Naluswa Polling Station. He rebuts the averment that he was absent from the polling station at any time on polling day and that ballot papers were issued selectively in favour of persons who showed the NRM sign. The DR form for Buyanga Junction PS is exhibit R2.95. It shows that a total of 334 voters cast their votes at that polling station. A total of 580 ballot papers had been issued to the Polling Station, which mean that the total number of registered voters was about 450 voters. The Petitioner worn with 165 to the first respondent's 161, votes. The voter turn up, therefore, was very near the constituency of 70.6% as exhibit P1, the tally sheet, shows.

Court believes Namudiba Farida as stating the truth as opposed to Nkulega Alamanzani. That is as far as the voting procedure at the polling station was concerned. However in light of the overall voter turn up at the polling station and in the absence of any affidavit by any voter who may have been disenfranchised, court is not satisfied that any voters were disenfranchised owing to the roll call procedure used by Nkulega Alamanzani.

As for Naluswa polling station, court also believes the averments of Farida Namudibya as opposed to the general denial by Lukoya Nelson. Court is satisfied that selective or preferential issuance of ballot papers was carried out. It is however, not satisfied that the

petitioner's supporter were turned away. None has made any averment to that effect. Namudiba Farida does not have any. The DR for Naluswa is exhibit R2.78. It shows a voter turn up of 426 out of about 600 registered voters. That is only slightly below the constituency average. The petitioner worn with 221 as opposed to 202 votes for the first respondent. The third alleged incident of disenfranchisement of voters C/S 19 (3) of the Electoral Commissions Act, is contained in the affidavit of Gwantamu Majid, PA4.6. He avers that on polling day, 23rd February, 2006, he was at Butende Church Polling Station before 4.00 p.m. The first respondent went to the polling station at about 4.00 p.m. and ordered the Presiding Officer to close the polling station saying that it was time to do so. That the voters in the voters' line, including the witness booed the first respondent. However, the Presiding Officer, one Njende obeyed the first respondent's order and closed the polling station to the protests of the voters still in the line.

Nansabadha Fatuma, in her affidavit, PA4.7, in paragraphs 6 and 7, corroborates the averments of Gwantamu Majid. She states that she was one of the voters who were denied their right to vote as a result of the first respondent's order to the presiding officer to close the poll before the expiry of the statutory voting time which is 5.00 p.m.

The first respondent rebuts the affidavits of both Gwantamu and Nanshabadha Fatuma and that of Naula Christine. He does so in a general denial in his affidavit in answer, R1A.2. The first Respondent does not deny that he was at the polling station as alleged. The Presiding Officer has also denied that he was ordered to close the

polling station early. According to him voting went on until late after 5.00 p.m. and the counting of votes did not end well until mid-night. Court finds no reason why these witnesses would have imagined this scenorid if they did not witness it. Court therefore, believes their testimony in preference to the denials by the first respondent and the Presiding Officer.

A candidate has no supervisory power over any election during which he or she is a candidate. He can, therefore, not order a Presiding Officer to do this or that thing at the polling station. Under section 29(5), of the PEA, 2005 if at 5.00 o'clock, which is the closing time for polling stations, there are voters still in the queue and have not voted, the Presiding Officer is required to keep the polling station open until all of them cast their votes. A candidate has no official duty to perform at a polling station a part as a candidate. He or she must, however, do that within the law. Court therefore, finds that the petitioner has proved, to the satisfaction of the court, that allegation that some voters were disenfranchised at Butende church of Uganda Polling Station.

In conclusion to the allegation that the second respondent disenfranchised the petitioners supporters by deleting their names from the voters roll or by denying the petitioner's registered voters, the right to vote, court finds that the allegation was not been proved to it's satisfaction. There is no evidence to show that the second respondent removed any supporters of the petitioner from the voter's rolls. Although some evidence proves that some Presiding Officers in a few polling stations did not follow the right polling

procedures and as a result, some voters lost their right to vote, there is no evidence of the alleged connivance between the second respondent's polling officers and the first respondent himself or his agents to deny the petitioner's supporters the right to vote. The evidence produced by the Petitioner, therefore, does not prove the two allegations under paragraph 4 (a) and (j) of the petition, on a balance of probabilities and to the satisfaction of the court.

Intimidation, Violence and Torture of Petitioner's Supporters and Agents.

In Paragraph 4 (b) of the petition, the petitioner alleges that contrary to section 2 (1) (e) of the Electoral Commission Act, the second respondent failed to take measures to ensure that the electoral process, in Bugweri County Constituency, was conducted.

Under conditions of freedom and fairness.

Now, section 2(1) (e) does not exist in the Electoral Commission Act, Cap.140. Section 2, of that Act, only confers corporate status upon the Electoral Commission. It has nothing to do with imposing a duty upon the Electoral Commission to ensure that the entire Electoral process is conducted under conditions of freedom and fairness. It appears that the relevant provision of the Electoral Commission Act is section 12 (1) (e), which provides as below:

"12

(I) The Commission shall, subject to and for the purposes of carrying out its functions under Chapter Five of the Constitution and this Act. Have the following Powers:

.....

.....

.....

.....

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

.....

.....

.....".

The Petitioner avers in Paragraph 4 of his affidavit in support of the petition that the first respondent deployed a squad of armed men who were under the command of one ***Lt. Mulindwa alias "Surambaya"*** who according to the petitioner, wrecked have, in the Constituency, by harassing, torturing and intimidating the supporters and comparing agents of the petitioner.

In paragraph 5, the petitioner avers that the first respondent deployed another group of persons led by one **Major Swaliki Kiswiriri** who moved all over the constituency addressing gatherings and telling voters not to vote for the Petitioner and that, if they did, they would face the entire wrath of the army which would move into the constituency.

In Paragraphs 6 – 7 of the some affidavit in support, the Petitioner avers that another group or militia was led by one **"Pastor NRM**". They traversed the constituency during the campaign period, using two vehicles from the NRM Secretariat – **Pajero, UG 0025B and Toyota Double Cabin, UG 0038B**. That Pastor NRM went telling voters that he had been instructed to go to Bugweri to uproot the petitioner who was an Al quaeda operative. The group was always dressed in Yellow T Shirts. But would be carrying army fatigues in the two vehicles.

In paragraph 8, the petitioner avers that several of his supporters were, throught the campaign period, clobbered, harangued, assaulted and generally tortured. He lists about 25 cases of such people whose cases were reported to Idudi Police Post. He attaches exhibits P2.1, P2.2 and P2.3, which he avers that he personally took showing men in yellow T-Shirts, armed with guns and sticks, seemingly chasing away residents and persons from Dude Trading Centre.

The Petitioner testified that he reported the violence to the second respondent and that a meeting was convened by the second respondent on 16th February, 2006 and that the chairman of the second respondent observed at that meeting that the violence in Bugweri Constituency was the worst in the whole country. The minutes of that meeting are exhibit P.3. The Petitioner also avers in paragraphs 10, 14, 15 and 16 that his four wheel drive car, KAP 040W, was grabbed two days to polling day, together with his driver, and campaign agent called Kasaga Twaha and dumped at Iganga

Police Station and that the RDC, Iganga, one Katamba, directed the DPC not to release it.

He also avers that several of his agents in Busembatya town were arrested on the eve of polling day. They were dumped at Busembatya Police Post. They included Musoke Josua, Kivuka Christopher, Siraje Magoola, Kiribaki and Balondemu. They were released on polling day in the evening with no charge or explanation. They misled voting. Exhibit P.4 shows them at the Police Post.

The Petitioner further avers that the first respondent together with Pastor NRM recruited and trained a squad of youths in the compound of one Igandi a brother to the first respondent and residing at Buwaabe near the first respondent's home.
The first respondent has rebutted all the above averments save the one relating to the meeting convened by the second respondent on 16th February, 2006 which was convened mainly to resolve complaints raised mainly by the Petitioner and himself.

The first respondent aver that it was true that there were incidents of violence during the campaign but that those were caused by the supporters of the Petitioner. He averred that he did not deploy any squad of armed men to wreck have upon the petitioner's supporters. He avers that he was not aware of the authorities of person like major ***Swaliki Kiswiriri, Pastor NRM and Lt. Mulindwa alias Surambaya*** except that the petitioner had

complained about them to the second respondents at the meeting convened by the second respondent on 16th February, 2006.

In a seeming contradiction to the above, the 1st respondent averred, in paragraph 7 of his affirmation in support of his answer, that he knew pastor NRM as a cadre of the National Resistance Movement whose job was to mobilise and rally movement members and recruit new members nationally. The first respondent did not know that Pastor NRM was a soldier or that he used the government vehicles mentioned by the Petitioner or that he carried army fatigues in those cars. The first respondent also agreed that there were incidents of Violence but that the police always took appropriate action. He was aware of persons that were arrested at Busembatya while moving during the night with knives and pangas, on suspicion of threatening violence. The first respondent denied training any rascals. He averred that the only persons who were trained were NRM campaign and polling agents.

The second respondent also rebutted the petitioner's averments in relation to the claim that the second respondent failed to take measures to stop violence and that it did not take steps to ensure that the Electoral Process was transparent and free and fair. The two affidavits in rebuttal were R2A.1 and R2A.2 by, the EC. Chairman Eng. Dr. Badru M. Kiggundu and the Returning Officer Ssempijja Godfrey, respectively.

The Petitioner and the first Respondent presented several affidavits intended to substantiate or corroborate the Petitioner's averments

and allegations in the petition or in rebuttal and support of the answer. Unfortunately none of all the numerous witnesses in this Petition appeared in court for cross-examination on the contents of the affidavit deponed by him or her. The court, therefore, did not have the opportunity of observing the demeanour of any of the witnesses in order to assess his or her credibility. Court, therefore has to find solace in the statement in Sakkar's Law of Evidence, Fourteenth Edition, at page 86, where the Learned Author acknowledges that, "*Proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs .....Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts .....has to weigh and decide."* respectively.

In addition to his own averments, respect of intimidation violence and torture of his voters and campaign agents, the Petitioner adduced evidence from the following witnesses: Katimbo Namudan, in affidavit PA4.1 avers that he was Chairperson L.C.1 and also Chairperson of N.R.M, of Naitandu B village. During the campaign period, one Hajji Isa Magoola, a campaign agent of the first respondent in the parish went to his home and asked him to recruit 18 strong bodied men and take them to the witnesses home. he recruited Wilson Waisswa, Baker Menya, Isabirye Magidu, Dan Alikubinga, Batte Mussa, Isabirye Tomasi, Isabirye Venient, Nsite Faruq, Magidu Bangi, Sula Bukenya, Awali Wayibango, Isiko Herman, Waisswa Kabibu, Eseza Banonya, Yakubu Doba, Opado Layimondo, Kalidi Bumali and himself. The witness avers that the first

respondent addressed the group at the home of Hajji Magoola. The first Respondent told them that their assignment was to block the Petitioner from campaigning in their village and to make life hard for the petitioner's agents in whatever manner. The witness was paid shs. 10,000/= per day while the others were paid shs. 3,000/= per day by the first respondent generally. They are also rebutted by Hajji Isa Magoola also generally in affidavit RIA.3.

Learned Counsel, Mr. Nkurunziza, for the first respondent, asked court not to believe the averments of Katimbo Hamudan. He submitted that since Katimbo was both LC.1 and NRM Chairperson, it did not make sense that he could have been instructed by Hajji Magoola, who was a mere NRM member to mobilise 18 persons for training. Court finds it equally hard to believe that Katimbo Hamudan, who was an NRM leader as well as a Local Council Chairperson and a supporter of the first respondent would make such serious false allegations against the candidate of his own party. There is no credible explanation why that could be the case. Court therefore, believes his evidence.

Ali Igambi swore affidavit PA4.2. His testimony is that on 21st February, 2006 he was driving the petitioner's vehicle, KAP 040W, a Hilux Pick-Up. He was driving to Busesa to collect the Petitioner's polling agents for a meeting. At Ibaako, he met the first respondent who was in a Mitsthibishi Pajero, in the front seat with men armed with AK47 rifles in the middle and back seat. The first respondent was being escorted by a mini bus whose number plates were covered. The minibus had men armed with sticks. The first

respondent ordered the witness to stop. The witness was ordered to lie down facing the ground. The first respondent took away the vehicle keys from him. the witness was beaten and stepped upon by the armed men. Uganda shs. 38,000 and shs. 45,000/= Kenya shillings was taken away from him. The 1st respondent then boasted that he had reduced the petitioner's manpower because the petitioner would have no car for transport. The petitioner and the agents, he had gone to collect, were dumped at Iganga Police Station at the orders of the first respondent who did not want them taken Idudi Police Post which was nearer.

All Igambi's averments are denied by the first respondent in general terms. Gideon Kateteyi, in affidavit R1A 4, does not specifically deny the averments of Igambi. Court finds Igambi's averments duly corroborated by the Petitioner's own testimony in material particulars. Court believes the evidence.

Charles Iguru swore affidavit PAS. According to him, one Igambi Yusuf, who was a neighbour to the witness and a mother to the first respondent established a training camp at his home where about 80 recruits were being trained daily by one **Afande Kirya**. The witness was persuaded to join the training by his friends Mukama Alex and Safari Kigenyi who were trainees themselves. He was also attracted by the shs. 2,000/= paid daily to each trainee. The group would do paramilitary drills in the morning and after lunch escort the first respondent to his rallies. They would be armed with sticks and their role was to beat anyone who flashed the FDC sign. They were known as **"Kivejinja troops".** They worked in conjunction with

another group known as "**Yellow Members**". The witness mentions two men they beat at Ibulanku trading centre and eight boys they beat up at Namigandu, for flashing the FDC sign. He also mentions a young man they arrested at Namigandu and took him to the first respondent's home for custody."

The first respondent rebuts the averment of Iguru Charles. So does Yusuf Igambi in affidavit R1A.9. According to Yusuf Igambi the persons who used to gather at his home daily were members of first respondent's task force and not paramilitary recruits. Alex Mukama, in affidavit R1A.11 also denies that he knows any person called Iguru Charles and that he persuaded him to join any training or group. Court believes the averment of Iguru Charles as being truthful. Being a neighbour of Igambi Yusuf, a fact which Igambi Yusuf does not deny, the witness could not make such far reaching averments falsely against his neighbour without any good reason. Secondly, court believes the denial by Mukama Alex that he know Iguru Charles to be untruthful. The two are village mates. They might not be friends but they would, certainly, know each other well.

Siraje Magoola swore affidavit PA4.8. His evidence was that he was a resident of Busembatya town council. On 23rd February, 2006, at about 5.00 a.m. he was preparing to go to the polling station. He had been appointed polling agent by the Petitioner, for Busembatya Ginnery polling station. A group of men invaded his home and seized him in his compound. They beat him. The numbered about 20 of them. They had parked their vehicles along the road. When the vehicle lights were switched on, he recognised Matayo, Igambi

Yusuf, brother to the first respondent, and Waisswa Kidejedye among the invaders. The witness was loaded on a Pick-Up where he found one Balondemu Moses who had been beaten almost into a comma. They were dumped at the police station where they found Kiribaki Stephen, Mukose Yunusu and Kiyimba Christopher also dumped there earlier the same night. They were released by the police late on polling day without any charges but medical forms to go for examination and treatment.

In affidavit R1A.13, Waisswa Kidyedye Samwiri rebuts the averment of Siraje Magola. According to him, it was the police from Iganga who arrested Siraje Magola and Balondemu at the instance of Waisswa's complaint after receiving information that Siraje Magola had blocked some of the first respondent's agents from accessing their own homes. The witness avers that Balondemu was conscious and not beaten at all.

Court finds this witness not quite credible to say the least. How could a single person, Siraje Magoola block the first respondent's agents from returning to their homes which were different homes? How could this witness have known that Balondemu was not beaten at all when he says he not at the scene where he was arrested from? The averments of Siraje Magoola are neatly corroborated, in all material particulars, by those of Balondemu Moses, in affidavit PA2.4. The pictures in exhibit P11 does clearly discredit the averment of Waisswa Kidyedye that Balondemu was not beaten. Court therefore, believes the evidence of both Siraje Magoola and that of Balondemu.

In affidavit PA4.10, One Sofatia Nsiyaleta avers that on 15th February, 2006
a mini bus full of armed men dressed in yellow T-Shirts went to his home at Buwoya, Buyenga. The men jumped off and immediately beat him telling him that he was very foolish to have given an office to the Petitioner. He recorded a statement at Idudi Police Post. There are no averments in rebuttal to this witnesses averments. Court, therefore, believes him.

Isiko Francis in affidavit PA4.11 avers that he was intimidated by two men, on 19th February, 2006 at 3.00 p.m. The men warned him against supporting the petitioner saying that the Petitioner was not wanted by President Museveni who had brought the first respondent as the right candidate for the constituency. On Polling day, the same men came back and loaded the witness and other voters into a Kamunye, registration No. UAF 7115 to Bumpingo Primary School polling station where they forced him and other voters, with a lot of intimidation to vote for the first respondent. The averments of this witness are not rebutted. Court finds no reason not to believe this witness. Other witnesses presented by the petitioner in relation to the allegations of intimidation, violence and torture of his supporters and agents include:

- Sebutemba Haruna, who swore affidavit PA4.12. He is a voter of Ibulanku B headquarters polling station. On 10th February, he was at Ibulanku trading centre. The first respondent, who was coming from holding a rally at Buryantole arrived in a

convoy. The last car was a Nissan Sahara. It was full of men in yellow T-shirts. The men got out of their pick-up and started beating everybody within the trading centre. The witness was beaten severely but managed to escape. He reported the incident to police at Idudo where he was given police Form 3. There is nothing to corroborate the averments of this witness. The list of police recorded incidents given by the petitioner himself in paragraph 8 of his affidavit in support does not include him. Court, therefore, is not satisfied he is telling the truth.

- Kiribaki Stephen is a resident of Busembatya town council. He avers that on 22nd February, 2006, he was at one John's Bar in Busembatya town a Land Cruiser Prado arrived. Some people jumped out of it and started beating everyone the witness and his friend Kiyemba Christopher, were severely beaten. They were taken to Busembatya Police Station. They were released without any charge and advised to go to Hospital. The witness identified Igambi Yusuf brother of the first respondent among the men who beat him. Igambi Yusuf, in affidavit R1A.9, rebuts the averment of Kiribaki Stephen. He states that from 4.00 p.m. on 22nd February, 2006 including 23rd February, 2006 he was at his home throughout giving out appointment letters and allowances to the first respondent's agents. Court does not believe Igambi's averments. He could not have given out those letters and allowances to the first respondent's agents on polling day itself. If that was to have been the case then those

agents would not have been fully at the polling stations. Court takes the averment of Kiribaki Stephen as true.

Muwewesi Muzamiru – in affidavit PA4.14, avers that he is a resident of Nakisene village and a registered voter at Mufumi Mosque Polling Station. He was an open supporter of the petitioner. On 22nd February, 2006 at 5.00 p.m. while at Idudi Town, he saw the first respondent with his supporter travelling in a Land Cruiser and two Pick-Ups. They flashed the NRM sign. But the witness and others around never responded. The men from the pick-ups got off and beat up everyone using big sticks asking them why they were not supporting the first respondent. The first respondent retorts these averments in general terms. Court believes this witness as stating the truth.

Mukose Yusuf, a resident of Busembatya town council, swore affidavit PA4.15. He avers that on 22nd February, 2006 he was riding home on a motor cycle with one Bogere Ismail. A Land Cruiser Prado blocked them. Then one of the occupants shouted "**this is science**". That was the nick name of the witness in his business circles. The men in the Prado pounced upon the witness and beat him severely. They dumped him at Busembatya Police Station from where he was released the following day without any charge but instead with Police Form 3. The Police record in Paragraph 8 of the affidavit of the petitioner shows that this witness's case was recorded as ***"SD 201/02/01/06, Muwewesi Muzamiru, assault & threatening violence by occupants of M/V UG. 0038B".*** Court, therefore, believes the evidence of this witness.

Saidi Odaka swore affidavit PA4.16. He is a resident of Mufumi village. On 9th February, 2006, he was at Idudi stage at about 1.00 p.m. The first respondent came along in a Land Cruiser and two double Cabins. They flashed the NRM sign. None of the people responded. The first respondent then got out of the vehicle and ordered the men in Pick-Ups to beat everybody. The witness was severely beaten up. He was placed on drip and spent two days on admission to Iganga Health Centre.

The first respondent retorts the averments of this witness generally. Court believes the witness's averments in preference to the general denials.

Waiswa Jafari, whose affidavit is PA4.19 on the record, avers that he was recounted by Kiwumpi Patrick, L.C.1 Chairperson, to joined the training for a group code-named "**Yellow Members**". The training was at Buwaabe, Ibulenku. Each member of the group was paid shs. 3,000/= daily. The trainer was one Afande Kirya. The members all over the Constituency throughout the campaign period till polling day. They were instructed that whenever they cited the supporters of the petitioner or of their commander, Affande Kirya who moved give them orders to beat them up. The witnesses T-Shirt used by him for the above purpose is exhibit P17.

Kiwumpi Patrick in affidavit R1A.16, retorts the averments of this witness. He denies recruiting the witness into the "Black Mamba Group and even knowing the witness himself. Court does not

believe his averments. As the L.C.1 Chairperson, he would know the residents of his village. His denial of the existence of the "**Black Mamba**" group cannot be believed in light of the
Overwhelming evidence, on records pointing to the existence of that group.

Kibira Aliyi, in affidavit PA4.23, avers that on 10th February, 06, he was at Bulanku trading centre, late evening. The first respondent's convoy from a rally at Bulyantole passed him. The last vehicle, a Nissan Sahara Pick-Up was loaded with men in yellow T-Shirts. The vehicle stopped. The witness and his friend, one Seputemba Haruna, were severely beaten. The Petitioner took the two to Idudi Police Post where they made statements and given Police Form 3 for medical exam. The affidavit of Sebutemba Haruna, PS4.12, duly corroborates this witness's averments. Court finds the averments truthful.

Kidika Gorreti, of Bupala, who swore affidavit PA4. 25, testified that Ali Kakooza, a campaign agent of the Petitioner went to her home on 23rd February, 2006 to give her an appointment letter for polling agent of the Petitioner went to her home on 23rd February, 2006 to give her an appointment letter for polling agent of the Petitioner. The Chairman LC.1 one Mahad Kakaire beat Ali Kakiboza in the witnesses presence telling him that he was bringing chaos to the village by supporting the petitioner. Mahad Kakaire swore affidavit R1A.26 and denied beating Ali Kakooza, whom he said was younger and far stronger than him. He gives no reason why the witness would make such an allegation against the L.C.1 Chairperson of her

own village without any truth in it. The affidavit of Ali Kakooza, PA4 –31, corroborates the averment of this witness. Court believes the truthfulness of his evidence.

Baligeya million is a resident of Namiganda, according to his affidavit PA4.26. He was an open supporter of the Petitioner. On 14th February, 06 at about 5.00 p.m., he was beaten by a group of men in yellow T-Shirts. They tied him up and led him to the home of the first respondent. They locked him into a small room where he found one Wakibi John and Fred Ogoola also locked up in the same small room. He knew them as fellow supporters of the petitioner. The three were removed from the small room at 10.00 p.m. and taken to Iganga Police Station. They were released on 18th February, 2006, without any charge. The first respondent rebutted those averments saying he had no detention centre at his home and that nobody was detained at his home. The evidence of Baligeya Milton are corroborated by that of Wakibi John, in affidavit PA2.7. That witness states that he was detained in the some small room in the house of the first respondent on 14th February, 2006, and that one Ali Kiyemba, told him that the reason for locking him up was because he was a supported of the Petitioner. Ali Kiyemba, of course denies that averment in his affidavit in rebuttal Ogoola Fred, whose evidence court has already accepted, also corroborates the evidence of Wakibi John. He testified that he was detained in the first respondent's house on the same day and with Wakibi John among others. Court would therefore, believe those witnesses.

Besides the evidence analysed above, there is on record the evidence of Joseph Mazinga, affidavit PA2.1, Namukwana Alice, PA2.3, Balonde Moses, PA2.4, Rehema Babirye PA2.9, Bogere Saad, PA4.27, Nyege Stephen, PA4.28, Maganda Adamu Kakonta, the Chairperson of the Parents Teachers Association for Busesa Mixed School, affidavit PA4.30.

He saw the group have all over the Constituency to cajole voters to vote for the first respondent. He had to run away from his home due to threats by this group.

This witness testified that a group of armed men wearing yellow T-Shirts and under the control of one **"Pastor NRM"** took over the school as their camp between 15th and 24th February, 2006. He saw them beat several voters within the school. "Pastor NRM", Basalirwa Yahya , in affidavit, R1A.31 denies the averments of Kakonto in a general denial. Court does not believe his denial. Court examined these witnesses' evidence in as far as it relates to intimidation violence and torture of supporters and agents of the Petitioner. Court has compared the witnesses' averments against those of the witnesses of the first respondent in rebuttal. It finds that the Petitioner's evidence is generally more credible and truthful.

The evidence shows that there was an extraordinarily high level of intimidation, violence and torture. It was very well organised and executed by groups trained and deployed purposely to do so. The first respondent was at the heart of it. Much of it was carried out in his very presence. At times by him or at his orders. Part of his

home was turned into an illegal detention centre for those known or suspected not to be his supporters. Gangs, armed with guns and sticks, in the names of **Black Mambas** scavengered the constituency, beat and intimidated hundreds of voters covering them to support the first respondent or punishing them for supporting the petitioner. Many were dumped at police stations after torture and mistreatment most likely to justify the torture and mistreatment or to temporarily disable them and prevent them from carrying out any activity in the campaign arena. The police itself appears to have been overwhelmed and perplexed with those events. Scores of persons were dumped at their posts and stations within the Constituency mainly by the armed supporters of the first respondent from various parts of the Constituency. The police charged None of them with any offences gave always recording statement issuing them with Police Form 3 and releasing them to go and nurse their injuries.

Court, therefore, finds that the Petitioner has proved, to the satisfaction of this court, that – during the campaign period and on polling day, there was wide-spread intimidation, and torture in Bugweri Constituency. The intimidation violence and torture were perpetuated by the first respondent and his armed groups. The violence focussed upon the supporters and agents of the Petitioner. The evidence does not, however, prove to the satisfaction of this court that the second respondent failed to take measures to stop the intimidation violence and torture. It shows that in spite of the intensely of the violence the only significant report made by the Petitioner to the second respondent, about intimidation violence and

torture, was the one that resulted into the meeting convened by the second respondent on 16th of February, 2006 just a week before polling day. There is evidence that the second respondent took some measures after that meeting towards ensuring that the violence reduced although it was, by then, obviously too late.

Court agrees with learned counsel for the second respondent, Mr. Kwarisiima, that the evidence, produced by the Petitioner, in respect of the allegations of intimidation, violence and torture, does not prove to the satisfaction of this court that the second respondent failed to take measures to stop the wide spread intimidation, violence against and torture of, the petitioners supporters and agents. The evidence does not prove, upon the balance of probabilities, that the second respondent failed to take measures to ensure that the election was free and fair. The evidence does prove though, to the satisfaction of court, that there was wide spread intimidation, violence and torture of the petitioner's supporters and agents at the hands of armed gangs trained and deployed by or on behalf of the first respondent.

Vote stuffing, Multiple voting secrecy of the vote and Polling Officials ignoring complaints by Petitioner's Agents.

Each party produced evidence on the above aspects of the first issue. Court has examined the evidence on both sides. It will not reproduce or analyse that evidence, to any degree. In this judgement.

On the alleged ballot stuffing, court finds that exhibit R1.5 alone does not prove to the satisfaction of the court, there were 188 unaccounted for ballots at Buyanga Polling Station. It appears more probable that the Presiding Officer merely made a mathematical error when he recorded the unused ballots as 188 when, if the other figures recoded by him on the DR form were correct, the un used ballots would have been only 8. The Petitioner should have produced the ballot box for Buyanga Polling Station for inspection in order for the court to ascertain whether the Presiding Officer had merely made a mathematical error or the number of 188 unused ballots was accurate. The court would have ascertained whether any of the ballot papers used at that polling station had serial numbers that were alien to that polling station. As matters stand, court would be speculating if it were to agree with Mr. Lukwago's submission that alien ballots were stuffed at Buyanga polling station.

Equally unproved to the satisfaction of this court is the allegation of ballot stuffing based upon the difference between the number of votes cast in the Presidential and Parliamentary Elections in Bugweri County Constituency. Those cast for the County Constituency. Those cast for the Presidential Elections were 34,536 or 69.9%. While those cast in the Parliamentary Elections were 34,875 or 70.6%. The difference being 339 votes. Both elections were conducted concurrently. It is quite normal to expect the same number of voters to have voted in either election.

In court's view is that since the figures 34,536 and 34,875 represent only the valid votes east for candidates by voters in either election. The difference of 339 votes can be explained upon a number of

hypothesis. The most probable of these is that the incidence of spoilt ballots is likely to have been less in the Parliamentary elections, where there were five candidates. The two candidates, in the Parliamentary elections, were more known to the voters in the constituency than the five who were standing at National level. Hence, the difference in the incidence of invalid or spoilt ballots.

Regarding Multiple voting and inquiring complaints by agents, court has analysed the evidence on either side. The conclusion is that the evidence shows that there was some multiple voting at a very limited number of polling stations. There was also instances when Presiding Officers ignored complaints raised mainly by the Petitioners agents. These too were extremely limited. It appears to court that there instances of multi-voting such as those mentioned by Shaban Nyende in affidavit PA2.11 and Sebesteri Ironde in PA4.21, and those of ignoring complaints raised by agents to Presiding Officers arose, in the very few places where they took place, mainly because some of the Presiding Officers appointed by the second respondent to be in charge of Polling Stations were open or well known supporters or even agents of one or the other candidate some of whom hardly measured up to the job. Presiding Officers ought to be seen to be neutral and competent election officers. The second respondent ought to resist the struggle by candidates to have persons favourable to them appointed Presiding Officers. Objective neutrality and competence should be the criteria.

It, therefore, appears that even in the area of polling day activities there were some instances of non-compliance with the provisions and Principles set out in the PEA 2005.

Court will now move to issue number two and decide whether or not the not compliance with the provisions and principles of the PEA,05 affected the result of the election in a substantial manner.

Whether Non-Compliance With The Provisions And Principles Set Out In The PEA, 2005 Affected The Result In A Substantial Manner

Without ignoring the whole range of complaints of non-compliance, court will lay particular emphasis upon the evidence of intimidation, violence and torture. Court has already come to the conclusion that there was wide spread intimidation, violence and torture of the Petitioner's supporters and agents. An election does not constitute a war of guns and sticks. It is a civic activity. It hinges upon the central concepts of freedom and fairness which constitute a constitutional norm under Article 61 of the Constitution. The totality of the evidence on record supports the conclusion that the first respondent ran his election campaign as if it was a war. He did so to the extent of even establishing or allowing the establishment of a detention room in his home for he wanted to force into supporting him. Mr. Lukwago submitted that uses the qualitative test, in this case and conclude that the overall quality of the election was so low that the election was so low that the election cannot qualify as free and fair one.

In ***Kizza Besigye :Vs: Yoweri Museveni Kaguta (Supra)*** Odoki, C.J. quoted with approval a statement by Grove J, which defined the degree of non-compliance which would justify setting aside the an election. It was to the effect that the objection must be something substantial. It must be something calculated really affect the result of the election. The learned Chief Justice wrote:

> *What is substantial effect? This has not been defined in the statute or judicial decisions. But the cases of Hackney (Supra) attempted to define what the word Substantial meant. I agree with Grove J. The effect must be calculated to really influence the result in a significant manner".*

The learned Chief Justice then went to state the evaluation tests for the effect of non-compliance on the election. He stated,

> "*In order to asses the effect, court has to evaluate the whole process for the election to determine how it affected the result and then asses the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produce those numbers. Numbers are useful in making adjustment for irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court that the effect on the result was substantial".*

My own understanding of the above statement is that both the quantitative and qualitative tests can be used in the evaluation process. I find nothing in the statement to the effect that none of the two tests can be used to the exclusion of the other depending upon the peculiar circumstances of each case.

In the case of Amama Mbabazi and The Electoral Commission :Vs: Musinguzi Garuga James, Election Petition Appeal No.12 of 2002, the Court of Appeal upheld the judgment of this court where the qualitative test had been applied. This court had found, as a fact, that on the evidence, that there had been extensive non-compliance with the Provisions and Principles laid down in the PEA. In my view a similar scenario arises in the instant case. The evidence does establish a generalised and widespread malpractices constituting non-compliance with the Principles that safeguard a free and fair election.

In the Amama Mbabazi Petition, the difference in the votes was very large. It was 12,456. The qualitative test was applied in spite of that extensive difference in the votes polled by each of the two candidates owing to the peculiar aspects of the non-compliance borne out by the evidence before court. In the instant petition, the difference in the votes is a mere 1,056. The Petitioner had 48.4% while the first respondent polled 51.6%. Thus the difference is hardly 3%. Yet the evidence clearly points to intensive and wide spread intimidation and violence perpetuated by and on behalf of the first respondent and calculated to affect the result of the election.

In the circumstances, therefore, court agrees with the petitioner that the qualitative test is most appropriate in the circumstances. And applying it to the set of facts and circumstances the evidence bears out in this Petition, the words of Mulenga J.S.C, in the Kizza Besigye :Vs: Yoweri Museveni Kagutta (Supra) become irresistible. *The learned judge stated, in respect to the application of the qualitative test alone, " In my view, for the petitioner to succeed in that way, the court would have to find that the only irresistible inference to be drawn from the evidence on the several aspects that constituted non-compliance is that the non-compliance affected the result of the election in a substantial manner."* That is the irresistible conclusion that this court draws from the evidence before it in this petition.

Whether Any I illegal Practice Or Election Offence was Committed by the First Respondent Personally or by his Agents with His knowledge Consent or Approval

The petitioner, in paragraph 7 of the petition, sets out seven allegations relating to illegal activities or election offences alleged to have been committed either by the first respondent personally or by his agents with his knowledge and consent or approval. Court understands that the petitioner abandoned the allegation relating to the first respondent being in possession of voters' cards and ballot papers, which is contained in paragraph 7(d) of the petition. I will now, very briefly, analyse the evidence before court with regard to each allegation. I will follow the order in which both learned counsel presented their submission on those allegations.

- Use of Government Resources.

The petitioner alleges that the first respondent used two government vehicles during his campaigns. The vehicles are named as Mitsubishi Pajero, No. UG. 0025B and Toyota Double Cabin, No. UG 0038B. He also alleges that the first respondent used, for the same purpose, government employees in the form of armed escorts and drivers as well as guns contrary to section 25 of the PEA.

As to the allegation of use of government personnel and guns, court dismisses it right away aw there is no evidence indicating who the drivers of the alleged vehicles were or that they were under government pay. Similarly there is no evidence to show that the guns which were used by those campaigning for the first respondent, such as Lt. Mulindwa Sulambaya or Pastor NRM, were guns owned by government. There was no evidence showing who the drivers of the alleged two vehicle were and whether they were government employees. These potential evidential facts cannot merely be assured.

Regarding the two vehicle, the first respondent in his two affidavits, R1 A1, paragraphs 14, 15 and 16 and in R1 A2, paragraphs 3 and 11, denies using any of them for campaign purposes. He admits however that Motor Vehicle UG 0038B was in his keeping during the campaign Period having been attached to him by the NRM Secretariat for his private home use. He avers that Motor Vehicle UG 0025B was not in his possession or use.

In respect of motor vehicle UG.0025B one George Ebola, avers in affidavit R1A.29, that for the whole of the campaign period he was in the possession of that vehicle in Gulu. He was Deputy Director of Economic Affairs at the NRM Secretariat. Court has a lot of reservations as to the name of the deponent to this affidavit and whether he actually swore the affidavit or not. However, the evidence produced by the petitioner to prove that this particular vehicle was used by the first respondent for campaign purposes is itself inadequate to prove the allegation to the satisfaction of court.

As to the use of motor vehicle UG 0038B, various petitioner's witnesses have testified to its use by the first respondent during the campaigns. The Petitioner avers that he reported the use of the two vehicles to the Minister of Internal Affairs, the Inspector of Police and the Returning Officer, Iganga, but got no answers. There is exhibit P3, the minutes of the meeting at the E.C. headquarters on 16th February, 2006 which indicate that the question of use of government resources was on the agenda and the E.C. was to check on the alleged misuse. The minutes supports the petitioner's averment that he complained about the use of motor vehicle UG. 0038B. The Petitioner produced exhibit, P2.4 to 7., photographs which he says he personally took of motor vehicle UG. 0038B, now bearing a different number plate, 097 UDQ. This was after the meeting at the EC headquarters on 16th February, 2006. He also produced exhibit P10, a computer print out by Uganda Revenue Authority showing the particulars of motor vehicle 097 UDQ. The name of the owner of that vehicle is Hon. Kirunda Kivejinja. The vehicle is a Mitsubishi Min bus. The Petitioner's allegation is that

after the EC was directed to check the misuse of vehicle No. UG. 0038B, the Petitioner plucked off the government number plates and put on the number plates of his mini bus.

Mr. Nkuruziza, learned counsel for the first respondent has attempted to discredit the probative value of the 4 pictures in exhibit P2.4-7. He submitted that the pictures do not show that the vehicle was a Pick-Up double Cabin. He also submitted that the number plates could be mere cardboard and not genuine number plates. Court is satisfied that the vehicle in question is a double cabin. It is also satisfied that the number plates, 097 UDQ are genuine number plates, for anything required, by law, to be done, is presumed to have been properly done until the contrary is shown. There is no evidence before court to lead to the conclusion that number plate 097 UDQ is not genuine.

The first respondent averred that he sold his Min bus 097 UDQ to one George Taliyiwula of Buwagi Trading Centre in May, 2005 and, therefore, the vehicle was not in his keeping during the campaign period. Taliyiwula has swore affidavit R1A.30 supporting the averments of the first respondent.

Court finds the averments of both the first respondent and Taliyiwula, on this point untruthful and rejects them. Taliyiwula has presented neither sale agreement nor registration book. His averment that he could not trace them cannot be believed. Lie. In light of exhibit P10, the first respondent cannot disclaim ownership of motor vehicle 097 UDQ for in Uganda a motor vehicle registration

card is a document of title. *Fred Kamanda :Vs: Uganda Commercial Bank, SCCA No.17 of 1995.* Motor vehicle 097 UDQ, was still owned by the first respondent by 16th March, 2006 when exhibit P10 was made by URA.

Lastly, there is exhibit P6, a report by the O/C Election Offences squad in respect of Bugweri county. It is dated 25th January, 05. The relevant part of the report is in paragraph 4.1 of the report. It reads as below:

> ***"The complainants, who are drama artists were hired by Parliamentary candidate Kirunda Kivejinja to entertain people at his rally in Lubira village on 22/01/06. They were travelling back in a white double Cabin Pick Up number UG 0038B provided by the candidate when FDC supporter surrounded the vehicle at Idudi while flashing the FDC sign to the occupants. After a struggle, the driver managed to manoeuvre his way and drove to Idudi Police Post, directed the occupants off with their musical instruments and sped off."***

Mr. Nkurunziza, learned counsel for the first respondent has objected to the admission of exhibit P6 of the contacting upon its contents. He says it offends the rule against hearsay. Counsel has relied upon a quotation by Karokora J.S.C., *In Major General D. Tinyefuza :Vs: Attorney General, Constitutional Appeal No.1 of 1997,* from Phipson on evidence, 10th Edition, at page 273, as set out below:

“Oral or written statements made by persons who are not parties ad are not called as witness are inadmissible to stat the truth of the matter stated.”

It appears to court that there is a clear distinction between the statement that was before the learned justice of the Supreme Court and the report by the Police Election Squad, before this court. The statement before the Supreme Court was a newspaper report, which is inadmissible. The police report, before this court, is a copy of a Public document. It is certified copy by the C.I.D. It is admissible under section 64 (i) (e) and 73 (a) (iii) of the Evidence Act, Cap.6.

The Petitioner has, therefore, proved to the satisfaction of this court that the respondent used motor vehicle UG 0038B for the purposes of campaigning contrary to section 25 (1) of the PEA. He committed an election offence.

BRIBERY.

The Petitioner alleged in paragraph 7(a) of the Petition that the first respondent bribed voters contrary to section 68 (1) of the PEA.

The incidents of the alleged bribery contained in the affidavits in support and the denials contained in the affidavits in rebuttal are simply too many for court to analyse them one by one. That would make this judgment unmanageably too long. Court will, therefore, analyse evidence in relation to only three of them. Most of the rest, although the averments may be true, there is no evidence to show that the money or item claimed to have been given was given with the knowledge and consent or approval of the first respondent.

The first incident is testified to by Katimbo Amudan, affidavit PA4.1. According to this witness he was the Chairperson LC.1 of Naitundu B. He was also the Chairperson of NRM in that village. He averred that during the campaign period but towards election day, the first respondent went to his home and handed over to him 5 bags of cement and 2 taplins. The firs respondent instructed the witness to give the taplins to the elders (Bataka) of Naitunda B and the 5 bags of cement to the save Dees of Naitundu A, asking them to vote for the first respondent in consideration, which the witness did.

The same witness avers that on 20th February, 2006, the first respondent campaigned in Kigulamo. On his way, he stopped at Naitundu and greeted the people. He requested to know who the woman leader was. The witness saw the first respondent give shs. 20,000/= to the woman leader, Eflance Wakabi shs. 20,000/= and heard him telling her to distribute it to the women asking them not to jail him on polling day.

The same witness avers that on the same day, at a rally at Naitundu Primary School, the first respondent gave shs. 30,000/= to three different women clubs in the area (each 10,000/=) telling the members not to let him down on polling day.

Furthermore, on 22nd February, 2006 at about 6.00 p.m., the witness received shs. 50,000/= from the first respondent through Hajji Magoola. The witness used the money to purchase salt which he and the 18 people belonging to the campaign group for the first

respondent distributed to 95 homes in Naitundu B throughout the eve of polling day.

The averments of this witness have been rebutted by the first respondent Hajji Magoola, Eflance Wakabi and others. Mr. Nkurunziza submitted that court should not believe this witness because it does not appear logical that the first respondent would have sent a Moslem for bribing the savedees and not a fellow savedee. Court does not agree. The witness was the L.C.1 chairperson. He was also the NRM Chairperson in the village most probably he was the closest confident that the first respondent could employ for such mission. Besides he was a member of the "group". He was in charge of 18 men he had recruited for training. The savedees or elders have not rebutted the witness's averments. Since this witness was an NRM supporter and vore or less an insider in the campaign build up of the first respondent, and since there is no evidence to show any reason why this witness should lie about his own party's candidate, court believes his evidence.

The next witness is Juma Kapado. His affidavit is PA2.5. He was Vice Chairperson LC1, FDC of Buganga, Nawangega. He avers that his LC.1 Chairperson, one, Twahili Mundiba Isabirye asked him to mobilise 10 people to go and meet the chairperson at his home. he mobilised them. The chairperson told them that it was the first respondent who had asked him to mobilise them and that he was going to give them money to persuade them vote for him. The following day, 22nd February, 2006, met them at the chairperson's home and asked them to shift from supporting Katuntu to supporting him. He gave the chairperson shs. 300,000/= saying that should he

loose the election, he would arrest all of them. The witness and each of the 10 persons he had mobilised received 5,000/=. The balance was to be distributed out to voters.

The averments are rebutted by the first respondent. Court notes that this witness was an EDC Official. His evidence would require corroboration. There is none. Neither of the 10 persons he names as mobilised by him and who shared in the 300,000/= has sworn any affidavit to support his averments. He does not know whether the balance of 250,000/= was distributed to voters and by who. Court is therefore, is not satisfied that the incident is proved to its satisfaction.

Use of Wrekless And Malicious Statements C/s 22 (5) and (b) of PEA

Court has analysed and elaborated the evidence on record with regard to his allegation. It agrees with learned counsel, Mr. Nkurunziza that it is not proved to its satisfaction because the evidence does not show that the statements complained of were not allegedly made on private electronic media as subsection 5 of section 22 requires.

Interfering With Electioneering Activities of Other Persons C/s 24(b) of PEA.

Court will not set out the evidence in support or in rebuttal of this allegation. It has already done so when dealing with non-compliance. Section 24 (b) prohibits any person before or during an election, for purposes of effecting or preventing the election of a candidate, either directly of indirectly, to organise a group of

persons with the intention of training the group in the use of force, violence, e.t.c.

The evidence on record is overwhelming that the first respondent did exactly that with groups trained on his behalf by Afande Kirya, Lt. Mulindwa alias Sulambaya and Yahaya alias Pastor NRM. The groups' activities testified to by numerous witness louder than words as to the purpose for which they were trained. Court has not option but to conclude that that the election offence unde4r section 24 (b) of the PEA was committed by the first respondent.

Undue Influence C/S 80 (1) (a) & (b)

The evidence on record, which court shall not repeat as much of it has already been analysed with regard to the issue on non – compliance with the principles in the PEA, Proves to the satisfaction of this court, that the first respondent committed the election offence of undue influence C/S 80 (1)(a) & (b). The affidavits of Baligeya Milton, Wakibi John and Najib Waisswa, Ali Kakooza and others which court has already accepted contain evidence relevant to this allegation.

Court, therefore, answers issue number three in the affirmative. The first respondent, indeed, committed an illegal Practice and Election offences.

REMEDIES.

The Petitioner has proved, to the satisfaction of court, some of the allegations made by him in the petition. Accordingly, the petition

succeeds as against the first respondent. However, it is disputed as against the second respondent. Court makes the following orders:

a) The election of the first respondent as M.P., Bukooli County Constituency, is annulled;

b) The Parliamentary seat for Bukooli County Constituency is declared vacant;

c) As between the Petitioner and the second respondent, each party shall bear its own costs.

V.F. MUSOKE-KIBUUKA
(JUDGE)