THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – EP – 0005 OF 2006.

BUSINGE FRED POLICE……..……..PETITIONER

VERSUS

1. **KITHENDE KALIBOGHA A. }**
2. **ELECTORAL COMMISSION }……RESPONDENTS**

BEFORE: HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The petitioner herein together with the 1st respondent and 4 other persons were duly nominated to stand as candidates for the election of Member of Parliament for Bukonzo East constituency in Kasese district in the parliamentary elections, which were held in February 2006. The 2nd respondent declared the 1st respondent as the winning candidate and he has since been sworn in and taken his seat as the Member of Parliament representing that constituency.

The petitioner was dissatisfied with the conduct and results of the elections. He filed this petition alleging that the elections were not conducted in a free and fair manner, and that the 1st respondent committed numerous election offences and illegal practices personally and through his agents with his knowledge and consent or approval, which were all contrary to the electoral laws.

It was alleged that there was massive bribing of voters by the 1st respondent personally and through his agents, and that the 1st respondent engaged in sectarian campaigns. It was also alleged that some voters were disenfranchised, as well as falsification of results. All the above rendered the result of the election a sham as the electoral process was flawed to the detriment of the petitioner, and that the 1st respondent benefited from such flawed election. It was the prayer of the petitioner that the election of the 1st respondent as the Member of Parliament for Bukonzo East constituency be nullified, a fresh election ordered, and the respondents ordered to pay the costs of the petition.

The petition was accompanied by the affidavit of the petitioner and 23 other affidavits all in support of the petition. The 1st respondent in answer to the petition filed 8 affidavits while the 2nd respondent also filed 8 affidavits in answer to the petition.

Court granted leave for the cross examination of some of the deponents of the affidavits. The petitioner cross examined the 1st respondent RW1, while the respondents cross examined the

petitioner Businge Fred Police PW1, Barozi Bagambe Geofrey PW2, and No. 32838 D/C Masereka Joseph.

During the scheduling, the following facts were agreed and a memorandum of agreed facts is on record.

1. That the 2nd respondent organised and conducted the parliamentary elections for Bukonzo East constituency on 23rd February 2006.
2. The petitioner, the 1st respondent and 4 others were candidates in the elections.
3. The 1st respondent was declared and gazetted by the 2nd respondent as the winning candidate in the election.
4. There was a recount of the votes, which was unsuccessful because some of the ballot boxes were not sealed.

The issues for determination were agreed as follows.

1. Whether an illegal practice or election offence was committed by the 1st respondent personally or by his agents with his knowledge and consent or approval in connection with this election.
2. Whether there was non compliance with and failure to conduct the elections in accordance with the provisions and principles laid down in the Parliamentary Elections Act.
3. Whether the non compliance and failure, if any, affected the results of the election in a substantial manner.
4. The remedies available to the parties.

At the hearing of the petition, Joseph Muhumuza Kaahwa from Kaahwa, Kafuzi, Bwiruka & Co. Advocates, together with Ngaruye Ruhindi from Ngaruye Ruhindi, Spencer & Co. Advocates represented the petitioner, while Maranga assisted by Chan Geoffrey of Maranga & Co. Advocates represented the 1st respondent, and Christine Kaahwa from the Attorney General's Chambers represented the 2nd respondent.

I will deal with the issues in the same order as they are set out above. But before going into the merits of the petition, I will make some observations on one aspect of this petition, which was

one of the admitted facts. It was admitted that there was a recount, which was not successful, as some ballot boxes were found to be open, meaning that either they were not sealed by the presiding officers, or were sealed, but the seals were broken. The point was that those ballot boxes arrived at the court premises for purposes of the recount when they were not sealed.

S. 50(2) of the Parliamentary Elections Act (hereinafter referred to as the PEA) provides that the presiding officer at a polling station must seal the ballot box in the presence of the candidates and or their agents. The sealed ballot box contains signed declaration of results forms, the ballot papers received by each candidate, the invalid ballot papers, the spoiled and the unused ones, plus the voters roll used at that polling station.

Under S.55 PEA, any candidate may, within 7 days of the declaration of the results, apply to the Chief Magistrate for a recount. The Chief Magistrate conducts the exercise of recounting of the votes from the sealed ballot boxes. The ruling of the Chief Magistrate in the exercise of the recount in this matter was annexed to the affidavit of the petitioner. In that ruling, the learned Chief Magistrate found as follows,

> ‘During the recounting exercise the court noted that some ballot boxes were unsealed and had been tampered with. The tampered with ballot boxes were from Kyondo sub county, Kisinga sub county and Mukunyu sub county all totalling to 11 unsealed and tampered with ballot boxes.’

Having so found, the learned Chief Magistrate proceeded to conduct ‘a recounting exercise’ in respect of the remaining ballot boxes which were sealed. At the end of that exercise, he had this to say,

> ‘In my view the conduct of this court in recounting the votes in the sealed ballot boxes amounted to and still amounts to a partial recounting and consequently leading to a partial result due mostly to the anomaly of unsealed and tampered with ballot boxes.
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> ‘As a result I find myself unable to declare a winner or a loser after recounting part of the results. On the other hand I don’t have the jurisdiction to set aside the election and order for a nullification of the same.
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> ‘Since there is no winner or loser, any party aggrieved is hereby referred to the high court for a remedy.’

I would have thought that it would be obvious to the learned Chief Magistrate that once he was satisfied that he could not, at the end of what he termed a partial recount of the votes, declare a winner, he ought to have brought the proceedings to a halt, and stopped the exercise rather than proceeding with what in effect was an exercise in futility.

The matter of a recount of votes where some ballot boxes were not sealed or were tampered with was dealt with by Musoke Kibuka J., in Civil Revision No. 0009 of 2001 *Byanyima Winnie V. Ngoma Ngime*, where the court held as follows,

> 'It appears to me that it would take less than ordinary commonsense to know that where any ballot boxes presented for recount are found to be open or unsealed, the purposes of the recount are not achievable. Prima facie the evidence would have been tampered with and rendered useless. In those circumstances the number of votes obtained by each candidate would not be verifiable by way of a recount.
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> ' To pretend to conduct a recount where some ballot boxes have been found open is mere false pretence. It is an abuse of court process. It amounts to second-guessing… Exercising jurisdiction under those circumstances would be exercising it with material irregularity…. Such material irregularity is so fundamental that it vitiates the entire process of conducting a valid recount.'

I am in entire agreement with the above. In *Tirwomwe Spencer Patrick V. Nduhuura Richard & Another* EP No. 4 of 2001 the court found the recount to have been a nullity. It held that any evidence arising out of such a recount could not be considered by the court to any degree whatever for the purpose of determining the petition. Similarly, I do not intend to use any evidence arising from the purported recount exercise, in determining this petition.

The question of burden and standard of proof in election petitions has been overstated by the cases, and I will not go into it, save to mention that the PEA in S. 61 and the interpretation of a similar provision in the Presidential Elections Act by the Supreme Court in *Col. (Rtd.) Dr. Besigye Kizza V. Museveni Yoweri Kaguta & Another* SC EP No. 1 of 2001 have put the matter to rest. The petitioner must prove his or her case to the satisfaction of the court, and the standard is on a balance of probabilities.

Illegal practice or offence.

The 1st issue was whether an illegal practice or election offence was committed by the 1st respondent personally or by his agents with his knowledge and consent or approval. This is prohibited by S. 61(1)(c) of the PEA, and is a ground under that provision, for setting aside an election. The act complained of was bribery, an election offence.

Part XI of the PEA sets out the illegal practices in Ss 68 –71. S.68 relates to bribery, which is an offence under sub-section (1) thereof. The offence of bribery under that sub section is declared under sub section (4) to be an illegal practice.

From the above provisions of the law, commission of an act of bribery constitutes both an illegal practice, as well as an offence under the PEA. The provision prohibits the influencing voters to vote or refrain from voting for any candidate by giving money, gifts, alcoholic beverage or any other consideration. The only exception is to be found in subsection (3), which accepts the provision of refreshments or food at a candidates campaign planning and organisation meeting.

Oder JSC (RIP) in *Col. (Rtd.) Dr. Besigye Kizza* (Supra) at page 475 of the certified edition (Vol 1) set out the ingredients of bribery as follow:

(i) That a gift was given to a voter.

(ii) The gift was given by a candidate or by his agent.

(iii) It was given with the intention of inducing the person to vote.

The gift or money or other consideration must be given to a voter. A voter is defined in S.1 of the PEA to mean “a person qualified to be registered as a voter at an election who is so registered no at the time of an election is not disqualified from voting”.

Blacks Law Dictionary (6th Edn) Page 192 defines “ Bribery at elections” as the offence committed by one who gives or promises to give or offers money or valuable inducement to as elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, was a reward to the voter for having voted in a particular way or abstained from voting.

From my reading of S.64 PEA, which details the grounds for setting aside an election, under sub section (1)(c) thereof, it does not require a multiplicity or any number of illegal practices or offences under the Act to set aside an election. The provision is in any event drafted in the singular; it reads 'an illegal practice or any other offence', meaning that even a single proven illegal practice or other offence would suffice to set aside an election under the Act.

In *Tirwome Spencer Patrick* (Supra) the court found that the 1st Respondent voted more than once in the election, at which he was returned as the Member of Parliament. That contravened S.77 (b) of the PEA, which prohibits voting more than once at an election. The court set aside the election for that single election offence. See also Maniraguha J. (RIP) in *Patick Mutono Lodoi & Another v. Dr. Stephen Malinga* Mbale EP No. 6 of 2001.

In the instant case, the alleged illegal practises are set out in paragraph 11(d) of the Petition, and the evidence is in paragraph 8(a) – (e) of the petitioner's affidavit P.1.

Six incidents of bribery were set out in the affidavit of the petitioner P.1. I will deal with each of them.

The 1st incident relates to a meeting at which one Dominic Kireru an agent of the 1st respondent gave shs 2000/= to each of those who attended that meeting.

Kamambu Yowasi, a registered voters in his affidavit P.2 deposed in paragraph 7 thereof that at a meeting convened by Dominic Kireru, and addressed by the 1st respondent, he received shs 6,000/= from Dominic Kireru, so that he would vote for the 1st respondent, and not for the petitioner, who was not giving them any money, and that the other people in attendance who were more than 30 in number each received shs 2,000/= from Dominic Kireru for the same purpose. This was at Kisinga Trading Centre. The meeting started at 5.p.m and ended at 8.p.m.

The 1st respondent denied this act of bribery in his affidavit R1. In paragraph 23 thereof, he deposed that he never gave Kamambu Yowasi any money as an inducement to vote for him.

Dominic Kambere swore an affidavit R2, in which he denied the allegations of Kamambu Yowasi contained in his affidavit P.2. In paragraph 5, he stated that he organised a meeting of the youth mobilisers in support of the 1st respondent's campaign. The meeting started at 4.00p.m and was addressed by the 1st respondent. He further stated in paragraph 9 that at the end of the meeting at 6.30p.m he gave out shs 2000/= for each participant as lunch allowance, since most of them started gathering at the meeting venue before 1.00p.m. But he denied giving Yowasi Kamambu shs 6000/=.

The 1st respondent did not deny attending this meeting for the mobilisation of the youth for his campaign at Kisinga Trading Centre. He did not deny that Dominic Kireru, the convenor of the meeting was his agent. He did not deny that Dominic Kireru, his agent, and in his presence gave what Kireru termed as "lunch allowance" of shs 2000/= to each of the more than 30 participants in that meeting.

On the other hand, Dominic Kireru stated in his affidavit that he was a campaign agent for 1st respondent for Kisinga sub county and he indeed convened the meeting, that it stated at 4.00p.m and ended at 6.30pm, and that at the end of it, he gave each of those attending shs 2000/= as lunch allowance. The reason for the money according to him was because most people gathered at the venue before 1.00p.m. He gave out the money after the 1st respondent had left.

According to Yowasi Kamambu the meeting started at 5.00p.m., but according to Dominic Kambere, it started at 4.p.m whatever the case, the meeting started late afternoon, well after the lunch period, even by village standards. The meeting was held at Kisinga Trading Centre, meaning there were shops in the vicinity, and possibly even eating places. But for some reasons, cash was given instead of food or refreshments for lunch. It was not convincing that the money, which was paid out at either 6.30 or 8.30 pm, was for lunch. It might have been more convincing if it was argued that the money was for dinner and the law does not restrict the food or refreshments only to lunch, in order to constitute a lawful election expense.

The 1st respondent in cross examination told court that in his constituency, on average the price of a meal together with a drink is between 500/= to 700/=. In this instance the amount given to

each meeting participant was shs 2000/=, more than double, in fact almost three times the constituency average. That cannot have been money for lunch as Dominic Kambere deposed in his affidavit.

The meeting was one to garner support from the youth. It was not a planning and organisation meeting. According to the evidence, the 1st respondent addressed the meeting seeking the support of the youth in his campaign.

S.68(1) PEA prohibits the giving of money, gifts and other consideration, and anyone who infringes that provision commits the offence of bribery. Subsection (3) thereof provides an exception to the above as follows;

> 'Subsection (1) does not apply in respect of the provision of refreshments or food –
>
> **(a)** offered by a candidate or a candidate's agent who provides refreshments or food as an election expense at a candidates' campaign planning and organisation meeting;'

The law allows the giving of refreshments or food. It does not state that money may be given as an allowance in lieu of refreshments or food. The reasons for this are not difficult to find. The possibility of abuse is all too obvious. Secondly the refreshments or food are allowed only at a candidates' 'campaign planning and organisation meeting.' It is not at every campaign meeting or rally that refreshments or food are allowed as a legitimate election expense.

I am satisfied, in view of the above analysis that Dominic Kambere gave Kamambu Yowasi a registered voter and others money as an inducement to vote for the 1st respondent in the elections and that is an offence of bribery c/s 68(1) of the PEA. Under S.68 (4) PEA, this is an illegal practice.

For the court to set aside an election where an illegal practice or offence was proved, under S.61(1)(c) PEA, it must be shown that the illegal practice was committed by the candidate personally or by his or her agents with his or her knowledge and consent or approval. The issue here then is whether Dominic Kambere gave the money to the voters with the knowledge and

consent or approval of the 1st respondent. In *Col. (Rtd) Dr. Besigye Kiiza* (Supra) Mulenga JSC (at page 371) discussed the phrase "with his knowledge and consent or approval", and held thus,

> "To my understanding, the legislature chose to use those words in order to limit the application of the sanction to only such illegal practice or offence as the candidate assumed personal responsibility for, either through consent where he had prior knowledge or through approval upon subsequent knowledge, of it, being committed. It is note worthy that the operation of the provision is not tagged to the relationship between the candidate and the perpetrator of the offence, but to the candidates knowledge of, and consent to, or approval of, the commission of the offence."

Odoki C.J (at page 165) on this point held thus;

> "The wording is clear and unambiguous. It requires that the candidates be liable for the actions of his agents only when they are committed with his knowledge and consent or approval. To this extent the general principles of the law of agency have been modified".

Oder J.S.C also agreed with that position when (at page 483) having found one Ali Mutebi to have been an agent of the 1st respondent, who was proved to have committed an offence of bribery in relation to the election of the 1st respondent, the learned Justice of the Supreme court held that it was not proved that that act of bribery was committed with the knowledge and consent or approval of the 1st respondent. He concluded in this respect that the 1st respondent was not bound by that illegal practice.

In the present case, the 1st Respondent in cross examination told court as follows,

> "I did provide lunch facilitation and where there was a facility like a restaurant, we would all go and eat and pay there. Where none existed there would be a little facilitation plus transport according to the law. In such a case this would be given to the people in case directly.
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> 'This happened in my campaign. I held at least 50 consultative meetings and at each of them we had to have lunch. It would be difficult to recall at how many of them case was given.

‘It was Peter Kalibogha in charge of Finance who would pay. He would get the money from me and he would give it out to the people.”

It is clear that the 1st respondent was aware, and approved the giving of money to those attending his campaign meetings. From the above, he not only gave the money to those responsible, for giving it out to the people, but this was done with his full knowledge and approval. In the incident under consideration, the money was given out by Dominic Kambere, who readily so admitted. The 1st respondent in cross-examination conceded this was his campaign agent for Kisinga Sub County. The money given was shs 2000/= way above the amount required for lunch, according to the 1st respondent’s evidence. It was given well after the time for lunch – at 6.30p.m, for a meeting which also commenced at 4.p.m or 5p.m. The 1st Respondent in any event was present at that meeting. I found that the evidence of Yowasi Kamambu was credible. The evidence of Dominic Kambere and that of the 1st respondent in cross-examination amply corroborated Yowasi Kamambu’s evidence.

I accept it, and find and hold that the act of bribery of voters by Dominic Kambere was committed with the full knowledge and consent of the 1st Respondent.

The 2nd incident of bribery is alleged to have taken place at the home of Kasasura. This is the incident which is referred to in paragraph 8(b) of the petitioner’s affidavit P1. In paragraph 5 of the affidavit of Masereka Charles P3, it was deposed that on 3/2/2006, while at his fathers home called Joseph Kasasura, the 1st respondent asked the young brothers of the deponent- Asaba Patrick and Friday Vincent Baluku to mobilise the residents of the village for a campaign meeting, and 68 people were mobilised. This certainly was not a candidates’ planning and organisation meeting.

The 1st respondent addressed them and persuaded them to vote for him. It was deposed in paragraph 7 thereof that after the meeting, the 1st respondent handed to Asaba Patrick shs 60,000/= for distribution to those who attended, that it was for lunch and to support him and not the petitioner. Kidemba Justus and Muhahya Milton, who were agents of the 1st respondent, also attended that meeting. Masereka Charles a registered voter was one of those who received part of

this money. In paragraph 9 he deposed that some of the people who were supporters of the petitioner were thereby induced to and started supporting the 1st respondent. He however did not name any of those who thereby changed their support as a result apart from him.

In paragraph 24 his affidavit R1, the 1st respondent denied giving this witness or anyone money as a bride. It is note worth that the 1st respondent did not deny giving money to Asaba Patrick, nor that this Asaba Patrick distributed the same to all in attendance, in his presence. Neither Asaba Patrick not Friday Tindyeba who was named as one of the recipients swore any affidavit to controvert these allegations.

I am aware of the holding by Odoki C.J in *Col. (Rtd) Dr. Besigye* (Supra) at page 29 that uncontroverted affidavits in an election petition will not necessarily be taken as gospel truth. Each affidavit has to be considered according to its status and probative value as evidence in determining the issues in the petition.

The 1st Respondent admitted in cross examination that at every meeting in his campaign, money or lunch was always given. He did not state that this would only occur where there was need for such 'lunch', meaning that even if the meeting took place at night, people would be provided with 'lunch'. This was stretching the provisions of S.68(3)(a) and (b) too far. Indeed it was being used to legitimise what was clearly nothing more than an illegal practice of bribery. I found that in respect of the second incident, an illegal practice of bribery was committed with the full knowledge and consent of the 1st respondent.

The 3rd incident of alleged bribery took place on 5/2/2006 at Munkuyu Catholic Church. One Dezi Musumbaho, a registered voter was present at a campaign meeting, which was addressed by the 1st respondent. In his affidavit P4, this witness stated that in paragraph 3 thereof that the 1st respondent arrived at the church with his agent Kidemba Justus. In paragraph 5, he deposed that the 1st respondent gave all the members who were in the church shs 20,000/= after telling all in attendance that be was looking for votes.

In paragraph 7, Musumbaho Dezi deposed that later he followed the 1st respondent and his campaign entourage to Kicucu Catholic Church where Christians were waiting. The 1st respondent repeated that they should vote for him and not the petitioner, and he gave those women shs 40,000/=. This was after all had eaten food at the church.

In his affidavit R1, the 1st respondent in paragraph 25 denied the allegations of Musumbaho Dezi. That he has built many churches and schools which the witness is against.

Kidemba Justus, the chairperson of the 1st respondent's campaign team, in his affidavit R3 deposed that he was with the 1st respondent in Mukunyu Catholic Church, but that 1st respondent did not give the women shs 20,000/= as alleged, that he never thereafter went to Kicucu Catholic Church, as this is none existent in the constituency.

With respect to the 3rd incident, there was only the evidence of Musumbaho Dezi on the one hand that the 1st respondent gave women money at Munkunyu catholic church and at Kicucu catholic church, and on the other hand the evidence of Kidemba Justus who denied these allegations that the 1st respondent gave money to women in the church. I found it difficult to disbelieve the evidence of Kidemba Justus a Christian when he deposed that there was no church in existence known as Kicucu Catholic Church in the constituency, a fact that could so easily be controverted, but was not. For that reason, I was not satisfied that the 1st respondent committed any act of bribery at Munkunyu Catholic Church or at Kicucu Catholic Church.

The 1st respondent allegedly committed the 4th incident of bribery personally on 5th February 2006 at the home of Sibiri, in Munkunyu village. In his affidavit P15, Kule Expedito deposed in paragraph 4 that he and 15 other persons attended a meeting, which was addressed by the 1st respondent, who later gave him shs. 1,000/- so that he could vote for him.

The 1st respondent in his affidavit R5 in paragraph 18 admitted giving Kule Expedito shs. 1000/-, but not any other person. Under cross examination, he denied knowing Kule Expedito. During re examination he said that he did not mean what was in his affidavit in respect of Kule Expedito. He intended to say that he did not give any money to Kule Expedito. When court put him to task

about the correctness of the contents of that affidavit R5, the 1st respondent confessed that it contained some untruths. I found that to be a damning confession. The credibility of the 1st respondents evidence was put in serious doubt. To this was added his confession that he always gave money to the voters, which he termed lunch allowance at each of his meetings.

The purpose of the money given out was in order that Kule and the other recipients could support the 1st respondent. From the 1st respondent's own admission coupled with his inconsistent testimony, I found the affidavit evidence of Kule Expedito credible and I believed it. For those reasons I was satisfied that the 1st respondent personally committed an illegal practice when he gave Kule Expedito a bribe of shs. 1000/-.

The 5th incident of bribery allegedly took place at the home of Mzee Kifaru in Kisinga. Tembo Wilson a registered voter in his affidavit P17, stated in paragraph 5 that with 13 others, he attended a meeting, which was addressed by the 1st respondent. He stated further that the 1st respondent gave Mzee Kifaru money to distribute and the witness got shs. 3,000/-. The 1st respondent in his affidavit R5 paragraph 22 stated that he visited Mzee Kifaru, but denied giving him any money. There was no independent evidence in this regard to corroborate either way the allegations of bribery. I was not satisfied that an illegal practice or other offence was committed in this incident.

The 6th and last incident was from the affidavit of Masereka Archangel P6. These were a series of incidents, which were witnessed by the deponent while he worked for the 1st respondent as one of his the campaign agents. He was initially a supporter of the petitioner, but when the 1st respondent gave him shs. 5000/-, he switched sides. He worked closely with the other campaign agents of the 1st respondents including Dominic Kambere, Milton Muhahya, Kidemba Justus and others. He deposed in paragraph 4 that he often got money from the two co agents above for distribution to the voters.

The witness stated that the voters would acknowledge receipt of the money by signing for the same for purposes of accountability. He was assisted by Bagambe Barozi Geoffrey to prepare a

list of the voters to whom the money was distributed, but the list though mentioned as an annexture to the affidavit, was not so annexed.

This Bagambe Geoffrey was cross examined as PW2, and I found him to be an unreliable witness. He told obvious lies in cross examination. He was in court as a witness for the petitioner in an attempt to unseat the 1st respondent, but he insisted that he was still his (1st respondent's) ardent supporter. In any event the so called list he prepared and kept referring to in cross examination was not annexed, and I would have found it of little if any evidential value, in view of his credibility as a witness or rather lack of it.

Kambere Dominic in his affidavit R2 did not deny the allegations of Masereka Archangel. None of the people mentioned in his affidavit P6 denied the allegations by way of affidavit. The 1st respondent in his affidavit R1 in paragraph 28 denied the allegations by Masereka Archangel of bribery.

The 1st respondent had a credibility problem. In his affidavit R5 he deposed how he gave Kule Epedito shs. 1000/- while they were at the home of Sibiri. In cross examination he said he did not even know this Kule Expedito. In the same affidavit in paragraph 21 he said he did not know Barozi Bagambe Geoffrey the dubious liar, but the same deponent in paragraph 27 of his earlier affidavit R1 deposed extensively about his relationship with, and the great if unreasonable demands of this Barozi Bagambe Geoffrey one of his campaign agents.

I was satisfied that the 1st respondent personally committed an illegal practice when he gave money as a bribe to Masereka Archangel as a result of which, he turned to support the 1st respondent, thereby abandoning the petitioner.

In final submissions, it was conceded that money was given out to voters by the 1st respondent and by his agents. It was strongly submitted that the money given out was only for food and refreshments as allowed under the law. Cash was given out to make people independent of what to eat, but not as a bribe. I found this argument not tenable in the incidents, which were analysed above. It was not at every meeting that cash had to be given out, or food provided. The 1st respondent made it a habit to give money at his every meeting. His evidence in cross

examination to this effect was quite revealing. A glaring example was in the 1st incident when the money was given out at 6.30pm, ostensibly for lunch even though a witness deposed the time was 8.30 pm. This could not be time for lunch by whatever standard.

I have stated above that the giving of money was not contemplated nor specifically provided for in the law. The law provides for 'refreshments or food'. Refreshment is defined in Macmillan's English Dictionary International Student Edition (at page 1186) as 'something to eat or drink during an event e.g. a meeting or party.' Food is defined in the same dictionary (at page 547) as ' the things people or animals eat.' Money cannot be said to fall within the meaning of either of the above definitions of refreshments or food. The economists define money as a medium of exchange. The dictionary above cited (at page 917) defines it more simply as, 'what you earn, save, invest and use to pay for things.'

The giving of money in lieu of refreshments or food was not specified as a legitimate election expense for it would be difficult to control, and the possibility of abuse as happened in this case was real. Would the giving of an amount to enable one get lunch for a 5 course meal accompanied by a glass of wine constitute a legitimate election expense under the provisions of S.68 (3) PEA? What about the different price ranges in the different places where such lunch may be partaken? What amount of money would be sufficient to constitute refreshments? The giving of voters shs. 2000/- where 500/- would have sufficed for lunch is such anticipated abuse.

I was satisfied that the 1st respondent committed illegal practices of bribery personally and also by his agents with his knowledge and consent and indeed his approval. The 1st issue is answered in the affirmative.

The 2nd issue was whether there was non compliance with and failure to conduct the elections in accordance with the provisions and principles laid down in the Parliamentary Elections Act. The complaints in this regard were three, 1st that there was sectarian campaigning, 2nd that there was disenfranchisement, and lastly that there was failure to properly count, tally and fill declaration of results forms and safe custody of election materials. I will deal with them in that order.

Sectarian Campaigning.

It was alleged that the 1st respondent employed sectarian campaign strategy in contravention of the law and to the detriment of the petitioner. In paragraph 11(a) of the petition, it was alleged that the 1st respondent promoted his candidature and undermined that of the petitioner through sectarian campaigning when he referred to the petitioner as, 'Omulihanda'. Instances and particulars of when and where this was done, and the meaning and effect of the word complained of were set out in the affidavits, which were filed in support of the petition.

The term 'Omulihanda' according to both the petitioner PW1 and the 1st respondent RW1 is a derogatory word, which refers to foreigners of Tooro origin who in the past were seen as colonialists and dictators among the Bakonzo people. They were consequently hated and looked upon in great distaste. Such sentiments apparently still linger on among the Bakonzo people, the ethnic origin of the petitioner and the 1st respondent. A reference to a Mukonzo as 'Omulihanda' is a derogatory reference to a sympathiser or maybe supporter of the colonial and dictatorial people from Tooro.

Kamambu Yowasi in his affidavit P2 in paragraph 5 deposed that during a meeting at Kisinga Trading Centre, the 1st respondent cautioned the voters not to vote for the petitioner as he was 'Omulihanda', and voting for him would mean a return to the old days when the Bakonzo people were under Tooro hegemony.

No. 32838 D/C Mareseka Joseph was a police officer attached to the election fraud squad based at Kasese central police station. In his affidavit P9 he deposed that he received a complaint from the petitioner that the 1st respondent had, during campaigns referred to him as 'Omulihanda' meaning a foreigner who among the Bakonzo is hated and shunned. He opened a criminal file No. Kse - CRB –1667/2005 on 19th December 2005. He investigated the complaint and recorded statements from 11 people, which were annexed to his second affidavit P22.

In cross examination, he told court that up to that date on 10th August 2006, i.e. eight months later and well after the elections anyway, no one had been arrested or charged in respect of that

complaint. He conceded that he had powers of arrest and would do so if there was need to do so. He admitted that in law a person was innocent of any criminal offence until proven guilty by a competent court, and that was the position with the 1st respondent.

Katungu Augustine swore an affidavit P11 in support of the petition. He stated therein that on 20th January 2006, he met the 1st respondent at a drinking joint at Kisinga. The 1st respondent told him that the petitioner's father was from Hoima/Tooro, and that he was involved in a criminal case of murder. A charge would soon be laid. That the petitioner did not support the 'Obusinga' meaning traditional rulers.

Yolamu Bwambale in his affidavit P19 in paragraph 6 deposed that at Muyina-Busine village the 1st respondent warned people not to vote for the petitioner who was 'Omulihanda', anti 'Obusinga', and a killer.

The 1st respondent in paragraph 5 of his affidavit R1 denied having ever referred to the petitioner as 'Omulihanda'. In his 2nd affidavit R5, the 1st respondent categorically denied the allegations of Yolamu Bwambale. He visited many areas in the village of Muyina-Busine, it was not shown where exactly in that village in which he held so many meetings, the utterances alleged were made. That was because none were made. In paragraph 19 of R5, he denied being at Matuga drinking joint on 20th February 2006 as alleged by Katungu Augustine but that he was in Kasese at Kithende College School that day. He did not know the father of the petitioner, and never contacted anyone about that issue.

Kidemba Justus his chief campaign manager in his affidavit R3 deposed that he never witnessed or heard the 1st respondent refer to the petitioner as 'Omulihanda' or 'anti Obusinga' at any time during the entire campaign period.

I found the allegations about references to the petitioner as a foreigner ridiculous. The petitioner correctly reported a complaint in that regard to the police. An Officer from a section of the police force, which was set up specifically to deal with election related offences, and I imagine expeditiously so, known as the election fraud squad, D/C Masereka PW3 was detailed to

investigate the allegations that the 1st respondent referred to him as a foreigner, 'Omulihanda', that he was involved in criminal activities and that he was anti 'Obusinga'.

Investigations were carried out and statements of witnesses were recorded. Eight months down the line no action has yet been taken to arrest or charge the 1st respondent or any other person with the offence in connection with that complaint. Even the 1st respondent has to date not been called upon to record a statement in that respect. All this to me means that the police have not found any credit in the complaint, hence the inaction. The evidence of D/C Masereka Joseph a witness for the petitioner would dispose of that matter.

Even from the other evidence on record, Katungi Augustine's evidence was put in doubt when it was deposed that the 1st respondent was at Kithende college school, but not at a drinking joint where the utterances were allegedly made. Yolamu Bwambale could not state where exactly in the village the utterances were made. In any event, if the utterance was that the father of the petitioner was from Hoima, which certainly is not from Tooro, then he could not be 'Omulihanda', a reference to 'foreigners' i.e. non Bakonzo of Tooro origin.

The annextures in D/C Masereka's 2nd affidavit were of no evidential value. They were recorded by the police, certainly not under oath, and none of the makers was called to file an affidavit in support, which in any event would have been the more relevant evidence than a plain statement to the police.

From the evidence above, a doubt remained in my mind whether the words attributed to the 1st respondent were indeed uttered by him. In the final analysis, I was left in serious doubt about the allegations and I accordingly find that it was not proved to courts satisfaction that an offence under S. 24 (a) of the PEA was committed by the 1st respondent personally or by any of his agents with his knowledge and consent or approval.

I noted that the complaint about sectarian campaigning was brought as one of the grounds of non compliance with the provisions of the electoral laws. It ought properly to have been brought under the 1st issue of illegal practices.

Disenfranchisement of voters

It was alleged in paragraph 7 of the petition that some of the petitioner's voters' names did not appear on the voters register. They were hence denied the right to vote contrary to Art. 61 of the Constitution, and S.19 of the Electoral Commission Act. This was in Kyondo Sub County.

The affidavit of the petitioner PI at paragraph 12 deposed that the names of his voters of Kasokero parish, Kyondo Sub county polling station were missing from the voters register. A list was attached as annexture A4. This is a list with an unspecified number of persons. Its authorship or origin was not clear.

Kalimunda Jim in affidavit P5 stated that he was the chairperson LC.I of Kyanzabiri village, Kasokero parish, Kyondo Sub County. On polling day, he visited many polling stations and discovered that many supporters and voters of the petitioner did not appear in the respective voters registers.

He reported to Bwambale Ivan the sub county Chief. Together they visited many polling stations and ascertained the same. After the election, he compiled the list of persons, Annexture "A" whose names were missing from the voters register. I took this to be the Annexture A4 referred to by the petitioner.

Bwambale Joseph in his affidavit P13 deposed that he was a registered voter for Kasokero polling station. On polling day he found that his name was missing from the voters register and so did not vote. That was the evidence of the disenfranchisement.

In reply, it was submitted that the 2nd respondent registered the persons who were eligible to vote and their names appeared in the voters register. Engineer Dr. Badru Kiggundu Chairperson of the 2nd respondent in his affidavit R.8 deposed in paragraph 5 that the voters register was updated between 29th September and October 30th, 2005 and displayed between 22nd December 2005 and 7th January, 2006. That means that any irregularities, omissions, etc which were brought to the notice of the 2nd respondent were rectified in the register.

There was the affidavit of Latif Ngonzi, the election officer in charge of mid/west in the office of the 2nd respondent. That affidavit was not dated. An affidavit which is not dated is not an affidavit in law for it does not satisfy the requirements of the jurat as provided for in S.6 of the Oaths Act. That section requires in mandatory terms every Commissioner for Oaths before whom any oath or affidavit is taken or made, to state truly in the jurat or attention at what place and on what date the oath or affidavit is taken or made. Failure to comply with this legal requirement invalidates the affidavit. See *Baguma Robert vs. Electoral Commission & Anor*, Fort Portal E.P No. 10 of 2006, and Maniraguha J. (RIP) in *Lolol Paul vs Hon. Lolem Micah and The Electoral Commission* Mbale E.P No. 2/2001, and the cases cited therein. I accordingly struck out the affidavit of Latif Ngonzi R.12.

Once the affidavit was struck out, this necessarily meant that the attachments annexed thereto also were struck out, for they could not remain hanging in the air. The annextures to the affidavit marked as R2A and R2B were accordingly similarly struck out.

The evidence of disenfranchisement was from Kalimunda Jim affidavit P5. He compiled a list Annexture A4 which the petitioner referred to in paragraph 12 of the petition. Kalimunda was not disenfranchised. The people he listed as having been disenfranchised did not file affidavits to show that they were so disenfranchised. How and where he got the information that these people's names were not on the voters register is not known. Only Bwambale Joseph filed an affidavit P13, in which he complained that his name did not appear on the voters register. That was the only person who complained of disenfranchisement.

Kalimunda Jim filed a second affidavit P.20 in which he attached group annexture "Y" showing the voters cards of 13 people. He deposed in paragraph 2 of that affidavit that the 13 persons had voter's cards, meaning that they were not, to that extent disenfranchised, but that they appeared in the voter's register for Kanyanzangwa. He deposed that this was from his knowledge. None of the 13 persons deposed any affidavit in support of the above, let alone in complaint that they were disenfranchised. It was not shown that these persons were not resident of the area of the polling stations in respect of which their names appeared. It was not even shown that they did not

vote at those respective polling stations. Save for Bwambale Joseph, I found the evidence of disenfranchisement wanting. That issue only succeeded in respect of Bwambale Joseph.

Failure to ensure safe custody of election materials.

The 3rd complaint in respect of this 2nd issue was that the 22nd respondent failed to properly count and tally the results, failed to sign declaration of results forms, and failed to ensure safe custody of election materials.

The petition in paragraphs 9(a)(b) and (c) and 10(a) to (k) listed the incidents complained of. This, it was alleged, contravened provisions of Sections 51 and 52 of the PEA.

It is to be noted that the complaint in paragraphs 9 and 10 of the petition arose from the recounting exercise. I stated earlier that the recounting exercise was a nullity and no evidence from such exercise would be considered by court in determining this petition. I accordingly disregarded the complaints in the above paragraphs for that reason.

However during the scheduling it was an admitted fact that there was a recount exercise in respect of this election, but it did not succeed, as some ballot boxes were found not sealed.

The Electoral Commission is enjoined to seal the ballot boxes and ensure the safety of elections materials under S.52 (2) of the PEA which reads thus:

> "(2) A returning officer shall, on receipt of each ballot box –
>
> **(a)** take every precaution for its safe custody;
>
> **(b)** examine the seal affixed to the ballot box, with a view to ensuring that the box is properly sealed, and
>
> **(c)** if the box is not in good order, record his or her observations and affix a different seal supplied by the commission"

It was disputed that 11of the ballot boxes in this constituency election were found open, when they were presented to the Chief Magistrate for a recount. It is not clear whether they were originally sealed, but the seals were broken, or they were not sealed in the first place. Whatever may have been the case, that the ballot boxes were found open when they were required for a

recount exercise, was a failure by the 2nd respondent of ensuring safekeeping of election materials and records, contrary to S.52 PEA.

I did not consider the other complaints of non-compliance, as the evidence in that regard was from the failed recount exercise and I have already given my reasons for so doing. In the result, the 2nd issue succeeded only in part.

The 3rd issue was whether the non compliance affected the results in a substantial manner. The provisions of S.61(1)(a) PEA make non compliance with the provisions of the Act a ground for setting aside an election. Such non compliance must be such as affected the results of the election in a substantial manner.

I may add here for emphasis as there seemed to be some misconception in this regard, the non compliance referred to must be in relation to the PEA, and not any other Act. This is clear from the wording of S. 61(1)(a), which reads, 'non compliance with the provisions of this Act relating to elections…' See Mulenga JSC., in the *Col. (Rtd.) Dr. Besigye Kizza* (supra) at page 305. Indeed as the learned Justice of the Supreme Court added (at page 306) the complaints of non compliance of the Electoral Commission Act are relevant to and are to be considered when dealing with the application of the principles in the conduct of elections.

For court to decide whether or not the non compliance affected the results in a substantial manner, it must be proved to its satisfaction on a balance of probabilities that the non compliance was calculated to really influence the result in a significant manner. In order to assess the effect, court has to evaluate the whole process of election to determine how it affected the results, and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important just as the conditions which produced those numbers, numbers are useful in making adjustments for the irregularities. See Odoki C.J., in *Col. (Rtd.) Dr. Besigye Kizza* (supra) at page 159.

This does not in my view means that the degree of non compliance must be such as would lead a change in the overall result of the election in order to set aside an election. Mulenga JSC., in the same case above of *Besigye Kizza* stated that the provision of the law, 'can only mean that the

votes a candidate obtained would have been different in a substantial manner, if it were not for the non compliance substantially.'

In *Amama Mbabazi & Ano. V. Musinguzi Garuga* C.A. EP. No. 12 of 2002, the appellant secured more than double the number of votes secured by his opponent. The Court of Appeal held that the difference in votes from the election results were so high that it could not be said that the non compliance with the electoral laws affected the results in a substantial manner.

In the present case, the incidents of non compliance were those related to the defective recount exercise, which I did not take into account. The other aspect of non compliance was the non securing of the election materials. This was an admitted fact. The failure to securely keep the election materials contravened S. 52 PEA. The ballot boxes were not all sealed as required when they were brought to the chief Magistrate for a recount. By this time the election results had already been announced. Whatever was or ought to have been in the ballot boxes could not affect the results, which were already announced by the respective presiding officers as required under S. 50(4) PEA. The aspects in respect of what was or was not contained in the ballot boxes, and the correctness or authenticity of those contents are what constitute the complaints in the petition.

This is not to say that the Electoral Commission is to be excused for its lack of diligence in conducting the elections as mandated by the law. Any sloppiness on the part of the 2nd respondent in conducting the elections is to be condemned.

Gaudino Okello JA in the *Amama Mbabazi petition* (supra) held that where there is generalised malpractice in the constituency figures loose meaning and court goes by the qualitative test. I did not find that there were generalised malpractices in this constituency. While there were aspects of non compliance as I indicated above, I did not however find that such non compliance with the electoral laws affected the results of the election in a substantial manner. The 3rd issue is therefore to be answered in the negative.

The last issue was on the remedies. Under S.61(1)(c) and (3) PEA an election of a candidate as a Member of Parliament will be set aside where court is satisfied on a balance of probabilities that an illegal practice or other offence under the PEA was committed in respect of the election. I found that illegal practices in respect of the election were committed by the 1st respondent personally and by his agents with his knowledge and consent and approval, in that bribes in form of money was offered to voters.

In accordance with the law therefore, the election of the 1st respondent as Member of Parliament for Bukonzo East constituency is hereby set aside, and the election is hereby annulled. The seat of Member of Parliament for Bukonzo East constituency is hereby declared vacant.

With regard to costs, out of the four issues, which were set out for courts determination, the petitioner was successful in the 1st issue and only partly in the second one.
I accordingly award him costs against the respondents to the extent of 50%. I award a certificate of two Counsel.

RUGADYA ATWOKI
JUDGE
15/09/2006.