

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT UGANDA AT FORT PORTAL**

**HCT-01-CV-EP- 0009/2006.**

**BYAMUKAMA K. JAMES ..... PETITIONER**

**VERSUS**

**1. KAIJA WILLIAM**

**2. THE ELECTORAL COMMISSION ..... RESPONDENTS**

**BEFORE : THE HON. MR. JUSTICE AUGUSTUS KANIA**

**JUDGMENT**

The Petitioner , Byamukama K. James and the 1<sup>st</sup> Respondent Kaija William stood as candidates for the election of the Local Government V Chairperson of Kyenjojo District. It was a two horse race. The election which was organised and conducted by the 2<sup>nd</sup> Respondent, the Electoral Commission, was held on 2<sup>nd</sup> day of March 2006. The 2<sup>nd</sup> Respondent declared the 1<sup>st</sup> Respondent the winner of the election on the 3<sup>rd</sup> day of March 2006 with 39.417 votes representing 53.5% of the total votes. The Petitioner was declared to have polled 34.259 votes which translates to 46.5% of the total votes cast while 683 votes represents 0.9% of the votes cast were declared invalid . That the 1<sup>st</sup> Respondent emerged the winner in the election was gazetted in the Uganda gazette Vol. XCVIX No. 27 of the 5<sup>th</sup> May 2006 which is Exhibit P. 2 on the Court Record having been an admitted document.

The Petitioner brought this Petition challenging the validity, and the results of the election. He alleges that the 2<sup>nd</sup> Respondent who has the Statutory duty to conduct the election, conducted the same contrary to and in contravention of the Constitution of Uganda , the Electoral Commission Act of Local Government Act and the Parliamentary Elections Act in that the election was

tainted with numerous electoral practices, illegal practices, election offences wide spread rigging in favour of the 1<sup>st</sup> Respondent and that there was a general failure by the 2<sup>nd</sup> Respondent to conduct the election in a free , fair and transparent manner. The Petitioner alleges that the non compliance by the 2<sup>nd</sup> Respondent with the laws and the principles laid above affected the result of the election in a substantial manner and prays that this Court sets aside the election of the 1<sup>st</sup> Respondent as Chairperson L.C. V Kyenjojo District.

The Petitioner also alleges that the 1<sup>st</sup> Respondent personally committed illegal practices and election offences including using Government or Local Government property and facilities, going to a polling station armed.

The Petitioner further alleges that the campaign managers and polling agents of the 1<sup>st</sup> Respondent also committed illegal acts and electoral offences such as bribing of voters and intimidation of voters and the Petitioners agents. The Petitioner contends that the sum total of the illegal practices and electoral offences above was to substantially affect the result of the election and to render it not a free and fair expression of the will and consent of the people of Kyenjojo District in electing a District Chairperson of their choice. He prayed the election results be nullified on these grounds as well.

The Petition is supported by the affidavit of Byamukama K. James and 60 others.

The 1<sup>st</sup> Respondent filed an answer to the Petition in which he averred that the election was conducted in compliance with the Constitution, the Electoral Commission Act, the Local Government Act and the Parliamentary Elections Act. He denied the commission of any illegal practice or electoral offence by himself, his campaign agents or supporters. In the alternative the 1<sup>st</sup> Respondent avers that if there were any offences or illegal practices committed, there were not with his consent, approval or knowledge and these irregularities if any did not affect the results of the election in a substantial manner. He filed a total of 145 affidavits in support of his case.

The 2<sup>nd</sup> Respondent made an answer to the Petition denying that the election was conducted contrary to the law and principles of free and fair election, as enshrined in Article 61 (a) of the Constitution. The 2<sup>nd</sup> Respondent also states in its answer that if there was any non compliance

with the law in conducting the election, such non compliance did not affect the result of the election in a substantial manner.

Both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents prayed that the Petition be dismissed with costs.

**ISSUES:-**

Issues framed for determination at the commencement of the hearing of this Petition were the following:-

1. Whether in organising and conducting the election there was failure or non compliance with the electoral laws.
2. If issue No. 1 is answered in the affirmative whether such non compliance affected the election in a substantial manner.
3. Whether any illegal practices and or election offences were committed by the 1<sup>st</sup> Respondent personally or by his agents with his knowledge, consent or approval.
4. What remedies if any are available.

In the course of the hearing of this petition the Respondents raised a number of objections. Because of the need to expedite these proceedings and to avoid being logged down by a multiplicity of rulings at every stage, rulings on these objections were deferred. I now propose to first deal with these matters before going into the merits of the case.

Mr. Kaahwa learned Counsel for the 1<sup>st</sup> Respondent who appeared with Mr. Patrick Mugisha and Mr. Bwiruka submitted that the affidavits in support of the Petition by 21 deponents should be struck out because each of these deponents who swore two affidavits describe themselves on the first set of affidavits as literated while they swore the second set as literates. Counsel argued that these deponents could not be at the same time literate and yet illiterate. He submitted that for the above reasons the said affidavits are incompetent and should be struck out.

Mr. Peter Katutsi learned Counsel who appeared with Mr. Musana for the Petitioner submitted that there is nothing to prove the said deponents were illiterate and did not understand. The contents of the first set of their affidavits. He argued that under basing on the provisions of Sections 101 (2) and 103 of the Evidence Act, the Respondents had the onus of proving that the deponents of the said affidavits were illiterate. Counsel pointed out that the Respondents had the opportunity to prove this by cross-examination which opportunity in the second set of affidavits, Mr. Katutsi submitted that the said certificate did not mean the deponents were illiterate. His explanation was that the said certificate did not mean the deponents were illiterate. His explanation was that the said certificate was a standard format which was inadvertently not deleted but did not at all prove the deponents were illiterate.

Here below listed are the two sets of affidavits in question. The affidavits sworn as if the deponents were literate are under list A while those sworn by the deponents as if they were illiterate are under list B.

#### A

No. of Affidavit

On Court Record

Deponed to by

47	Irumba Bashir
18	Tweheyo Samwiri
45	Moses Ntegerisi
48	Kiiza Joseph
49	Seruguma Vinally
20.	Tumwesigye Adolf
52	Tumwesigye Lawrence
23	Mwebesa Julius
21	Alinaitwe Anthony
31	Nanyonga Margaret
8	Habomugisha H.
26	Mugisa Ezekiel
71	Kazooba Wilfred

58 Twinamasiko  
19 Bekunda  
68 Oliver Bahemurwaki  
25. Aheebwa George  
78 Mungereza Robert  
79 Umaru Kiiza

**B.**

19. Irumba Bashir  
117 Tweheyo Samwiri  
43 Moses Ntegenisi  
105 Kiiza Joseph  
109 Seruguma Vinally  
110 Tumwesigye Adolf  
113 Mwebesa Julius  
114 Alinaitwe Anthony  
115 Nanyonga Margret  
116 Habomugisa H.  
95 Mugisa Ezekiel  
89 Kazooba Wilfred  
120 Twinamasiko Sebuturo  
152 Oliver Bahemurwaki  
150 Ahebwa George  
153 Mungereza Robert  
154 Umary Kiiza  
156 Kazooba Wilfred.

Though Mr. Kaahwa submitted that each of the deponents to the above affidavits swore one affidavit as someone who is literate and the other as an illiterate, this appears not to be totally true of all the deponents. Affidavits Nos. 78 and 153 sworn by Mungereza Robert and 79 and

154 sworn by Umaru Kiiza all bear a certificate by the Commissioner for oaths as provided for in the Oaths Act in the event of an illiterate swearing an oath. Another affidavit Mr. Kaahwa sought to strike out is No. 144 of Otuganyire Amos but then this is deponents only affidavit which bears the Commissioners certificate under the Oaths Act meaning the deponent swore it as an illiterate. It was contended that the deponent also deposed to a second affidavit No. 104 on the Court record. This is not borne by the record as affidavit No. 104 is sworn by one Richard Bukonya. In the result the objection taken by Mr. Kaahwa is not applied to the affidavits sworn by Mungereza Robert, Umaru Kiiza and Otuganyire Amos as I find them to be competent.

An affidavit is evidence on oath. When a witness deposes to a set of facts, it is to be taken that such a witness knows and understands what he/she is deposing to. In the event the deponent is illiterate either in the sense that he cannot read or write or that he does not understand the language in which the affidavit is written the jural in the form of a certificate that the contents of the affidavit have been read to the deponent in a language he understands is provided for under Schedule I Form B under the heading Oaths for Affidavits. When the deponents of the first category of affidavits with the exception of Mungereza Robert, Umaru Kiiza and Otuganyire swore to them and the Commissioner did not attach thereto a certificate to the effect that the same had been read to them, the only inference flowing therefrom appears to be that the deponents were literate and understood the contents of those affidavits. However when these same deponents again deposed to the affidavits in the second category and the commissioner for Oaths attached a certificate that the deponents being illiterate he read to them. The contents of the said affidavits their literacy is negatively. Though Mr. Katutsi Peter argued that it was the onus of the Respondents to prove the deponents were illiterate, I can say in fact discharged this duty for the Respondents by filing the affidavits in question with the Commissioner for Oaths declaring on the jural that he read the contents of the said affidavits to the deponents who were illiterate. I accordingly find that though these deponents swore the first lot of affidavits as literate persons, they are in fact illiterate. Being illiterate they did not understand the contents of the first lot of affidavits. Mr. Katutsis explanation that the jural in the second lot of affidavits was inadvertent on that they are a standard form which was not deleted from the computer is not sustainable. Having found that the deponents of the first set of affidavits were illiterate and they did not understand the contents of their affidavits in category A above, the same are struck out.

Mr. Kaahwa had invited me also to strike out the second category of affidavits. Counsel did not appear to me to have advanced any compelling ground why the second lot of affidavits should be struck out. The main ground in my view for striking out the first category of affidavits was that the deponents did not understand or know their contents, because being illiterate the Commissioner for oaths attached no certificate to the effect that he had read and explained to the deponents the contents.

With regard to the second category of affidavits the deponents swore their affidavits as illiterates after the Commissioner for Oaths had explained to them the contents of the affidavit by including his certificate. The second category of affidavits having complied with the Oaths Act, there is no reason to strike them out. In the result, while the affidavits in category A above, with the exception of those sworn by Mungereza Robert, Umaru Kiiza and Otuganyire Amos, are struck out the application to strike out the affidavits on category B fails.

Mr. Kaahwa also attached the affidavits in category B for non compliance with the Oaths Act in that the jural or the certificate of the Commission on the said affidavits is not that prescribed by the Oaths Act. Mr. Peter Katutsi submitted that though the jural in these affidavits was not in the very words prescribed by the Oaths Act, it substantially carried across the same meaning.

The jural prescribed for affidavits sworn by illiterates where the Commissioner for Oaths has read over the contents to the deponents is in the following terms:-

*Sworn at-----in the District of-----this-----day of-----2006 before me. I having first truly distinctly and amolibly read over the contents of this affidavit to the deponent he/she being illiterate and explained the nature and contents of the exhibits in the affidavit in the-----language. The deponent appeared perfectly to understand the same and made his/her mark/signature. Thereto in my presence.*

The form the jural or certificate in the affidavits in category B took is as follows:-

*Sworn at Fort Portal by the said-----the-----day of-----2006 before me and I certify that this affidavit was read over to the deponent he being illiterate and the nature and contents of the exhibits referred to in the affidavit explained to him in-----language which appeared to understand.*

The wording in the two formats is not exactly identical. They obviously deviate. However to my understanding they convey the same meaning which is that the Commissioner swore the deponent who was illiterate only after having and explained to him the contents of the affidavit in a language the deponent understands and that the commissioner before signing the affidavit had the impression that the deponent understood its contents. In the instant case I am of the view that though the Commissioners for Oaths deviate in the affidavits in category B from the prescribed form of the jural in the Oaths Act, they substantially comply with it. The competence of these affidavits is accordingly not affected. This view is bolstered by the provisions of Section 43 of the Interpretation Act which provides:-

*43 where any form is prescribed by any act, an instrument or document which purports to be in such form shall not be void by reason if any deviation from that form which does not affect the substance of the instrument or document or which is not calculated to mislead.*

As the jural or certificate on the affidavits in question substantially complied with the jural prescribed for affidavit evidence by illiterates, in the Oaths Act and as a whatever deviation there might be is not shown to have been calculated to mislead, the objection is overruled.

Mr. Kaahwa also challenged a number of affidavits filed in support of the Petition on grounds that they raise new matters not canvassed in the Petition. Counsel contended that this amounts to a departure from and introduction of new matters which amounts to filing those grounds out of time. He cited affidavits Nos. 3, 10, 11, 17, and 18 sworn by Tibahwa Stephen, Tumuhairwe Posiano, Alinaitwe Wilber, Agaba Robert and Tweheyo Samwiri which raise complaints of allowing unauthorised persons to vote, the Presiding Officers voting for illiterates, failure to update the Register and to delete the names of voters who had since migrated or died, closing of the polling stations before 5.00 p.m. and of one Muganga who was not an election official being in possession of a ballot box. Mr. Kaahwa contended that these affidavits should be struck out as the matters raised there in constitute fresh grounds of the Petition which many case were filed outside of the time within which the Petition and its grounds ought to have been filed. Mr. Patrick Mugisha reinforced the objection to these affidavits in question and invited court to strike them out on the authority of the case of **Amama Mbabazi Vs. Musinguzi Garuga CA. Civil**



**Appeal No. 12/2002** where the Court of Appeal upheld the criticism of the trial Judge for making a finding on a matter that had not been pleaded.

Mr. Musana, the learned lead Counsel for the Petitioner submitted that while the Petitioner concedes that the affidavits in question were filed after the time set for filing the grounds of the Petition, the said affidavits did not at all raise fresh grounds. He pointed out that while the Petition generally alleges the illegal practices and electoral offences committed by the Respondents, the affidavits complained of adduce evidence of such illegal practices and electoral offences but in no way state new grounds on which the Petitioner bases his Petition. Counsel submitted that the reasoning behind the objection is fallacious and misconceived and prayed that the objection be overruled.

Under Section (4) of the Local Government Act a petition challenging the result of an election must be filed within 14 days after the day on which the results have been notified by the electoral Commission in the gazette. It follows therefore that an election Petition brought under that act after the expiration of the time limited as above is decidedly out of time and incompetent as it will have been barred by law. Mr. Musana conceded that the time within which to file the instant petition expired on 19<sup>th</sup> May, 2006 and that the affidavits in question were filed after that date. The relevant issue to decide here is whether the contents constitute new grounds as opposed to the grounds contained in the Petition itself.

The new grounds allegedly raised in the offending affidavits include the illegal practices of the Presiding Officers allowing unauthorised persons to vote the Presiding Officer voting for illiterates, failure to update the voters register and to delete the names of those voters who had since migrated or died, election materials falling into the possession of unauthorised persons and election officials closing the polling stations before the official closing time of 5.00p.m. and chasing away voters who were already in the queue ready to vote.

I have very carefully perused the Petition and the grounds of the same together with the contents of the offending affidavits No. 3, 10, 11, 17 and 18 on the court record sworn by Tumuhairwe Posiano, Alinaitwe Wilber, Agaba Robert, Tweheyo Samwiri and Tibahwa,. Except for affidavits

17 of Agaba Robert which allows failure by Rabwoni John and John Papa to update the Register of voters and to delete the names of voters who had migrated or died and except for the contents of the affidavit of Tweheyo Samwiri which has in any case been struck out all the other affidavits refer to incidents of illegal practices and electoral offences which form grounds of the Petition. For instance paragraph 7 (a) of the Petition made the fact of the ballot box falling into the possession of unauthorised persons a ground. In the affidavit of Tibahwa Syephen he avers that he saw one muganga who was not an election official transporting a ballot box on his motor cycle on the polling day. In my view the Petitioner in filing this particular affidavit did not intend to file a fresh ground of the Petition but was rather adducing evidence to the fact that a ballot box was found in unauthorised hands. The Petitioner made the fact that the Presiding Officers allowed unauthorised persons to vote and they themselves voted for illiterates, which are illegal practices grounds of the Petition. The affidavit of Alinaitwe provides the evidence of these illegal practices by citing incidences that prove them. Alinaitwe was therefore not raising any new grounds as suggested by Counsel for the Respondent. The same illustrations applies to the affidavit evidence of Tumuhairwe Posiano. From the above I find that except for the affidavit of Agaba Robert alleging failure to update the voters register and delete the names of voters who had migrated and died, the rest of the affidavits raise no new grounds of the Petition. The objection succeeds only in respect of the affidavit of Agaba Robert but fails in respect of the other affidavits. I have looked at the case of Amama Mbabazi Vs. Musinguzi Garuga (Supra) but did not find it very useful as it concerned a situation where a finding was made on a point which was not a ground of the Petition.

Mr. Kaahwa further attached affidavits Nos. 5, 10, 12, 17, 22, 24, 34, 42, 54, 57, 61, 70, 71, 89, 94, 99, 144 and 156 sworn by Asiimwe Robert, Tumuhairwe Posiano, Tumusiime Bwire, Agaba Robert, Kaija Morris, Byamaraki, Kyamanywa Mzee Majara, Alii, Mwanguhya Joseph, Gaston Maliro, Rutankundera Edward, Julius Kihika, Mwirumubi, Kazoora Wilfred, Stephen Rwankwenge, Kawesa Edward, Otuganyire Amos and Kazooba Wilfred. He contended that these affidavits were sworn contrary to Section 32 of the Parliamentary Elections Act because the deponents of these affidavits claim to have variously sworn the same as mobile agents, coordinators monitors and supervisors of the Petitioner and yet Section 32 of the above act only provides for the appointment of 2 polling agents by each candidate.

I failed to see the merit on this objection. Section 32 of the Parliamentary Elections merely provides for polling agents who take care of the interests of the candidate at the polling station. It does not appear to me to prohibit employing any of his supporters by whatever name to take care of his interests. Nor does Section 32 of the above act restrict persons to give evidence in favour of the Petitioner or in favour of any other party to a Petition to agents appointed under that Section. This objection has no merit and it must fail.

#### **BURDEN AND STANDARD OF PROOF:-**

In an election Petition seeking to nullify the election of a Chairman or member of a Local Council, the burden of proof lies on the petitioner to prove the allegations to the satisfaction of the Court as provided for in Section 139 of the Local Government Act.

The standard of proof has also now been put beyond debate by the Supreme Court in **Retired Col Dr. Kiiza Besigye Vs Kaguta Museveni Election Petition 1/2001** where the Court stated that the standard of proof on election Petitions is on a balance of probabilities. However because the allegations on an election Petition which the Petitioner has to prove are invariably criminal, the degree of the probability of proof is higher than in ordinary Civil suits. See **Karokora Katono Zedekia Vs. The Electoral Commission and Kagonyera Mondo Election Petition No. 0002/2001**.

Mr. Mwene Kahima learned Counsel for the 2<sup>nd</sup> Respondent cited a number of cases from other jurisdictions to justify his submission that the standard of proof on election petitions is beyond reasonable doubt. These cases included the Nigerian case of **Alhaji Mohamed Dikko Yusuf & Another & Chief Olusegun Aremu Akikola Obasanjo & 53, No. CA /A/EP/1/2003** The Zambian case of **Anderson Kambela Mozooka Lt. General Christon Sijapi Tembo Godfrey Kenneth Muyanda & Levy Patrick Mwanamwasa, the Electoral Commission, The Attorney General SCZ/EP/01/02/03/2002** and the East African Case of **Mbowe Eliofo 1967 CA**. In view of the statement of the Uganda Supreme Court of Uganda in respect of the standard

of proof in election Petitions those case are not good Law. The standard of proof for purposes Election Petitions in our Courts is that on a balance of probabilities.

Having set down the standard of proof in the present Petition I now propose to discuss the issues framed one by one. Counsel submitted first on the 3<sup>rd</sup> issue followed by issues Nos. 1, 2 and 4.

### **ISSUES NO. 3:-**

Whether any illegal practices and /or election offences were committed by his agents with his knowledge, consent or approval.

Section 139 of the Local Government Act as follows:-

*139. The election of a candidate as a Chairperson or a member of a Council shall only be set aside on any of the following grounds if proved to the satisfaction of the Court.*

- (a) That there was failure to conduct the election in accordance with his part of the Act and that the non compliance and failure affected the result of the election in a substantial manner.*
- (b) That a person other than the one elected purportedly won the election.*
- (c) That on illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.*
- (d) That the candidate was at the time of his/her election not qualified or was disqualified from election.*

As far as issue No. 3 is concerned the Petitioner relies on Section 139 ( c) above. To succeed on this issue the Petitioner must on a balance of probabilities prove either that the 1<sup>st</sup> Respondent committed the alleged malpractices personally or that they were committed with his knowledge and consent or approval. While adducing evidence to prove that the 1<sup>st</sup> Respondent committed the illegal practices and election offences presents no problem it is more difficult to prove that

the alleged illegal practices or election offences were committed with the 1<sup>st</sup> Respondents knowledge and consent or approval. This brings in the law concerning agency.

### **AGENCY:-**

The law of agency as relates to Election Petitions was discussed in great detail **Oder ISC** as he then was in his judgment in the case of **Col (Ret) Dr. Kiiza Besigye Vs. Kaguta Yoweri Museveni Supra at page 470**. I will set out the relevant passage in whole as it eloquently summarises law in that regard:-

*The general principles of the law of agency apply to elections as well. However, the relationship between an election candidate and his agent is much more intimate than that which subsists between an ordinary principal and agent. For as regards a Parliamentary election the candidate is responsible for all the misdeeds of his agents committed within the scope of his authority, although they were done against his express directions and even in defiance of them.*

*An agent is a person employed by another to act for him or her and on his /her behalf either generally or in prove particular transaction. The authority may be actual or it may be implied from the circumstances. It is not necessary in order to prove agency to show that a person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as an election agent, and the candidate accepted his service as such he would thereby ratify the agency, so that a man may become agent for another in either of two ways, by actual employment or by recognition and acceptance .-----if a person were appointed or accepted as an agent for canvassing generally, and he were to bribe a voter, the candidate would thereby lose his Parliamentary seat. But if he was employed or accepted to canvass a particular class for instance a master were to ask the agent to canvass his workmen and the agent were to go out of his way, and bribe a person who was not the candidates workman. The candidate would not be bound. In the one case the agent would be acting with us . The scope of his authority, though it may be in the abuse of it, in the other , he would be*

*acting beyond his authority and he would be no more to the candidate than a stranger. It follows that if a person whom the candidate had not authorised to canvass at all, or take such part in the management of the election as including canvassing, whatever else she was employed to do, the agent were to take upon himself to bribe a voter, the candidate would not be responsible. See The Digest of Annotated British Commonwealth & European Cases 1982 Russue, Butherworths & Co. (Publishers) Ltd. 1982 page 72.*

The learned JSC made reference in his judgment to the law on agency for electoral purposes as stated in **Halsburys Laws of England 4<sup>th</sup> Edition Vol. 15 para. 698** which is to the effect that in order to prove agency, it is not necessary to show that the person was actually appointed by the candidate or that he was paid.

The crucial test is whether there has been employment, or authorisation of the agent by the candidate to do some election or the adoption of his work when done. The candidate however, is liable not only for the acts of the agents when he has himself appointed or authorised, but also for the acts of the agents employed by his election agent or by any other agent having authority to employ others. Oder JSC as he then was, was discussing the law of agency as applicable to Parliamentary elections which he held was applicable to Presidential Elections. The same law and principles of agency are in my view applicable to elections to the Local Councils with equal force.

With regard to the illegal practices and electoral offences complained of by the Petitioner, I propose first to deal with those the 1<sup>st</sup> Respondent is alleged to have committed personally and then I shall proceed to deal with those allegedly committed with the knowledge or consent or with the approval of the 1<sup>st</sup> Respondent.

#### **USE OF LOCAL COUNCIL OR GOVERNMENT FACILITIES CONTRARY TO SECTION 126 OF THE LOCAL GOVERNMENT ACT:-**

It is alleged in paragraph 13 (b) of the Petition that contrary to the provisions of Section 126 of the Local Government Act, the 1<sup>st</sup> Respondent who during the election in question was the incumbent L.C.V Chairperson Kyenjojo District used the official vehicle of the L.C. V Chairperson, a Toyota Land Cruiser Reg. No. LG 0025 50 to conduct his campaign. The

Petitioner in paragraph 18 of his affidavit in support of the Petition averred that when the 1<sup>st</sup> Respondent used the official vehicle for the L.C.V Chairperson to wit Motor vehicle LG 0025 50, he wrote to the Chief Administrative Officer of the District about this illegal practice per his letter dated 15<sup>th</sup> February 2006 which is D exh. 4 on the Court record. He further deponed that because no action was taken the 1<sup>st</sup> Respondent continued using the said official vehicle which was all along being driven by the official driver one Sam Rubiibi.

To further prove the allegations of the above illegal practice or electoral offence, the Petitioner relied on the following affidavit evidence:-

**No. of Affidavi**

**On the Court Record**

**Deponed by:**

100	Magezi Abubaker
101	Musinguzi Paul
106	Basaliza Kyalimpa
122.	Kirungi Kyalimpa
123	Mrs. Alice Basaliza
124	Geofrey Kayondo
125	Stephen Basaliza
126	Peter Bacwa
127	Mugisa Patrick
128	Tibenda Stephen
157	Margaret Kyamanywa
158	Ajuna Apolo Kasangaki
140	Kiiza Henry Buhwa
142	Zaribwende Omuhereza
143	Owoyesigire Omuhereza
144.	Otuganyire Amos.

Magezi Abubaker, Musinguzi Paul and Basaliza Stephen deponents of affidavits 100, 102 and 106 respectively aver that the 1<sup>st</sup> Respondent used motor vehicle, LG 0025 50. The official vehicle for the LC V Chairperson through out the campaign period to conduct his campaign. In

particular they refer to an occasion on the 1<sup>st</sup> day of February 2006 when the 1<sup>st</sup> Respondent addressed a rally at Rwaitengya Parish having travelled there in said vehicle driven by the official driver one Sam Rubiibi Musinguzi Paul also rebutted the denial of Sam Rubiibi of his driving the vehicle during the period in question.

Kirungi Kyalimpa in his affidavit No. 122 avers that he did see Sam Rubiibi who was driving the official vehicle of the L.C. V. Chairperson of Kyenjojo District drop the 1<sup>st</sup> Respondent at Kikaras Bar. When he crossed the road the witness saw the said official vehicle parked at the Polling Station and Sam Rubiibi surrounded by a crowd. Rebutted the denial of the 1<sup>st</sup> Respondent and his official driver of using the vehicle during the campaign period. Alice Basaliza in her affidavit 123 testified that she saw Sam Rubiibi driving the official vehicle of the L.C.V Chairperson to the Polling Station which he later parked at the home of Kabahuma. He drove away when he was attacked by the youth. Geoffrey Kayondo in affidavit 124 averred that he was informed by one Baguma Kanyuma at 300 p.m. that the 1<sup>st</sup> Respondent was at the Trading Centre bribing voters official vehicle LG 0025-50 being driven by Sam Rubiibi which the latter parked at the Polling Station. The vehicle was only driven away when Sam Rubiibi was confronted by the supporters of the Petitioner.

In his affidavit 125 Stephen Basalizas testimony is that he saw Sam Rubiibi, his wife and a brother of the 1<sup>st</sup> Respondent in the official vehicle of the 1<sup>st</sup> Respondent at Rwaitengya Trading Centre. The vehicle was parked at Ibrahim Kasangakis shop where they met the 1<sup>st</sup> Respondents agents Samson Manyindo and Mrs. Baguma. He averred that Sam Rubiibi then drove to Kikaras bar where the 1<sup>st</sup> Respondent was said to be buying drinks for the voters. When the 1<sup>st</sup> Respondent was confronted by the youth he left in the said official vehicle.

Peter Bacwa and Mugisa Patrick the deponents of affidavits 126 and 127 gave similar evidence to the effect that while at the Polling Station they saw the official vehicle of the L.C. V. Kyenjojo District Reg. No. 0025-50 being driven by Sam Rubiibi who parked it directly opposite the Polling Station. Because Sam Rubiibi and the 1<sup>st</sup> Respondent were being accused by the public of bribing voters. The former drove away and parked at the Trading Centre. Mugisa Patrick was the Presiding Officer at this Polling Station. Tibenda Stephen Omuhereza, who swore affidavit 128, rebutted the claim by Moses Kikumbo that he was during the campaigns employed in a private



vehicle. He averred that that this could not have been possible because the said Moses Kikumbo was himself a candidate and was seen canvassing votes for himself in the Nissan Sunny looking for his own votes.

In her affidavit 157 Margret Kyamanywa averred that Baguma reported to her that the 1<sup>st</sup> Respondent and his group were distributing money and buying drinks for voters at Kikaras bar. She saw Sam Rubiibi, his wife and two other people in the L.C.V Chairpersons official vehicle parked opposite the polling Station. She approached them and challenged them why they were bribing. A commotion followed and Sam Rubiibi drove away. Ajuna Apolo Kasangaki who swore affidavit 158 averred that he saw the 1<sup>st</sup> Respondent disembark from Motor vehicle LG 0025-50 driven by Sam Rubiibi. The 1<sup>st</sup> Respondent called him and others into a bar where the 1<sup>st</sup> Respondent bought a 3 litre jerrycan of potent gin known commonly as (kicooli) and gave it to the people present to drink. In the mean time Sam Rubiibi had parked the said vehicle at the house of the father of the witness one Ibrahim Kasangaki. The deponent of affidavit 140 Kiiza Henry Buhwa averred that he is resident in the house that adjoins Matiri Trading Centre Polling Station ground. On polling day he saw the 1<sup>st</sup> Respondent being driven on motor vehicle LG 0025- 50 by Sam Rubiibi. He also testified that it is not true that Moses Kikumbo was driving the 1<sup>st</sup> Respondent as he had his own campaign to conduct his Nissan Sunny 1200. Owoyesigire Omuhereza and Otuganyire Amos who swore affidavits 143 and 144 respectively averred in identical terms that on polling day they saw the 1<sup>st</sup> Respondent being driven at Matiri Trading Centre at the Matiri Trading Centre Polling Station where he came out armed with a gun.

Apart from the above evidence the Petitioner relies on to prove the use of Local Council or Government Facilities and in particular the Official LC. V Chairpersons vehicle Reg. LG-0025-50, the Petitioner also relies on the following affidavits:-

**No. of Affidavits**

**On the Court Record**

**Deponed by**

53

Samuel Katusabe

62

Kyaligonza Stephen

54

Mwanguhya Joseph

63	Kiiza Henry Buhwa	
55	Olive Kansiime	
66	Manyindo Wilson	
67	Nalongo Katenta	
129	Paddy Rubongo	
130	Nyakahuma Stephen	
132	Agaba Richard	
131	Basaliza Tadeo	
133	Atuhairwe K. James	
134	Muhumuza Bosco Ronald	
135	Byaruhanga Vicent	
136	Bigwire Faith	
137	Malidadi Kusema	
149	Irumba Patrick	
152.	Oliver Bahemurwaki	
148	Ategeka Vincent	
143		Owoyesigire-Omuhereza
144	Otuganyire Amos	
145	Kamarwaki Everest	
146	Tweheyo Fred	
147	Nsungwa Getrida	
138	Augustine Bitamazire	

All the above deponents averred that on polling day at around 11.00a.m. they saw the 1<sup>st</sup> Respondent being driven by his official driver Sam Rubiibi on motor vehicle LG 0025 50 which is the official vehicle of the LC. V. Chairperson of Kyenjojo District.

Both in his reply to the Petition and in paragraph 17 of the affidavit in support of the answer to the Petition the 1<sup>st</sup> Respondent denies having used the official vehicle of the L.C.V Chairperson of Kyenjojo District for his campaign. He averred further that during the period in question he

used a hired Land Rover Reg. No. UAG 819 and his personal motor vehicle Registration No. UAF 703 L.

Nsungwa Alphael who swore affidavit No. 67 for the 1<sup>st</sup> Respondent averred that on polling day at about 10.00a.m. the 1<sup>st</sup> Respondent came to Matiri Trading Centre driving a small car. He stopped at the stage at the Trading Centre and handed the keys of the car to Moses Kikumbo who drove it towards Kampala.

Sgt. Kamanyire Philip, deponent of affidavit 115 for the 1<sup>st</sup> Respondent, averred during the election campaigns the 1<sup>st</sup> Respondent used his private vehicles Reg. Nos UAF 703 L and UAG 819 M and was being driven by Kikumbo Moses. He testified that on polling day he was in the campaign of the 1<sup>st</sup> Respondent throughout the day. The 1<sup>st</sup> Respondent passed through Matiri Trading Centre that day to pick his driver.

The deponent of affidavit 144 for the 1<sup>st</sup> Respondent, Asiimwe Sulaiman deponed that during the campaign he was the driver of the 1<sup>st</sup> Respondent in Land Rover Reg. No. UAG 819 M and also drove the 1<sup>st</sup> Respondents private vehicle UAF 703L. Rubiibi Samuel the official driver of the 1<sup>st</sup> Respondent who swore affidavit No. 46 for the 1<sup>st</sup> Respondent averred that the official vehicle of the L.C.V Chairperson was handed over to the Chief Administrative Officer and on no account did he drive the same during the campaigns.

Mr. Katutsi submitted that the above evidence overwhelmingly proved that the 1<sup>st</sup> Respondent contrary to Section 126 of the Local Government Act used Motor vehicle No. LG 0025 50 which is a local Council facility during his campaigns. He argued that the fact that as a result of the complaint by the Petitioner P. Exh. 4, the Chief Administrative Officer Kyenjojo District wrote Annexure 5 to the 2<sup>nd</sup> Respondents answer to the Petition which is exhibit P.2.- 1 on the court record restraining the 1<sup>st</sup> Respondent from using the said official vehicle proved that indeed the 1<sup>st</sup> Respondent was using it. He submitted that inspite of having been restrained , the 1<sup>st</sup> Respondent obstinately continued to use the said motor vehicle as testified to by the numerous affidavits sworn in support of the Petitioners case. Counsel submitted that from the numerous affidavits pinning the 1<sup>st</sup> Respondent in this illegal practice, the only inference is that he indeed

did commit the same as it is inconceivable that up to 30 people could have got together to conspire to falsely implicate the 1<sup>st</sup> Respondent in this illegal practice. Mr. Katutsi invited Court to find that the Petitioner has proved this illegal practice on a balance of probability which on itself applies to nullify an election under the provisions of Section 139 ( c) of the Local Government Act.

Mr. Patrick Mugisha the lead Counsel for 1<sup>st</sup> Respondent submitted that Section 126 of the Local Government Act prohibits the use of Local Council or Government facilities for campaigning. He argued that in the instant case the affidavit avers that a deponent saw the said official vehicle was being used by the 1<sup>st</sup> Respondent in the midst of campaigns nor did the Petitioner make such a complaint and at that the Petitioner in cross-examination denied seeing the 1<sup>st</sup> Respondent using the said vehicle during the campaigns.

Mr. Mugisha attached the evidential value of P. E. X. 4 and EX P.2 1 because these did not state the dates of the use of the vehicle. He pointed out that the Returning Officer/Chief Administrative Officer of Kyenjojo District Muhenda R. Owen in his letter to the 1<sup>st</sup> Respondent merely stated the law but no finding that he had been using the said vehicle. Counsel submitted that even if such a finding had been made, it would have been contrary to the rules of natural justice as an explanation was not sought from the 1<sup>st</sup> Respondent. Counsel contended certain affidavit which were out of time aver that the 1<sup>st</sup> Respondent was seen using the vehicle in question of the campaign period and therefore not covered by Section 126 of the Local Government Act.

The relevant part of Section 126 of the Local Government Act with regard to the matter under consideration reads as follows:-

*126 ( 1) Except as otherwise provided in this section, where a candidate is a Chairperson or holds any other political or public office, he or she shall not use local Council or Government facilities for the purpose of campaigning for election under this Act.*

*(2) Where a candidate holds any political office, he or she shall during the campaign period restrict the use of the official facilities ordinarily attached to his or her office to the execution of his or her duties.*

This section is intended to ensure that candidates contesting against those holding political office are at par and that the latter don't have unfair advantage over their competitors at the expense of the public.

Though Mr. Patrick Mugisha submitted that none of the many people who swore affidavits in support of the case for the petitioner avers to having seen the 1<sup>st</sup> Respondent using the official vehicle during the campaigns, Magezi Abubaker, Musinguzi Paul and Basaliza Stephen in their affidavits 100,102 and 106 respectively, all aver that the 1<sup>st</sup> Respondent used his official vehicle throughout the campaign period and cite a campaign meeting he held at the home of Byamukama alias Saddam on the 1/2/2006 to which he traveled in the official vehicle Reg. No. LG 0025-50.

Counsel also argued that the affidavits which claim to have seen the 1<sup>st</sup> Respondent using the official vehicle were out of time. Earlier in this judgment, the matter of these affidavits was exhaustively dealt with and they were found not to be out of time as none of them raised new ground of the petition but merely provided evidence of the grounds of the Petition.

Mr. Patrick Mugisha also submitted that Section 126 of the Local Government Act applies to campaigns done during the campaign period gazetted by the Electoral Commission. He contended that on the instant case the campaign period gazetted in the Uganda Gazette of 13<sup>th</sup> January 2006 was between 16<sup>th</sup> January 2006 and 26<sup>th</sup> February 2006 and therefore even if the 1<sup>st</sup> Respondent used the said vehicle on polling day such use did not fall under the arm of Section 126 of the Local Government Act. I must respectfully disagree. Section 126 above merely talks about campaigning but not campaigning during the campaign period. To limit using of such facilities during the campaign period, which is not even the provision in the first place, would lead to ridiculous consequences. The mischief Section 126 of the Local Government Act seeks to get rid of is an employee of a Local Government gaining undue advantage over his/her opponents in election by using public resources. To say it is alright for such a political leader to take such advantage to campaign or canvass for votes outside of the campaign period would be to defeat

the purpose of the law. I make a finding that Section 126 of the Local Government operates from the time a person becomes a candidate until the conclusion of the election.

With regard to the evidence adduced by the Petitioner to prove the allegation of the use of the official vehicle by the 1<sup>st</sup> Respondent contrary affidavits all aver that they saw the 1<sup>st</sup> Respondent on polling day being driven in motor vehicle LG 0025- 50 by Sam Rubiibi.

The rest of the affidavits are by deponents who saw the 1<sup>st</sup> Respondent being driven in motor vehicle LG 0025- 50 by Sam Rubiibi at Matiri Trading Centre and Matiri Polling Station.

The 1<sup>st</sup> Respondent and Sam Rubiibi in his affidavit No. 146 dispute these allegations. They are further supported in this by the affidavits of Sgt. Kamanyire, Moses Kikumbo and Asimwe Sulaiman whose affidavits are 115, 72 and 114 in support of the Reply to the Petition by the 1<sup>st</sup> Respondent. There are others though but not as specific in denial.

I have carefully evaluated the affidavits of both for the Petitioner and the 1<sup>st</sup> Respondent . In all the affidavits for the Petitioner, the deponents are specific as to the time of arrival of the 1<sup>st</sup> Respondent, the Registration of the official vehicle he was driving in, the driver of the said vehicle and even the passengers on the vehicle. Though in law a fact is not necessarily proved by the size of the numbers alone, in the instant case over 40 affidavits with no major contradictions aver that they saw the 1<sup>st</sup> Respondent using the said vehicle. Like the learned Chief Justice B, Odoki wondered in **Col (Ret) Col Kiiza Besigye Vs. Kaguta Yoweri Museveni (Supra)** it is not possible that over 40 people would conspire to accuse the 1<sup>st</sup> Respondent if he was innocent. I find that the affidavits sworn in support of the case for the 1<sup>st</sup> Respondent are a pack of lies.

Mr. Patrick Mugisha attempted to discredit the evidential value of the letter of the Returning Officer / Chief Administrative Officer saying that it didnt make a finding that the 1<sup>st</sup> Respondent was using the said vehicle and that it merely stated the law. This argument is based on the premises that both the 1<sup>st</sup> Respondent and his official driver claimed that the said vehicle was surrendered to the Chief Administrative officer and was parked on the District Headquarters yard. If this had been the case the Returning officer would not have written to the 1<sup>st</sup> Respondent spelling the legal requirement to desist using the vehicle. In such circumstances what he would

probably have done would have been to reply to the Petitioner saying he found no merit in his complaint. Having instead written Exhibit R 2 1 to the 1<sup>st</sup> Respondent leads to the inference that the letter had not surrendered his official vehicle and was indeed using it in the campaigns as alleged. That must have been the only reason.

Moses Kikumbo who had sworn affidavit 72 in support of the answer to the Petition by the 1<sup>st</sup> Respondent averred that during the election campaigns he was employed by the 1<sup>st</sup> Respondent to drive the latter's private motor vehicle UAF 703 L. Apart from evidence on behalf of the Petitioner that Moses Kikumbo could not have been employed to drive the 1<sup>st</sup> Respondent because he himself was a candidate and had to canvass and indeed canvassed votes himself in his Nissan Sunny 1200 Pick-up, Asimwe Sulaiman in his affidavit 144 deponed that he was throughout the campaigns the driver of the 1<sup>st</sup> Respondent in Motor vehicle UAG 819 M Land Rover.

From the evidence adduced by the Petitioner, which I find to be overwhelming, I find the Petition has proved on a balance of probabilities that the 1<sup>st</sup> Respondent used the official vehicle of Kyenjojo District Local Council to conduct his campaign contrary to Section 126 of the Local Government Act.

### **CARRYING A FIRE ARM AT A POLLING STATION**

It is alleged in paragraph 13 (a) of the Petition that contrary to Section 42 of the Parliamentary Elections Act the 1<sup>st</sup> Respondent went to Matiri Trading Centre Polling Station on polling day armed with an AK 47 Assault Rifle. To prove this illegal practice the Petitioner relied on the affidavits of the very witnesses who swore affidavits to seeing the 1<sup>st</sup> Respondent use the official vehicle of the L.C.V Chairperson at Matiri Trading Centre Polling Station. The relevant affidavits which have already been listed above are 53, 62, 54, 63, 55, 66, 67, 129, 130, 132, 131, 133, 134, 135, 136, 137, 149, 152, 148, 143, 144, 145, 146, 147 and 139 in support of the Petition. The evidence in these affidavits is generally that the deponents saw the 1<sup>st</sup> Respondent being driven in the official vehicle of the L.C.V Chairperson by Sam Rubiibi who was his official driver. On arrival at the polling station the 1<sup>st</sup> Respondent disembarked armed with an AK 47

Assault Rifle. He held the Rifle in the left hand while in the right hand he carried a walking stick. The deponents all stated that the above event took place on polling day as around 11.00a.m.

A few of the deponents added details of what transpired. Sam Katusabe who was at the polling station and swore affidavit 53 deponed that the said official vehicle was driven to the polling station and parked next to his own vehicle. In that vehicle there were the 1<sup>st</sup> Respondent his uniformed and armed guard the driver and a fourth man he did not know. It was his evidence that the 1<sup>st</sup> Respondent asked Mwanguhya Joseph what he was doing at the polling station and on Mwanguhya Joseph asking him why he was carrying a gun, he replied that things had become tough and that he was going back to Kyankwanzi. Mwanguhya then asked the 1<sup>st</sup> Respondent why he should go to Kyankwanzi instead of going to the District Headquarters.

Mwanguhya Joseph himself who swore affidavit 54 in support of the petition gave identical evidence to that of Sam Katusabe. Stephen Kyaligonza, the deponent of affidavit 62 in support of the Petition, after relating how the 1<sup>st</sup> Respondent came out of his official vehicle armed with a gun and walking stick, averred that he heard him say if it means going back to Kyankwanzi we shall go, if it means beating people we shall beat them while Kiiza Henry Buhwa the deponent of affidavit 63 stated that he heard the 1<sup>st</sup> Respondent say if it means beating people we shall beat them, we are going back to Kyankwanzi.

In paragraph 8 of his answer to the Petition, the 1<sup>st</sup> Respondent denied going to Matiri Trading Centre polling station armed with a gun on polling day. He was supported by Nsungwa Alphael who swore affidavit 67 in support of the 1<sup>st</sup> Respondents reply and by Kamanyire Philip the deponent of affidavit 115. Nsungwa Alphael averred that on polling day the 1<sup>st</sup> Respondent went to Matiri Trading Centre to pick up his driver Moses Kikumbo but he did not reach Matiri Trading Centre polling station. The witness did not see the 1<sup>st</sup> Respondent armed. Kamanyire Philip deponed that he was the bodyguard of the 1<sup>st</sup> Respondent and that on polling day the 1<sup>st</sup> Respondent was not armed as alleged. Affidavits 27, 73 and 68 sworn in support of the 1<sup>st</sup> Respondents reply by Kababito Leonida, Moses Kikumbo and Kantu Samuel Abooki respectively also support the case of the 1<sup>st</sup> Respondent.



Mr. Musana submitted that by going armed to Matiri Trading Centre polling station the 1<sup>st</sup> Respondent committed an illegal practice contrary to Section 42 of the Parliamentary Election Act. He submitted that this electoral offence is created in Local Governments elections by the provisions of Section 172 of the Local Governments Act which provides as follows:-

*172. For any issue not provided for under this part of the Act, the Presidential Elections Act and the Parliamentary Elections Act in force shall apply to the elections of Local Councils with such modifications as may be deemed necessary by the Electoral Commission.*

He submitted that in view of the above S. 42 of the Parliamentary Elections Act is part and parcel of the Local Government Act and therefore applicable. The 1<sup>st</sup> Respondent committed the offence or illegal practice personally and therefore the case falls squarely under S. 139 (c) of the Local Government Act, Counsel argued. He pointed out that the incident is testified to by up to 30 affidavits which constitutes overwhelming evidence.

Mr. Patrick Mugisha submitted that the interpretation assigned to Section 42 of the Parliamentary Elections Act vis avis Section 172 of the Local Government Act is not correct because Section 42 above is an applied provision. He submitted that the Local Governments Act creates illegal practices and election offences in Sections 147-159 but deliberately excludes the offence created in Section 42 of the Parliamentary Elections Act which could not have escaped the attention of the Legislature. Counsel contended that it is not possible for the Legislature to create an offence by mere reference as that would offend against the fundamental principle of criminal law that no one shall be punished for an offence unless it is specifically provided for by Statute. Mr. Patrick Mugisha argued that the provisions of Section 172 can not be used to interpret the word **this act** under Section 139 (c) of the Local Government Act to include Parliamentary Elections Act because:-

- (a) The adaptation is so general that it could not have been intended to create criminal offences.
- (b) By its couching it required the Electoral Commission to adopt specific provisions.

- (c) The purported application is only directory in nature and only intended to make the Electoral Commission, while carrying out its function, to revert to other provisions for procedural purposes.
- (d) The specific provisions on which this complaint is grounded is section 139 ( c) of the Local Government Act. That provision relates only to offences committed under the Local Governments Act. The provision had in mind that there were other offences that could be committed by a candidate punishable by any other law- but singled out only those committed under the Local Governments Act.

On the evidence with regard to the 1<sup>st</sup> Respondent going to Matiri Trading Centre Polling Station Mr. Patrick Mugisha found it contradictory. Counsel submitted that it was the 1<sup>st</sup> Respondents bodyguard who was armed but not the respondent himself. He argued that for the 1<sup>st</sup> Respondent to go within one kilometre of a polling station with his armed security and was not in breach of Section 42 of Parliamentary Elections Act.

Section 42 of the Parliamentary Elections Act makes it an offence for a person, while armed with armed or ammunition during any part of polling day to approach within one kilometre a polling station reads in full:-

*42 (1) Any person shall not arm himself or herself during any part of polling day, with any arms or ammunition or approach within one kilometre of a polling station with arms and ammunition unless called upon to do so by lawful authority or where he or she is ordinarily entitled by virtue of his or her office to carry arms.*

No such offence is directly created in the Local Governments Act. However Section 172 of the Local Governments Act imports that offence by reference. It provides:-

*172 For any issue not provided for under this part of the Act, the Presidential Elections Act and the Parliamentary Elections Act in force shall apply to the elections of Local Councils with such modifications as may be deemed necessary by the Election Commission.*

I agree with Mr. Patrick Mugisha that the drafting of Section 172 of the Local Governments Act is rather awkward as far as it is couched in general terms and by it the legislature appears to have aided part of its powers to the electoral commission giving it powers to modify provisions of an act of Parliament. The fact that the Electoral Commission has so far under taken no such modifications is evidence that it did not consider itself up to the task. This appears to be the only aspect of Section 172 of the Local Government Act but not the general reference to the Presidential and Parliamentary Elections Acts.

Mr. Mugisha dwelt on the intention of the legislature and submitted that had Parliament wished to make the offence created under Section 42 of the Parliamentary Act an offence under the Local Government Act it would have directly provided for it in the latter Act. Not having done so, it could not have intended that the offence would be created by reference under S. 172 of the Local Government Act, he contended.

Still talking of the wisdom of the legislature, if it did not wish the offence under Section 42 of the Parliamentary Elections Act to be created by reference under Section 172 of the Local Government Act it would in its wisdom have excluded it expressly from those provisions of the Presidential and Parliamentary Elections Acts.

I also agree that legislation by reference is not the best of practice particularly in case of offences with penal sanctions. In this case the three Acts, the Parliamentary Elections Act, Presidential Elections Act and the Local Governments Act are of one genuine. Their objective is democratization of Uganda society by the holding of free and fair elections leading to good governance. They are not primarily penal in intent. Given the wisdom of the legislature it would not have intended that going armed within one kilometer of a polling station which militates against the principle of free and fair elections is an offence under the Parliamentary Elections Act but not under the Local Government Act. Such a position would be contrary to the letter and spirit of Article 61 of the Constitution. Though Section 172 of the Local Governments Act may not be the best example of draftmanship, it all the same incorporates Section 42 of the Parliamentary Elections Act into the Local Governments Act making it an offence thereunder.

With regard to the evidence in proof of the allegation that the 1<sup>st</sup> Respondent went to Matiri Trading Centre Polling Station, armed with a gun, the Petitioner relied on the evidence of the thirty or so witnesses who deponed that they saw the 1<sup>st</sup> Respondent being driven in the Kyenjojo District L.C. V Chairpersons official vehicle on polling day. In their same affidavits, they averred that the 1<sup>st</sup> Respondent came to the Polling Station at 11.00a.m. disembarked from the vehicle carrying an A.K. 47 gun in the left hand and a walking stick on the right hand. In particular Mwanguhya Joseph, who swore affidavit No. 54M support of the petition, deponed that he confronted the 1<sup>st</sup> Respondent and asked him why he had come to the polling station armed to which the latter replied

things have become tough, I am going back to Kyankwanzi. The deponent of affidavit 53 Sam Katusabe swore to having heard the above conversation and to have seen the 1<sup>st</sup> Respondent armed as alleged. The deponent of affidavit 62 Kyaligonza Stephen and Kiiza Henry Buhwa in his affidavit No. 63 both averred to having heard the conversation between the 1<sup>st</sup> Respondent and Mwanguhya Joseph. Though they differ on what the former said to Mwanguhya Joseph. According to Kyaligonza Stephen the 1<sup>st</sup> Respondent said If it means going back to Kyankwanzi we shall go, if it means beating people we shall beat them and according to Kiiza Henry Buhwa the 1<sup>st</sup> Respondent is reported to have said if it means beating people we shall beat them, we are not going back to Kyankwanzi.

The 1<sup>st</sup> Respondent denied the allegations. He was supported in this by the affidavits of Sergeant Kamanyire Philip, Nsungwa Alphael and Kikumbo Moses Nos. 115, 67 and 72 in support of the 1<sup>st</sup> Respondents Answer to the Petition. In all these affidavits the deponents averred that on polling day the 1<sup>st</sup> Respondent was not armed and except for passing through Matiri Trading Centre, the 1<sup>st</sup> Respondent did not reach the polling station.

Though the 1<sup>st</sup> Respondent and his witnesses above denied going to Matiri Trading Centre Polling Station there is the eye witness evidence of close to thirty witnesses who deponed to seeing the 1<sup>st</sup> Respondent at the Polling station armed with a gun. Some of them heard him and Mwanguhya Joseph exchange words. These witnesses are the same ones who testified to seeing the 1<sup>st</sup> Respondent using his official motor vehicle at the same Matiri Trading Centre Polling Station and whose evidence I had found credible. Most of these deponents were residents of the neighbouring village to that of the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent being a public

political leader, there is no chance that these witnesses could have been mistaken about the identity of the 1<sup>st</sup> Respondent. Besides the whole incident took place during broad day light. Though the mere number of witnesses is not in the instant case the fact that about thirty witnesses all state having seen the 1<sup>st</sup> Respondent on polling day at Matiri Trading Centre Polling Station armed with a gun is compelling. They are unanimous in describing that the 1<sup>st</sup> Respondent carried the gun in his left hand while he held a walking stick on the right hand. It is also conceivable that thirty witnesses would get together and plot to implicate another and at that with consistency.

Mr. Patrick Mugisha attached the evidence for the Petitioner on the grounds that what Kyaligonza Sephen and Kiiza Henry Buhwa stated the 1<sup>st</sup> Respondent to have said to Mwanguhya Joseph is different from what Mwanguhya Joseph himself and Sam Katusabe reported the 1<sup>st</sup> Respondent to have said. I found this discrepancy minor as the root of the matter in issue is whether the 1<sup>st</sup> Respondent was armed at the polling station or not and not what he said.

In the result I am inclined to reject the denial of the 1<sup>st</sup> Respondent. I believe the witnesses for the Petitioner and find that the 1<sup>st</sup> Respondent indeed went to Matiri Trading Centre Polling Station armed with an A.K. 47 Rifle Contrary to Section 42 of the Parliamentary Elections Act, and therefore committed the illegal practice and electoral offence personally.

### **1<sup>ST</sup> RESPONDENTS BODYGUARD GOING ARMED TO THE POLLING STATION**

The Petitioner did not plead that an electoral offence was committed when the escort of the 1<sup>st</sup> Respondent one Sgt. Kamanyire went to the polling station at Matiri armed with a rifle. However a few deponents to the affidavits which implicated the 1<sup>st</sup> Respondent in going to Matiri Trading Centre polling station armed also aver that Sgt. Kamanyire Philip the bodyguard of the 1<sup>st</sup> Respondent went to the Polling Station armed. Sgt. Kamanyire himself and the 1<sup>st</sup> Respondent in crossexamination admitted that much. On this basis Mr. Musana submitted that it should be found that the said Sgt Kamanyire Philip committed an electoral offence or an illegal practice Contrary to Section 42 of the Parliamentary Elections Act with the knowledge or

consent and approval of the 1<sup>st</sup> Respondent. On this type of illegal practice by body guards, Mr. Musana referred to the case of **AMAMA MBABAZI VS. MUSINGUZI GARUGA ELECTION PETITION APPEAL NO. 18/2002** where the trial Judge was criticized for making a finding that the appellants body guards had committed an election offence when the Petitioner had not pleaded such an offence. I am of the view that the authority cited by Mr. Musana does not in any way support his case. It is rather in favour of the 1<sup>st</sup> Respondent in that it was not pleaded in the Petition that Sgt. Kamanyire Philip went to the Polling Station Armed Contrary to Section 42 of the Parliamentary Elections Act with the knowledge or consent and approval. Mr. Musanas submissions in this regard is rejected.

### **USE OF GOVERNMENT OR LOCAL COUNCIL FACILITIES - BODY GUARD**

There is no averment in the Petition that the 1<sup>st</sup> Respondent used a bodyguard being a Government or Local Council facility to conduct his campaign Contrary to Section 126 of the Local Government s Act. Nor is there any affidavit to that effect. However during the cross examination of the 1<sup>st</sup> Respondent he testified that at the commencement of the campaigns he requested for a body guard and one Sgt. Kamanyire Philip was assigned to him. It was his evidence that the said Sgt. Kamanyire Philip provided him security through out the campaign.

Mr. Musana submitted that this constitutes an admission that the 1<sup>st</sup> Respondent used a Government or Local Council facility to wit a body guard to conduct his campaign. Apart from not having shown him the body guard was used to conduct the 1<sup>st</sup> Respondent s campaign . The Petitioner did not set down the use of the bodyguard as a ground of his Petition nor did he adduce any affidavit evidence of this allegation. As this Petition cannot be decided on grounds other than those raised in the Petition, this ground raised during submissions must fail. Besides what Mr. Musana describes as an admission merely states that the 1<sup>st</sup> Respondent had a body guard during the campaign but not that he used such a body guard to conduct his campaign.

### **BRIBERY**

The petitioner in paragraph 13 ( c) of the Petition alleges that the 1<sup>st</sup> Respondent committed the illegal practice and electoral offence of bribery Contrary to Section 147 of the Government Act.

In paragraph 16 of his affidavit in support of the Petition the Petitioner avers that he received from his agents and supporters information that during the election there was widespread bribery and voter buying by the Respondent, his campaign agents, managers and supporters in the run up to the election and on polling day itself.

In support of this allegation the Petitioner relied on the affidavits of Rusoke Moses, Mutambuzi Edison, Tugume Siverino, Agaba Robert, Ntambineza Julius, Gaston Maliro, Kituufu Zaverio, Julius Kihika, Mwirumubi, Kazooba Wilfred and Karugaba Patrick which are affidavits 6, 9, 12, 13, 15, 17 36, 57, 69, 70 and 73 in support of the Petition respectively.

Rusoke Moses averred in his affidavit that on polling day one Kusemererwa a polling agent of the 1<sup>st</sup> Respondent slaughtered an animal (cow) at the Trading Centre near Kyongera polling station in Kyarusoji Sub-County and issued the meat free to voters whom he instructed to vote for his candidate. He also averred in the same affidavit that Nyakahuma John Bosco who was the second polling agent for the 1<sup>st</sup> Respondent in the polling station bought busera local alcohol for voters and instructed them to vote for his candidate. Mutambuzi Edison deponed that one Karaachi a campaign agent for the 1<sup>st</sup> Respondent stopped voters from going to vote at Kyongera Trading Centre polling station by bribing them. He added that the money given for bribing was given by Mwesige who was the District Councilor for Kyarusoji Sub-County.

Tugume Severinos testimony was that the L.C.II movement Chairman bribed his fellow polling agent one Bekunda, got two ballot books or 100 ballot papers from the Presiding Officer, ticked and stiffed them into the ballot box. Agaba Robert deponed that the campaign agents of the 1<sup>st</sup> Respondent namely Kabarole L.C.I Chairman Kyanguha, Bacwa Stephen, Mwesige Francis, Kasaija John and one January bribed voters along the roads leading to Buhura and Kagorra Itambiro polling stations. He also deponed that this malpractices was orchestrated by the Presiding Officer at Buhura polling station one Adolf Kato a known supporter of the 1<sup>st</sup> Respondent.

Gaston Maliro averred that as a coordinator of the Petitioners campaign he witnessed widespread and serious bribery and vote buying by agents of the 1<sup>st</sup> Respondent. He made a police report against Rwanyabuzana at Nyaruzigati polling post under SD Ref. 05/02/03/06. Kituufu Zaverio's affidavit is to the effect that on polling day two shops at Mahasa Trading Centre belonging to Namara and Mrs. Kaijabwango were open and were being used for distributing salt to induce voters to vote the 1<sup>st</sup> Respondent. The shop owners confirmed to him that the salt was being given out so that the recipients could vote for the 1<sup>st</sup> Respondent. According to the affidavit evidence of Julius Kihika Mwirumubi he found L.C. officials at Rugombe Trading Centre distributing money to voters on polling day and soliciting votes for the 1<sup>st</sup> Respondent. He reported the incident to the police, the police arrested the culprits who admitted that they were distributing money but on the instructions of L.C.III Chairman of Bugaaki Sub-County. Julius Kihika Mwirumubi also averred that all the L.C.s in Bugaaki Sub-County were involved in the same malpractice. Sam Magezi who was the brain behind this malpractice was arrested while still dishing out money in Mabaale, Kyabaranga parish after having failed to answer police summons. Kazoba Wilfred deponed that Rwanyabuzana who was a campaign agent of the 1<sup>st</sup> Respondent and the movement Chairperson in the area was reported to the police for bribing and arrested. The last affidavit in support of the Petitioners allegation in this regard is that of Karugaba Patrick.

Patrick Karugaba who states that he is a Parish Youth Councilor and that he supported the 1<sup>st</sup> Respondent as he was the NRMO flag bearer. He averred that on polling day he was called from his business premises in Kijongobya to Mpara Trading Centre by one Emmanuel Tumusiime alias Brown who is the L.C.III Chairperson and the 1<sup>st</sup> Respondents Chief Campaign manager in Mpara Sub-County. The latter gave him Shs. 20,000 to hire a motor cycle to cover Kijongobya, Kisagazi, Ruteerwa and Kamutuumi polling stations. He also used the said motor cycle to transport voters to the polling stations to vote for the 1<sup>st</sup> Respondent. At Kijongobya polling station one Jane Mwesige who was the 1<sup>st</sup> Respondents polling agent informed him that the polling agent of the Petitioner was too strict against cheating. He averred that the said Jane Mwesige gave to him Shs. 20,000 to pass on to the Petitioners agent to silence him. Mr. Karugaba Patrick further deponed that after the above transaction with the agent of the



Petitioner, the Presiding Officer ticked 3 ballot books comprising 150 ballot papers in favour of the 1<sup>st</sup> Respondent and stuffed them into the ballot box.

Again Emmanuel Tumusiime alias Brown approached him at 10am. On polling day and informed him that the polling agents of the petitioner at Kasagazi polling station were being stubborn. Emmanuel Tumusiime then gave him Shs. 30,000 and instructed him to proceed there and bribe the agents so that they could keep quiet. He proceeded there as instructed and gave Shs. 10,000 to the Presiding Officer one Katusabe Christopher Shs. 10,000 Mugisha Richard one of the polling agents of the petitioner and Shs. 5000 to each of the 1<sup>st</sup> Respondents polling agents Mwesige Vincent and Musa. All the above received the bribe and they started stuffing ballot papers in favour of the 1<sup>st</sup> Respondent.

Karugaba Patrick lastly averred that on the afternoon of the polling day when he went to Kamutuumi polling station Emmanuel Tumusiime alias Brown found him there and he gave Shs. 20,000/= to a polling Assistant called Kabyanga and Shs. 10,000 to the Petitioner polling agent Kabasinguzi Agnes. After this the Polling Assistant began issuing multiple ballot papers to known supporters of the 1<sup>st</sup> Respondent in complicity with polling officials and the agents of the Petitioner who had been compromised.

The 1<sup>st</sup> Respondent in his paragraph 8 ( e) of his answer to the Petition avers that he did not himself or with, his approval, consent and knowledge engage in acts of bribery. He repeats the same denial in paragraph 15 of his affidavit in support of his answer to the petition. The case for the 1<sup>st</sup> Respondent is supported by Kabyanga Julius, Sam Magezi, Emmanuel Tumusiime and AIP Ogwal Michael who swore affidavit 98, 96, 97 and 127 in support of the 1<sup>st</sup> Respondents answer to the Petition. Kabyanga Julius who was a polling assistant at Kamutuumi polling station denied having been given money by Emmanuel Tumusiime to make him issue multiple ballot papers to supporters of the 1<sup>st</sup> Respondent. He deponed that the allegation that he and Muhairwe Alice were deployed to give money to and instruct voters for the bus or the 1<sup>st</sup> Respondent are false. Sam Magezi denied that Emmanuel Tumusiime instructed the LC.s to distribute money to voters or to solicit votes for the 1<sup>st</sup> Respondent. The witness deponed that he knows of no LC.s who were arrested in connection with bribery during the election and that in any case these

allegedly arrested are not known to him. He also averred that on the eve of polling day he was suspected to have been in illegal possession of firearms and ballot papers but the police and army cleared him of the suspicion. On his part Emmanuel Tumusiime the L.C.III Mpara Sub-County denied in his affidavit ever having been an agent of any candidate. He averred that he did not give money to Patrick Karugaba to hire a motor bike and to look for votes. He also deponed that he did not give Shs. 20,000 to the Presiding Officer of Kijongobya Polling Station for him to condone cheating.

The 1<sup>st</sup> Respondent also relied on the affidavit evidence of AIP Ogwal Michael who averred that only 9 cases of election malpractice were reported the election of the L.C.V Chairperson for Kyenjojo District. He deponed that in seven of the cases reported no offence was detected whereas two of the cases were referred to the Electoral Commission.

Mr. Musana submitted that this was an election held under the multiparty system of Governance, in which the 1<sup>st</sup> Respondent was the flag bearer of his party the NRM/O . He submitted that of the names of people allegedly involved in the illegal practices of bribery, the 1<sup>st</sup> Respondent admitted they were his agents, Chairman of his party of Local Council members at various levels.

Mr. Musana contended that Kanyamuzana who was a movement Chairman was implicated in the bribery allegations by affidavit 57 in support of the Petition. The case against him was reported under SD/05/02/03/06 of Kyarusenzi Police Post which is reflected in affidavit 127 sworn by AIP Ogwal Michael in support of the answer of the 1<sup>st</sup> Respondent to the Petition. Though Rwanyabuzana himself in his affidavit 28 denies ever bribing anybody and being reported to the police.

Counsel pointed out that Sam Magezi , the L.C.III Chairman Bugaaki was arrested distributing money and his case was reported under SD01/02/03/2006. He also cited Emmanuel Tumusiime alias Brown, L.C.III Chairperson Mpara Sub-County who was implicated by Patrick Karugaba a person from the camp of the 1<sup>st</sup> Respondent.

Emmanuel Tumusiime is involved in many polling stations. Jane Mwesige or Councilor for Kyarusozi is also implicated by Patrick Karugaba in bribery. Mr. Musana contended that apart from the above there were many other instances of bribery.

Mr. Bwiruka submitted that in all the incidents of bribery cited none is cited where the 1<sup>st</sup> Respondent bribed a voter. He pointed out that the only allegation of bribery are against persons who were either holding positions in the NRO Party or those alleged to be campaign agents. Counsel submitted that there is nothing to show that these persons were acting with the knowledge, approval and consent of the 1<sup>st</sup> Respondent. Mr. Bwiruka submitted that though Rwanyabuzana was accused of bribery those allegations were rebutted by affidavits 107, 123, 26, 29, 72 and 114 sworn in support of the answer of the 1<sup>st</sup> Respondent to the petition by Gambogo K. James, Bataringaya Peter, Charles Rwanyabuzana, Mutambuzi and Mwesige Christopher respectively. The allegation is further disproved because the affidavit of AIP Ogwal Michael proves that though the accusations against Rwanyabuzana were lodged with the police, the latter found out nothing was found on him. Mr. Bwiruka also submitted that the allegations of bribery against Emmanuel Tumusiime alias Brown has not been proved and they are denied.

Mr. Bwiruka submitted that Karugaba Patrick who alleges that he was an agent of the 1<sup>st</sup> Respondent and yet attaches no appointment letter nor is he mentioned as an agent in the 1<sup>st</sup> Respondent's campaign programme. He submitted that in the circumstances Karugaba Patrick is a supporter of the Petitioner.

With regard to the allegations of bribery against Mwesige Christopher, District Councilor for Kyarusozi, Counsel submitted these were not proved because those who implicated him did not make a report to the police or other relevant authorities. Counsel said the same of the allegations by Karugaba Patrick against Jane Mwesige. He contended that all in all the allegations of bribery have not been proved by the Petitioner.

Section 147 of the Local Government Act as far as it is relevant to the instant case provides as follows:-

*147 (1) Any person who, with intent either before, during an election either directly influences another person to vote or refrain from voting for a candidate, or gives, provides or causes to be given or provided any money, gift or other consideration to another person, to influence that persons voting, commits an illegal practice of the offence of bribery.*

*(2)*

*(3)*

*(4) A candidate or candidates agent who by himself or herself or any other person who directly or indirectly before the polls on polling day offers, procures or provides or promises to procure alcoholic beverages to any person commits an offence of illegal practice.*

The Petitioner leveled numerous allegations of bribery against the 1<sup>st</sup> Respondent and various other persons including the 1<sup>st</sup> Respondents agents, movement officials and LCs. I propose to tackle the allegations against these other persons first and shall then go back to the allegations against the 1<sup>st</sup> Respondent.

It was alleged by Rusoke Moses that on polling day one Kusemererwa, a polling agent of the first Respondent slaughtered a cow near Kyongera polling station in Kyarusizi Sub-County and issued the meat free of charge to voters whom he instructed to vote for his candidate. In the same affidavit Rusoke Moses alleged that the other polling agent of the 1<sup>st</sup> Respondent at the same polling station by names of Nyakahuma John Bosco bought Busera a local drink for voters and instructed them to vote for his candidate. Mutambuzi Edison alleged in his affidavit that one Karaachi, a campaign agent for the 1<sup>st</sup> Respondent stopped voters from going to vote at Kayogera Trading Centre polling station by bribing them. As stated above in this judgment the standard of proof in elections is on a balance of probabilities and because an election is set aside by proving an illegal practice which invariably constitutes a criminal offence. The degree of probability is higher than in the ordinary civil cases. In the above instances the allegations remain vague. It is not stated in the case of the meat who received it and how many people received the meat. Like wise who partook of the bushera local drink and who was stopped from

voting. In all three cases, the deponents dont aver as to how they came to know of these offences of illegal practice. The deponents of these affidavits in which the above allegations are raised being residents of the same areas from which the victims of the illegal practices are supposed to reside, the deponents ought to have known he identity of those who benefited from the bribery. Because the deponents failed to give the particulars of those bribed the petitioner has not proved that these persons perpetrated any offence of ill bribery.

Equally general are the allegations of Julius Kihika Mwirumubi who averred that the LCs at Rugombe Trading Centre were dishing out money to voters on polling eve and soliciting votes for the 1<sup>st</sup> Respondent. He further deponed that all the LC members of Bugaaki were involved in his malpractice. No where did Julius Kihika aver who these LCs who were dishing out money were nor does he state the identity of any of the people arrested by police and who confessed to dishing out money to voters. Again this nature of evidence of generalization falls far short of the standard of proof required in an election Petition. I accordingly find that the allegations raised in the affidavit of Julius Kihika have not been proved.

Tugume Seriverino averred that on polling day Rwanyabuzana who was the campaign agent and LC.II Chairman for Kasaba Parish went to Kasaba Trading Centre at Mpara polling station in Kyarusozi Sub-County, 300p.m. and bribed Bekunda who was a polling agent for the Petitioner with Shs. 10,000. Having done this he got two ballot books, ticked them and stuffed them into the ballot box. Gaston Maliro averred in his affidavit averred that as a coordinator of the Petitioners campaign he witnessed widespread bribery by agents of the 1<sup>st</sup> Respondent. He had to make a police report against Rwanyabuzana at Nyaruzigati police post under SD Ref 05/02/03/06.

Though much of the affidavit of Gaston Maliro is in general terms, the evidene of Tugume Seriverino is specific. He said Rwanyabuzana came to the polling station at 300p.m. bribe Bekunda the agent of the Petitioner with Shs. 10,000/= Gaston Maliro did not passively observe Rwanyabuzana perpetrate the illegal practice. He opted to report the matter under SD Ref 05/02/03/06 . Though Rwanyabuzana denied committing the illegal practice and electoral offence of bribery and having been reported to the police, I find he did commit the offence. I

am convinced of this if the great detail given by Tugume Seriverino of how the bribery was committed. He gave the place where the offence was committed as the polling station, the person bribed as Bekunda and a polling agent of the Petitioner and the consideration was Shs. 10,000 to condone ballot box stuffing. I also find that Rwanyabuzana had a case against him reported at the police as evidenced by the Annexure to the affidavit of AIP Ogwal Michael.

I now proceed to examine the allegations of bribery leveled against a number of people by Patrick Karugaba, the deponent of affidavit 73 in support of the Petition averred that he was given Shs. 20,000 by Emmanuel Tumusiime the Chief Campaign Manager of the Respondent to hire, a motorcycle to cover Kijongobya, Kisagazi, Ruteerwa and Kamutuumi polling stations. He also used the same motor cycle to transport voters to polling stations. He also used the same motor cycle to transport voters to polling stations to vote for the 1<sup>st</sup> Respondent. He confessed to having received Shs. 20,000 from Jane Mwesige the 1<sup>st</sup> Respondents polling agent to bribe the polling agent of the Petitioner at Kijongobya Polling Station who had been too strict against cheating. He deponed that after this transaction the Presiding Officer ticked 150 1<sup>st</sup> Respondent and stuffed them into the ballot box. At the instance of Emmanuel Tumusiime and with money given to him by the said Tumusiime he bribed the Presiding officer at Kasagazi polling station one Katusabe Christopher, one of the polling agents of the Petitioner, one Mugabo Michael and also gave money to each of the two Polling agents of the 1<sup>st</sup> Respondent.

Lastly Karugaba confessed to having bribed the Petitioners polling agent one Kabasinguzi Agnes at Kamutuumi Polling station and a polling assistant called Kabyanga. These allegations by Karugaba Patrick are denied by Emmanuel Tumusiime, Kabyanga and Sam Magezi.

I have carefully considered the evidence for the Petitioner and the 1<sup>st</sup> Respondent in this regard. I found the evidence of Karugaba to be very precise in detail in that he describes the places where the bribery took place, the time and the amount of money paid as an inducement. The person who provided the money in every case and the names of the persons to whom the money was paid. This is as opposed to the general denials by the 1<sup>st</sup> Respondent and his witnesses. I also believe that Karugaba was indeed working in the camp of the 1<sup>st</sup> Respondent who was the official candidate of NRM to party. There appears to be no evidence adduced to oppose his averments to that effect. One other reason I found very compelling to believe the evidence of

Karugaba Patrick is the fact that he confessed to having committed the offence of the illegal practice of bribery which has penal sanctions. If he was not telling the truth Karugaba Patrick could not have implicated himself. He was just coming to terms with his conscience. He stood to gain nothing by implicating himself. For these reasons . I consider the denials of Emmanuel Tumusiime alias Brown , Kabyanga and Jane Mwesige to be that of his attitude proves the truth of what Oder JSC as he then was stated in **Election Petition 1/2001 (Ret) Col. Dr. Besigye Vs. Kaguta Yoweri Museveni at page 204:-**

*There is no way a witness who is alleged to have committed a criminal offence or malpractice in a personal capacity is going to own such an accusation. This part of behaviour applies to all human beings. This is common knowledge for which proof is unnecessary*

For the above reasons I find that Emmanuel Tumusiime and Karugaba Patrick committed the offence of illegal practice of bribery Contrary to Section 147 (1) of the Local Government Act.

With regard to the allegation of the 1<sup>st</sup> Respondent having committed the offence of bribery Contrary to Section 147 (4) of the Local Government Act, the Petitioner appears to rely on the affidavit of Ajuna Apollo Kasangaki . This is to the effect that the 1<sup>st</sup> Respondent bought for a group of people including the deponent a three litre jerrycan of local potent gin popularly known as kicooli at Kikaras bar at Rwaitengya Trading Centre on polling day. The 1<sup>st</sup> Respondent disputes allegation in his affidavit 145 dated 21/8/2006. This is a case where there is only the word of the witness against that of the 1<sup>st</sup> Respondent. Ajuna Apollo Kasangaki has not been particularly helpful in his affidavit evidence by not stating the persons or some of the persons he was with in Kikaras bar when the 1<sup>st</sup> Respondent procured the drink. Though there is other independent evidence to the effect that the 1<sup>st</sup> Respondent could have entered Kikaras bar, the Petitioner has in my view failed to prove that the 1<sup>st</sup> Respondent procured alcohol on polling day to people as alleged.

Having found that Karugaba Patrick and Emmanuel Tumusiime committed the illegal practice of the offence of bribery it remains now to be decided if the illegal practice was committed with the consent , knowledge and approval of the 1<sup>st</sup> Respondent. Karugaba Patrick in his affidavit

averred that he supported the 1<sup>st</sup> Respondent on party grounds in that the latter was the NRMO flag bearer. Though counsel for the 1<sup>st</sup> Respondent suggested that Karugaba Patrick must have been a supporter of the Petitioner, Rwobuzizi Tarsis who swore affidavit 64 in support of the answer to the Petition by the 1<sup>st</sup> Respondent categorically stated that Karugaba Patrick was the District Youth Representative for the National Resistance Movement Organisation and an agent of the 1<sup>st</sup> Respondent. All the evidence therefore proves and I do find that Karugaba Patrick was indeed an agent of the 1<sup>st</sup> Respondent.

As for Emmanuel Tumusiime alias Brown, Karugaba Patrick describes him as the L.C.III Chairperson Mpara Sub-County and the Chief Campaign Manager. This is denied by both the 1<sup>st</sup> Respondent and Emmanuel Tumusiime himself. However from the description of his activities at various polling stations by Karugaba Patrick, I find that he by conduct acted as an agent of the 1<sup>st</sup> Respondent. And as most of the affidavits on behalf of the 1<sup>st</sup> Respondent and that of the 1<sup>st</sup> Respondent himself merely deny but don't distance the 1<sup>st</sup> Respondent from the activities of Emmanuel Tumusiime alias Brown which I found to have taken place, I find that he was by conduct the agent of the 1<sup>st</sup> Respondent. I find in accordance with the discussion above regarding the law of agency that Emmanuel Tumusiime alias Brown was an agent of the 1<sup>st</sup> Respondent by recognition and acceptance as to render the 1<sup>st</sup> Respondent liable for the illegal acts of Karugaba Patrick and Emmanuel Tumusiime alias Brown.

## **UNDUE INFLUENCE**

The Petitioner in paragraph 13 of the Petition accuses the 1<sup>st</sup> Respondent of the illegal practice of the offence of undue influence contrary to Section 154 of the Local Government Act. To prove this allegation, the Petitioner relied on affidavits 12, 14, 39, 53, 57, 61, 80, 85 and 59 sworn by Tumusiime, Bwire, Tusiime John, Nyangabyaki, Sam Katusabe, Gaston Maliro, Rutankudira Edward, Omuhereza Mugume, Kasaija M and John Mary Byaruhanga respectively.

Tumusiime Bwire deponed that when he visited Kajuma Catholic Church polling station in Kyarusozi he found the LCs of the area had arrested a polling agent of the Petitioner and had been drugged to the Trading Centre and forced to sit down. Because of protest the polling



agent was released but his appointment letter was confiscated. Tusiime John averred that Busingye Ernesti, the LC.III Chairperson of Kyarusozi Sub-County deployed Busingye Wilson Byaruhanga Edward, Kamaza Moses, Simon and Bonabana Dolice to stop and threaten people from campaigning for the Petitioner . He also deponed that on polling day the same Busingye Ernesti deployed Kamuza Moses and Vincent Kateeba to obstruct the road and prevent the Petitioners supporters from voting and the said Busingye Ernesti after casting his vote, sat at the junction to the polling station and ordered the supporters of the Petitioner to go home without voting. He also threatened Bafumbira voters with the confiscation of their land and eviction if they voted the Petitioner and he lost. The evidence of Nyangabyaki is that the L.C.II Movement Chairperson went to the polling station with a policeman and accused him and the supporters of the Petitioner of belonging to FDC , harassed and ordered them to leave immediately. He had to abandon the polling station for his own safety. The testimony of Sam Katusabe is to the effect that the 1<sup>st</sup> Respondent went to Matiri Polling Station armed with a gun and stated that things had become tough so he was going back to Kyankwanzi. This same evidence is given by Mwanguhya Joseph and many other witnesses when the allegation that the 1<sup>st</sup> Respondent went to a polling station armed was being considered. Gaston Maliro averred that in Kyarusozi Sub-County the supporters of the Petitioner were harassed and intimidated by LCs. And movement leaders and that the campaign agents and supporters of the 1<sup>st</sup> Respondent deployed the army to assist him. Rutakundira Edward stated in his affidavit evidence that Abdallah Kamanyire the LC.III Chairman Katooke Sub-County who was also the campaign agent for the 1<sup>st</sup> Respondent went to Katembe polling station at the starting of polling and harassed voters calling them Banyarwanda and Bafuruki migrants who had come to spoil the country and that they should leave the area. The evidence of Omuhereza Mugume, a polling assistance at Kazinga polling station was to the effect that Mugisha Stephen a campaign agent of the 1<sup>st</sup> Respondent came to the polling station and harrassed the polling agents of the Petitioner accusing them of belonging to FDC. He also accused the agents and the Petitioner of being foreigners in the area and ordered them to leave. Kasaija a polling agent at Kinogero Iraara polling station in Katooke Sub-county gave evidence that one Tindigwihura jumped off motor vehicle UG 1117 belonging to Hon. Butiime, chased and assaulted Musiime known supporter of the Petitioner. John Mary Byaruhanga averred that the agents of the 1<sup>ST</sup> Respondent and the polling officials abused him because he was making an independent tally at the polling. He

singled out the 1<sup>st</sup> Respondent's campaign agent one Gamboga Manuel. It was also his evidence that an Administration askali one Iddi came to the polling station with a gun and grabbed the exercise book he was using for making his independent rally.

The 1<sup>st</sup> Respondent filed affidavits sworn by Mugisha Stephen, Samwiri Nkirimwani the Movement Chairman Kyarusozzi Sub-County and by himself denying the occurrence of incidents of undue influence as alleged.

Though the allegations of undue influence are denied, it is to be noted that the affidavits the Petitioner relied on to prove the illegal practice are several and cover diverse polling stations and places. As summarised above the deponent of each of these affidavits mentions the names and positions of the perpetrator of the illegal practice alleged. The names of the victim, the place where the malpractice occurred and the effect of the illegal practice on the victim and members of the public. It is inconceivable that all these witnesses could have framed these people.

The offence of undue influence is committed if one:-

- (a) (i) *Makes use of or threaten to make use at any force or violence.*
- (ii) *Inflicts or threatens to influence a person or through any other person or any temporal or spiritual injury, damage, harm or loss upon or against any person in order to induce or compel that person to vote or refrain from voting or on account of that person having voted or refrained from voting; or*
- (b) *if that person by abduction, duress or any fraudulent device or contrivance impedes or prevails upon a voter to either to vote or to refrain from voting -----,*

I am satisfied that the above evidence adduced against Busingye Erinesti that he stopped people from campaigning for the Petitioner, that he abstracted the Petitioner's supporters from going to vote, and that he threatened Bafumbira voters with the confiscation of their land and evicted if they voted for the Petitioner constitute undue influence within the context of Section 154 (1)

of the Local Governments Act. Equally so is the evidence of Gaston Maliro in Kyarusuzi Sub-County supporters of the Petitioner were intimidated by the LCs and movement leaders. That if Omuhereza Mugume and the other deponents.

From the clarity of the affidavits sworn in support of the Petition and from the sheer number of affidavits accusing various people of this illegal practice of undue influence, I find that the Petitioner has proved to the required standard of proof that the 1<sup>st</sup> Respondent committed the illegal practice of the offence of undue influence indirectly through his agents and other party officials. While the liability of the 1<sup>st</sup> Respondent for the acts of his agents is rather straightforward, what needs to be looked at is his liability for the acts of movement leaders.

The election in dispute was under the multipart dispensation as opposed to previous elections held in Uganda under the Movement system of Governance. Under the latter a candidate stood on his own merit and could derive his support and election agents from anywhere. Under the multipart system each candidate is flag bearer of his party or organisation. The 1<sup>st</sup> Respondent was the NRM party and NRM/O Party organisation was under a duty to support the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent submitted to the system whereby all party organs supported him and campaigned for him. In other words he endorsed their agency and therefore he is liable for the acts of the movement leaders during the election period aimed at gaining electoral victory for the party and the 1<sup>st</sup> Respondent.

I also find that the 1<sup>st</sup> Respondent committed the illegal practice of the offence of undue influence personally. I base myself in this on my earlier finding that he went to Matiri Trading Centre polling station on polling day armed and uttered words to the effect that things had become tough and he was going back to Kyankwanzi. That these words and his state of being armed at a polling station constituted undue influence is borne out by the evidence that his presence created commotion and the public left the trading centre. I accordingly find that this ground has been proved on a balance of probabilities.

**ISSUE NO I**

Having answered issue No. 3, I now go to issue No. 1 which is whether in Organising and conducting the election there was failure or non compliance with the electoral laws.

Article 60 of the Constitution creates the Electoral Commission and spells out its composition and tenure. Article 61 of the Constitution of the Republic of Uganda clause 1 (a) states one of the primary functions of the Electoral Commission to be

*61 (1) (a) to ensure that regular free and fair elections are held*

The same provision while vesting the Electoral Commission with powers and functions of conducting elections, it at the same time limits it to ensuring the elections are free and fair. That is the standard set by the constitution whether the elections are Presidential Parliamentary or Local Government if the Electoral Commission in breach of its constitutional mandate organises and conducts elections which are not free and fair, such an election is not an election as the Constitutional standard will not have been met.

Conducting a free and fair election entails providing conditions which enables and empowers a voter to cast his/her vote for the candidate of his choice on his /her own accord. The voter should be able to cast his vote without any harassment, hinderance, intimidation or threats. There must also be no illegal practice of bribery to induce a voter to vote in one way or other. Generally no fear should be created in the mind of the voter of being victimized after the election.

In achieving this high constitutional standard the Electoral Commission must be honest, competent to conduct elections. The candidates must be represented at every crucial stage of the election e.g. the nomination, voting and the counting of votes. Free and fair elections aim at achieving and promoting a free, just and democratic society as is the aim of the National Objectives and Directives Principles of State Policy.

The Petitioner contends that the 2<sup>nd</sup> Respondent failed in its mandate to conduct a fair and free election for the Kyenjojo L.C.V Chairperson. He cited numerous illegal practices committed by the agents of the 2<sup>nd</sup> Respondent.

The Petitioner, in his paragraph 7 ( c) of the Petition, alleged that contrary to the principles of transparency enshrined in section 132 (3) of the Local Government Act and Section 53 of the Parliamentary Elections Act, the officials of the 2<sup>nd</sup> Respondent in particulars, the Assistant Returning Officer of Kyenjojo District , at gun point ejected the Petitioners Representatives out of the Tally centre where the results of the individual polling stations were being received and tallied and the tallying of the results proceeded thereafter in the absence of the Petitioners agents or representatives.

To prove this allegation the Petitioner relied on the affidavit evidence of Friday Clovis, Musinguzi Jonathan and Kabanyomozi Naome who swore affidavits 2, 160 and 159 in support of the petition. Friday Clovis averred that he was appointed by the Petitioner as his representative to oversee on his behalf the receiving and tallying of results. He was assisted by Karamagi Michael, Musiguzi Jonathan, Mwesige Patrick and Kabanyomozi Naome. He deponed that before the tallying commenced it was agreed between them and the Electoral Commission officials that they would be allowed to study the source, documents before entering individual results but when the tallying started they were denied the source documents. It is his evidence by 200 a.m. the petitioner was ahead and it was at this stage that the Assistant Returning officer Joseph Byaruhanga left the room. On his return Joseph Byaruhanga ordered him and his group to leave the tally room. They were ejected by police men at gun point.

Musinguzi Jonathan deponed that the tallying proceeded well until 200a.m. when Joseph Byaruhanga made calls and when advised Radio West to announce that the tallying was over and the 1<sup>st</sup> Respondent had won. When he and his colleagues protested Byaruhanga Joseph ordered them to be ejected from the tally room by two men one of whom was armed with a pistol. And on coming out he saw the building in which the tally room was well surrounded by police and army . Kabanyomozi gave evidence identical in substance.

Joseph Byaruhanga swore affidavit 142 in support of the 1<sup>st</sup> Respondents answer to the Petition but swore none in support of the case of his principal, the Electoral commission. In the affidavit he swore, he denied the allegations leveled against him by the evidence for the Petitioner. The 1<sup>st</sup>

Respondent had won. When he and his colleagues protested Byaruhanga Joseph ordered them to be ejected from the tally room and they were accordingly ejected by two men one of whom was armed with a pistol. He further averred that on coming out they found the building that housed the tally room had been surrounded by police and the army. Naome Kabanyomozi gave identical evidence in substance to the above.

The 2<sup>nd</sup> Respondent did not file an affidavit in reply to the above evidence Joseph Byaruhanga, the Assistant Returning Officer Kyenjojo and therefore the agent of the 2<sup>nd</sup> Respondent strongly swore an affidavit in support of the answer of the 1<sup>st</sup> Respondents to the Petition. I found this form of pleading rather strange because the cases of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are independent of each other. One can fail while the other could succeed and therefore each of them need evidence in its support. In paragraph 8 of the 2<sup>nd</sup> Respondents answer to the petition, he denies the allegations in paragraph 7 ( c ) implicating Byaruhanga Joseph in general terms . Friday Clovis, Musinguzi Jonathan and Kabanyomozi they swore affidavits implicating him as the agent of the 2<sup>nd</sup> Respondent who opts to keep quiet and produce no evidence in defence of its case. It is trite that if a party files no affidavits to contradict what the other party has deponed to, the inference to draw is that the facts raised are unchallenged and are to be presumed to be the truth.

Notwithstanding that the evidence adduced for the Petitioner is unchallenged, Mr. Mwene Kahima, learned counsel for the 2<sup>nd</sup> Respondent submitted that the affidavit evidence of the witness was contradictory. He pointed out that whereas Musinguzi Jonathan and Kabanyomozi Naome deponed that they were ejected by two men in civilian clothes, Friday Clovis averred that they were chased by policemen. I am of the view that that discrepancy does not go to the root of the matter which is that the agents of the Petitioner were sent out of the tally room and the tallying went on in the absence of the representatives of the Petitioner. I believe the evidence that the agents of the Petitioner were ejected and tallying of votes continued in their absence an act which contravened the principles of transparency enshrined in Section 132 (3), of the Local Government Act and in Article 68 (3) of the Constitution. Counsel also submitted that the margin Friday Clovis said the margin by which the Petitioner was leading in the election at 200a.m. at the time of tallying in his oral evidence was different from what he deponed to in the affidavit. I

don't find that discrepancy major as to impeach the credibility of that witness as what really is in issue is whether the Representatives of the Petitioner were about during the tally. In the result I find that the 2<sup>nd</sup> Respondent breached. The principles of fairness and transparency in the election of the L.C.V Chairperson of Kyenjojo District.

In paragraph 7 (a) of the Petition it is alleged that contrary to Section 12 (1) (b) and (c) of the Electoral Commission Act, the 2<sup>nd</sup> Respondent failed to control the distribution and use of ballot books and boxes to eligible voters, which resulted in the said ballot boxes and books falling in the unauthorised possession by agents and supporters of the 1<sup>st</sup> Respondent who used them to commit election offences such as multiple voting and ballot stuffing.

The evidence in proof of this allegation brought by the Petitioner is to be found in affidavits 3, 16, 22, 34, and 101 in support of the Petition sworn by Tibahwa Stephen, Isoke Mohammed, Kaija Morris, Kyamanywa and Kadabu Beatrice. Tibahwa Stephen deponed that on polling day one Muganga a movement mobiliser and a campaign agent for the 1<sup>st</sup> Respondent ferrying a ballot box on his motor bike. When he met the said Muganga next at Katooke Trading Centre, the ballot box was no longer with him. He averred further that a day after the polls he visited his uncle Expedito Kyaligonza at Mwaro village and saw two ballot boxes the type used in the District Chairpersons election in his house in the sitting room. His uncle was a campaign agent for the 1<sup>st</sup> Respondent. The evidence of Isoke Mohamed is that soon after the election he visited Expedito Kyaligonza at Mwaro who was a supporter of the 1<sup>st</sup> Respondent. The said Expedito openly boasted of how their camp had cheated the election. To prove his point Expedito Kyaligonza displayed two ballot boxes which were in his sitting room. He identified the ballot boxes as the transparent types which were used during the Presidential and District Chairperson Elections. In this regard Kaija Morris deponed that he saw the vehicle of Mugisa Robert alias Mugisa Sankei parked at Kyarusozzi in front of the premises of Aliganyira the L.C.I Chairman. Mugisa Sankei, Sam and Aliganyira carried a ballot box and placed it in Mugisa Sankei's car and drove with it towards Kyarusozzi. He averred that when he followed the vehicle to the Senior Secondary School he saw a motor vehicle Reg. No. UG 1177W in which was Hon. Tom Butiime, the 1<sup>st</sup> Respondent and the driver. It is further his evidence that he then saw Sam Mugisa alias Sankei transfer the ballot box from the premises of Aliganyira into Motor vehicle UG 1177W

which then drove off. He averred that on returning to the trading Centre, he found Mugisa Sankei celebrating and boasting that because of the above the 1<sup>st</sup> Respondent was going to win the election by a margin of between 5000 6000. Kaija Morris deponed that the ballot box he is talking about is the black metallic type used to seal and forward the results to the Returning Officer after counting votes at individual polling stations.

Kyamanywa deponed that he received a report of a missing ballot book from a polling agent of the Petitioner one Mrs. Kaswara at Humura polling station. A polling assistant confirmed to him that when a ballot box was opened at the start of voting, the seals of the ballot book was missing. Incident was reported to the Police under SD/18/02/03/2006. Kyamanywa also testified that he received a similar report from one Kesi Kaliisa in Kakabara which he forwarded to the police and advised the concerned agent to notify the District Registrar.

Lastly Kadebu Beatrice gave affidavit evidence that she reported to Mwaro polling station on polling day at 7.30a.m. to find the ballot box half full though voters had not started to come to vote. He also averred that the Katooke Sub-County movement Chairperson went to the polling station, was given more than 4 ballot papers which he cast in the view of everyone else.

The second Respondent just like in the case of the allegations in paragraph 7 ( c) of the Petition did not file an affidavit in support of his answer though the allegations are denied by the affidavits of Hon. Butiime and other deponents who swore affidavits in support of the Answer of the 1<sup>st</sup> Respondent to the Petition.

On the whole Mr. Mwene Kahima resorted to questioning the capacity and efficiency on the basis that they were sworn by deponents who are stated to be both literate and illiterate.

Mr. Musana submitted that the evidence on record showed the illegal practices took place in that a person who is not involved in the electoral process was seen carrying a box and another person is found in possession of two ballot boxes in his house. The incident involving Hon. Butiime and the 1<sup>st</sup> Respondent is also true and proved, Mr. Musana submitted because the same Hon. Butiime who stated on oath that after voting he went back to Kampala was seen in the company



of the 1<sup>st</sup> Respondent ferrying a ballot box. According to the affidavit of Ogwal Michael Hon. Butiime reported a criminal case that evening at the police.

Though the fact that the second Respondent filed no affidavit in reply leads to the evidence of the witnesses for the Petitioner unchallenged, the evidence of these same witnesses is very compelling on its own merits. I find the Petitioner has proved the allegation that the 2<sup>nd</sup> Respondent failed to control electoral materials has been proved on a balance of probabilities. This illegal practice has agency of election officials.

Again contrary to the principles of freedom and fairness it is alleged in the Petition in paragraph 7 ( b) (ii) of the Petition that Presiding Officers coerced polling agents to sign Declaration of Results Forms in blank before the end of voting at many polling stations in particular at Kyabulyezibwa, Nyaburara, Kibale Trading Centre, Kyembogo, Twabuurro and Isanga Nursery School.

To prove this illegal practice the Petitioner relied on affidavits 4, 33, 44, 119, 156, 59, 72, 92 and 70 sworn in support of the Petition by Rukanyangira Amos , Byaruhanga Richard, Bukenya Richard, Irumba Bashir, Kazooba Wilfred, John Mary Byaruhanga and Julius Kihika, Mwirumubi respectively. In each and every one of these affidavits the deponents who are all polling agents of the Petitioner deponed that the Presiding Officers in the respective polling stations either tricked, coerced or forced them to sign the Results Declaration Forms blank before the close of voting. Rukanyangira Amos averred that the Presiding officer of Nyaburara polling station Kyakuha Jackson ordered him and Tweheyo Samwiri who was his fellow polling agent to sign the Declaration of Results forms in blank before the close of polling. Byaruhanga Richard deponed that the Presiding Officer at Ngangi Church polling station tricked him and Buhurya Richard into signing the Declaration of results forms in blank before the close of polling. The other deponents aver to the same illegal practice except that the incident in each case occurred at a different polling station involving a different presiding officer. The 2<sup>nd</sup> Respondent as already observed earlier did not file any affidavits in support of its answer to the Petition in which he denied all illegal practices. What is on record is a number of affidavits filed and sworn in support of the answer of the 1<sup>st</sup> Respondent to the Petition which cannot serve to support the case of the 2<sup>nd</sup>

Respondent. In the circumstances as the averments by the above deponents are not at all challenged by affidavits in reply, they are taken as the truth. The Petitioner has accordingly proved on a balance of probabilities that the Presiding Officers at many polling stations caused Declaration of Results Forms to be signed in blank before the close of voting contrary to the principles enshrined in Article 61 (1) (a) of the Constitution and Section 12 (1) (e) of the Electoral Commission Act.

It is alleged in paragraph 7 (b) (vi) of the Petition that many election officials like Presiding Officers allowed unauthorised persons to vote, pre-ticking of voters registers and ballot stuffing and alteration and false declaration of results and multiple voting. Evidence of this allegation is to be found in the affidavits 5, 8, 15, 29, 35, 30, 46, 51, 73, 76, 82, 84, 98, 101, 18, 37, 45, 50, 59, 73, 75, 77 and 99 in support of the Petition sworn by Asiimwe Robert, Habomugisha H., Tugume Siriverino, Nkurunziza Bernard, Mucunguzi Richard, Byaruhanga Godfrey, Aliganyira Godfrey, Kato Robert, Kanyamuzi John, Karugaba Patrick, Kurabiraho Charles, Mugarura Moses, Byaruhanga Beatrice, Tweheyo Samwiri, Morning Charles, Rwambale Elijah, John Maru Byaruhanga, Simon Rumuhuga, January Vincent and Kawesa Edward respectively. In these affidavits the deponents aver to pre-ticking of the register, multiple voting, unauthorised voting by Presiding officers and other unauthorised persons, ballot stuffing and alteration and false declaration of results. The second Respondent filed no affidavits contradicting these allegations. I find therefore that the Petitioner has proved these incidents of illegal practice on the part of election officials and partly on the part of Presiding Officers to the requisite standard of proof.

In paragraph 7 (b) (1) of the Petition the Petitioner alleges that the Presiding Officers acting in concert with agents and supporters of the 1<sup>st</sup> Respondent voted for illiterate and blind voters. In proof of this allegation the Petitioner relied on affidavits 11, 32, 1, 25, 9 and 30 sworn by Alinaitwe Wilber, Kutegeka Archangel, Byamugisha P. George Aheebwa, Kisaija Pauson and Aliganyira Godfrey respectively in support of the Petition. Alinaitwe Wilber deponed that Bogere Gerald of Kigoyera Trading Centre polling Station personally voted for illiterates. The evidence of Kutegeka Archangel is that the Presiding Officer at Karambi polling station in Kasule polling Station instead allowed the agents of the 1<sup>st</sup> Respondent to vote for illiterates instead of advising the later to choose who was to vote for them. Byamugisha averred that the

Presiding Officer of Kigoyera parish Hall polling station allowed the Kigoyera Parish Chief one Kasangaki to vote for illiterates while according to the affidavit of Aheebwa George the Presiding Officer of Bwahuurro Polling Station Ruhweza Mathias voted personally for illiterates. These affidavits were not contested and are therefore taken as the truth. Even on their own merits they give compelling evidence that the concerned Presiding officers took it upon themselves to vote or to allow other persons to vote for illiterates contrary to Section 129 of the Local Government Act. I find this allegation of illegal practice to have been proved on the requisite standard.

All in all I find that the electoral process in his election was riddled with numerous instances of non compliance with the electoral laws like failure to control the use and distribution of electoral materials, bias and impartiality on the part of the electoral officials, pre-ticking of registers and ballot stuffing by and with the tacit consent of the electoral officials and the exclusion of the Representatives of the Petitioner from the tallying exercise which is a very crucial stage of an election. I answer the first issue in the affirmative and find that in organising and conducting the election there was failure and non-compliance with the electoral laws.

#### **ISSUE NO. 2:-**

This now takes me to the second issue which is whether such non compliance affected the election in a substantial manner. Mr. Musana submitted that the election now in issue failed to meet the standard of a free and fair election as set out in the case of **Winnie Babihuga Vrs. Masiko Winifred Komuhangi & 2 others Election Petition 4/2001** where Musoke Kibuka J said:-

*A democratic election is merely a medium for the expression of the free will of the people while choosing their representatives etc----*

Mr. Musana submitted that if this election is subjected to both the qualitative and quantitative tests the conclusion arrived at will be that the non compliance with the electoral laws affected the election result in a substantial manner. He argued that if the quantitative test is applied to this

election the effect of the serious illegal practices including ballot stuffing in favour of the 1<sup>st</sup> Respondent, vote tallying in the absence of the Petitioners agents leaving Presiding Officers to do what they pleased including unabsurd result showing that 477 out of 478 registered voters voted the vote difference of 5158 between the 1<sup>st</sup> Respondent and the Petitioner would have disappeared. He also pointed out that things to consider when applying this test would be the evidence of vote stuffing in 22 polling stations, cases of pre-ticking of votes. Counsel submitted that with the above relying on the quantitative test the Petitioner has proved that the malpractices affected the results in a substantial manner.

With regard to the qualitative test counsel submitted that irregularities in 60 polling stations have been highlighted. He contended that there was widespread rigging intimidation, ballot stuffing. The Petitioners agents were chased away from polling stations, forms were filled in blanks. There was irregular voting for illiterates and the 2<sup>nd</sup> Respondent failed to control electoral materials. He described the election a sham. For the proposition that the difference of 5158 between the candidates is not too large, Mr. Musana cited **Musinguzi Garuga Vrs. Amama Mbabazi (supra)** where the vote difference was 13000 and yet court after considering the anormally of the irregularities and malpractices decided the case in favour of the Petitioner. Mr. Musana submitted that this case passes both tests and prayed that this Court finds that the non-compliance with the electoral laws affected the results in a substantial manner.

Mr. Patrick Mugisha submitted that the allegations of illegal practices and electoral officers have not been proved more so because the deponents of most of the affidavits as the subject had no capacity to answer them. On the irregularities Counsel submitted that whether the qualitative test or quantitative test is applied, the irregularities proved could not affect the final result of the election in a substantial manner. He argued that the case of **Winnie Babihuga Vrs. Winnie Matsiko Komuhangi & 2 others** is not applicable here because the facts and circumstances of the two cases are different. In the case of Winnie Babibuha over 52% of the Constituency was challenged with serious complaints of election malpractices, whereas in this case, only 60 polling stations out of a total 260 had any complaints. He contended that even of these 60 complaints not all of them would lend to the annulment of the election. He argued that in all the complaints of bribery and intimidation etc the 1<sup>st</sup> Respondent has not been personally implicated nor has it been shown that such acts were done with his knowledge or consent and approval. Mr. Mugisha

submitted that the Petitioner cannot agree that the declaration of Results Forms were improperly signed when they were signed by his agents nor can he complain of the election results when he conducted an independent tally by which he lost. Counsel contended that in the above circumstances the Petitioner was caught by the doctrine of election.

Mr. Mwene Kahima, learned Counsel for the 2<sup>nd</sup> Respondent submitted that the Petitioner failed to prove against the 2<sup>nd</sup> Respondent any of the allegation on the Petition because the affidavits in support of those allegations had been sworn by persons who had no capacity to swear them. He also argued that the other affidavits which were filed later than the Petition itself were barred by law and out of time as they contained fresh grounds.

Before going into the merits of the 2<sup>nd</sup> issue I must state that the issue of affidavits raised by Mr. Mwene Kahima has already been exhaustively discussed above in this judgment. I dont therefore propose to revert to it.

In determining whether irregularities in the electoral process and contravention of the electoral laws in an election affected the results on a substantial manner leading to it being set aside the courts use two tests namely:-

- (a) The quantitative test
- (b) The qualitative test

**See (Ret) Col. Kiiza Besigye Vrs. Kaguta Yoweri Museveni (Supra).**

Under the qualitative test the margin between the votes of the winning candidate and those of the losing candidate in the light of the votes that were affected by the irregularities in and the non compliance with the electoral laws . If it is found that were it not that there was non compliance with the electoral laws the margin between the two protagonists would have been substantially reduced or even that the losing candidate would have won the election petition is said to have passed the test in that the result of the election would have been substantially affected.

The qualitative test examines the quality and conditions under which the election was conducted. If the election was held in a fair and free atmosphere and represented the will and choice of the people, such an election passes the qualitative test. But an election will invariably fail the

qualitative test if it is held contrary to the principles of fairness and in contravention of the electoral laws will it have failed the qualitative test. An election marred by fear, theft, unfairness, violence, cheating and criminal acts must fail the qualitative test.

In the instant case the margin between the 1<sup>st</sup> Respondent who was declared the winner of the election and the Petitioner was 5158 votes. To pass the quantitative test the Petitioner needs to show that if the irregularities in the electoral process and the non compliance with the electoral law had not been perpetrated the margin that divided him and the 1<sup>st</sup> Respondent would have been drastically reduced or non existent or that he would have won the election.

In the instant case, there are a few witnesses like Karugaba Patrick, the deponent of affidavit 73 in support of the Petition who stated the exact number of votes that were cast in favour of the 1<sup>st</sup> Respondent directly as a result of the illegal practices of the offences of bribery, ballot stuffing, undue influence and other malpractices. Those votes if all added up dont reach 2000.

The vast majority of votes the Petitioner complained of were those resulting from ballot stuffing , pre-ticking of the register, multiple voting and things like that. In most of these cases the deponents who testified to these abuses did not state the number of ballot papers were stuffed into ballot boxes, how many of the votes were in favour of the 1<sup>st</sup> Respondent even in the cases of multiple voting. As no numbers are testified to it is difficult to say because of these malpractices the margin between the two candidates would be reduced by a particular margin.

With regard to the qualitative test I have made various findings regarding the quality of the election. Credible evidence was adduced of the 1<sup>st</sup> Respondent using the official LC.V Chairpersons vehicle during the campaigns and on election day. I also found that contrary to Section 42 of the Parliamentary Elections Act, he went to Matiri Trading Centre polling station armed with a gun and that by being armed at a polling station this constituted the offence of undue influence contrary to Section 154 of the Local Governments Act. The Petitioner was not represented at the tallying exercise which is a very crucial stage in an election. This was not because his representatives opted out but because they were ejected from the tally room or centre by an electoral official, contrary to the principle of fairness. On various pretexes many presiding officers caused polling agents of the Petitioner to sign Declaration of Results Forms in blank and

at least two cases the agents of the 2<sup>nd</sup> Respondent allowed electoral materials ballot boxes to fall into the hands of unauthorised person.

Though these illegal practices affected the quality of the election, I dont find them to have been so pervasing as to have affected the result of the election in a substantial manner. I agree with Mr. Patrick Mugisha that the abuses complained of took place in less than a ¼ of the Polling Stations measuring the vast majority of the 260 polling stations had no complaints and proved illegal practices.

All in all, the second issue is answered in the negative as the Petition has not passed both the qualitative and quantitative test.

#### **REMEDIES ISSUE NO. 4**

The Petitioner made the following prayers that it be declared

1. That the 1<sup>st</sup> Respondent was not validly elected as the District Chairperson of Kyenjojo District.
2. That the Petitioner is the validly elected District Chairperson of Kyenjojo District.
3. Alternatively that the election Results for the District be set aside and a new election be held.
4. That new and impartial Returning and Polling Officials should conduct the new election.
5. That the Respondent pay the costs.

Mr. Musana repeated these prayers and additionally prayed that a Certificate for two Counsel considering the intricate and complex nature of these proceedings Mr. Patrick Mugisha asked for a certificate for three Counsel for the same reasons.

During the final submissions prayer No. 2 that the Petitioner be declared the validly elected Chairperson of Kyenjojo District was abandoned. This was rightly done as the Court would rather that the people representative be chosen in a free and fair election.

Prayer No. 3 is that the election by which the 1<sup>st</sup> Respondent was elected Chairperson of Kyenjojo District be set aside. Grounds upon which a Local Government election may be set aside are to be found in Section 139 of the Local Governments Act. In the context of the present Petition the relevant subsection is 139 ( c) which provides as follows:-

*139 ( c) the election of a candidate as a Chairperson or a member of a Council shall only be set aside on any of the following grounds if proved to the satisfaction of the Court-*

*(a)*

*(b)*

*( c) That an illegal practice or any other offence under this act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.*

The election of a Chairperson of a District shall therefore be annulled or set aside on proving that he committed an illegal practice or electoral offence personally or that such an illegal practice was committed with his consent or knowledge and approval. In this judgment I have found that the 1<sup>st</sup> Respondent personally committed illegal practices contrary to Section 42 of the Parliamentary Elections Act in that he went to a polling station armed, Contrary to Section 126 in that he used a Government facility to conduct his campaign and that by the act of going to a polling station armed and uttering the words Things have become tough, I am going back to Kyankwanzi or words to that effect he committed the electoral offence of undue influence. I also found that some of the illegal practices committed by his agents and by National Resistance Movement Party leaders were with his implicit consent or knowledge and approval. For the above reasons I hereby set aside the election for the Kyenjojo District Chairperson held on the 2/3/2006 and order the holding of fresh elections. Consequent up setting aside the said election I declare that the 1<sup>st</sup> Respondent was not validly elected the Chairperson Kyenjojo District and declare that post vacant. I direct that the new election be organised and conducted by electoral officials other than these who were in charge of the previous one who have given elections and democracy a bad name.



Considering the sheer volume of the case, the complexity of the issues the research undertaken by Counsel and regarding all the electoral laws of his country, I hereby issue a Certificate for two Counsel for the Petitioner. Had the Petition failed Counsel for the 1<sup>st</sup> Respondents would have been similarly entitled.

The costs of this Petition shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

.....  
**AUGUSTUS KANIA**  
**JUDGE**  
**15/09/2006.**

Delivered in presence of Mr. Musana for the Petitioner  
Mr. Bwiruka for the 1<sup>st</sup> Respondent.  
1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent present.  
Mr. Bwiruka also holding brief for the Counsel for 2<sup>nd</sup> Respondent Mr. Mwene Kahima.  
Ms. Kinjojo Flavia Assistant District Registrar.  
Mr. Mutabazi Court Clerk.

.....  
**AUGUSTUS KANIA**  
**JUDGE**  
**15/09/2006.**

Mr. Bwiruka:- Under Rule 29 of the Parliamentary Elections Party which are applied by Section 172 of the Local Governments Act which provides giving oral notice of appeal on behalf of the 1<sup>st</sup> and second Respondents against the whole judgment of this Court I pray for the record and judgment for purposes of appeal.

Court:- Oral application giving notice noted.

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**AUGUSTUS KANIA**

**JUDGE**

**15/09/2006.**

