

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA

ELECTORAL PETITION

**HC-03-CV-EP-0008-2006**

**SHABAN SADIQ NKUTU**

**VERSUS**

**ASUMAN KYAFU AND ANOTHER**

**BEFORE: HONOURABLE JUSTICE D. K. WANGUTUSI**

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**JUDGEMENT**

The 2<sup>nd</sup> day of March 2006 was an election day for District Chairmen commonly known as LC.V Chairmen. Just like in all the other districts in Uganda, Iganga also held the aforementioned elections. Laban Kasiko John, Kisambira Wabodah Emmanuel, Asuman Kyafu, and Shaban Sadiq Nkutu were the candidates who saw themselves as capable of leading the people of Iganga District.

In the contest that followed, the Electoral Commission tallied results and found 70,915 votes for Asuman Kyafu and 42,665 votes for Shaban Sadiq Nkutu.

Mr. Shaban Sadiq Nkutu being aggrieved with the conduct of the elections and the results filed this petition against Mr. Asuman Kyafu and the Electoral Commission seeking nullification of the results.

We shall for the purposes of these proceedings refer to Nkutu as the Petitioner, to Kyafu as the 1<sup>st</sup> Respondent and to the Electoral Commission as the 2<sup>nd</sup> Respondent.

The Petitioner gave several grounds in support of his petition.

He alleged that the whole electoral process was flawed. That there were acts of intimidation, bribery and violence.

He alleged that the 1<sup>st</sup> respondent in breach of the electoral laws, used his official motor vehicle to campaign at various rallies.

That the 1<sup>st</sup> Respondent agents voted more than once and were engaged in ballot staffing and distribution of ballot booklets.

That civil servants also were prohibited by the law to campaign, were engaged in doing so.

That the elections were not free and fair because bogus policemen in police uniform were planted at polling stations where they worked in favor of the 1<sup>st</sup> Respondent.

That elections began before 7.00 a.m.

That there was pre-ticking of ballot papers.

The Petitioner also alleged that he was denied representation at several polling stations, during voting, counting and tallying votes.

Further that the 2<sup>nd</sup> Respondent deployed polling officials who were partial in favor of the 1<sup>st</sup> Respondent. That because of this there were interchanging of electoral results.

The 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent both denied that there were malpractices. They contended that the elections were conducted in a fair and just manner. They demanded for proof.

The following issues were drawn from the pleadings and formed the basis of these proceedings.

1.

Whether the elections were conducted in accordance with the law.

2. If not whether such misconduct of elections affected the results in a substantial manner.

3. Whether illegal practices were committed by the 1<sup>st</sup> Respondent or by his agents with his knowledge, consent or approval.

4. Reliefs.

On the first issue the Petitioner contended that the second appellant managed and conducted the elections in complete breach of the Parliamentary Election Act and in disregard of the relevant provisions and principles of the Constitution, the electoral laws, which non compliance with the law affected the results of the election in a substantial manner rendering it invalid. Further that the 1<sup>st</sup> Respondent and his agents and supporters committed illegal practices and various electoral offenses as will be enumerated here below. That the sum total called for nullification.

### Government Vehicles

Under this head the Petitioner told court that although the law specifically prohibited the use of government facilities during campaign, the 1<sup>st</sup> Respondent did use government vehicles. He alleged that the respondent used motor vehicle LG 0019-11 and an ambulance whose centre he had forgotten but later said it was of Namungalwe and another of Nsinze Health Centre.

The respondent told court that he was an LC V Chairman and remained so during campaign. Mr. Kirenda the Chief Administrative Officer in his affidavit told court that the 1<sup>st</sup> Respondent remained in office and still retained his privileges and benefits using the motor vehicle in execution of his official duties.

In this matter while the petitioner and Isabirye Ibrahim P<sub>7</sub> said the 1<sup>st</sup> Respondent used government vehicles during campaigns, they do not say to which campaign rally or that they saw him personally. PW<sub>7</sub> Isabirye said he saw me Sadiq Kyafu in the official motor vehicle distributing money, at Budhuuba, but that this is the same PW<sub>7</sub> who said he saw voting at Lumbuye a non gazzeted station. But the Petitioner himself said that at Lumbuye there was no voting because in response to information he went there and found no voting took place at that station. Its even just so because there were no result returns from that place or other non gazzeted. Isabirye's evidence was therefore questionable.

Furthermore Amis Bamutole who also alleged to have seen the official vehicle in use several occasions, did not state when, where and what was going on when he saw it. It remains difficult to decide whether the times the petitioner was seen he was not on official duty.

Likewise while the Petitioner alleged use of Namugalwe ambulance, he did not say where and when. He even said he did not know its registration numbers. Worse still under cross examination he said he did not see the ambulance physically and he could not confirm they were ambulances.

Because of the foregoing I find the head on use of government vehicles unproved.

Relatives and Friends appointed by Electoral Commission:

Under this head the Petitioner alleged that the Electoral Commission appointed officials who were either friends or relatives of the 1<sup>st</sup> Respondent and as such they acted in his favor and exhibited bias. \_

One of the officials accused by the Petitioner was Sarah a Sub-County Chief. The Petitioner alleged that Sarah was an in-law to the 1<sup>st</sup> Respondent and yet appointed a presiding officer. When asked under cross examination under what circumstances she was an in-law, the Petitioner replied that he did not know under what circumstances.

Further more the petitioner alleged that Sarah was partisan because she urged every one who went to her office to vote for the 1<sup>st</sup> Respondent. This he said he was told by Aramanzani Kakaire. The said Aramanzani Kakaire did not however swear any affidavit.

Still on Sarah he said Kakaire had told him that Sarah had given ballot papers to Badiru Kasigala but as I have said Kakaire whose information the Petitioner relied upon did not swear any affidavits. This left court with nothing to go by unless it believed Kakaire's information who was not available for cross-examination. In the absence of such the court finds no proof of Sarah's misconduct.

Still on relatives and friends the petitioner contended that the appointment of Grace Ndizawa a Presiding Officer yet he was a son of Gregory Ndizana who was a campaign coordinator of the 1<sup>st</sup> Respondent was wrong, breached the law and worked against the principles of free and fair elections.

I have gone through the laws and regulations governing elections and I have not come across any provision that bars a son of an active politician from holding office in the Electoral Commission. To do so would be to reduce the employment opportunities to such sons of politicians. What the petitioner should have proved to court, was that, because of such appointment Grace Ndizawa influenced the vote in favor of the 1<sup>st</sup> Respondent. This was not done and court finds this ground like the one of Sarah's with no support and can not stand.

It was also alleged that Ssempira, Kwerinda and the Medical Officer held campaign meetings in favor of the 1<sup>st</sup> Respondent. The court was however not told what took place in the meetings. These were government officials who must from time to time meet. If one is to use meetings as a ground, he

must show that the agenda, was to draw favor for one of the candidates. In the absence of such evidence, merely stating that they met is not enough. Courts will not act on mere suspicion.

For example the petitioner said he saw Ssempira two to three times. That the first time he saw him in his office. The other two times he by passed him. The petitioner went on to say that he could not identify him. One wonders whether he ever saw him hold the meetings.

He further said Mastula and Isabiryie also saw them in Bukoma where they are born. But even Mastula and Isabiryie do not tell court what transpired in these meetings. To hold that they were pro-Kyafu campaign meetings would be to act on unproven allegations.

#### Intimidation, Violence and Assault:

Another complaint by the Petitioner was that pro-Kyafu people intimidated his agents and voters. He said on of his supporters called Kaija was beaten up.

That at some polling stations his supporters were being forced to sign declaration Result Forms. That his agent at Bugobi one Godfrey Basalirwa told him that he had been beaten and forced to sign. Saidi Salleh PW<sub>4</sub>, told court at Bugobi he found forms signed before the voting ended. While it is true the forms were signed early in time, there was no evidence that force had been used.

The 1<sup>st</sup> Respondent's officials had instead asked the agents to sign early because at the closure of the elections there was always the rush to deliver the results to the collection centre. None the less evidence is abundant that when the forms were withdrawn elections went well until the end when fresh declaration forms were signed by all agents.

As for Kaija's assault there is no evidence to show that the 1<sup>st</sup> Respondent was involved or that he approved the act. At the same time Kaija did not swear any affidavit to say he had been assaulted. No reasons are given for leaving out the beaten and using the observer. The same applies to Godfrey Basalirwa who is alleged to have been beaten at Bugobi.

#### Non Gazetted Polling Stations:

the Petitioner alleged that the Electoral Commission had on voting day set up polling stations which were not gazetted. He mentioned Lunguye and Ikumbya. Under cross examination, he said on receiving information, he rushed to Ikumbya but there was not voting going on. There is also no evidence that voting took place at any ungazetted place. Amongst the declaration forms exhibited or result tally sheets, no ungazetted stations are shown. No one came to say that he or she had voted in such a place. Its

therefore this court's finding that no ungazetted polling stations have been proved to have existed.

#### Ballot Staffing, Ballot Boxes and Ballot Booklets:

The other allegation was that the 1<sup>st</sup> Respondent's supporters and agents had committed offences of ballot staffing. He said he did not witness this himself but was told by Kyafu's agents like Waiswa Peter, Mbeyagala Juma. Mbeyagala Juma was not available for cross examination and therefore his evidence was struck out. The other person who allegedly told the Petitioner about ballot staffing was Kakaire. This Kakaire did not however swear any affidavits.

PW<sub>4</sub> Saidi Salleh Halage said he was a supervisor of the petitioner. That while on duty at Primary School Polling Station at 4.00 p.m. he did not find anybody apart from polling agent, presiding officer, LDU and polling assistants who were staffing ballot papers in ballot boxes. That when he asked as to what was going on he was chased away. That he went and sat in his car fifty meters away. Under cross examination he said after 40 minutes he went back and collected the declaration forms. They had been signed by the agents of the Petitioner and respondent. The declaration form Ex RR<sub>1</sub>P was shown to court. Isiko Muhandi and Salim Isiko had signed as agents. PW<sub>4</sub> told court that he did not know any of the agents of the Petitioner and that he did not know whether they were the Petitioner's agents or not. Since there is nothing to suggest that the Isikos were not agents of the Petitioner and the Petitioner has not denied them, court can only but conclude that these were the Petitioner's agents and what they endorsed was correct reflection of what the voters in that area decided. In a declaration form there are provisions for recording mishaps. None were recorded save that the other two candidates had no agents at Bubutya Polling Station. Ballot staffing has not been proved.

The Petitioner also alleged that he received a report that the 1<sup>st</sup> Respondents agents were in possession of ballot boxes.

PW<sub>10</sub> Abey Kanyoto on his affidavit told court that on the election eve, they got information that the 1<sup>st</sup> Respondents team had pre-ticked votes that they were distributing through out the District.

That at 3.00 p.m. as they drove they saw three vehicles loading ballot boxes into the boots. That as they approached they all drove off towards Bunya. They off loaded ballot boxes at Kako's. Stones were hurled at them and they withdrew and reported to police. That after voting 10 ballot papers were recovered from Kako with help of police. He under cross examination said

the ballot boxes were used at Buligo the following day.

The problem is that the Petitioner did not file the declaration forms of Buligo. They would have shown whether the agents objected to the use of boxes that had pre-ticked ballot papers. The fact that the agents of Buligo did not give any objection is indicative that the ballot boxes that were used at Buligo were not tampered with or pre-loaded with ballot papers.

The other thing with PW<sub>10</sub> is that while in his affidavit he swore that he said that his men saw the boxes during the day at 3.00 p.m., under cross examination he changed it to night hours. If it was 3.00 p.m. at a place near a market as he says I wonder whether the said Amunye would pull out boxes and take them in full view of the populace.

Lastly PW<sub>10</sub> said they recovered 10 ballot papers from Kakos and took them to police, but its surprising that they have not exhibited them. What is most interesting is that no one was even called from police to at least prove the entry of the complaint and the reception of those ballot papers. The foregoing leaves court unconvinced that there were ballot boxes going around and that even some ballot papers were recovered.

This brings us to the ballot booklets.

In his evidence the petitioner averred that the 1<sup>st</sup> Respondent agents were given ballot booklets to pre-tick and staff ballot boxes. In his affidavit the petitioner deposed in paragraph 27 as follows:

“That even after the electioneering process, one resident and a well known 1<sup>st</sup> Respondents supporter was arrested with four booklets of ballot papers each containing 50 (fifty) sheets of ballots as reported to the CID Headquarters under reference JEF 150/2006”.

In his affidavit PW<sub>9</sub> Peter Waiswa deposed having been approached while in the presence of Nyende Paul, by an agent of the 1<sup>st</sup> Respondent who took him to the NRM office which also doubled as the 1<sup>st</sup> Respondent Headquarters. That at the office he was received by Munyu Nyende who gave him four ballot booklets with an ink pad and advised him to tick them and stuff the ballot box very early before the real voting begun. That on reaching home, he begun the ticking but before long he received news that his cousin had died. So he did not even vote.

That after election Kanyoto sent Nyende Paul to him and pleaded that he surrenders the ballot papers to the Petitioner. That convinced he took the ballot booklets to Kampala where the Petitioner was on 23<sup>rd</sup> March 2006 and

met him at Nkurumah Road waiting. That they then proceeded and recorded statements under Ref.CID/GEF/150/2006. The books were surrendered to one Catherine.

PW12 Mugogo Tucker also supported the foregoing. He told court that he collected a policeman on request of the petitioner. The policeman Alex Saturday by name interrogated Waiswa and had them taken to CID Headquarters, where the Petitioner, Abbey Kanyoto and Waiswa Peter recorded statements.

The first thing with this evidence is that while the Petitioner said the ref. number of the case was JEF 150 2006 the two PW<sub>9</sub> and PW<sub>12</sub> said it was CID/GEF/150/2006.

This is not helped by the disappearance of the books.

During cross examination PW<sub>9</sub> who had said he went with Munyu Nyende again went ahead to say its Munyu Nyende who had received them.

PW<sub>9</sub> said he only got to know of how unlawful his possession of the ballot booklets was only after going to police. This does not agree with his affidavit in which he said that he was first persuaded and convinced that he would not be arrested before he went to police. Yet later he says he feared to go to police because he feared arrest. That he did not know that pre-ticking was wrong yet he admitted he had been an agent in 2001.

These were the answers of PW<sub>9</sub> on cross examination. He was not straight forward. Its no wonder the booklets were not exhibited. These were books allegedly found. They were handed to police. When it came to court they were not produced. In their absence the police officer who received them should have testified as to their whereabouts. In their absence, a description say by their serial numbers should have been given to court. Not even their exhibit slip from police was brought to court. Such important exhibits should have been foremost on the list of exhibits. Its being left out raises doubt as to whether it even existed. From the foregoing the petitioner falls short of proving the existence of the booklets or that PW<sub>9</sub> ever surrendered such booklets to the police.

#### The Tally Centre and Change of Results:

The petitioner also alleged that the 1<sup>st</sup> Respondent accompanied by the



former vice President Kazibwe, the Chief Administrative Officer Kirenda, the officials of the 2<sup>nd</sup> Respondent and PW8 Faruk Kibwiru went to the tally centre and altered the results in favor of the 1<sup>st</sup> Respondent. The petitioner in paragraph 214 deposed as follows:

“That during the tallying the officials of the 2<sup>nd</sup> Respondent alleged failure of the printer and therefore could not proceed with the tallying process at around 11.00 p.m. However they later on without my consultation connived with the 1<sup>st</sup> Respondent and his agents and went back in the tallying room at around 2.00 a.m. and started concocting results in favor of the 1<sup>st</sup> Respondent”.

The Petitioner also told court that at 2.00 a.m. he received a phone call from Ali Mugoya who told him tallying was going on. So the petitioner telephoned Abdul Batambuze and Mohamad Kasumba to go and verify. At 3.00 a.m. Mohamed rang and told him the doors were locked at the tally centre. That he heard as if there was some one inside but did not climb to see. That the place was under guard of military police. That Batambuze also rung and told him that they could not verify whether there was anything going on.

PW8 Kibwiru in the affidavit deposed that after transporting voters they went to the 1<sup>st</sup> Respondents. That former Vice President Wandira Kazibwe found them there. They then went to Kirenda's home. They picked Kirenda and another man and they drove to the tally centre. At the tally centre there was only one security man. They entered and Ms Kazibwe ordered the man they had gone with to sit and alter the results. That the man altered them in favor of the 1<sup>st</sup> Respondent. That Kirenda was standing near the computer man while this went on. Then Daido Ayub gave the computer man 250,000/ and 50,000/. To PW<sub>8</sub> (himself).

Under cross examination PW8 said he had first transported votes with Ayub from 8.00 a.m. to 2.00 p.m. that the motor vehicle he used was not a Toyota. It was Registration UAG 006X. then later he said he did not know whether it was Toyota or not.

He said they were at the 1<sup>st</sup> Respondents house at 1.30 p.m. That they reached the tally centre at 3.00 a.m.. There was only one security man. There was no one in the tally room. That the man who operated the computer was found at Kireenda's home. That they left the tally room at 4.30 a.m. They were eight people in all Kirenda inclusive.

Cross examined by counsel for the 2<sup>nd</sup> Respondent he said, “I do not know Kirenda”. “I can not identify him”.

Right from the start PW8 Kibwiru sounded unclear. He was a driver of a Toyota pick up. On the election day he said Ayub gave his omnibus taxi to drive. He exhibited ignorance of the registration number. Instead of UAG 004X he said he used UAG 006X. While registration numbers might be difficult to remember, it's surprising that he did not know whether the motor vehicle he drove was a Toyota or not. Surely as a driver he should have known which motor vehicle he was driving.

On time, in the affidavit PW<sub>g</sub> deposed that he transported people from 8.30 a.m. to 12.00 midday. In court and while on oath he said he transported people from 8.00 up to 2.00 p.m. Yet at the same time he was at the 1<sup>st</sup> Respondent's place by 1.30 p.m. This is a clear conflict in time.

The Petitioner told court that the 1<sup>st</sup> Respondent went to the tally office at 2.00 a.m. But PW8 said they reached the tally office at 3.00 a.m.

But then both the hours 2.00 and 3.00 a.m. are put in doubt because Mohamed and Batambuze were at the tally centre by 3.00 a.m. They neither saw the 1<sup>st</sup> Respondent, former Vice President and their entourage arrive or leave the tally centre. Since both Batambuze and Mohammed had specifically been sent by the Petitioner to see what was going on at the tally centre they would certainly have seen the group of eight which included the politically targeted opponent if they (1<sup>st</sup> Respondent and company) had gone there.

What even makes Kibwiru (PW<sub>g</sub>) evidence more suspect is that he said he saw only one security man yet everyone else said the place was full of military men. Lastly PW<sub>g</sub> who had said he met Kirenda, went with him to the tally office, and saw him stand near the computer could not identify him when asked by counsel for the 1<sup>st</sup> Respondent, rendered evidence that he went with others to the tally centre perforated and unbelievable. They could not have been there and been invisible to Mohammed and Batambuze and others who reported to the Petitioner all the time of what was going on at the tally centre.

Neither could he have been with Kirenda the whole evening right from his home up to the tally centre and fail to identify him when asked to do so. I am not satisfied with the evidence, it leaves a lot to be desired and is rejected.

#### Bribery:

Lastly I would look at the allegations of bribery.

One of the campaign coordinators of the 1<sup>st</sup> Respondent was Gregory Ndizawa. Grace Ndizawa the son to Gregory was a polling official. In their

affidavits Lukungu Adam and Rose Takuba deposed that on the polling day Gregory Ndizawa RW2 went to the polling centre, pulled out a bundle of Shs.1000 and gave it to Grace Ndizawa in the presence of many. That people lost tempers and demanded an explanation. Lukungu also said that Grace Ndizawa was temporarily arrested.

In their affidavits the Ndizawas explained the money issue.

Ndizawa Gregory said in evidence that Grace Ndizawa was not only his son but still under his care. That before leaving home to his polling station Grace Ndizawa had left a note requesting for money for lunch, since he was going to be at his duty station for the whole day.

Both the Ndizawas swore affidavits. The senior Ndizawa withstood the rigorous cross examination. The younger Ndizawa was not cross examined seemingly because he was believed. In my opinion a parent giving his son lunch money, who is going to remain fixed in a foodless work place for a whole day is not only understandable but a parental duty as well.

The fact that Grace Ndizawa was confronted as Lukungu Adam stated, but was left to continue with his work, and the fact that at the end of the day the results at that polling station raised no dispute shows that the father-son lunch duty relationship did not interfere with just and fair elections. In the absence of inducement or any evidence that the money father gave to son influenced results or was so intended, it would be far fetched to hold that it was bribe.

The other bribe of 50,000/. from Ayub to PW<sub>8</sub> and 250,000/. of Ayub to the computer operator has been dealt with in detail under the head of tally centre.

The other is that alleged by Aidah Namugema PW<sub>5</sub>. in her affidavit she said as a group of women in Kasokoso they met the 1<sup>st</sup> Respondent's wife 3 times and on each occasion she gave each of them 5000/. Asking them to vote her husband. PW<sub>5</sub> said she had a role in this women's group. What is interesting is that she could not name any one in this alleged group although she said none of the members of the group voted for the 1<sup>st</sup> Respondent because he had called them prostitutes when he addressed them. Moreover this issue of the 1<sup>st</sup> Respondent addressing them seems to be an after thought because it did not appear in the affidavit.

That being so there is nothing under this head to show that the 5000/. If given at all was with his knowledge or approval.

There were other allegations of bribery like the one where Hon. Katuntu organized villagers and then allegedly called the 1<sup>st</sup> Respondent to give

money to them.

The question to whether a staunch FDC member like Hon. Katuntu could have joined hands with a staunch NRM member like the 1<sup>st</sup> Respondent to bribe voters in favor of the 1<sup>st</sup> Respondent when other opposition members were also contesting was not answered and left a lot of doubt in the averments of the Petitioner and his witness.

All in all the allegations of bribery have not been proved. There also lacks even evidence in attempt to show that these malpractices save the issue just concluded, that they were within the knowledge, direction or approval of the 1<sup>st</sup> Respondent.

The sum total is that the elections have not been shown to have been conducted outside the law.

The fore going also therefore disposes of the 2<sup>nd</sup> issue whether misconduct affected the results in a substantial manner which must be answered in the negative that it did not.

On the 3<sup>rd</sup> issue following the analysis and findings in the first issue its also held that no illegal practices have been proved to have been committed by the 1<sup>st</sup> Respondent or his agents.

Finally the Petitioner having failed to fulfill his obligation as a Petitioner to prove the grounds of the petition, this petition stands dismissed with the petitioner to bear the costs of the petition.

HON. JUSTICE D. K. WANGUTUSI

**JUDGE**

21.12.2006