

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

HCT-03-CV-EP-0008/2011

HON. GAGAWALA NELSON WAMBUZI PETITIONER

5

VERSUS

1. RETURNING OFFICER KALIRO DISTRICT

2. ELECTORAL COMMISSION RESPONDENTS

10

3. KENNETH LUBOGO

BEFORE: THE HON. LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

15 Hon. Gagawala Nelson Wambuzi the Petitioner in this case, the 3rd Respondent Kenneth Lubogo and others were candidates in the Parliamentary Elections held on 18th February, 2011 in Bulamogi Constituency. The election was organized and conducted by the 1st and 2nd Respondents

The 3rd Respondent was declared winner at the close of the election and thereby the validly
20 elected member of Parliament of the Bulamogi Constituency. The Petitioner was the runner-up to the election.

According to the results published in the Uganda Gazette the 3rd Respondent obtained 23,136 votes as against the Petitioner's 21,898 votes.

25 Due to some errors at two polling stations that the 2nd Respondent subsequently rectified, the Petitioner's votes increased to 22,363 votes. The 3rd Respondent's results did not change. However, the difference in results between the two candidates was reduced to 773 votes.

Dissatisfied with the results, the Petitioner filed this petition in the High Court Jinja, contending that the election was conducted in contravention of the provisions of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act, 2005; and

that the contravention of the said laws affected the result of the election in a substantial manner, thereby rendering it an invalid election.

The Petitioner further contended that, the entire electoral process in the Constituency, beginning with the campaign period right up to polling day, was characterised by gross irregularities, malpractices, violence, acts of intimidation and torture, lack of freedom and transparency, unfairness, commission of numerous electoral offences and illegal practices all contrary to the law. The alleged acts were listed under paragraph 4 (a) – (s) of the petition.

The Petitioner also stated that the 3rd Respondent directly benefited from the said acts of non-compliance with the law. Adding that, the 3rd Respondent personally and or through his agents with his knowledge, consent or approval also participated in the commission of the illegal practices and offences set out in paragraph 7 (a) – (g) of the petition, and is therefore liable.

The petition was supported by the affidavit of the Petitioner together with several other affidavits of his agents, supporters and supervisors at the election, plus a list of documents on record. Refer to affidavits marked as P1- P12

The following remedies were sought:

- a) A declaration that the 3rd Respondent was not validly elected as directly elected member of Parliament for Bulamogi Constituency
- b) A recount of votes cast be ordered or
- c) The election of the 3rd as directly elected member of Parliament be annulled and a fresh election conducted
- d) The Respondents pay the costs of the petition
- e) Such other remedy available under the electoral laws as the court considers just and appropriate in the circumstances.

In reply to the petition, the 3rd Respondent denied all the allegations of the Petitioner, asserting that the election was peaceful and was held and conducted in accordance with the electoral laws, without any connivance or collusion with the 1st Respondent or other persons.

The 3rd Respondent maintains that the Petitioner and or his agents like all candidates had access to the polling stations whose management was the responsibility of the 1st and 2nd Respondents. And all allegations of participation in any illegal practices either directly or

indirectly through his agents or having any knowledge thereof or consenting to the same was vehemently denied.

It is also the contention of the 3rd Respondent in the alternative but without prejudice to earlier denials that, if at all there was any non-compliance with the electoral laws and
5 practices, such non-compliance did not affect the results of the election in a substantial manner.

Arguing that the loss of the election by the Petitioner does not imply non-compliance with the electoral laws, the 3rd Respondent prayed for dismissal of the petition with costs.

The reply to the petition was supported by affidavits in reply to the petition, including those
10 of the 1st and 2nd Respondents, together with the documents listed as R₁ 1 - R₁ 12 and R₃ 1 – R₃ 9.

The following were the agreed issues:

1. Whether there was non-compliance with the provisions of the electoral laws.
2. Whether the non-compliance affected the result of the election in a substantial
15 manner.
3. Whether the 3rd Respondent by himself or through his agents with his knowledge, consent and approval committed any electoral offences during the election
4. What remedies are available to the parties?

Hearing began on 10.12.12 with cross examination of the Petitioner and 13 of his witnesses.

20 **PW1** the Petitioner confirmed to court that all the deponents who swore affidavits apart from himself were his agents or supporters. That while he was denied representation and results were interchanged at a number of stations, the only station mentioned in paragraph 4 (b) of the petition was Namwiwa polling station. That his agents did not sign the declaration of results forms and he could not identify the signature of one of his agents on the form for
25 Namwiwa, stating that the agent who brought him the form told him the results had been changed.

While claiming that he was also denied representation at Butongole polling station, the Petitioner at the same time stated that his two agents at the station gave him a copy of the declaration form Annexure 'A' and that he believed the results.

However, he could not explain how the agents got the forms if they were denied representation.

The tally sheet for Butongole indicated that the Petitioner got zero votes and 1 vote at Namwiwa. And it is from the declaration of the results forms and the information of his
5 supporters that he corrected the results at the 2 polling stations. While the anomaly was later corrected by the Returning Officer, the Petitioner asserts that he was denied a recounting of the votes.

Referring to creation of ghost polling stations, the Petitioner stated that his agents told him and it is common knowledge in the village that a ghost station was created at Bulondo
10 village. That the said station does not exist in the official gazette but during the election, it was set up at someone's house. Neither is it indicated in the tally sheets.

Claiming that many of the declaration of results forms were forged, the Petitioner avers that he could therefore not tell how many votes he got from the declaration of results forms.

About the alleged stuffing of ballots, the Petitioner's evidence was that he could not give the
15 serial numbers of the ballots stuffed as they were not allowed to inspect the ballot papers. That therefore, all polling stations became suspect because they were denied a recount.

However that, he did not know of any person who voted more than once as he was merely told by his agents. And that the petition and supporting affidavits were based on information from his agents and supporters.

20 While contending that the 3rd Respondent was both directly and indirectly involved in the malpractices, the Petitioner admitted that he did not see him personally commit any of the alleged offences that is, bribery of voters. He said he was told by his agents that the 3rd Respondent had ballot papers in his possession and supplied them to his agents and supporters.

25 Although confirming the contents of paragraph 4 (b) (1) of the petition, at the same time the Petitioner denied the truth thereof, when he stated that it is not only his wife who voted at Namwiwa.

The Petitioner admitted that there are contradictions in the NRM Party structures, pointing out that some of his supporters committed election offences against him and that the 3rd
30 Respondent who had been his treasurer stood against him as an independent.

Remarking about the switching of results in tally sheets, the Petitioner gave an example of Bulumba polling station, although he admitted that he never got a copy of the declaration of results form from the station. He observed that complaints were verbally made to the Returning officer and in writing to the Chairman of the Electoral Commission and that the
5 Commission responded in writing.

That apart from the two stations admitted by the Commission to have had errors, there were several other polling stations where results were changed, citing as example the 5 polling stations where agents swore affidavits. He added that the results of ghost stations were incorporated in the Tally sheets.

10 The Petitioner insisted that many of his supporters were denied to vote and the agents chased away from the polling stations. But he produced no declaration of results forms where any of his agents refused to sign and gave reasons for not doing so.

Acknowledging that corrections were made in the results at Butongole and Namwiwa, on the other hand the Petitioner claimed that this it affected the overall result since the 3rd
15 Respondent's results were not reduced and only those two stations were revisited. He stressed that the ghost polling stations increased votes for 3rd Respondent and reduced his own.

PW2 Dr. Shaban Mugerwa one of the supporters of the Petitioner told court he voted from Namwiwa polling station. He attested that when he reached Nankoola polling station in the
20 afternoon, he found rowdy youth at the station but the 3rd Respondent was not there and police was present.

The witness stated that paragraph 2 of his affirmation was from information received. Nevertheless that the violence meted out on voters especially those of NRM included chasing voters away, threatening violence, abetting of crime by police officers by pushing voters of a
25 particular candidate and while allowing them to vote while denying others.

That the rowdy youth threatened to smash his car with tree branches thereby forcing him to flee and to park at a distance of about 200 meters. However, he could not name any of the youth who were violent or any other person threatened other than himself. He declared that he voted freely and the threats of violence did not affect him personally but that they affected
30 the overall tally as agents and voters of a particular candidate were chased away. He added

that he did not look at the declaration of results form of the station as he was chased away. When Police provided re-enforcement the polling agent was taken back.

The witness claims he reported to police on phone and therefore no complaint was entered into the police station diary.

- 5 Commenting about counting of votes he said did not know if the polling agent was present and he does not know what any of the candidates scored at the polling station.

As to his affirmation he certified that it was signed at lawyer Matovu's chambers and that he does not know the Commissioner of Oaths Deo Bitaguma.

10 The witness was the District Elections Supervisor for the Petitioner and insists he played the role entrusted to him as per the terms of reference. While he could not recall how many polling stations were in the area he pointed out that he kept in touch by phone with all polling agents. Although not indicated in his affirmation, he revealed that there were many other polling stations apart from Nankoola where he received complaints of violence.

15 That at Nankoola polling station there were 2 polling agents including one Bazigu Charles the lead agent. The witness made affirmation to confirm the allegations of the said agent who referred to people who chased him a way as "**rowdy supporters of 3rd Respondent but did not name them**". He never saw the rowdy youth himself.

20 Asked about Ballot stuffing, PW2 stated that Bazigu Charles told him about bribery of voters and that a bundle of 56 votes were brought by thugs and stuffed in the box. This information is not in this witness's affirmation but that he was confirming what is in Bazigu's affidavit. He could not tell court any serial numbers of the stuffed ballots because according to him it was the responsibility of the agent to note serial numbers of the votes, while his responsibility was to receive the final number of votes.

25 Also that the agent told him that, polling officials were assisting under age voters to cast ballots and that pre-ticked ballots were being distributed and the Petitioner's supporters were chased away. Whereas there were other candidates, the real contention was between the Petitioner and 3rd respondent.

30 **PW3** Kisadha Jude is a Police officer attached to Kamuli Police Station. He asserted that he never went to Nankoola polling station, and that any one claiming he went would be telling lies. Police officers were sent there to attend to complaints. The witness testified that on

18.05.11, he was at Kaliro the whole day and never went to Kampala to swear any affidavit on that day.

Further that, he received about 10 calls from supporters of the Petitioner complaining that the agents of the Petitioner had been chased away. No report was filed with Police. He was at
5 Mukomuserebende polling station when the tallying of votes was going on and he was one of those who took the votes to the sub-county. However, he could not recall the number of votes the Petitioner got there, or if Petitioner's agents signed the declaration of results forms, as they were not present when he arrived, although he found other people there. According
10 to the complaints he received, the agents and supporters of Petitioner had been chased away, but he could not tell which side the many people belonged to. The witness did not personally see anyone being chased away.

Despite claiming that there were electoral malpractices committed, PW3 told court that no perpetrators were formally arrested, they were just cautioned. He clarified that several people from both sides were arrested and he could not tell who belonged to which side. Also that the
15 supporters of the 3rd Respondent mentioned in paragraph 8 of his affidavit was a mistake.

From Mukomuserebende the witness went to Bumanya sub-county and from there to Gadhumire sub-county. On 19.02.11 he asked for the tally sheet from the Returning Officer, after getting complaints that results were changed.

He admitted that he did not have all Declaration of results forms from Bulamogi
20 Constituency and that the figures in paragraph 12 of his affidavit were given to him by the Presiding Officer of Namwiwa. He also does not know if any tallying was done at Mukomuserebende.

No malpractices were ever reported by him to the District Police Commander. Nonetheless that, as a police officer he can swear any affidavit in any matter before court and his
25 Supervisor was aware that he was coming to testify.

The witness confirmed only receiving complaints of malpractices from the Petitioner and making arrests depending on complaints received from different areas about intimidation of voters. That he only visited one place and deployed police officers. Complaints were not formally recorded as they were received by phone and he was moving around different
30 places. He admitted signing his affidavit without going to Kampala but maintained that he stands by the averments therein.

PW4 Bazigu Charles stressed that he does not know English and therefore could not read what, is in affidavit. He told court that he swore 2 affidavits on 21.03.11 and 13.05.11 respectively. However, he denied ever writing to the Resident District Commissioner of Kaliro, about any matter concerning affidavits. Though his name appears on a letter dated
5 15.10.12, he denies knowing how it got there, adding that the signature there is forged. The witness confirmed that he signed the affidavits but that he could neither read nor understand what is written there. Nonetheless, he said that he identified the declaration of results form by reading that it was such a form but that he could not read the contents of the affidavit.

This witness was the polling agent of the Petitioner at Nankoola, where the Petitioner got 214
10 votes according to the declaration of results form. He did not sign the form but never indicated the reasons for the omission.

Further that, there were two policemen deployed at the station but he was chased away between 10 -10.30 am and he moved away to a distance of about 200 metres. However, he contends that there was wide spread bribery of voters in favour of the 3rd Respondent. He got
15 back to the polling station about 4pm when more police officers were deployed and was present when votes were being counted.

He is not aware if the 2nd agent of the Petitioner was chased away but that he was also present while votes were being counted. The counting was done between 8pm - 2 am in darkness. The only source of light was some telephone flashlights and therefore he could not see clearly
20 what was going on and only went by what other people were saying.

The contents of paragraph 8 of his affidavit were denied. He did not witness the stuffing of ballots but heard of it from the supporters of the 3rd Respondent. He reiterated that he was watching proceedings from a distance and was not following properly as it was dark.

He left the polling station after it was declared that the Petitioner got 214 votes, which he did
25 not accept and therefore did not sign the declaration of results form. The other reasons for not signing the form, he says are set down in paragraph 7 of his affidavit.

In addition, the witness said that when he returned to the polling station and sat there for about 2 hours, he saw the polling officials help children to vote. When he moved away, he did not go far. And one of the children who voted was brought by the 3rd Respondent's
30 campaigner one Kirya Dan, although he is not mentioned in his affidavit.

The witness could not tell how many votes the Petitioner lost because he had been chased away. While Ibanda Wycliffe was the Chief Campaign Manager of the Petitioner, he could not tell if Kagoda Elijah was an agent of the 3rd Respondent. The supporters of the 3rd Respondent were hostile but he did not see the 3rd Respondent at the polling station. And that
5 the police used excessive force to keep away the people but were overpowered by supporters. Adding that, Kagoda Elijah was the Campaign Manager of the 3rd Respondent as he used to hear him tell people to vote for the 3rd Respondent.

PW5 Enos Diima testified that he was a student and could understand English but could not read it. He confirmed to have sworn 7 affidavits before a Commissioner of Oaths in Kampala
10 but could not recall the name of the Commissioner, due to the long passage of time. He claimed he had travelled to Kampala for the first time on 03.05.11.

He identified one of the 7 affidavits he swore, and the denied swearing 7 affidavits saying he could not recall the number of affidavits he swore as he forgets very easily.

Shown the affidavit dated 21.03.11, he declared that he went to Kampala on that date, an
15 indicator that he had been to Kampala twice. That is on 21.03.11 and 13.05.11, although he could not recall the place he went to.

The witness denied being the agent of the Petitioner at Magooda Polling Station or that he was ever at the said polling station as indicated in paragraph 3 of his affidavit of 21.03.11. He admitted the fallacy of the statement in that paragraph.

20 He averred that he was at Bulumba Market polling station where he was the agent of the Petitioner. And though he admitted signing the declaration of results form, he denied the signature on the form.

His specimen signature taken on Court's direction was admitted as the Respondents Exhibit R1. Court noted that the specimen signature is different from that on the witness's affidavit of
25 21.03.11, although it is the same as that on the affidavit of 13.05.11. The signatures on the two affidavits are different.

Questioned further, PW5 admitted signing the declaration of results form for Bulumba Market adding that when he did so he did not have a copy of the declaration form as he had been denied one, and that he informed the Petitioner.

Further that the declaration form for the said polling station was forged as the results were changed by the Returning Officer, albeit he never saw him do so. Claiming that different results were announced, the witness then again denied having signed the form, though admitting that the signatures on the two affidavits are his. It was realized that the witness has
5 3 different signatures.

PW6 Batuli Christopher a farmer told court that he can hear and read English but can neither understand nor write it. He was the Petitioner's agent at Butongole Primary School Polling Station. He signed the declaration of results form and identified his signature on it, but said he could not read the form.

10 At the said station, the Petitioner got 161 votes and the 3rd Respondent got 213 votes. The witness claims that the confusion was at the Tallying Centre, but he did not know the total number of votes each candidate got.

Although denying any knowledge as to whether the anomaly was rectified, at the same time he stated that the Petitioner got 161 votes after the anomaly was rectified. While not knowing
15 the total number of votes lost in Bulamogi Constituency, he insisted that the 161 votes had an impact at District level where the Petitioner had been given nil votes. However, he could not explain how the 161 votes affected the results in the whole Constituency.

It was the testimony of this witness that, his presumption was that since the 3rd Respondent got 231 votes of his own at Butongole polling station, then the Petitioner's votes had been
20 added to those of the 3rd Respondent.

While admitting that he swore the affidavit to verify that there had been wrong tallying at the District level, he denied the contents of Annexure 'A' mentioned in paragraph 5 of the affidavit.

PW7 Batabaire Simon avowed that he does not understand English but knows the contents of
25 his affidavit as it was read back to him and explained in a language he understands. On the other hand, he could neither recall the name of the advocate where the affidavit was sworn nor what he looks like, but insisted his lawyer took him there.

Also that on 15.02.11, he attended a meeting for Presiding Officers, although he had never been appointed one. The witness then denied the contents of paragraph 6 of his affidavit

saying it was stated in error as he never got any appointment letter, in spite that he is the one who told the person who drafted the affidavit the information contained therein.

He pointed out that he attended the meeting as NRM trainer to train Presiding Officers, as the Returning officer required him to attend.

- 5 **PW8** Musingiro Daniel was an agent of the Petitioner and admitted signing the declaration of results form, but stated he can neither read nor write English.

The form shows that at Namwiwa Polling Station the Petitioner got 305 votes, while the 3rd Respondent got 211 votes. The witness confirmed the said results as correct, but claimed that the signature on the declaration of results form differs from his signature on the specimen
10 form.

It was observed that the signature on his affidavit of 21.03.11 and the one on the declaration of results form are slightly different, while the signature on the affidavit and the specimen signature are the same. PW8 acceded to having signed all the three documents.

This witness further told court that on 21.03.11 he went to the office of Matovu Advocate to
15 sign the affidavit. Later he claimed that he had forgotten where he signed the affidavit from. And that he did not attach to it the form indicating he was agent of the Petitioner because he had lost it.

While he says he mentioned the polling station where he saw people being denied the opportunity to vote, he did not know if they were in the register or not. That he never read
20 his affidavit since he does not know how to read.

It was the assertion of this witness that he signed the declaration of results form for Namwiwa polling station as there were no problems encountered during the voting. And that if anyone said there were problems or that only the Petitioner's wife voted at the said station, they would be telling lies. The Petitioner won at the station.

- 25 **PW9** Ibanda Wycliffe a teacher and the District Chairperson of Kaliro District, claims he swore his affidavit before the Commissioner for Oaths after all contents therein were explained to him.

It is indicated in the affidavit that there were irregularities in voting but the kind of irregularities were never specified. - Paragraph 2

Only two people PW3 Kisadha Jude and PW4 Bazigu Charles were mentioned by this witness as having called him to inform him of irregularities. He was also informed by agents that the 3rd Respondent won at Nankoola Polling Station.

5 No victim of the alleged violence is mentioned because PW9 just phoned and informed the police officer in charge of electoral offences and the complaints were consequently never entered in the police station diary.

10 No one was ever prosecuted for any electoral related violence although he wrote to the Presiding Officer Hakim Mamuli. Later he changed his testimony when he said the letter was written by the Petitioner and not by himself. And that only police officers who investigated can verify the malpractices.

PW10 Wamwagala Ronald said he can read and write English. Certifying that voting was by secret ballot he disclosed that he could therefore not tell who voted for whom. He did not see but was told that the agent of the Petitioner at Iguliryo Polling Station was chased away. For that reason did not know who won at the said station.

15 There were two agents of the Petitioner at the station and one of them Samanya Mathias was chased away. Yet he asserted that by the time he got to the station the polling agents of the Petitioner were not there and that both of them were chased away because the polling station is in the area where the 3rd Respondent resides. He again changed his evidence to say only one agent Samanya was sent away and the Petitioner's supporters were not chased away as
20 they were voters.

It is agreed that there are two polling stations in Panyolo parish- Iguliryo and Panyolo primary School. However, it is not indicated if the Petitioner's agents at Panyolo were sent away. Nor did the witness name anyone who told him that the agent of the Petitioner at Iguliryo was chased away.

25 While claiming he saw supporters of the 3rd Respondent give themselves ballot papers and complained to the Presiding Officer, no names of such supporters were mentioned. Further that he was at the station for about 20 minutes as supervisor and was not chased away.

30 That the Presiding Officer informed him of the agents who were at the station. And he ascertained that the agents of the Petitioner signed the declaration of results forms although he does not know their signatures.

The supporters of the 3rd Respondent who chased the supporters of the Petitioner are not mentioned in the affidavit are said to have been mentioned in the draft! Adding that he can only recall the Commissioner of Oaths if he sees him

Further that the supporters of the Petitioner had not voted by the time he got to the polling station, and that only two of them voted in his presence as others were denied chance to vote by the supporters of the 3rd Respondent, whose names are not stated.

The number of votes Petitioner got at Panyolo could not be recalled. At both polling stations, complaints were made verbally to the Presiding Officers. The Presiding officers were overwhelmed by the agents of the 3rd Respondent. Reports were made to police but complaint was never entered in police station diary and hence there is no station diary number.

The witness says he was at Iguliryo polling station for 25 minutes from 11 -11.25 am and arrived at Panyolo at 11.30 am. While he went to many polling stations he says only those two were mentioned as that is where most chaos was. Though he was chased away from Panyolo he maintains that all people who voted at the station voted for the 3rd Respondent. He clarified that he was chased away for a few minutes and was back there by 3 pm.

The number of polling stations in the constituency was unknown to him and he was not sure whether the 3rd Respondent voted at Gadumire or at Panyolo. He recalled different names of the agents of the 3rd Respondent from those appearing on the declaration of results forms. And emphasized that at Panyolo the supporters of the 3rd Respondent took over the ballot papers. A verbal report was made to both Presiding Officers because he was threatened. This does not appear in his affidavit.

PW11 Kivunike Fred told lies to court on oath when he stated that he was not employed by Government whereas he is a health worker on pay role at a health centre, among other lies. He was handed over to police for perjury proceedings to be commenced against him. His evidence was accordingly disregarded by court and his affidavit expunged from the record.

PW12 Makaya Jalil is a Muslim though his affidavit of 21.03.11 indicates that he swore instead of affirming. He claims he signed affidavits at the office of the Commissioner in Kampala on 13.05.11 and that he cannot read or write English. In paragraph 2 of his affidavit of 21.03.11, the witness affirms that he was not at Kyanfuba polling station the whole day but the agent was there. He also refutes that Byansi Jethro was ever the polling agent of the

Petitioner at the said polling station. This statement is reiterated in the affirmation of 13.05.11, on the ground that the supporters of the 3rd Respondent claimed that he was.

Proclaiming that he was chased away from the polling station and did not get back there until 2 pm, when he found the confusion continuing, he still went ahead and signed the declaration of results form where the Petitioner got 190 votes and the 3rd Respondent garnered over 200 votes. He also insisted that there were irregularities at the station between 7 am – 2 pm as he was standing only about 300 metres away. That, other agents of the Petitioner were also chased away by supporters of the 3rd Respondent

The witness gave a different name of the Presiding Officer other than the one mentioned in his affidavit. He claims he was assaulted but did not name any of the assailants. He contradicted himself as to the number of times one Byaruhanga was assaulted.

It was also his testimony that, while he went to school as far as senior 1, he has forgotten English although he wrote his primary 7 examinations in English. That his affidavit of 13.05.11 was read back to him by Wamwagala Ronald, but it is not indicated thereon.

PW 13 Kunya Eliot testified that his level of education is senior 2. He left school in 2002. He was the supervisor of the Petitioner at Kaliro District together with about 20 other people.

He said he went to Panyolo Poling station at about 10 am and remained there for about 5 minutes. He found the Petitioner's agent one Kibeedi outside the polling station and talked to him for about 2 minutes, before he was chased away by a gang of people.

That the agent complained to police officers although there is nothing to show that such complaint was made. He never saw PW 12 Wamwagala Ronald at Panyolo that day, as Wamwagala arrived at the station after he left. The witness does not know the number of votes each candidate got or who the agents of the Petitioner were. However, that the agents of the 3rd Respondent were Mawanda Joshua and Goole David.

Neither Mutalya John nor other agents of the Petitioner are mentioned on the declaration of results form. Kibeedi the agent of the Petitioner was chased away.

This witness maintained he was threatened and left the polling station as he believed his life was in danger. He went to report to the sub-county police but found the police officers busy. Thereafter, he reported to Ibanda Wycliffe and that if anyone says he did not report, he would

be telling lies. Of all the many polling stations he visited, it is only Panyolo where there was trouble.

Upon closure of the Petitioner's case, his counsel applied to be allowed to cross examine the 3rd Respondent and 6 other people who had sworn affidavits in support of the Respondents
5 and also the Chairperson Electoral Commission.

It should be noted that at the scheduling conference, counsel had indicated that he only wished to cross examine 2 people. That is, the 3rd Respondent, the Returning Officer and any other persons with leave of Court. Scheduling was done on 10.12.12 and up to 10.04.13 when the Petitioner closed his case, no intimation was made as to which other people his counsel
10 wished to cross examine.

The application was disallowed on the ground that, to call more witnesses for cross examination without sufficient notice would amount to trial by ambush and abuse of court process among other things. The detailed ruling is on record and there is no need to reproduce it.

15 Court then went ahead to hear the case of the Respondents. The 3rd Respondent Kenneth Lubogo was cross examined on his affidavit. He testified that many of the allegations of irregularities, made by the Petitioner are false. The only information he has as to what happened at Namwiwa, Butongole, Panyolo and Iguliryo Polling stations is from information given to him by his agents.

20 He pointed out that, if anything outward happens at a polling station, the first person to know would be the Presiding Officer and the agents of the candidates. The Presiding Officer must accordingly make a report but there was none in this case at all places where irregularities are alleged to have occurred apart from the declaration of results forms. There were no affidavits from any Presiding Officer talking of any irregularities. Nor was there any document from
25 the Returning Officer of Nankoola.

As per paragraph 13 of his affidavit, the witness only heard from his agents but did not see the Petitioner use his official vehicle during the elections. The owner of the said vehicle was never verified and no official complaint was made.

The results of the election were declared on 18.02.11 by the Returning Officer. The 3rd
30 Respondent got 23,136 votes while the Petitioner got 21,898 votes. Later, a clarification was

made by the Returning Officer in respect of the results of Butongole Polling Station. The error was noticed after the declaration. The Petitioner then got 161 votes at that station, as indicated on the 3rd Respondent's declaration of results form. The 3rd Respondent got 213 votes- Annexure "BDR".

5 After the clarification Annexure "LET" the Petitioner got 161 votes and the 3rd Respondent's votes remained 231. While the total number of valid votes increased and the total number of votes of the Petitioner increased, the total number of votes of this witness remained the same at all stations.

Annexure "NDRF" 3rd Respondent got 211 votes and Petitioner 305.

10 The Petitioner's agents at Butongole that is, Batuli Christopher and Lubogo Lawrence signed the declaration of results form. The total number of invalid votes at Butongole was 10. After the clarification the winning margin was reduced to 773 votes.

The two remaining witnesses of the Respondents were not cross examined. Court was informed that the Returning Officer had since left the Electoral Commission and the
15 Chairperson of the Commission could not appear at short notice. It was agreed to take their affidavits in account bearing in mind that they had not been cross examined.

All counsel then made lengthy verbal submissions.

In determining this petition, the following principles of law established by decided cases concerning the burden of proof are borne in mind. That is "***the burden of proof in election***
20 ***petitions lies upon the Petitioner to prove every allegation set out in the petition to the satisfaction of the court***". The Supreme Court of Uganda has held that "***proof to the satisfaction of the court implies that the matter is proved without leaving room for the court to harbour any reasonable doubt about the occurrence or existence of the matter***".

The standard of proof is on the balance of probabilities: - **S. 61 (1) Parliamentary Elections**
25 **Act**. However, courts have emphasised that, "***the degree of proof is higher in petitions than that which is required in ordinary civil suits because of the public importance and seriousness of the allegations normally contained in petitions***". Refer to the case of **Col (RTD) Kiiza Besigye vs. Y. K. Museveni and Another(SCU) Election Petition 01/2001; Baku R. Obudra Vs Agard Didi and Another, Election Petition 0004/2001 and Mbowe**
30 **Vs Eliasafu [1967] EA 240.**

I am also aware that, courts have further stated that *“election petitions are matters of public interest that concern not only the parties but also the general body of the electorate in the affected area. They are the democratic expression of the will of the people as to whom they wish to represent them. For those reasons elections cannot be lightly set aside on trivial and flimsy grounds....the objection must be something substantial, something calculated to really affect the result of the election”*. See the case of **Morgan Vs Sampson [1974] 3 ALL ER** that was cited with approval in **Besigye Vs Y.K. Museveni (supra)**

In now proceed to deal with the issues in the order that they were set out in this judgment, taking into account the evidence of the parties, the principles referred to above and the submissions of all counsel.

The first issue is **whether there was non-compliance with the provisions of the Electoral laws in respect to the election**. As shown by the evidence of the Petitioner and his witnesses already referred to in this judgment, there were a number of complaints raised in this respect. They included undue influence, violence, chasing away supporters of the respondent and thus denying them a chance to vote, interchange of results, setting up of ghost polling stations, ballot stuffing and deliberate omission of results of the Petitioner among other things.

In his submissions, counsel for the Petitioner summarised the evidence in support of the Petitioner's case.

Violence and undue influence: He stated that, contrary to the Parliamentary Elections Act, there was violence and undue influence during the election that occurred in various areas in the constituency- paragraph 5 (f) of the petition. The affidavit of PW13 Kunya Eliot paragraphs 2 and 5 was relied upon in respect of Panyolo polling station. While the affidavit of PW10 Wamwagala Ronald paragraphs 5 – 7 was cited to support the allegation that one Mutalya Bosco was violent and took over Iguliryo polling station to determine who voted and who did not.

That the violence at Kyanfuba Landing Site polling station was confirmed by Jethro Byansi and corroborated by one Makaya. As a result of the said violence, Makaya the agent of the Petitioner was forced to leave the polling station until the police intervened.

In respect of Nansololo polling station, the affidavit of Bwire Moses paragraph 3 talks of rowdy youth –supporters of the 3rd Respondent chasing away the supporters and agents of the Petitioner. That this is corroborated by the affidavit of Hamza Baligeya paragraphs 4-6

The violence at Nankoola polling station is confirmed by Charles Bazigu an agent of the Petitioner in paragraphs 3 – 8 of his affidavit. The evidence is corroborated by Kisadha Jude who asserts that he received reports of violence from Ibanda and Shaban Mugerwa as a result of which he deployed police there and at several other stations. Dr. Shaban Mugerwa PW2 a
5 supervisor of the Petitioner mentions the violence in paragraphs 3-7 of his affidavit.

While Diima Enos PW5 alleges that there was violence at Bulumba which was put down by police.

Counsel for the Petitioner contended that all the above mentioned episodes were just a few highlights of the stations where violence and undue influence occurred; and that the violence
10 and undue influence affected the result of the election both quantitatively and qualitatively. He reasoned that this was confirmed by the small difference in the winning margin between the Petitioner and the 3rd Respondent.

For the Respondents it was submitted that none of the allegations made to prove the first issue were supported by any evidence.

15 Commenting about the alleged violence against supporters of the Petitioner in the whole constituency, counsel for the 1st and 2nd Respondents stated that the allegations were made by partisan supporters of the Petitioner and their evidence should therefore be looked at with caution. No people affected by alleged violence were mentioned.

Moreover, no reports were made to police as no reference numbers were presented and
20 neither were there any medical reports to show that people were treated for alleged torture. Even the evidence of PW3 Kisadha Jude the police officer did not help. Consequently, without any specific complaints having been made, the evidence of the Petitioner becomes suspect.

Both Counsel for the 3rd Respondent agreed with the submissions of Counsel for the 1st and
25 2nd Respondent that no cogent evidence had been adduced to prove the violence and undue influence and there is no averment to that effect in the Petitioner's affidavit.

Indeed as pointed by counsel for the respondents there is no other independent evidence other than that of the witnesses of the Petitioner, to support the allegations of violence and undue influence. No formal complaints were ever filed with the authorities who were in charge of
30 the election or with those responsible for security. The case of **Mwogezaddembe Vs**

Wambuzi and Another H.C. Election Pet. 02/11 found that **“to displace an election requires cogent and independent evidence other than the evidence of partisan witnesses who would sometimes call an ant hill a mountain”**. The same principle was reiterated in the case of **Kamba Sale Moses Vs Namuyangu Jennifer C.A. Pet.27/11** when the Court of Appeal stated that **“where witnesses are partisan and are all agents of the Petitioner, the court must look for an extra layer of corroboration of such testimony”**.

The Petitioner by his own admission solely relied on the information given to him by his agents and supporters and did not see the alleged violence or undue influence with his own eyes. This was in breach of the rule of Divine Justice that requires one **“to see with their own eyes and not through the eyes of others and to know of their own knowledge and not through the knowledge of their neighbour”**. His witnesses on the other hand contradicted themselves in many respects thereby making their evidence unreliable. The police officer Kisadha Jude did not help matters either. He had no evidence of formal complaints having been made. He also based his assertions on hearsay evidence

Interchange of results: Remarking about the alleged interchange of results, Counsel for the Petitioner referred court to paragraph 4R of the petition, saying that this was contrary to S.53 of the Parliamentary Elections Act. Butongole Primary School and Namwiwa Sub- county Headquarters were cited as examples of polling stations where the Returning Officer admitted that the results declared were flawed- affidavit of 1st Respondent.

At Butongole zero votes were declared for the Petitioner instead of 161 votes. While at Namwiwa only one vote instead of 305 votes was declared. When corrections were made, the difference in total votes between the Petitioner and the 3rd Respondent came to 773 votes.

The affidavits of Diima, Gulumba, and Tulibatono Hussein were relied upon to claim that at Nawaikoke only 79 votes instead of 179 were recorded for the Petitioner. And that at Bulumba and Nawaikoke results were not properly tallied thereby affecting the quantitative result of the election.

For 1st and 2nd Respondent it was submitted in this respect that no polling station where results were interchanged was ever mentioned. And where the Petitioner’s results had been left out, clarifications were made and the results of the 3rd Respondent remained the same.

For the 3rd Respondent it was argued that the Petitioner was mistaken as there was never any interchange of results. The Petitioner relied upon what happened at Butongole and Mamwiwa

polling stations where mistakes were made but were corrected. It was pointed out that certified declaration of results forms that were exhibited in court were confirmed by the Petitioner's witnesses as to the number of votes the Petitioner got after corrections. And despite the correction, the Petitioner lost. The case of **Kakooza Vs Iga and Electoral Commission S.C. Petition Applcn. 11/06** was cited in support.

Regarding this allegation I must state that I agree with the submissions of counsel for the Respondents. The Petitioner did not adduce any credible any evidence to prove any interchange of results. What he complained about was omission of his results and he admits that this was corrected. The certified declaration of results forms attached to the 1st Respondent's affidavits that were presented at the hearing and confirmed by the Petitioner's witnesses show the results the Petitioner got after clarifications were made. Decided cases have established that ***"irregularities at the polling station or on results which a candidate obtained can only be deduced from the declaration of results forms. What is important is that the record is transmitted to the Electoral Commission"***. - *Kakooza's case (supra)*

It is apparent that what occurred at these two stations was an error in computation of the total number of the Petitioner's votes, a matter that was brought to the attention of the 2nd Respondent. It also worth noting that, despite that correction and the attendant adjustment to the total number of the Petitioner's votes, the votes of the 3rd Respondent did not change. Granted, the winning margin became lower and the Petitioner came nearer to the 3rd Respondent, however, the correction did not change the final outcome of the election.

It can also be discerned from the evidence that at most polling stations where irregularities are alleged to have occurred, the Petitioner's agents signed the declaration of results forms and no complaints of irregularities were recorded with the Returning Officer or with police. By signing the forms, they confirmed the results therein.

This finding is fortified by the principles set down by case law that ***"when an agent signs a declaration of results form, he is confirming the truth of what is contained therein. He is confirming to the principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent"***. *Further that* ***"even an agent who refuses to sign a declaration form but does not state the reasons for not signing as prescribed on the form is also estopped from claiming that there were irregularities at the***

polling station when he had an opportunity to complain but did not". Refer to the case of **Babu Vs Electoral Commission and Another Election Pet. 10/06**.

Disenfranchisement of voters: - under paragraph 4 (a) of the petition, the Petitioner contends that he was denied representation during voting, counting votes and tallying of results. He gave an example of Mamwiwa polling station where he claims that only his wife was allowed to vote, while the rest of his supporters were denied a chance to cast their votes.

Counsel for the Petitioner did not directly submit on this issue other than to state that the Petitioner and his witnesses were truthful, while the Respondents relied upon general denials.

For the Respondents it was argued that no names of people who were allegedly disenfranchised were presented to court and none ever swore any affidavits. The allegations in paragraph 4 (b) (2) of the petition were accordingly criticised as baseless since the Petitioner got 305 votes at Namwiwa and the only error was in entering the results. The declaration of results form indicates 305 votes and there is nothing to show that some voters were denied their right to vote, thereby contradicting the evidence of one Musubira David.

It is true that between 45 – 100 people were mentioned as having been denied the right to vote –see evidence of Diima Enos PW5 and Samanya Mathias but as already pointed out in this judgment, these figures were not supported by any convincing evidence. The evidence of the Petitioner and his witnesses was also generalised when they stated that “**many supporters of the Petitioner were denied to vote**”. The Petitioner himself did not witness such alleged incidents and one of his witnesses Makaya Jalil PW12 said that he was standing about 250 metres away from the polling station and did not see any person’s name crossed out.

Ghost Polling stations: The claim of Ghost polling stations was not supported by any evidence as no such stations were named or reported to police.

Ballot stuffing: There was no evidence of rigging either through ballot stuffing and or pre-ticking. As pointed by counsel for the Respondents, the results presented tallied with the number of voters who cast votes.

The law requires that where such allegations are made, they ought to be proved on the balance of probabilities by the Petitioner. Courts have clearly stated that “**it is critically important to prove the existence of these stuffed ballots, their serial numbers, how**

many they were, and where they came from. Absence of proof means the issue was glossed over and it would fail". See the case of **Fred Badda Vs Electoral Commission and Prof. Muyanda Mutebi C.A. Election Pet. 25/06, by Lady Justice Mpagi**. The holding was confirmed by the Supreme Court on appeal.

5 In the present there was no evidence to show how many votes were stuffed. Bazigu Charles PW4 mentioned 56 ballots but never any of their other particulars set out in the above cited case. The witness also reneged on his evidence when he later stated that he was only told but did not see as it was at night and he was far away from the polling station. The allegations were consequently not proved.

10 **Other irregularities:** relied upon by the Petitioner included changing of his agents, voting through the night, voting by open method as opposed to secret ballot, multiple voting, names missing from the register, denying Petitioner's voters a chance to check their names in the register, counting of votes at un gazetted places, among others.

The submissions of Counsel for the Petitioner in this respect were general. He pronounced
15 that the Petitioner's witnesses who were cross-examined were truthful in material terms; while the Respondents' affidavits in reply were general denials and legalistic. He argued that, in such cases where irregularities are alleged, the best evidence in rebuttal is that of the Presiding Officer –who makes a report but that there is no such report in this case.

Also that the rest of the evidence of the 3rd Respondent, also solely relied upon by 1st and 2nd
20 Respondents is hear say. And that in absence of such direct evidence, court should believe the Petitioner and find that the election was held in contravention of the Electoral laws. The case of **Abdu Katuntu Vs Hon. Kirunda Kivejinja Election Pet. 07/06** was relied upon for the holding that **"where there are contradicting testimonies regarding existence of a fact, the court takes the specific assertions of fact as correct and rejects the general denials"**.

25 In response it was asserted for the Respondents that none of those irregularities were proved as required and that the elections were held in accordance with the law.

And indeed court finds that none of the agents allegedly interchanged were named and none of his witnesses ever testified to the fact. The Petitioner's sole evidence cannot be relied upon
30 either as he was not present at the polling stations but merely heard from his supporters.

No single polling station where voting allegedly went on through the night is mentioned. And in any case, under **S. 29 (5) of the Parliamentary Elections Act**, voting is allowed to continue past 5pm for voters already at the polling station.

No evidence was adduced to show there was voting by open method.

- 5 The claims of multiple voting were not substantiated. Bazigu Charles PW4 changed his evidence when he admitted that he was merely told but did not witness such multiple voting.

Apart from general claims, neither was any cogent evidence brought to prove that the Petitioner's voters were never allowed to check their names on the register nor that they were they were not allowed by 1st Respondent to present complaints. Most of the witnesses who
10 claimed they made complaints admitted that such complaints were not formal and therefore there are no records. This explains why there are no reports from the Presiding Officers in this case.

The averment that votes were counted not at the polling stations but at places chosen by the 1st and 2nd Respondents agents to facilitate the interests of the 3rd Respondent is not borne out
15 by evidence either. The witness Makaya Jalil PW12 who could have thrown more light on this grossly contradicted himself. He confirmed the votes that appear in the certified declaration forms which he signed, thereby putting himself within the exceptions set out in **Babu's case (supra)**. The assertion that he was chased away was also belied by his statement that he left the polling station after it was declared that the Petitioner got 214 votes.

- 20 The omission of results was explained by the response of the 3rd Respondent. It was not deliberate but was due to a technical error that was committed by Data Entry Clerks. And as already pointed out, the corrections were relayed to the 2nd Respondent and the votes of the Petitioner that had been missed out were added on to bring the total of his votes to 22,363.

It should also be noted that some of the alleged irregularities while mentioned by the
25 Petitioner and his witnesses in their oral evidence, do not appear in their affidavits: case law has established that ***“to allow such oral evidence would amount to departure from the pleadings”***.

Refer to the case of **Mbagadi & Another vs. Dr. Nabwiso – Election Pets. 14 & 16 of 2011**
– where Court emphasised that ***“when filing a Petition, the Petitioner must have had
30 knowledge of what votes he is challenging and must have had basis for his challenge. If***

the basis is not in the Petition, any evidence outside the Petition is departure from the pleadings and is inadmissible”.

This position was set by the earlier case of **Bwambale vs. Electoral Commission & C. Kiyonga – Election Pet. 07/06** where Court held that *“The provisions of O.6 rr. 6 & 7 of C.P.R apply to departure in Election Petitions. No evidence can be adduced on allegations not contained in the Petition”.*

For all those reasons set out herein in respect of the allegations of the Petitioner, I agree with Counsel for the Respondents and reiterate that without plausible evidence to the contrary, the elections were held in accordance with the provisions of the electoral laws.

Contrary to the submissions of counsel when he cited the case of **Abdu Katuntu (Supra)** general claims without concrete evidence do not amount to definite assertions. And to accept such generalities would amount to shifting the burden of proof upon the Respondents whereas the law clearly places it upon the Petitioner. Counsel for the Petitioner deliberately misapplied the holding in **Katuntu’s case** to try and justify the unjustifiable. In my view the case fortifies the Respondent’s case and not that of the Petitioner.

Before I take leave of the 1st issue, I have to determine whether the affidavits in support of the petition were competent. This issue was raised by the submissions in support of the 3rd Respondent’s case when counsel declared that the petition was not supported by any competent affidavit and should accordingly fail on that ground alone.

As pointed out by Counsel for the Respondents and rightly so in my view, the evidence available is to the effect that the affidavits of the Petitioner, PW2, PW5 and PW 8 were never sworn before the Commissioner of Oaths but in the office of the Petitioner’s lawyer. PW3 confirmed that he never travelled to Kampala at all. Although counsel for the Petitioner argued that there is a Commissioner in his office, there is nothing to indicate that Deo Bitaguma before whom the affidavits were allegedly sworn works with or sits in the same office with Counsel for the Petitioner.

Certainly, as was held in the cases of **Okumu Robert Vs Alenyo and Electoral Commission Elect. Pet 01/12 and Kakooza John Baptist Vs Electoral Commission and Another (S.C.U)** *“such affidavit evidence should be excluded as the omission goes to the core essence of an oath”.*

Case law has further established that **“where the Petitioner’s affidavit accompanying the petition is faulty, since this is the statutory affidavit required to be attached to the petition, the petition would be incompetent and should be dismissed”**.- **Mugula Francis Xavier Vs Electoral Commission and Another**

5 The affidavits of PW3, PW5, PW6, PW7, PW8 and PW11 indicate that they were sworn in Kampala. In spite of this, the witnesses were inconsistent in their evidence. They could not tell court where exactly in Kampala they had gone or describe the person before whom they swore the affidavits. PW3 stressed that he was never in Kampala on 18.05.11 when his affidavit was allegedly sworn. Such uncertainty raised grave doubts in their evidence as to
10 whether they ever actually appeared before the Commissioner of Oaths. Courts have consistently held that **“inconsistencies in affidavits cannot be taken lightly”**- **Bitaitana Vs Kananura [1977] HCB**. It would be unsafe to rely on such inconsistent evidence.

PW4 Bazigu Charles, PW7 Batabaire Simon, PW8 Musindiro David, PW11 Kivunike Fred, PW12 Makaya Jalil and Kunya Eliot PW13 claimed they could neither read nor write
15 English. Yet their affidavits are in English but there is no indication that the affidavits were read back to them in a language they understand. This can be discerned from the fact that there are no interpretation certificates on the affidavits as required by S.3 of the Illiterates Protection Act. According to case law **“The section prohibits any person making an affidavit on behalf of an illiterate to do so without putting an interpretation certificate”**.
20 – Refer to **Kasaala Growers Cooperative Society Vs Jonathan Kalemera S.C.C.A. 19/10 and Ngoma Ngime Vs Winnie Byanyima Election Pet. App.11/2002**. In such circumstances, earlier decisions illustrate, the only recourse is to strike the affidavits for offending mandatory provisions of the law.

The affidavit of PW12 Makaya Jalil of 21.03.11 was criticised for offending Ss.5 and 6 of the
25 Oaths Act. The witness swore the affidavit as a Christian and yet he is a Muslim and should have affirmed. For that reason, counsel argued that the affidavit is fatally defective. Nonetheless, am not persuaded by this argument for the reason that I find it to be a technicality. The word **“affirm”** has the same meaning as **“swear”**. To use one for the other does in any way affect the essence of the oath taken. This is one of those situations where the
30 holding of the Supreme Court in the case of **Besigye Vs Museveni (supra)** that **“affidavits in election petitions should not be defeated on technicalities”** is suitably applicable.

Better still, it is time the world accepted that **“There is only one God and that all Prophets proclaim the same Faith”**, and got rid of the meaningless differences that serve no useful purpose other than just enhance disunity.

5 The only credible reason for rejecting the affidavit is that it has falsehoods and was based on hearsay. The witness claimed to have been one of the agents of the Petitioner whereas not and deponed upon things he did not see when he claimed that many supporters of the Petitioner were denied to vote, thereby making his evidence unreliable. See **Bitaitana’s case (supra)**

10 Having found all the affidavits referred to above defective, then it follows that the oral evidence that forms part of the affidavit evidence should also be rejected. This finding is fortified by the case of **Mugema Peter Vs Abed Nasser Elect. Pet. 30/11** where court held that **“where it is agreed that oral evidence forms part of the affidavit evidence, and the affidavit is struck out, the oral evidence follows”**.

The oral evidence in cases of affidavit evidence as this petition forms part of the affidavit evidence.

15 Considering that as already pointed out in this judgment, the Petitioner based his case upon the information of his supporters, agents and the police officer Kisadha Jude, and having found that the evidence of those witnesses cannot be relied upon, it follows that there is no independent evidence to support the Petitioner’s claim that the 3rd Respondent by himself or through his agents with his knowledge and sanction committed any irregularities or offences.
20 See the case of **Mawiya Vs Sempijja and Others Election Petition 16/11**

In the circumstances, I find that the petitioner failed to prove that there was non-compliance with the electoral laws. The first issue is therefore answered in the negative.

25 Those reasons alone would dispose of the whole petition but I will go ahead to briefly comment on the rest of the issues **“so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matter avoided”** .- S.33 Judicature Act.

The 2nd issue is whether the non-compliance affected the result of the election in a substantial manner.

30 Counsel for the Petitioner submitted in this respect that with all the irregularities narrated by the Petitioner and his witnesses which amounted to breach of the law, the result of the

election was affected in a substantial manner. That this was confirmed by the small difference in the winning margin between the Petitioner and the 3rd Respondent.

For the Respondents it was argued that since the elections were held in accordance with the law, the result of the election could not have been affected in a substantial manner. They
5 relied upon the case of **Achieng Sarah Opendi and Another Vs Keziah Election Pet. 39/11** where the case of **Mbabazi Vs Musinguzi Garuga James Election Pet..2002** was cited for the statement that **“substantial effect is effect calculated to influence results in a substantial manner taking into account the whole election. The irregularities must affect the result of the election”**. Though acknowledging that there had been an error in
10 entering of results at Namwiwa and Butongole polling stations, they argued that once the errors were discovered, corrections were made and the 2nd Respondent was notified. The mistakes had been made by Data Entry Clerks.

This court having found that the alleged non-compliance with the provisions of the electoral laws was not proved, then it follows that there was nothing to affect the result of the election
15 in a substantial manner. All parties agree that the errors of omitting the Petitioner’s results at the above mentioned stations were corrected. While the correction reduced the winning margin of the 3rd Respondent, his final results were not affected as the votes added to the Petitioner were not taken from his. Such an error as happened in this case cannot lead to the cancellation of the election. The case of **Mawiya Vs Sempijja Election Pet. 16/11**
20 reinforces this position. The situation in that case, was even more alarming than in the present case in that there had been an **interchange** of votes. When the results were rectified, the difference between Petitioner’s votes and 1st Respondent was 25 votes. Still the court declined to cancel the election observing that **“even with the favourable adjustment in the total number of votes garnered by the Petitioner, it did not change the final outcome of
25 the election as it only brought him nearer to the 1st Respondent”**. This holding is spot on with the circumstances of the present Petition.

This court is further persuaded by the holding of Justice Karokora that **“an election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if
30 it appears to the Election Tribunal or Court that the election was conducted substantively in accordance with the principles of this Act, and that the non-compliance did not affect substantively the result of the election”**.

The Justice yet again observed that **“non-compliance is deemed to be substantial if the victory of the winning candidate would be reversed when the scores or votes credited to him through the non-compliance are deducted from his final score”**. Refer to **Besigye’s Case (Supra)** the case of **Ndiko and Another Vs Obasanjo and 53 Others C.A. Nigeria Election Pet. 01/03** was cited.

I wish to reiterate that in the present case neither was non-compliance with the electoral laws proved nor were any votes of the Petitioner credited to the 3rd Respondent. There was no change in the final outcome of the election. And therefore no substantial effect. The finding is fortified by **Achieng’s case (supra)**

10 For all those reasons outlined above, the 2nd issue is also answered in the negative.

The third issue was whether the 3rd Respondent by himself or through his agents with his knowledge, consent and approval committed any electoral offences during the Parliamentary elections in Bulamogi Constituency.

15 The issue was put to rest when Counsel for the Petitioner abandoned it upon realising and admitting that there was no evidence to support it.

What is left is to determine is **what remedies are available to the parties.**

20 The Petitioner sought five remedies set out at the beginning of this judgment. But having found that he has failed to prove his case to the standard required by the law, I find that he is not entitled to any of those remedies. The Petition is thus dismissed with costs to the Respondents. The election of the 3rd Respondent as Member of Parliament of the said constituency was valid; the election was conducted substantively in accordance with the provisions of the Parliamentary Elections Act.

25 The order for certificate for two counsel is also granted as requested by counsel for the 3rd Respondent. The two displayed proficiency in handling the petition. Their research was especially helpful.

FLAVIA SENOGA ANGLIN

JUDGE

25.06.13

