THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC.)

PRESIDENTIAL ELECTION PETITION NO. 01 OF 2006

RTD. COL. DR. KIZZA BESIGYE :::::::::::::::::::::: PETITIONER

VERSUS

1. ELECTORAL COMMISSION }
2. YOWERI KAGUTA MUSEVENI} :::::::::::: RESPONDENTS

REASONS FOR JUDGMENT OF ODOKI, CJ

This Presidential Election Petition was brought by Rtd Col Dr Kizza Besigye, the Petitioner, against the Electoral Commission, the 1st Respondent, and Yoweri Kaguta Museveni, the 2nd Respondent, challenging the validity of the results of the Presidential election, held on 23 February 2006. The election was organized by the 1st Respondent. The Petitioner and the 2nd Respondent were among the five candidates who contested in the election under a multiparty dispensation.

On 25 February 2005, the 1st Respondent declared the 2nd Respondent the winner of the election, having obtained over 50% of the valid votes cast. The Petitioner who was the runner-up, was dissatisfied with the declaration of results. On 7th March 2006, the Petitioner lodged the petition in this Court challenging the validity of the election results on various grounds.

The law requires that the petition should be inquired into expeditiously and findings of the Court be announced within 30 days from the date of filing the petition. We heard the petition from 22nd to 30th March 2006 and we reserved our judgment to be given on 6th April 2006. The Court announced its decision on that day, containing a summary of its findings. The Court dismissed the petition and ordered that each party bears its own costs.

Background to the Petition:

The 23 February 2006 Presidential Election, was held under a multiparty political dispensation following the change of political system by a national referendum, from a movement political system under which the country had been governed since 1986 when the National Resistance Government assumed power following a bush war. This was the third Presidential election held under the 1995 Constitution. The Constitution was amended in 2005 to remove Presidential terms limits from two terms to indefinite eligibility. The Presidential election was held on the same day as the Parliamentary elections unlike in the previous Presidential elections.

During the elections five candidates were nominated as Presidential candidates, four representing political parties or organisations and one as independent. The petitioner stood as candidate for Forum for Democratic Change (FDC). The 2nd Respondent stood for the National Resistance Movement (NRM), Mrs Miria Kalule Obote stood as candidate for the Uganda Peoples Congress (UPC), while John Ssebaana Kizito was for the Democratic Party (DP), and Abed Bwanika stood as an independent candidate.

On 25 February 2006, the 1st Respondent declared the national results of the Presidential elections as follows:

Abed Bwanika	:	65,345	(0.95%)
Besigye Kiiza	:	2,570,603	(37.36%)
Obote Kalule Miria	:	56,674	(0.82%)
Ssebaana John Kizito	:	108,951	(1.58%)
Yoweri Kaguta Museveni	:	4,078,911	(59.28%)
Valid votes	:	6,880,484	
Invalid votes	:	292,757	(4.08%)
Total votes	**:**	**7,173,241**	**(68.64%)**

The petitioner who was aggrieved by the declaration of the results filed this petition before this Court under Article 104(1) of the Constitution and section 59(1) of the Presidential Elections Act, based on various grounds and complaints.

In the petition, the Petitioner made complaints against the respondents. Against the 1st Respondent, he complained that it did not validly declare the results in accordance

with the Constitution, and the Presidential Elections Act; that the election was conducted in contravention of the provisions of the Constitution, Electoral Commission Act and the Presidential Elections Act; and that the provisions of Section 59(6) (a) of the Presidential Elections Act are contrary to the provisions of Article 104(1) of the Constitution.

In the alternative, the petitioner contended that the election was invalid on the ground that it was not conducted in accordance with the principles laid down in the Presidential Elections Act, and that the non-compliance affected the results in a substantial manner.

The Petitioner complained further that the entire electoral process in the 2006 Presidential Elections, beginning with the campaign period up to polling day was characterized by acts of intimidation, lack of freedom and transparency, unfairness and violence and the commission of numerous offences and illegal practices, contrary to the provisions of the Presidential Elections Act, the Electoral Commission Act, and the Constitution. Among the specific complaints are: disenfranchisement of voters by deleting their names, allowing multiple voting and vote stuffing, failure to cancel results at polling stations where gross malpractices took place, failure to declare results in accordance with the law, and failure to take measures to ensure that the entire electoral process was conducted under conditions of freedom and fairness.

The Petitioner alleged in the petition that the 2nd Respondent Yoweri Kaguta Museveni personally committed several illegal practices and offences while campaigning. He complained that the 2nd Respondent, used words or made statements which were malicious, made statements containing sectarian words or innuendos against the Petitioner and his party, made abusive insulting and derogatory statements against the Petitioner, FDC or other candidates; made exaggerations of the petitioner's period of service in Government and the reason why he was moved from several portfolios; used derisive or mudslinging words against the petitioner; used defamatory or insulting words; knowingly or recklessly made false statements at a rally that FDC had frustrated efforts to build another dam, that the petitioner was in alliance with Kony and PRA and other terrorists, and that the petitioner was an opportunist and a deserter.

The Petitioner further contended that the 2nd Respondent committed acts of bribery of the electorate by his agents with his knowledge and consent or approval, just before or during the elections, by attempting and interfering with the free exercise of the franchise of voters, and by agents procuring the votes of individuals by giving out tarpaulins, saucepans, water containers, salt, sugar and other beverages, and making promises of giving such beverages.

In their answers to the petition, both the 1st Respondent and the 2nd Respondent denied the allegations made in the petition against them.

At the hearing of the petition, the Petitioner was represented by a team of lawyers led by Mr. Wandera Ogalo and Mr. John Matovu. The 1st Respondent was represented by a team of lawyers led by the Solicitor General, Mr. L Tibaruha, Mr Peter Kabatsi, and Mr. J Matsiko. Dr. J Byamugisha, assisted by Mr. Didas Nkurunziza, led the team of lawyers for the 2nd Respondent.

All the evidence adduced by the parties was through affidavits filed before or during the hearing of the petition, and read by counsel in the Court. The petitioner filed about 200 affidavits while the respondent filed about 280 affidavits.

The following issues were framed at the hearing of the petition:

1. Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act, in the conduct of the 2006 Presidential Election.

2. Whether the said Election was not conducted in accordance with principles laid down in the Constitution, Presidential Elections Act and the Electoral Commission Act.

3. Whether if either issue 1 or 2 or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner.

4. Whether the alleged illegal practices or any electoral offences in the petition, were committed by the 2nd Respondent personally, or by his agents with his knowledge and consent or approval.

5. Whether the petitioner is entitled to the reliefs sought.

The Court's decision on the issues framed was as follows:

> ***"On issue No 1, we find that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 Presidential Elections, by the 1st Respondent in the following instances:***
>
> ***(a) in disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote.***
>
> ***(b) in the counting and tallying of results***
>
> ***On issue No 2, we find that there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act, and the Electoral Commission Act, in the following areas:***
>
> ***(a) the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country.***
>
> ***(b) the principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting and vote stuffing, in some areas.***
>
> ***On issue No 3, by a majority decision of four to three, we find that it was not proved to the satisfaction of the Court, that the failure to comply with the provisions and principles laid down in said Acts and the Constitution, as found in the first and second issues, affected the results of the Presidential election in a substantial manner.***
>
> ***On issue No 4, by a majority decision of five to two, we find that no illegal practice or any other offence, was proved to the satisfaction of the Court, to have been committed in connection with said election, by the 2nd Respondent, Y K Museveni, personally or by his agents with his knowledge and consent or approval.***
>
> ***In the result, by majority decision, it is ordered that the petition be dismissed, with no order as to cost".***

The Court reserved the reasons for its decision due to constraints of time. We announced that each of us will give his individual detailed findings and reasons later. Unfortunately a member of the Coram, the late Hon Justice A H O Oder passed away on 26th June 2006 before he gave his reasons for allowing the petition. I now give my detailed findings and reasons for dismissing the petition.

Preliminary Application for a Reference to Constitutional Court:

At the commencement of hearing of the petition, counsel for the Petitioner made an application under Article 137(5) of the Constitution, to refer to the Constitutional Court for interpretation, the question whether Section 59(6) (a) of the Presidential Elections Act is inconsistent with Article 104(1) of the Constitution.

Counsel submitted that the requirement of proof that the non-compliance with the principles laid down in the provisions of the Act affected the results of the election in a substantial manner is inconsistent with the provisions of Article 104 of the Constitution which only require proof that the person declared elected President was not validly elected.

It was his contention that it was sufficient to prove that there was non-compliance with the provisions of the Presidential Elections Act. He referred us to the decision of this Court in the case of ***Kyamanywa Simon vs. Uganda,*** Cr. App. No.16 of 1999 where this Court made a reference to the Constitutional Court. It was also argued that under Article 137(5) of the Constitution, where any question as to the interpretation of the Constitution arises in any proceedings in a Court of Law other than a field Court Martial, and any party to the proceedings requests the Court to refer the question to the Constitutional Court, the Court must refer the question to the Constitutional Court for determination.

For the respondents, it was submitted that the issue of referral had not arisen in the proceedings, but it had originated in the petition. Since the Petitioner was aware of the issue before filing this petition, he should have lodged a separate petition in the Constitutional Court to determine the question raised. Furthermore, it was argued for the respondents, that allowing the application would defeat this petition which this Court might not be able to determine within the prescribed period, if the question is

referred to the Constitutional Court which would take its own time. Article 104(1) of the Constitutional provides as follows:

> ***"Subject to the provisions of this Article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the electoral Commission elected President was not validly elected."***

This provision is echoed in Section 59(1) of the Presidential Elections Act which states:

> ***"(1) An aggrieved candidate may petition the Supreme Court for an order that a candidate elected as President was not validly elected."***

On the other hand Section 59(6) (a) of the Presidential Elections Act which provides the grounds on which an election may be annulled states,

> ***"6 The election of a candidate as a President shall only be annulled on any of the following grounds, if proved to the satisfaction of the Court –***
>
> **(a)** ***non-compliance with the provisions of this Act, if the Court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a substantial manner."***

After hearing arguments from both sides, we rejected the application and reserved reasons for our ruling to be given later in our judgment. We gave the following reasons in our decision:

> ***"Firstly, the question as to the interpretation of the Constitution did not arise during the course of these proceedings but prior to the proceedings as it was raised in the petition to this Court instead of petitioning the Constitutional Court in the first instance. Therefore Article 137 (5) (a) of the Constitution was inapplicable to the application for a reference to the Constitutional Court. Secondly, these are special proceedings concerning the election of the President which must be completed within 30 days of filing the petition. It would be difficult to hear and determine the petition in the Constitutional Court, deal with a possible appeal to this Court, and finally dispose of the petition within the stipulated period.***

Thirdly, this being an enquiry into the petition, we thought we could deal with the question in the course of our judgment.

In our view, Section 59(6) (a) of the Presidential Elections Act is not inconsistent with Article 104(1) of the Constitution. The Constitution does not provide grounds for annulment of Presidential elections but expressly provides in Article 104(9) that Parliament shall make such laws as may be necessary for the purpose of the Article, including laws for grounds of annulment and rules of procedure. Parliament implemented this Article by enacting in Section 59(6) of the Presidential Elections Act, which specified the grounds for annulment of Presidential elections. We find nothing in Section 59(6) (a) which is inconsistent with Article 104(1) of the Constitution."

In my view, the provisions of Article 137(5) of the Constitution should not be invoked to clog proceedings in Courts by referring questions of interpretation of the Constitution to the Constitutional Court when the questions do not arise out of the particular proceedings, and are necessary for the determination of the issues in the proceedings.

A Court before which a request for a reference is made is not merely a conduit to transmit the question for a reference but must consider whether there is merit in the application and that it falls within the letter and spirit of the relevant provisions of the Constitution. Parties or counsel should identify issues in their cases or disputes requiring interpretation of the Constitution early enough and lodge necessary petitions directly before the Constitutional Court.

Affidavit Evidence:

As already pointed out all the evidence adduced in this petition was by affidavit. Mr. Nkurunziza for the Respondents made lengthy submissions regarding the affidavits filed by the petitioner. He submitted that the affidavits could be divided into four categories as follows:

1. Affidavits which have been adduced in contravention of the law and which should be rejected ignored by this Court.

2. Affidavits which do not disclose or prove a cause of action or evidence of complaint.

3. Affidavits which have no basis or probative of evidence value.

4. Affidavits specifically referred to which have been answered by affidavits file in reply.

With regard to affidavits in contravention of the law, Mr. Nkurunziza submitted that it is a mandatory requirement of the Advocates Act that any instrument drawn relating to any legal proceedings must have the name and address of the person who drew or endorsed that document. Any person who omits to do so or falsely endorses much document commits an offence under Section 67(1) of the Advocates Act. He pointed out that under sub-Section (2) of that Section any registering authority is required to reject such a document.

Mr. Nkurunziza contended that eleven affidavits filed in this petition purport to have been filed by a firm of M/s Mwene Kahima and Mwebesa Advocates of Mbarara. He pointed out that an affidavit has been sworn by the Managing Director of that firm, Mr. Mwene Kahima Mwesigwa, in which he denies that his firm drew and prepared those eleven affidavits or any other affidavits. Learned Counsel submitted that the endorsement on the affidavits is a false endorsement and therefore the affidavits cannot be accepted or recognized by this Court.

In his affidavit, Mr. Mwene Kahima Mwesigwe stated that until the beginning of this year, he used to have two Assistants in his chambers called Richard Nokrach and Edgar Tibeijuka. Those two Assistants ceased to work for him. The only active lawyer in his chambers, Mr. Jason Mwebesa who was his only partner had been appointed a member of the Public Service Commission.

He then depones:

> ***"6. That I have seen affidavits purporting to have been drawn and filed by my chambers in support of the petition in Presidential Election No.2006.***

7. That the above said affidavits were purportedly deponed by Beingana Leonard Taaza, Friday Dismas, Ensinkweri Godfrey, Rukandema David, Twinomukago Vanice, Katwakura Edward, Haruna Mutabazi, Turyamureeba Mande,Byaruhanga Johnson, Kaina-Turyasingura Joseph.

8. That at the bottom of all there affidavits are the false inscription that they were drawn and filed by firm.

10. That I do not know those deponents, I have never seen them and my firm did not draw those affidavits and any other affidavits deponed support of the petition in that respect, and all those affidavits are forgeries.

11. That what I have stated herein is true to the best of my knowledge."

No affidavit was sworn nor any other evidence adduced to refute the allegations made by Mr. Mwene-Kahima, nor was he called for cross-examination. It was claimed from the Bar that Mr. Murumba who drew the affidavits worked in the Kabale branch of M/s Mwene-Kahima Advocates. But Mr. Mwene-Kahima maintained he did not have any other Partner apart from Mr. Mwebese or a legal assistant.

If the affidavits were not prepared in his chambers or by his firm, then the endorsement on them to that effect was false. Mr. Mwene-Kahima called it a forgery. The affidavits were not sworn before an advocate but apparently before a Magistrate in Kabale Chief Magistrate's Court. These affidavits appear suspect and in my view, it would be unsafe to reply on them.

Mr. Nkurunziza contended that there are four other affidavits which do not bear any endorsement. These are affidavits sworn by Alieje Simon, Byaruhanga Charles, Mayimbo Dick and Asimwe. Learned Counsel submitted that these affidavits should be rejected. I have looked at the affidavits and they were not duly endorsed by the person who prepared them. They were sworn before a Magistrate in Kabale. They must be deemed to have been prepared by the deponents. In those circumstances it would be unfair to reject the affidavits.

On the second category of affidavits which do not disclose any evidence of complaint, Mr. Nkurunziza referred to affidavits in Vol. 1(b) and 2 (d) of the Petitioners affidavits which deal with disenfranchisement and submitted that none of

them prove or show disenfranchisement. He contended that the affidavit of Aliege Gilbert does not indicate that he went back to check his name on the register during display of the register. He argued that accordingly to the affidavit Mr. Nsimbi, Aliege Gilbert was removed by the tribunal from the register following a display preceding the referendum of 28 July 2005. Learned Counsel also referred to other affidavits by presiding officers in answer to allegations of disfranchisement. In my view this submission is premature and I prefer to deal with those affidavits when considering the ground of disenfranchisement under the first issue.

With regard to the third category of affidavits with no basis or probative value, Mr. Nkurunziza referred to affidavits which contained generalized allegations, for instance, that there was wide spread intimidation or bribery and yet they could not indicate any areas where they took place. An example of such affidavit included the affidavit of Augustine Luzindana, who alleges that shs.50.000/= was paid to all LC 1 Chairpersons, when this information is not from his personal knowledge, and Kamateneti whose evidence is not admissible as it is not of her personal knowledge. Once again, I propose to deal with the probative value of such affidavits when considering the allegations of bribery or intimidation.

The last category of affidavits relates to affidavits referred to by counsel for the petitioner which were answered by affidavits by the respondents. He referred to the affidavits of Pte Barigye, Major Rubaramira Ruranga and David Magulu. Mr. Nkurunziza submitted on the credibility of these witnesses. In my view, it is better to evaluate their evidence under relevant issues.

Some of the affidavits purported to attach annextures which were not annexed. This does not render the affidavit inadmissible, but affects the probative value or credibility of the affidavit in respect of the matter deponed to. By applying the doctrine of severance such matters as affected can be excluded from the consideration of the Court, if he annexture was the main evidence relied upon.

A number of annextures attached to affidavits consisted of reports of international and national observes on elections. These reports are important in rendering credibility to the election process because there are deemed to be made by independent observers.

However, their probative value depends on how the observers conducted their monitoring and evaluation of the election, how long they stayed in the country, how much of the information was first hand, how wide spread was their coverage of the process in the country, and what standards they applied in evaluation.

The reports of observers cannot be taken as gospel truth, but can be relied on especially where they are corroborated by evidence adduced in the petition. Like reports of experts their opinions or findings are not binding on the Court which has the power to come to its own conclusion after considering all the evidence adduced.

Non-compliance with the provisions of the Act:

The first issue framed was whether there was non-compliance with the provisions of the Constitution, the Presidential elections Act and the Electoral Commission Act in the conduct of the 2006 Presidential election. Section 59(6) (a) of the Presidential Elections Act requires proof of ***"non-compliance with the provisions of this Act."*** It does not refer to the Constitution or any other Act. However, Section 1(2) of this Act provides**,** that ***"the Commission Act shall be construed as one with Act."*** It seems to me therefore that the main provisions which are relevant to the issue of non compliance with the Act are those of the Presidential Elections Act, and the Electoral Commission Act. Be that as it may, the framing of issues was based on pleadings, which required the court to inquire into whether there was non-compliance with provisions of the Constitution.

The major complaints raised by the Petitioner against the 1st respondent relating to non-compliance with the provisions of the Act are contained in paragraph 8 of the petition which is couched in general terms followed by a list of specific irregularities complained about. The Petitioner then lists instances which constitute non-compliance with the law. The main irregularities listed are:

- Disenfranchisement of voters
- Multiple voting
- Failure to cancel results
- Failure to declare results in accordance with the law

- Failure to take measures to ensure that entire electoral process is conducted under conditions freedom and fairness.

There were other allegations challenging the registration of the National Resistance Movement as an organisation and the use of its symbol which were abandoned at the hearing. It should be noted at the outset that there were many other allegations of non compliance contained in various affidavits but which were not particularized in the petition. It can be safely assumed that these allegations did not form part of the complaints raised in the petition. Those allegations will therefore not be considered unless they are directly connected with the complaints in the petition and the petitioner's accompanying affidavits in support thereof. This Court is enjoined by the Article 104(1) of the Constitution ***"to inquire into and determine the petition expeditiously."*** The Court is not required to make a general inquiry into the Presidential Election as if it was a Commission of Inquiry but to determine the issues and complaints raised in the petition. I shall now proceed to consider the allegations of non-compliance contained in the petition.

Disenfranchisement of Voters:

The Court found that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act in the conduct of the 2006 Presidential election by the 1st Respondent in disenfranchisement of voters by deleting their names from voters register, or denying them the right to vote.

In his petition, the petitioner complained that Contrary to S.19(3) and S.50 of the Electoral Commission Act, the 1st Respondent disenfranchised voters by deleting their names from the voters roll/register. He swore an affidavit listing a number of instances to establish his complaint of disenfranchisement as follows:

> ***"5. That on polling day many voters who had duly registered and were holders of voters' cards were unable to vote because their names did not appear on the voters' roll.***

6. That on polling day many duly registered voters in most districts were not allowed to vote because their names did not appear on the voters' registered.

7. That many voters were transferred without their knowledge.

8. That many voters who registered after my return from exile were removed from the register and were denied their right to vote."

The petitioner relied on the affidavit evidence of several officials of his FDC party, and about 90 persons who claimed had been disenfranchised. In his affidavit, Major (Rtd) Rubaramira Ruranga, the Chief Electoral Officer of FDC, dated 18th March 2006, alleges that the 2nd Respondent's brother, Gen. Caleb Akandwanaho (Salim Saleh) was involved in an exercise of registering FDC supporters by noting their voter's Pin Cards and that most of those names written down were subsequently deregistered or deleted from the register. It was in Eastern Uganda in the districts of Iganga, Kamuli, Mayuge, Jinja and Mbale.

Major Rubaramira Ruranga then goes on to allege massive deregistration throughout the country and gives figures for some places in Kampala in the affidavit as follows:

"12. That I also know that many people whose names appeared in the register during the display exercise were deregistered and therefore unable to vote. This took place throughout the country for example at Muno A/B Salompas Zone Kanyanya Zone and UTC Kampala where 400 people were deregistered. Some names of such people and their voter registrations Pins are indicated in the document annexed hereto as "A".

22. That I know the tribunals to consider complaints during the display exercise were never constituted by the 1st Respondent and the clean-up exercise was conducted by persons not authorized.

23. That I know that many people who registered to vote upon the return of the petitioner from South Africa and duly issued with registration certificates their names were deleted or not entered in the register."

Major Rubaramira Ruranga annexed several reports of international observes and local monitors from HURINET Uganda, Democracy Monitoring Group

(DEMOGROUP), and Foundation for Human Rights Foundation Initiative (FHRI), Periodic Observation Reports.

Another FDC Official whose evidence was relied on was Livingstone Kizito, FDC Chairman, Kampala District, and Coordinator for the petitioner in the 2006 elections in Kampala. He deponed that he visited about 20 polling stations on polling day. He states that on that day he received reports that many FDC supporters had been disenfranchised by removing their names from National Voters Register. On investigation he discovered the following:

(a) At Kanyanya Zone polling station in Kisenyi, Kampala Central Division, the polling station was surrounded by members of the Military Police who even attempted to arrest him.

(b) At Katimba and Main Library polling stations over 300 people could not find their names on the National Voters Register including Sheikh Mbogo who had been voting at Katimba Station for a long time.

(c) At Muno A/B Salompas Zone Kampala Central Division the names of many FDC Voters had been removed from the Voters Register.

He listed about 120 names. He stated that he reported the matter to the office of the 1st Respondent but no response was made to the complaint.

There were about 90 affidavits sworn by persons who claimed that they had been registered and had voters' cards but did not find their names on the voters' rolls at the polling stations where they registered and were therefore denied the right to vote. Other people claimed that there were on the register but they were ***"cut off from the line"*** by presiding officers and did not therefore vote.

The 1st Respondent refuted the above allegations through the evidence of many affidavits from its members and officials, returning officers, presiding officers, officials and supporters of the National Resistance Movement (NRM) allegedly implicated and security officers.

The first to refute the allegations was Eng. Dr Badru M Kiggundu, Chairman of the 1st Respondent. In his affidavit in answer to the petition, he denied allegations relating to disenfranchisement of voters as follows:

> ***"6. That the voters register was updated between 29th September 2005 and 30th October 2005, displayed between the 22nd December 2005 and 17 January 2006 and subsequently cleaned up in accordance with the law and every person who registered as a voter had an opportunity to correct any anomaly related to their registration.***
>
> ***7. That the allegation by the Petitioner that many registered voters who turned up at their respective stations were turned away and not allowed to vote is false.***
>
> ***8. That all the registered voters who turned up to vote at their polling stations were allowed to vote.***
>
> ***9. That all transfers of voters on the register were done in accordance with the law.***
>
> ***10. That the allegations by the Petitioner that many voters who were registered after his return from exile were removed from the register is false."***

The evidence of the Chairman of the 1st Respondent was supported by the affidavit of Nsimbi Charles, Head of Voter Registration of the 1st Respondent whose duties include registering voters, maintaining the voter register and issuing voter cards. In his affidavit dated 22 March 2006, in response to the affidavits of Major (Rtd) Rubaramira Ruranga and Livingstone Kizito; he stated that after scanning the National Voters Register, he found as follows:

- 17 people alleged to have been deleted from the voters register by the parish tribunals were actually on the register (names were listed)

- 29 people were not on the register because they were removed from the register at the Children's Library polling station since they neither reside nor originate from the area. (names supplied).

- 14 people were not on the register because they were removed from the voters' register at Munno offices polling station because they neither reside nor originate from the area.

- 32 people were not on the register because they were removed from the voters' register at Katimba polling station because they neither reside nor originate from the area.

- Mutamba Adam, Kimuli Richard, Nassanga Cissy, and Bwajja Owahgut were removed from their respective polling stations by Parish Tribunals because they neither originate, nor reside in the respective areas where their polling stations are situated.

Mr. Nsimbi also found that many persons who claim that they were registered and yet they did not appear on the voters' register were actually on the register. For instance Namawaya Zaina of Idudi, Foundation School Polling Station in Iganga District was actually on the register. On the other hand there were others who claimed to have been registered when they actually they were not on the register. For instance, Pimundu Samuel at Omoyo Polling Station, in Nebbi District.

Some voters who claim they were not on the register were actually on the register but at different polling stations, for instance Waparwoth Grace who claimed to have been registered at Onfuku Polling Station Nabbi Town Council, but was instead found to have been registered Namrwooho Polling Station in the same Town Council. This change of polling stations affected many voters in Nebbi, Masindi, Mbale, Sironko and Busia Districts.

Many voters whose names did not appear on the register were removed from the register on the recommendations of the Parish Tribunals following the display preceding the referendum of 28th July 2005. Mr. Nsimbi found that some of the deponents who claim to have been disenfranchised had no names on the database because they did not register as voters.

He stated that all the persons who claim to have been disenfranchised had the opportunity to check if their names appeared on the voters register and the polling

stations they belonged anomalies may have arisen from their registration during the display exercise of the National Voters Register from 22 December 2005 to 17 January 2006. He defended the 1st Respondent that if the complainants had participated in the display exercise their complaints which they raised would have been addressed and whatever anomalies they raised would been corrected ruing the cleaning and preparation of the final voters register which was used in the Presidential Elections.

Evidence from presiding officers and returning officers supported the evidence presented by the members and officials of the 1st Respondent. Most presiding officers denied allegations of stopping voters who were on the line to vote, by ***"cutting them off"***. In some cases people who claimed had been deleted or prevented from voting actually voted. In other cases people who claim had not found their names on the register were not actually seen at the polling stations.

It was, however, conceded by the 1st Respondent, that 153,614 voters out of a total of 10.6 m voters were deleted from the voters register, but it was argued that the deletion was valid since the persons whose names were deleted had ceased to qualify or to be eligible for registration at those particular polling stations as they neither originated nor resided in those areas as required by electoral law. Others had been registered in two places. It was also submitted that the names were removed by the 1st Respondent during the voter up-date exercise upon the recommendation of the Parish Tribunals. It was also contended that the complaints were unjustified as the persons deleted failed to check their names on the registers when they were displayed.

The right of every Ugandan to vote and to register as a voter is provided in Article 59 of the Constitution as follows:

> *"**(1) every citizen of Uganda of eighteen years of age or above has a right to vote.***
>
> **(2) *It is the duty of every citizen of Uganda of eighteen years of age or above to register as a voter for public elections and referenda.***

(3) ***The state shall take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote.***

(4) ***Parliament shall make laws to provide for the facilitation of citizens with disabilities to register and vote."***

Section 19(1) of the Electoral Commission Act provides that any person who is a citizen of Uganda, and is eighteen years or above shall apply to be registered as a voter in a parish or ward where the person originates from or resides. No person shall be qualified to vote at an election unless that person is registered as a voter in accordance with Article 59 of the Constitution.

As regards the display of voters rolls, Section 25 of the Electoral Commission Act provides that before any election is held the Commission shall by notice in the Gazette appoint a period of not less than twenty one days during which a copy of the voters roll for each parish or ward shall be displayed for public scrutiny and during which any objections or complaints in relation to the names included in the voters roll or in relation any necessary corrections shall be raised or filled. The display must be carried out in a public place within each parish or ward.

During the period of display of the voters roll, any person may raise an objection against the inclusion on the voters roll of any name of a person on grounds that the person is not qualified to vote or to be registered as a voter in the constituency, parish or ward or that the name or a person qualified to vote or to be registered has been omitted. Any objection must be addressed to the returning officer through the chairperson of the parish council of the person raising the objection.

The appointment and composition of parish tribunals is provided for under Section 25(5) and (6) as follows:

"(***5)*** ***The returning officer shall appoint a tribunal comprising five members to determine objections received by him or her under Subsection (4).***

(6) ***The tribunal shall comprise-***

(a) ***at least three members of the village executive committee, at least one of whom shall be a woman; and***

(b) ***at least one of each of the following-***

(i) ***elders***
(ii) ***Chiefs."***

It is provided in Subsection (8) that any decision of a tribunal appointed under Subsection (5) shall be subject to review by the Commission.

On the evidence adduced I am satisfied that quite a number of voters were disenfranchised or denied the right to vote through removal of their names from the register during the exercise of cleaning or up-dating the voters register. Disenfranchisement can be effected by law or by action or omission of electoral officials. In the instant case it seems that some voters were disenfranchised by change in the law requiring them to register either where they originate or reside, and not where they work. Some voters who registered where they work could have been removed from the voters roll due to this change in the law. But there was also evidence that those who ceased to reside in the parishes where they were registered were also removed from the voters register allegedly on the recommendations of parish tribunals. The evidence showed that more urban areas were affected by this factor. The allegations of manipulation or influence by people from outside the areas like Gen Caleb Akandwanaho were not proved, nor were the allegations that some voters were ***"cut off"*** from the line and prevented to vote proved.

There was unsatisfactory evidence to establish how and why so many names were removed from the voters register. There was inadequate evidence to prove that in all such cases parish tribunals had been duly appointed and that they functioned efficiently and impartially. The procedure followed by the tribunals was not established. As a result, there was no evidence to show that the affected registered voters had been informed of their removal, or that their cases had been reviewed by the 1st Respondent. In my view a citizen is entitled to a right to fair and just treatment in administrative decisions, the right to access to information, and the right to a fair

hearing when making decisions affecting his or her fundamental rights like the right to vote, and participate in his or her governance.

I accept that it is the duty of the citizen to check during the display period whether his or her name appears in the voters register. I am also of the view that a citizen should be vigilant to check at which polling station he or she is registered as a voter. But if a citizen is not so vigilant, should he or she be disenfranchised? I think not, for the right to vote is fundamental in promoting the right of a citizen to participate in governance and determine the destiny of his country. It should not be taken away lightly.

The Electoral Commission has a duty to ensure that all citizens qualified to vote register and exercise their right to vote. The entire process of cleaning the register should be fair and transparent, and should be preceded by adequate voter education. The confusion and frustration of voters who were unable to vote suggest lack of adequate civic education. Although I agree that some of the names removed were done legally, I find on the evidence presented that the names of about 150,000 people were improperly removed from the voters register and were therefore disenfranchised during the Presidential Election.

Failure to Cancel Results where Gross Irregularities or Malpractices Occurred:

The Petitioner complained that contrary to Section 57 of the Presidential Elections Act, the 1st Respondent failed to cancel results in polling stations where gross irregularities and malpractices occurred, particularly in the districts of Kiruhura, Pallisa and Manafa.

The Petitioner relied on the evidence of Anthony Adome, Chairman, FDC Pallisa District and Edith Byanyima who monitored elections for FDC in Kiruhura District. In his affidavit Adome states on 24 February 2004 at 4.00 p.m. the Registrar Mr. Pabire Higenyi printed a copy of the Presidential Election Results for Pallisa District where he had declared the total number of polling stations received as 415 out of 440 total number of polling stations. He immediately queried the Registrar over the difference of 25 polling stations. He states that he found out that the Registrar had not tallied other polling stations where the number of votes which were received in

were and above the registered votes. The Registrar acknowledged the nullification of results from those stations in the declaration of results form. Later the Registrar declared 425 polling stations, an addition of 10 more polling stations. He then states,

> ***"10. That I found out that out of 10 polling stations the Registrar had cancelled outright the results of 2 polling stations where there were massive malpractice namely,***
>
> ***(i) Mukongoro polling station in Tirinyi County.***
>
> ***(ii) Kobolwa in Kibuku sub-county, all in Kibuku County, Pallisa District***
>
> ***11. That I found out that in respect to the remaining 8 polling stations, the Registrar did not tally them as the votes cast were and above the registered voters. The 8 polling stations referred to are: Midiri A – M, Nalubembe N-Z, Mayobe, Kalekwana SDA Church, Kaguma COU; Okiruket A, Nyanza and Bumiza.***
>
> ***12. That the Registrar's explanation left 5 polling stations whose results had not been tallied."***

The 1st Respondent relied on the evidence of Mpima Kolonero the Presiding Officer at Kobolwa polling station, and Pabire Higenyi who was the Registrar and Returning Officer for Pallisa District, in denying the allegations. Mpima Kolonero confirmed that certain malpractices had taken place at polling stations where voting had been interrupted by violence and consequently he did not declare the results at those polling stations. He explained in his affidavit that while he was executing his duties as Presiding Officer at Kobolwa Primary School polling station on 23 February 2006 at about 2.00 p.m., there was a heavy rain down pour. He asked the voters to go to the nearest classroom and shelter, which they did. At about 2.30 p.m., a numberless pick-up with many people armed with sticks alighted from the vehicle, locked voters inside, and returned to the room where he was held hostage. They grabbed the ballot papers and started ticking them.

He stated that what was alleged that ballot papers were ticked in favour of candidate Yoweri Museveni, candidate Kamba and Hon Jennifer Namuyangu was not true as he did not establish which candidate exactly they were ticking for. He averred that as a Presiding Officer he did not see the said pre-ticked ballot books and it was not true

that such ballot paper books were ticked in favour of 2nd Respondent, Kamba Saleh and Hon Jennifer Namuyangu for Parliamentary and women representative, respectively.

He deponed further that he telephoned a Police Officer called Bamunoba on telephone N0.078 2 471676 who came with other Police Officers and arrested three people. Thereafter the voting stopped and election materials were taken to Pallisa Police Station and I did not declare the results from that polling station.

Pabire Higenyi who was the Registrar and Returning Officer for Pallisa District deponed in reply to the affidavit of Anthony Adome, and admitted that he cancelled the results of 7 polling stations where gross malpractices were discovered. He explains why he cancelled results in those polling stations as follows:

> ***"4. That the polling stations at which the number of votes received was over and above the registered votes were five namely Nalubembe P/S N-Z, Midiri P/S A – M, Nyanzi, Okiruket and Manyobe polling stations and the results were not reflected on the tally sheet as they were cancelled.***
>
> ***5. That it is true as alleged in paragraph 6 of Anthony Adome's affidavit that the results of polling stations where the number of votes received were over and above the registered voters were nullified.***
>
> ***Annexture A of the affidavit of Adome on which this was done was not a declaration of results form but a summary form, which was not conclusive and was up dated from time to time as results were coming in.***
>
> ***7. That it is true that out of the 10 polling stations, I cancelled outright the results of 2 polling stations where there were malpractices, namely Makongoro polling station in Tirinyi sub County and Kobolwa Polling station in Kibuku sub county, all in Kibuku County, Pallisa District.***
>
> ***11. That following update by Electoral Commission, it is only the results of 7 polling stations, which were not tallied and the reasons for not doing so are mentioned in paragraphs 4 and 7 of my affidavit."***

On the evidence adduced it is clear that the 1st Respondent cancelled some results in polling stations in Pallisa District where gross malpractices or irregularities occurred.

The second piece of evidence relied on was that of Edith Byanyima who was appointed by the Petitioner to supervise and monitor the voting process on polling day in Kiruhura District claimed to have observed many irregularities in the district. These included open voting, chasing away of the petitioner's agents, underage voting, and failure to give copies of declaration forms to the petitioner's agents. She claims that she protested against underage voting and the Presiding Officer at Rushonge polling station promised not to repeat the mistake. She also claims to have appointed two polling agents at Kiruhura polling station, where the agents had been chased away.

Ms Byanyima's claims were strongly refuted by affidavits of Capt.(Rtd) Bashaija David, an LC 5 Councillor representing Kanyunyera in Kiruhura District, Matsiko Hope Eric, LC III Chairperson Kenshunga Sub County, and Rwakashaya Samuel, a polling Constable, among others. These deponents seriously cast doubt on the credibility of Edith Byanyima's evidence.

Consequently, I was not satisfied that there were gross malpractices which warranted the cancellation of results in those polling stations in Kiruhura District. There was no evidence led on the alleged gross malpractices which justified cancellation in Manafa District. Accordingly, this complaint was not proved.

Failure to Declare Results in Accordance with the Law:

In his petition, the Petitioner alleges that the 1st Respondent did not validly declare the results in the Presidential Election in accordance with Sections 56 and 57 of the Presidential Elections Act, and the Electoral Commission Act. In his affidavit in support of the petition he alleges that the 1st Respondent declared results from the districts without a return form, reports of elections, tally sheets, and declaration of results forms.

These allegations were supported by the affidavit of Muntu Mugisha who is the Mobilising Secretary of FDC and was assigned to the National Elections Tally Centre at Nambole to represent the Petitioner. He states that his instructions were to ensure that results transmitted from the Returning Officer are complete and in accordance

with the law comprising of the Result Form, a report of the elections within, the Returning Officer's electoral district, tally sheets, and the declaration of results forms from which the official addition of the voters was made.

He then depones:

> ***"5 That at the National Tally Centre I noted and observed the following:***
>
> ***(a) The National Tally Centre purportedly received results from the Returning Officers by fax or telephone transmission.***
>
> ***(b) That I was not allowed access to the fax receiving the results which was manned by an Electoral Commission official.***
>
> ***(c) That the results received purportedly by fax were not the official results declared by the Returning Officer in respect of the electoral districts but partial results from selected polling stations.***
>
> ***(d) That similarly the Electoral Commission purportedly received results from the Returning officers by telephone which results had not been declared by the Returning Officers.***
>
> ***(e) That the results that were received by the Electoral Commission either way by fax or telephone had no corresponding tally sheets accompanying them.***
>
> ***6. That accordingly, I did not observe the tallying and ascertainment of results by the Electoral Commission but I was not shown faxes indicating purported results received from the different districts and entries by the Electoral Commission Office of results received on phone."***

He states further that he reported to the Petitioner his observations at the Tally Centre and objections were made by FDC to the Electoral Commission. He concludes his affidavit:

> ***"11. That in order to ascertain the results of the winner of the 2006 Presidential Elections held in 23rd February 2006, there is a need to add all the votes recorded on each Declaration Form at a polling station tally the votes of all results for all***

the polling stations and ascertain the final results at the elections at the national level."

The 1st Respondent presented the evidence of Wamala Joshua, the Head of Election Management Department of the Electoral Commission, who in his affidavit refuted allegations that the declaration of results was not validly made. He stated that the national tally centre for the Presidential Election 2006 was Nambole Stadium where the 1st Respondent declared the results of the election. He was the head of the team that received and tallied the elections with close supervision of the 1st Respondent. He explains how results were received from districts by fax and telephone from districts and that the results were declared after the results had been received from all 69 districts. In this connection Mr. Wamala deponed as follows:

"7. That the 1st Respondent and previous Electoral Commissions in Uganda as well as other countries have traditionally received election results from the districts by fax and by radio calls and phones where fax facilities are not available.

8. That the 1st Respondent received the 2006 presidential election results from the Districts by fax and by phone from Districts without fax facilities using a facility by which the candidates and parties representatives listed to the phone conversations between the 1st Respondent's receiving officers at the National Tally Centre and the District Returning Officers.

9. That the results transmitted by phone were done through a listen in telecommunication facility through which the agents of participating parties and candidates were able to listen to and confirm the results as they were transmitted to the National Tally Centre.

10. That the results transmitted by phone were recorded by the receiving officers on transmission of results forms identical to those distributed to the districts.

11. That the 1st Respondent had received results from all the 69 districts by 4.30 p.m. of Saturday 25 February 2006 by fax for districts where fax facilities were available and by phone from districts where fax facilities were not available.

12. That the 1st Respondent properly ascertained the correct result of the election before declaring the 2nd Respondent elected as President.

13. That subsequently the 1st Respondent received all the original transmission of results forms and tally sheets from all the districts which confirm the accuracy of the declared results of the election.

14. That tallying of results at the districts was done using a computer program which would automatically produce a transmission form for transmission by fax or phone to the National Tally Centre.

15. ***That the dates which appear on the tally sheets are dates when they were printed out."***

The evidence of Wamala was supported by that of Sam Rwakoojo, the Secretary of the 1st Respondent who in his affidavit dated 21st March 2006, explained the use of radio calls and phones and the reason for cancellation of results. He stated,

"6. That the 1st Respondent and previous Electoral Commissions in Uganda as well as other countries have traditionally received election results from districts by fax and by radio calls and phones where fax facilities are not available.

7. That before during and after the polling, the 1st Respondent took several decisions to guarantee the transparency of the election and ascertain the accuracy of the counting, tallying and declaration of the result of the election. Minutes containing the 1st Respondent's decisions are collectively annexed hereto and marked "EC3."

8. That the 1st Respondent before declaring the result of the election cancelled results from 29 polling stations after ascertaining that the cancellation would not substantially affect the result of the election.

9. That the major reasons for cancellation of results was return of more votes than the number of voters on the voters roll and tampering with voting materials.

10. That I know that the 1st Respondent successfully conducted a transparent, free and fair presidential election in which the 2nd Respondent emerged the winner and was declared elected as President."

There was also the evidence of Steven Ongaria, a Member of the 1st Respondent and Chairman of the National Electoral Liaison Consultative Forum who deponed that the Forum, established by the 1st Respondent discussed and resolved numerous

challenges related to the Presidential Elections. The Forum comprised of a member and several officers of the Commission, and two permanent representatives from each of the participating parties and independent candidates. They held at least two meetings every week which were attended by representatives from the Petitioners political party. He asserted that the 1st Respondent took numerous decisions pursuant to the recommendations of the Forum to ensure that the election was conducted in a transparent free and fair manner including the decision to count, tally and declare the result of the Presidential election. One of the issues discussed was the use of telephones where fax facilities were not available.

Article 103(7) of the Constitution provides that the Electoral Commission shall ascertain, publish and declare in writing under its seal, the results of the Presidential Election within forty-eight hours from the close of polling. This provision is echoed in Section 57 of the Presidential Elections Act; which gives further details on the form and procedure for declaration of results.

In the present petition, it was complained and submitted that the 1st Respondent did not comply with the provisions of Section 56 of the Presidential Elections Act regarding the documents which must be received by the 1st Respondent, from the districts before declaration of results. Section 56 provides:

> ***"(1) Each returning officer shall, immediately after the addition of the votes under Section 54 (1) declare the number of votes obtained by each candidate and also complete a return in the prescribed form indicating the number of votes obtained by ach candidate.***
>
> ***(2) Upon completing the return under subsection (1) the returning officer shall transmit to the Commission the following documents:-***
>
> **(a)** ***the return form;***
>
> **(b)** ***a report of the elections within the returning officers electoral district;***
>
> **(c)** ***the tally sheets; and***
>
> **(d)** ***the declaration of results forms from which the official addition of the votes was made."***

The main borne of contention was whether the 1st Respondent was entitled to declare the results without receiving all the documents listed in Section 36(2) of the Presidential Elections Act from the returning officers. It was argued for the Petitioner that the 1st Respondent could not validly ascertain the results without the documents. On the other hand, it was submitted for the 1st Respondent that it was not a mandatory requirement to receive all the said documents in order to ascertain and declare results because the mode of ascertaining results was not prescribed; and therefore the Commission had broad mandate in ascertaining results. It was also submitted that it was impractical to receive all the reports from the returning officers before the results could be declared within the time limit of forty-eight hours. As regards tally sheets, it was contended that the returning officers used them in ascertaining results.

I accept the submission by the 1st Respondent that Section 56 does not require the 1st Respondent to receive all the documents listed in Section 56(2) from the returning officers before ascertaining and declaring the results of a Presidential election. There is no time limit of or any period provided in the subsection within which the documents listed must be transmitted to the 1st Respondent. The provisions of the law and the difficulties that would arise in requiring the reports to be submitted within 48 hours, compel me to hold that the reports are not pre-requisites for a valid declaration of results. This is not to hold that the reports are not essential to the transparency of the election process or indeed that they should not be prepared and transmitted to the 1st Respondent within a reasonable time.

There is finally the issue of use of telephones in ascertaining or transmitting results from the districts. The 1st Respondent defended the use of telephones where fax facilities were not available because of the constraints of time and also that they had been previously been used in Uganda and elsewhere as valid medium of communicating results from up country stations. Moreover, according to the 1st Respondent this procedure had been discussed in the National Electoral Liaison Consultative Forum, attended by representatives from the Petitioners political party.

In my view, the use of telephones to transmit results is not prohibited by any electoral law. Section 56 is silent on the matter. Its use is clearly a controversial issue as it

may be manipulated and abused to transmit inaccurate results. In the present case, the system of listening in by all concerned may have reduced or eliminated room for falsification of results. There was no evidence of such falsification of results by telephone. Accordingly the complaint of failure to declare results in accordance with the law was not established.

We did not find that the 1st Respondent had failed to declare the results in accordance with law. On the evidence available, I am satisfied that the 1st Respondent validly ascertained the results of the election using correct information transmitted to it by returning officers.

Inaccuracy in the Counting and Tallying of Results:

This Court found that there was non-compliance by the 1st Respondent with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act, in the counting and tallying of results. This finding arose out of the complaint that the 1st Respondent did not validly declare the result in accordance with said laws. It was also alleged that the 1st Respondent declared results from the districts without return forms, reports from returning officers, tally sheets, and declaration of results forms. While the Court found that the results were validly declared it found that there had been some inaccuracies in the counting and tallying of results in some polling stations.

To establish this complaint, the Petitioner relied on the affidavit evidence of Muntu Mugisha, Olive Kamya, and Dr. Jonathan Odwee, among others. Muntu Mugisha in his supplementary affidavit dated 19th March 2006, alleges a number of irregularities in respect of tally sheets obtained from the Electoral Commission. The first complaint is that the tally sheets were prepared and signed by the Returning Officers after the results were declared by the Electoral Commission, on 25 February 2006. The list of the tally sheets from 31 districts shows that they were released at different dates between 26th February and 9th March 2006. The release date appears at the top of the tally sheets. It is doubtful whether this is the date of preparation or signature or just the date when they were printed. The signatures at the bottom of the sheets do not bear the date.

The second complaint is that there were discrepancies in the results contained in tally sheets and returns from the Returning Officers in Hoima, Bundibugyo, Kamwenge, Pallisa and Kibaale Districts. The discrepancies are contained in paragraph 4 of the affidavit as follows:

> ***"(a) In respect of Hoima District there are 2 sets of Tally Sheets for Bugahya county prepared on 24th February 2006 and 25th February 2006 with different results.***
>
> ***(b) The 2 sets maintain a fixed percentage but with different results.***
>
> ***(c) The returns faxed to the Electoral Commission also show different results. Copies the Tally Sheets and Faxes are annexed as "1" "2" "3" and "4" respectively.***
>
> ***(d) That in the same district of Hoima, there are results for Karama Outside Quarter Guard Polling Station included in the Tally Sheet where the registered voters being UPDF had shifted and were not longer resident in the area.***
>
> ***(e) That in respect of Pallisa District the Tally Sheet was prepared on 27th February 2006 and in respect of Ajepetete GCS Ltd the number of votes for the Petitioner was reduced from 446 to 4. Copies of the Declaration Form signed by the Petitioner's agents is hereto attached together with the Tally Sheet page 48 and the Returning Officer are attached hereto and marked "5" "6" and "7" respectively.***
>
> ***(f) That in respect of Bundibugyo District, the Return transmitted on telephone by the Returning Officer was signed by a one Kabagambe Deus whereas the Tally Sheet was signed by Kaija Gweon. Copies of the Results Form are attached and marked "10" and "11" respectively."***

In her affidavit dated 18 March 2006, Beti Olive Namusango Kamya, a Member of Parliament for Rubaga North Constituency who was appointed by the Petitioner to coordinate his campaign and election efforts in the Constituency gave figures in terms of votes cast during the Presidential elections which were different from the number of votes cast in the Parliamentary votes which was done on the same day. She alleged that there was a discrepancy of 8,145 votes between the total votes on Declaration Forms in Rubaga North and total votes announced by the Electoral Commission.

Affidavit evidence was also produced by Dr. Jonathan Odwee, a Senior Lecturer in Institute of Statistics and Applied Economics at Makerere University. He received instructions from the Petitioner to make an analytical study of the Voters Register, Tally Sheets, Returning Officers reports and declaration of results forms in respect of all Constituencies in the Presidential and Parliamentary Elections of 23 February 2006 and draw conclusions from them. I shall consider the value of this expert evidence or opinion on other aspects of the case later in this judgment. Suffice it to say that his findings showed inaccuracies between the declaration of result forms and tally sheets, at some polling stations. He also found some discrepancies between provisional results and final results.

In his affidavit, Dr. Odwee alleges,

> ***"12. That the 1st Respondent manipulated the tally sheets and distorted the results from some polling stations as reflected in the declaration of results forms attached herewith together with their corresponding tally sheets for Bunabigabo in Mbale District, Nsola Polling Station in Iganga District, Kisasi College School N-Z, West Mengo Growers Polling Station, both in Kampala District and Kadulumi Teachers College Polling Station, Nasenyi Polling Station, Kasasira Polling Station, Muyiti Teachers College Polling Station and Ajipet Growers Society Limited Polling Station, in Pallisa District, and Ibanda Main Street Polling Station, Kisame IV Polling Station in Ibanda District, to illustrate this serious anomaly. The resulting effects are negatively weighed against the final totals declared for the Petitioner. The declaration of results forms and the tally sheets for the affected polling stations are herewith attached and marked D_1 and D_2 respectively."***

Dr. Odwee alleges further that another method of manipulating the final results was to increase and/or decrease the final results as compared with the provisional results. He states that the method is well illustrated by an example of Apac District where the totals of the provisional and final figures are not supported by the number of registered voters. He further states,

> ***"25. That from the examination of the Tally Sheets available we have observed that in some instances the votes cast for the Petitioner were reduced as in the case of Ajepetete G C S Ltd***

in Pallisa District where the Petitioner's votes were reduced from 446 to 4. this also happened at Kisasi, Kawempe Division, Kampala District where the Petitioner's 317 votes were entirely wiped out. The losses and gains in the percentage points cumulatively total 1 million."

The 1st Respondent relied on the affidavit evidence of Wamala Joshua, the Head of Election Management Department of the 1st Respondent. In his affidavits in reply to the affidavits of Muntu Mugisha and Beti Olive Kamya, he denied most of their allegations. Mr. Wamala gave the correct number of polling stations in Rubaga North Constituency and the number of votes cast for each Presidential Candidate in the Constituency. He denied most of the allegations made by Dr. Odwee including the allegation that the 1st Respondent manipulated the tally sheets, or distorted the results from any polling station. Mr. Wamala however, admitted that there were some errors in data entry at the time of tallying, the sum total which amounted to 962 votes of the Petitioner which is 0.013% of the total votes cast.

Mr. Wamala went on to state that the polling stations where such errors were committed were six instead of twelve as alleged by Dr. Odwee. The polling stations involved were West Mengo Ground in Kawempe Division North where in respect of tally sheet, the Petitioner was given 174 whereas on the results declaration form, he received 280 votes; Kisasi College School in the same division, where the Petitioner was given 0 in tally sheet whereas he received 317 votes in the Results Declaration Form; Kasasira Primary School, Kibuuka county where the Petitioner was given 33 votes whereas in the result declaration form he received 62 votes; Ajepetete GCS Ltd, Pallisa County where the Petitioner got 4 votes on the tally sheet whereas he had received 442 on the results declaration form; Kihamu in Ibanda South where the Petitioner got 36 on the tally sheet whereas the results declaration form had 44 votes; and Nsola Primary School, in Busiki County where the Petitioner got 4 on the tally sheet whereas on the results declaration form, he received 64 votes.

According to Mr. Wamala no differences were detected in the following stations: Bunabigabo GSC, in Bungokho County, Kadalumu Teachers College, Mugiti Teachers College, in Budaka County, Ibanda Main Street and Kagungu Catholic Church in Ibanda South. All these ten polling stations corresponded to the stations

identified by Dr. Odwee. Mr. Wamala stated that these errors at the time of tallying could not change the winning candidate.

From the evidence adduced from both sides I am satisfied that there were some inaccuracies in the counting and tallying of results in some polling stations as admitted by 1st Respondent. The 1st Respondent did not assign any reason for these mistakes but the Petitioner contends that the figures were manipulated in favour of the 2nd Respondent. While there was some evidence to support this allegation for instance, in the fact that generally speaking the votes of the Petitioner were reduced in the tally sheets, whereas those for the 2nd Respondent were increased, there was no consistent pattern as in some cases the figures of the Petitioner were increased whereas those of the 2nd Respondent were reduced. There were also figures which indicated that they could have been caused by typographical errors. The extent of the errors was not established and the figure of 1 million votes lost by the Petitioner as suggested by Dr Odwee remains merely speculative.

N**on-compliance with the Principles of the Act:**

The second issue for determination was whether the Presidential election was not conducted in accordance with the principles laid down in the Constitution, the Presidential Elections Act and the Electoral Commission Act. This issue was founded on the first part of the Petitioner's allegation in paragraph 7 of his petition where he averred:

> ***"In the further alternative but without prejudice with the foregoing paragraph the election of the 2nd Respondent was invalid on the ground that it was not conducted in accordance with the principles laid down in the provisions of the Presidential Elections Act and that such non compliance affected the results in a substantial manner."***

The principles of the Act the 1st Respondent is alleged to have failed to comply with are not specified in the Petitioner's affidavits in support of the petition. In my view, the Petitioner should have expressly pleaded them. The Petitioner merely pleaded in paragraph 8(e) of the petition that contrary to Section 12(e) and (f) of the Electoral Commission Act, the 1st Respondent failed to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness.

The 1st Respondent denied the allegation made by the Petitioner in its answer to the petition; and averred that it took measures to ensure that the entire electoral process was conducted under conditions of freedom and fairness. In his affidavit in support of the answer, the Chairman of the 1st Respondent Eng. Dr. Badru Kiggundu states that the elections were held in an atmosphere of freedom, fairness and transparency and there were no irregularities or malpractices that affected the results in a substantial manner. He asserts that the 1st Respondent accredited several independent election observers whose findings confirm that the election was transparent, free and fair. He attaches copies of the observer reports of the European Union and the Commonwealth. The 2nd Respondent averred that no acts of bribery by the electorate or attempts to interfere with the free exercise of the franchise by voters were done either with his consent and or approval.

Mr. Wandera Ogalo, for the Petitioner submitted that the principles were laid down in my judgment in the Presidential Election Petition No 1 of 2001, ***Rtd Col Dr Kiiza Besigye vs Yoweri Kaguta Museveni and Electoral Commission.***

Learned counsel cited the passage where I stated,

> ***"In my opinion the principles of the Act can be summarized as follows:***
>
> - ***The election must be free and fair***
> - ***The election must be by universal adult suffrage, which underpins the right to register and vote***
> - ***The elections must be conducted in accordance with the law and procedure laid down by Parliament***
> - ***There must be transparency in the conduct of elections***
> - ***The result of the election must be based on the majority of the votes cast".***

In that judgment, I pointed out that in my view, the overriding principle was that the election must be free and fair. However, the concept of free and fair election was not

defined in the Constitution or in any Act of Parliament, but it was derived from the principles contained therein.

After referring to several authorities, I attempted to define a free and fair election entails:

> ***"To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the ground so that the incumbents or Government Ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedures should guarantee the secrecy of the ballot, the accuracy of counting and the announcement of the results, in a timely manner. Election law and guidelines for those participating in elections should be made and published in good time.***
>
> ***Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine election disputes speedily and fairly."***

In their separate judgments, in that petition, my learned brothers generally agreed with the principles I stated above. The principles are also in line with commentaries and reports from distinguished authors and organisations. I shall refer to a few of them.

In a Press Release No. 222 dated 24 March 2006, the Inter-Parliamentary Union in Geneva stated,

> ***"International law, as such does not provide straight answers to the questions, "was this a free and fair election?" It does however, provide the standard to be achieved namely, that the election produces an outcome which expresses the will of the people. It also prescribes certain obligations of conduct-protection of fundamental human rights – and of adult – universal suffrage, equality and secrecy of the vote – all of which confine and structure the conduct of states as primary actors. The 'free and fair' criteria are***

normative background against which to make a value judgment on the electoral process in context." (see http://www.ipu.org/press–e/gen 222 html.)

Prof William P. Quigley of Loyala University defined free and fair elections as follows:

"Free and fair mean that all people have a safe chance to vote for candidates of their choice, that all candidates who want to run have a safe chance to do so, and all voters have a real chance to have that vote counted and a real chance that their candidate, if elected will be allowed to serve." (see http://www.info/haiti-news/2005/free_fair.html.)

The European Commission for Democracy Through Law (The Venice Commission) of the Council of Europe adopted an 18 – 19 October 2002 a Code of Good Practice in Electoral Matters, with Guidelines and Explanatory Report which spelt out principles which can be said to ensure a free and fair election. In paragraphs 1 and 2 of the Report, the principles are described as follows:

"1. Alongside human rights and the rule of law, democracy is one of the three pillars of the European Constitutional heritage, as well as the Council of Europe. Democracy is inconceivable without elections held in accordance with certain principles that lend them their democratic status.

2. These principles represent a specific aspect of the European constitutional heritage that can legitimately be termed the European "electoral heritage." This heritage comprises two aspects, the first, the hard core, being the constitutional principles of electoral law such as universal, equal, free, secret, and direct suffrage, and the second is the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees are met."

The Report emphasises that the holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Freedom of movement within the country and the right of nationals to return to their country

should be guaranteed. Restrictions on these fundamental rights must comply with the Constitution and International Bill of Rights and Conventions. Stability of the law is crucial to the credibility of the electoral process which is itself vital to consolidating democracy. Rules which change frequently – and especially rules which are complicated may confuse voters.

Procedural safeguards include organisation of elections by an impartial body because only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process from the pre-election period to the end of the processing of results. Other safeguards include observation of elections by international and national observers, an effective system of appeal against failure to comply with electoral law, and provision of security so that security forces can intervene in the event of trouble.

This court found that there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act and the Electoral Commission Act in the following areas:

a) the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country.

b) the principles of equal suffrage transparency of the vote and secrecy of the ballot were undermined by multiple voting and vote stuffing in some areas.

I shall now consider each of the malpractices or illegal practices which affected the above principles.

Bribery:

The Court found that the principle of free and fair elections was compromised by bribery and intimidation or violence, in some areas. I shall first deal with bribery.

Bribery is defined in Section 64 of the Presidential Elections Act. Subsections (1) and (2) of that Section define corruption as follows:

"(1) Any person who either before or during an election with intent either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both."

(2) Any person who receives any money, gift or other consideration under Subsection (1) also commits the offence under that Subsection."

There are exceptions provided under the Section which specifies circumstances where gifts or consideration may be offered or received without amounting to bribery. It is provided under Subsection (3) that the provision of refreshments or food at a candidate's campaign planning or organisation meeting does not constitute bribery where they are offered by a candidate or candidate's agent, as an election expense, or offered by any person other than a candidate or a candidate's agent, at his or her own expense.

Bribery as defined under Subsection (1) is declared to be an illegal practice by Subsection (4). There are other illegal practices which arise out of bribery under the same Section. Subsection (5) makes it an offence of illegal practice for every candidate or a candidate's agent who by himself or herself by another person, before the close of the polls on polling day to offer, procure or promise to provide any alcoholic beverages to any person. Under Subsection (6) any person, who during an election campaign solicits from a candidate or a candidate's agent any money, gift or alcoholic beverage or other consideration in return for influencing another person to vote or refrain from voting for a candidate commits an illegal practice.

The allegations of bribery and intimidation or violence were addressed by Mr. Wandera Ogalo under the complaint raised in the paragraph 8(e) of the petition that contrary to Section 12(e) and (f) of the Electoral Commission Act, the 1st respondent failed to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness. Learned counsel relied generally on the affidavits of Kamateneti Ingrid Turinawe, Hon Augustine Ruzindana, Kevina Taaka, Hon Ekanya, Hon Abdu Kantuntu and Hon Salaam Musumba, Okama, Charles Byarugaba.

He also referred on over ten affidavits of persons who claimed had received money allegedly as bribe. These persons included Timbukha Joseph, Nabalayo Mary, Nafuna Irene, Khaitsa Margaret, Mushebo Charles, Mulindwa Robert, Mutonyi Juliet, Khaitsa Lofisa and Wataka James. Others deponents alleged that they witnessed receiving of the money.

Mr. Matsiko the Ag. Director of Civil Litigation for the 1st Respondent submitted that the 2nd issue be answered in the negative. He relied mainly on his submission of Issue No.1 where he dealt with the allegation of failure to take measures to ensure that the entire electoral process is conducted in conditions of freedom and fairness and multiple voting and vote stuffing. Dr. Byamugisha made submission of bribery especially in respect of allegations made against the 2nd Respondent. I shall now consider these submissions and the evidence adduced by either party in respect of the allegations.

It is clear that under this section it must be proved that the bribe taker is a voter. A person cannot be influenced to vote or refrain from voting unless he or she is a voter. In Presidential Election No. of 2001**, *Rtd Col Dr Kizza Besigye v. Y. K. Museveni and Electoral Commission***, this Court held that the offence of electoral bribery is not committed unless the gift, money or other consideration is given or received by a person who is proved to be a registered voter. Under this section, it must also be proved that money or item given was not part of election expenses during campaign period. The offer of refreshments or food is not permitted on polling day.

Kamateneti Ingrid Turinawe, the National Secretary for Women (FDC) ad a Parliamentary Candidate for Rukungiri Women Representative deponed on the reports the District Elections Task Force received from monitors on Election day. The reports regarding bribery consisted of the following allegations:

- That the NRM agents were stationed at all roads and paths leading to polling stations distributing money to voters leading to the polling stations especially in sub counties of Buhunga, Ruhinda, Nyakisenyi, Kebesone and Bwamoka.

- Distribution of money by District NRM Task Force on 20 February 2006, to all Sub county Chairpersons to use to buy items like soap, salt or actual cash to bribe voters on the eve of elections.

- One of the Chairpersons who received the money was Ruraka George of the NRM Office Kebisoni Sub-county and a photocopy of the receipt of the money was annexed to the affidavit indicating that he had received Shs.4,000,000/= from the District Task Force headed by one Zedekia K. Karokora.

Technically speaking this information was hearsay as the deponent did not witness the incidents reported to her. Her affidavit can only be relied on if it is corroborated by other evidence from those who reported to her or who witnessed similar incidents.

Augustine Ruzindana, a member of Parliament for Ruhama County, Ntungamo District, and was a candidate for the same constituency in the 2006 Parliamentary elections under FDC sponsorship, was also a member of the National Campaign Committee for the Petitioner in charge of Research and is a Deputy Secretary General of FDC. He deponed about the allegation of bribery as follows:

> ***"10. That a week before polling day Shs.50,000/= was paid to all LC 1 Chairpersons in the whole of Ntungamo District by agents of the 2nd Respondent and I later carried out a survey and established from all our District coordinators that this was the case throughout the country for the benefit of the said respondent.***
>
> ***11. That on the eve of polling day and on polling day itself there was widespread distribution of money by agents of the 2nd Respondent to registered voters for purposes of inducing them to vote for the 2nd Respondent".***

Hon. Geoffrey Ekanya, a Member of Parliament representing Tororo county in Tororo District stated that he was the Zonal coordinator for FDC in Tororo, Busia, Buteleja and Pallisa District. He deponed as regards bribery as follows:

> ***"17. That shillings 50,000/= was received by campaign agents of the 2nd Respondent in each village in my constituency, some time in the second week of January.***

18. ***That in most villages the money was simply shared among the voters who turned up for the meeting.***

19. ***That in other villages' jerricans and basins were purchased and distributed to homesteads.***

20. ***That it was impressed among the voters at the meetings held that the money was for those who were ready and willing to vote for the second respondent.***

21. ***That in a district meeting attended by the President, the District Commissioner, the District Police Commander, the District Internal Security Officer, the Chief Administrative Officer and a representative of the District Registrar complained about this money.***

22. ***That Mr. Radice Okama the NRM Campaign Force Chairman in Tororo District replied that the money was for NRM village committees to mobilise voters and the jerricans and basins distributed to voters were NRM promotional materials.***

23. ***That the meeting noted that discussions."***

Jack Sabiti who was a Member of Parliament representing Rukiga County in Kabale District and was a Parliamentary Candidate for the same constituency stated that he was the Coordinator for FDC in charge of Presidential Campaigns in Kabale and Kisoro Districts. He made several allegations of election malpractices including bribery. He claimed that sugar, salt and money was offered to and accepted by Women Associations as an inducement to vote for the 2nd Respondent in Bikinda and Kamwezi sub-counties. He also alleges that at polling stations in Kamwezi and Bukunda Sub-county Kabale District, Charles Mayombo and Julius Ndihohabwe who were agents of the end Respondent openly distributed sugar and salt to voters while telling them to vote for the 2nd Respondent.

Sabiti further alleges that on the eve of polling day there was wide spread bribery of voters by the 2nd Respondent's agents who were escorted and protected by the police throughout Rwamucucu and Bukenda in Rukiga. He claimed that Captain Matsiko and Major General Oweyesyire's vehicles were used to canvas support for the 2nd Respondent as well as soap, sugar and salt for bring voters. In Bukende sub-country

Rubabura, Mrs. Kaansa and Apollo Nyegarehe and Moses Kakuru bribed voters by giving out money, sugar, salt and soap to women organisations and burial associations.

Mr. Sabiti states that all the above information is based on his knowledge but he did not state that he witnessed all these incidents. Otherwise his evidence is hearsay. He does not explain how contributing money to women organisations amounted to bribery as defined in the law.

Proscovia Salaamu Musumba, who was Member of Parliament for Bugabula South Constituency in Kamuli District,, a candidate for the same seat, and is one of the Vice Chairpersons for FDC, alleged that the whole Presidential campaigns and voting process was marred by bribery of voters facilitated by funds released by the National Resistance Movement Central Executive Committee chaired by the 2nd Respondent.

She described how the NRM distributed funds to each village branch, sub-county, district and parliamentary constituencies. She claimed that each of the 43,365 NRM Village Branches received Shs.100,000/= making a total of Shs.4,336,500/=. Each of the Sub-county Task Force received Shs.400,000/=, making a total of Shs.388,000,000/=. Each of the 69 District Task Force Executive Committees received Shs.4,000,000/=, making a total of Shs.276,000,000/=. Each of the 215 NRM Parliamentary Candidates received Shs.4,000,000/=, making a total of Shs.860,000,000/=. Each of 69 NRM Woman District Parliamentary Candidates received Shs.6,000,000/=, making a total of Shs.414,000,000/=. She also alleged that funds were disbursed for local government elections and that each of the 69 NRM candidates vying for Local Council V seat received Shs.6,000,000/=, making a total of Shs.414,000,000/=. Each of the 1340 NRM Candidates vying for District Council seat received Shs. 400,000/= making a total of Shs.536,000,000/=. Sub-county Chairperson according to her received Shs. 400,000/=. She alleged further that money was also sent to parishes, municipalities, etc..

She claims that funds were released in two installments, the last have been released two days before the polling day. She then avers:

> ***"25. That 48 hours to commencement of polling for president of the Republic of Uganda the central executive committee chaired by the 2nd Respondent placed not less than Shs.5,000,000,000 in the hands of its campaign agents throughout Uganda.***
>
> **26.** ***That the said sums were used to influence voters to cast their votes in favour of the second Respondent.***
>
> **27.** ***That the said sum does not include the shilling 3,000,000 released to each district through four regional heads totaling Shs.207,000,000 nor the sums disbursed through volunteer offices such as the one at Nsamba and money released to NRM heavy weights."***

Major (Rtd) Rubaramira-Ruranga, the Chief Electoral Commissioner of FDC, claims in his affidavit that he knows that the NRM as a party dully authorized bribery by the distribution of items like tarpaulins, basins, jerricans and match boxes with the 2nd Respondent's pictures and NRM symbols throughout the country before and on polling day.

He also alleges that the 2nd Respondent's agent and brother Caleb Akandwanaho (Salim Saleh) a serving officer of the UPDF canvassed votes for the 2nd Respondent actively campaigning for the 2nd Respondent and got personally involved in buying out structures of the FDC in Eastern Uganda in the districts of Iganga, Kamuli, Mayuge, Jinja, and Mbale. He further claims that Salim Saleh bribed voters in Kayunga and FDC agents of Hoima District. He claimed to have attached a videotape to that effect marked ***"Saleh Kamuli",*** but none was attached nor produced in Court. He failed to name even a single voter who was bribed. This evidence of Major Ruranga is hearsay as he received it from FDC coordinators and agents from these districts.

Aryeija Simon from Kambuga Sub County in Kinkizi East constituency stated that he was a supporter of the Petitioner in the Presidential elections. He claims to have been persuaded to abandon FDC Party and join NRM Party for a reward of a bicycle and money, but he refused, while one George the son of Muteresa who was a staunch supporter of the Petitioner accepted and was given a phoenix bicycle after changing to NRM. He alleges that the election was marred by massive systematic bribery of

voters. He states that at Katete market polling station, the LC 1 Chairmen of Nyakishojwa cell called Johnson Friday openly bribed voters on polling day by paying cash 1000/= to every voter to deny the petitioner his votes and votes for the 2nd Respondent. He claims to have been given a bribe of Shs.1000/=which he refused, but others accepted and voted against the Petitioner. He mentions other people who bribed voters at polling stations and who were spread along the paths leading to Katete polling stations bribing voters who were coming to vote at five stations of Nyamabale.

Evidence was adduced of those voters who claimed to have received money as bribes to vote for the 2nd Respondent. Particularly in Bungokho Constituency South in Mbale District. Among them were Musimbi Edward who claimed that throughout the campaigns the NRM agents for 2nd Respondent bribed others by giving them money between 200/=, 300/= and 500/= and others got 1000/=. He states that Joram Mayatsa the District NRM Chairman moved in the village on the eve of the voting giving people money and instructing them to vote for the 2nd Respondent. He claims he received 500/=. Others who swore affidavits claiming to have been seen Joram Mayatsa giving out money to voters in Bungokho Constituency South and who claim to have received Shs.500/= each to induce them to vote for the 2nd Respondent included Timbukha Joseph, Nabalayo Mary, Nafuna Irene, Khaitsa Margaret, Mushebo Charles, Mulindwa Robert and Wataka James.

The 2nd Respondent swore an affidavit in reply to the affidavits of Proscovia Salaamu Musumba, Umah Bashir and Henry Lukwaya in connection with the allegation of bribery. I shall however deal with the affidavits of Umah Bashir and Henry Lukwaya when considering the 4th issue.

In reply to Musumba's affidavit, the 2nd Respondent stated that he is the Chairman of the National Resistance Movement (NRM), a political organisation, and Chairman of its Central Executive Committee. He averred that neither himself nor the NRM Central Executive Committee authorized or released any funds to bribe voters in the Presidential Elections held on the 23rd February 2006 or only elections of whatever description as alleged in Para 4 of Musumba's affidavit.

He deponed that after he was nominated as Presidential candidate for the said Presidential Elections, he chaired an NRM Central Executive Committee meeting to plan out and put in place strategies for all NRM candidates campaigns at National, District Constituency and local levels including the raising of resources for those campaigns. The Central Executive Committee, among other things, established a National Campaign Task Force chaired by the NRM Vice Chairman, Alhaji Moses Kigongo, to manage the overall strategies for the campaigns of all NRM candidates at national and lower levels, raise resources from our supporters**.**

He stated that the main strategy for the campaigns was physical voter contact tasked to the NRM branch/village task forces throughout the country. The primary responsibility of each branch/village task force was to persuade each voter in its area to vote for him and all NRM candidates from village to national levels, while the Parish, Sub-country, Urban, District and National Task Forces would deal mainly with coordination and supervision of activities.

The 2nd Respondent further stated that a national budget for facilitating all NRM candidates' campaigns was prepared and approved by the Central Executive Committee. The resources were handled at the Central Executive Committee level and disbursed to the levels below through the districts by payment voucher documents. A copy of a typical sample of the said payment voucher was attached thereto and marked as Annexture R.2A1.

He denied that the figures in paragraphs 6 to 23, 25 and 27 of Musumba's affidavit were true. There was no such regular parten of distribution and disbursements depended on amount received at Central Executive Committee level and facilitation needs at the various levels. He explained that all funds raised by NRM for the campaigns were exclusively spent on facilitation of the campaigns as stated in the affidavit and no money was ever disbursed for the purpose of bribing voters as falsely alleged by Proscovia Salaamu Musumba.

In his affidavit in reply to Major Rubaramira Ruranga's affidavit, General Caleb Akandwanaho aka Salim Saleh denied that he was a serving military officer as he retired from UPDF and was issued with a certificate of service to that effect. He

described as false allegations that he got involved in buying out structures of FDC in Eastern Uganda and in the districts of Iganga, Kamuli, Mayuge and Jinja. He denied that he bribed any voters in Kayunga and FDC agents in Hoima District. He admitted that as individual he actively campaign for the 2nd Respondent in many parts of the country, but at no point did he bribe any person as alleged. He also denied ever registering FDC supporters, nor any existence of a group known as ***"Caleb Akandwanaho Group."***

Mr. Nashao James Wateyo, who was the presiding officer at Musoola Trading Centre polling station, denied the allegations made by Khaitsa Margaret, Nafuna Irene, Charles Mushebo, Mary Nambalayo, Joseph Timubkho, Eunice Muzaki, Mulindwa Robert, Mwayafu Deo, Edward Musimbi, James Wataka and Juliet and claimed that the incidents alleged never took place. Washireko Sam Apollo, who was the presiding officer at Nabumali Boarding Primary School polling station, denied the allegations of bribery made by Masaba Robert.

An evaluation of the evidence relied on by the petitioner shows that much of it is hearsay and uncorroborated. Evidence of reports received by FDC officials cannot be relied on without the persons who witnessed those incidents of bribery swearing affidavits to confirm the reports. The evidence of Kamatenati Turinawe, Augustine Ruzindana, Major Rubaramira Ruranga falls in this category. Little of their evidence was based on their personal knowledge but on information received. There was some corroboration of the claims made by Salaamu Musumba regarding the distribution of money by the NRM National Task Force to the districts and branches for purposes of funding the campaigns of NRM during the general elections. The affidavits of the 2nd Respondent though denied the details indicated Musumba's affidavit, did admit funds were sent from the National Task to the District and Constituencies for campaign purposes and facilitation of agents. This by itself does not amount to bribery.

The evidence of bribery from Bungokho Constituency East in Mbale District appears to have been corroborated though there were denials on behalf of the respondents. There was evidence that the persons who received the money were voters. In many other areas, there was no satisfactory proof that those who received money or articles

like soap, salt etc were voters and that these items were given with the motive of influencing them to vote for the 2nd Respondent.

I do not accept the submission of Mr. Wandera Ogalo that there was nation-wide bribery which rendered the entire electoral process not to be and fair, and to subvert the will the people. It seems to me that the incidents of bribery were few and isolated and it may well have been that some of the money sent down for facilitation may have been seen as bribe or used to bribe voters in certain cases.

Intimidation and Violence:

The petitioner made general allegations of intimidation and violence in his petition when he pleaded in paragraph 8 that the entire electoral process was characterised by acts of intimidation, lack of freedom and transparency, unfairness and violence and commission of numerous offences and illegal practices. He also averred that the 1st Respondent failed to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness.

In his affidavit in support of the petition, the petitioner listed three incidents where violence or intimidation occurred. There were stated as follows:

> ***"22. That during the campaign period 3(three) of my supporters were murdered by an NRMO Party functionary and agent during a vehicle covered with the 2nd Respondent's campaign posters at Bulange.***
>
> ***23. That on Election day Fox Odoi, a legal Aide of the President who is the 2nd Respondent harassed, assaulted and intimidation my supporters in Tororo District.***
>
> ***24. That on the 12th day of December 2005 my supporters at the party headquarters were attacked by the Army Personnel and the Party Chairman of the Electoral Commission, Major Ruranga was assaulted by the commandant of the group, Col. Dick Bugingo."***

I shall deal with these three specific allegations before I consider the general allegations of intimidation and violence in other areas.

With regard to the incident at Bulange, there appears to be no other evidence from the Petitioner or the respondents to support or refute the allegation. As the allegation is not refuted or the occurrence of the incident disputed, it is deemed to be admitted. Consequently, I find the allegation established.

The Petitioner adduced evidence to support the allegation of intimidation or violence in Tororo District. The evidence consisted mainly of the affidavit of Hon Geoffrey Ekanya. Hon Ekanya, a Member of Parliament representing Tororo County, in Tororo District stated that he was the Zonal Coordinator for FDC in Tororo, Busia, Butaleja and Pallisa Districts. He deponed about violence and bribery as follows:

> ***"7. That two days to polling day and on polling day itself the Army was deployed in Tororo Town, Malaba and other areas.***
>
> ***8. That on polling day Military vehicles commonly known as Mambas were deployed and cruised around in Tororo and Malaba Town, Madila and Kwapa Sub-counties.***
>
> ***9. That the population was frightened and many FDC supporters feared to turn up to vote.***
>
> ***10. That a polling day Fox Odoi, a Legal Assistant of the 2nd Respondent terrorised voters in Tororo Municipality.***
>
> ***11. That I saw the said Fox Odoi armed with a gun accompanied by Local Defence Unit blocking the road between Tororo and Mbale and forcing passengers out of the vehicle.***
>
> ***12. That I heard him order the LDU to undress the passengers and to beat them up which LDU heartily using gun butts.***
>
> ***13. That Fox Odoi fired in the air and many voters ran back to their homes and did not vote.***
>
> ***14. That he eventually dumped the passengers at the police station."***

The allegations made by Hon Ekanya were denied by George Abaho, who is the officer in charge of Tororo Central Police Station. He states that during the Presidential election, he received a report from Apollo Yeri Ofwono, the Movement Chairman for Tororo District that there were members of the FDC party who were ferrying voters to polling stations to illegally vote in the election. He admits that Fox

Odoi Oywelewo was present at the time. He decided to investigate the matter and invited Fox Odoi and Apollo Ofwono to accompany him. They travelled in separate cars and he went with policemen in a police vehicle.

They intercepted a vehicle suspected of ferrying voters along Mbale Road. The police arrested some of the passengers while some other passengers escaped. The suspects were taken to police station and after interrogation they were released to go home. He denied the allegations made by the petitioner in paragraph 13 of his affidavit and averred that he was present at the scene and did not see Fox Odoi intimidate assault or torture the petitioners, supporters or any other person.

Omalla Richard and Okware Kamu from Tororo District denied the allegations made by Hon Ekanya that they were assaulted or intimidated by Fox Odoi. Omalla states that he was a registered voter at Torokindwe polling station, Aukot, Tororo District. He did not vote on polling day because he was arrested while going to vote. He was arrested by policemen from Tororo District Station. He was with four other persons namely Oculu Laben, Okware Kamu and Epakasi Lawrence. He denied being assaulted or intimidated by Fox Odoi.

He claims that Fox Odoi came with the policemen who arrested them, and he did not know him before. They were arrested along Mbale Road and taken to the police station where they were released on police board in the evening of the same day. When he saw a photograph on the front page of **Monitor Newspaper** of 24 February 2006, he identified himself as one of the people in photograph. He denied being a supporter of the petitioner. He subsequently made a statement at CID Headquarters where he denied being assaulted by Fox Odoi on polling day.

The affidavit of Okware Kamu supports the evidence given by Omalla Richard. He states that he saw Fox Odoi whom he did not know before when the latter came to Tororo Police Station after his arrest. He claims that he was arrested with Epatasi Omalla and others for allegedly being ferried to vote. He denied being assaulted or intimidates by Fox Odoi. He also denied being a supporter of FDC.

The allegations made by Hon Ekanya against Fox Odoi of terrorizing and beating up passengers in Tororo District are not supported by the police and some of the

passengers who were allegedly terrorized and intimidated. It seems that the victims were arrested for being ***"ferried to vote."*** However, it is clear that Fox Odoi participated in this incident which amounted to intimidation. I find that the allegations made by Hon Ekanya of intimidation by military armed forces of Tororo, Malaba, and Kwapa Sub counties have been established.

The third allegation of intimidation was the incident at the FDC Party Headquarters at Najjanakumbi. The petitioner adduced the evidence of Major (Rtd) Rubaramira Ruranga who stated that on 12 December 2006, while at the FDC headquarters at Najjanakumbi, he was assaulted by a serving officer of the UPDF a one Lt. Col. Dick Bugingo, and the matter was reported to the 1st Respondent and police, but the 1st Respondent did not follow up the matter.

Lt. Col. Bugingo responded to the allegations made by Major Ruranga. He admitted assaulting Major Ruranga. He explained that on 11th December 2005, he received instructions from the Inspector General of Police to join other security agencies in supplementing police efforts in ensuring that no such unlawful acts were committed and also ensure safe passage of the presidential motorcade.

In his capacity as the Commanding Officer of the Military Police, he was privy to intelligence to the effect that FDC supporters had for political reasons planned to hold an unlawful assembly on Entebbe Road with the intention of blocking the convoy of the South African Head of State, H E Thabo Mbeki, who was to visit Uganda on the 12 December 2005.

On 12 December 2005, he deployed his staff along Entebbe Road as instructed. During the said deployment he was informed by his informers who were amongst the FDC supporters at their headquarters at Najjanankumbi that FDC Officials were through telephone communications monitoring the movements of the Presidential convoy through persons they had deployed along Entebbe Road.

He immediately proceeded to the said FDC offices to assess the situation and upon his arrival, he found the FDC supporters gathered in their compound inside the gate whistling and hurling insults at the security personnel that had first been deployed

around those offices. While he was still assessing the situation he received information from the Presidential motorcade that the convoy had reached Zana and his informers also informed him that FDC received he same information and were preparing to storm out and quickly proceed to the road. He then depones:

> ***"9. That I immediately went up to the entrance to the FDC Offices whereby Rtd. Major Rubaramira Ruranga who appeared to be the leader of the group that had assembled there approached me apparently for a handshake.***
>
> ***10. That as we shock hands I asked Rtd. Major. Rubaramira Ruranga why he was attempting to lead unlawful assembly and he answered me in Runyakole saying, 'nogamba ki mushenzi we' meaning, what are you saying you fool? The words were demeaning and abusive especially when the said words were altered by my junior and as such I was instantly infuriated, momentarily lost my cool and slapped him.***
>
> ***11. That after slapping Rtd. Major Rubaramira Ruranga I immediately realized that what I had done was improper and in my mind regretted it. In the meantime, the gang that had assembled in the FDC compound was already out of the gate indicating to me that they were about to execute their unlawful plan of blocking the Presidential convoy."***

He ordered his staff to take them back to the compound and not allow anyone get out. No other direct force was applied to the FDC supporters. At all material time, he did not enter FDC compound. After the presidential convoy had safely passed by the offices, the FDC supporters well allowed to get out of their compound and he left the area.

Lt. Col. Bugingo denied having any prior intention to attack any of the FDC supporters and he pleaded that he was just proved to slap Major Ruranga. After the incident he was charged before the Division Court Martial of the General Headquarters at Bombo with the offence of common assault on Major Ruranga. He pleaded guilty to the offence and was convicted on his own plea of guilt and sentence to a severe reprimand. He explains that he pleaded guilty because he knew he should never have slapped Rtd. Maj. Ruranga but instead should have caused his arrest by the Police and dealt with according to law.

Since the allegation made by Maj. (Rtd) Rubaramira Ruranga of assaulting him by Lt. Col. Dick Bugingo is admitted, I find that the allegation is established. I find that the incident has some effect of intimidating supporters of FDC who witnessed it and those who were around the FDC Headquarters.

There were other generalized allegations of intimidation and violence in various districts of Uganda. Among these districts are Bushenyi, Ntungamo, Rukungiri, Kanungu, Kamwenge, Mbarara, Kiruhura, Kabale in Western Uganda; and Iganga, Kamuli, Pallisa, Tororo and Mbale in Eastern Uganda. I shall deal with the evidence from each district.

Most of the allegations of violence or intimidation originated from western Uganda. The allegations included arresting supporters of FDC, intimidation by military and security personnel, chasing away of FDC agents and showing war like films.

In Rukungiri District the Petitioner relied on the affidavit of Kamateneti Ingrid Turinawe who is a National Secretary for Women FDC and was a Parliamentary candidate for Rukungiri Women Representative. She deponed that on the eve of the elections, the FDC District Elections Task Force put in place a team on election day to report to the Task Force what was happening at various polling centres. The office also provided a video camera to the team to cover Rukungiri Town Council, Nyarusanje and Nyashenyi Sub-counties.

On election day while she was in her FDC District Office, she received reports from FDC monitors. Among the reports received was the arrest of several monitors including Benon Christmas who was in charge of Bugagari sub-county, Julius Tindiwegi in charge of Bwambara Sub-county, Cyril Koboko in charge of Kagunga Sub-county and several others by a combination of ordinary police, ISO operatives and other people in plain clothes, and detained at different Sub-county police cells.

She also received reports that the Presiding Officer at Rwentodo polling station forced out polling agents at the station to sign declaration of results forms before commencement of voting. The RDC of Rukungiri, Mr. Charles Byabakama was moving around Kebisoni Sub-county deploying UPDF soldiers near polling stations using his official vehicle.

She alleges that the Presiding Officers and polling officials were ticking ballot papers in favour of the 2nd Respondent and handing them over to cast at Marashaniro primary school polling station. She claims that she and the petitioner went and complained to the Returning Officer, Mr. Ntaho Frank, who dispatched his Assistant and the District Registrar to the station around midday but they just switched them to other tables in the same polling centre.

She claims further that there was ferrying of voters to polling stations, and that the Presiding Officers refused to give FDC polling agents copies of declaration of results' forms. Furthermore she alleges that ballot boxes at many polling centres notably at Rukungiri Stadium polling station bore no seals. At some polling stations polling agents were denied access to the Presiding Officers desk and were made to sit metres away from its. The irregularities which occurred throughout the voting process were reported to the Returning Officer.

Most of the evidence given by Kamateneti is hearsay as it is not based on her own personal knowledge but on information received from reports of agents and supporters. It is insufficient to establish the allegations made on such evidence unless corroborated. On the other hand, the 1st Respondent adduced evidence to refute the allegations made by Kamateneti. There was evidence contained in the affidavits of Okot Obwona, the District Police Commander Rukungiri District, Byabakama Charles, the Resident District Commissioner and Ntaho Frank, the Chief Administrative Officer and returning Officer for Rukungiri District.

Byabakama Charles, the Resident District Commissioner of Rukungiri District, denied the allegations of intimidation made by Kamateneti Ingrid Turinawe. He denied the allegation that he was moving around Kebisoni sub-county deploying UPDF soldiers near polling stations using his official vehicle. He admitted moving with one UPDF Soldier and one Special Police Constable for keeping his personal security as he normally did. He stated that the District Police Commander (DPC) who was the Chairman of the Election Security Coordinating Committee (ESCC) did not deploy any soldiers at any polling station in Kebisoni Sub-county.

Okot R Obwona, the District Police Commander Rukungiri in answer to the affidavit of Kamateneti, stated that he deployed two vehicles per sub-county with instructions to cub down any form of malpractices. He learnt that Benon Christmas was arrested from Bugangari and charged with ferrying voters, and he was later released in Police Bond. He denied having any knowledge about the arrest of Julius Tindiwegi, Cypril Koboko and others as claimed.

Ntaho Frank, the Chief Administrative Officer and Returning Officer for Rukungiri District, denied the allegations made by Kamateneti that ballot boxes at Rukungiri Police station were unsealed because he sent the District Registrar Mr. Nkuruziza to go and investigate the allegation and the latter found it untrue.

On consideration of evidence from both parties, I am not satisfied that allegations of intimidation made by Kamateneti in respect of Rukungiri District have been proved.

With respect to Ntungamo District, Mr. Augustine Ruzindana, a Member of Parliament for Ruhama County at the material time and a Parliamentary candidate for the same constituency in the 2006 Parliamentary elections under FDC sponsorship deponed about the deployment of soldiers in the District who were arresting and harassing the petitioners' supporters. He states:

> ***"3. That from the month of November 2005, soldiers totaling to over seven hundred were deployed at Kyamugashe Barracks which had had no soldiers until then.***
>
> **4.** ***That as at the time of the display of the voters' register the polling station at outside Quarter Guard at that barracks had a total of 743 registered voters.***
>
> **5.** ***That in addition to soldiers of the Presidential guard Brigade and intelligence operatives were staying in all the lodges in Ntungamo Town council and in other places throughout the campaign period and many of them were registered at Karegyeya polling station which had an increase of around 200 voters over and above the voters registered as at the time of the Referendum.***
>
> **6.** ***That the PGB soldiers and intelligence operatives are involved in campaign activities throughout the campaign period on the side of the 2nd Respondent.***

7. ***That the said soldiers and intelligence operatives were involved in affecting arrests and harassment of the Petitioner's supporters and agents. Other people not campaigning for the 2nd Respondent including one Karekyezi who was also a Parliamentary candidate were harassed and arrested."***

He also complains about open voting on the tables in front of polling officials and agents, confiscation of voters register by the presiding officer Mwirasandu polling station ferrying of voters from Kampala in five buses, all dressed in yellow T-shirts and singing songs in praise of the 2nd Respondent, sending away of petitioners' agents, and pre-ticking of Ballot papers at a number of polling stations in favour of the 2nd Respondent.

Dr. Katebarirwe of Rukoni Sub-county, Ruhaama Constituency in Ntungamo District and coordinator of FDC in Ntungamo District alleged that during the campaign period there was an extra ordinary presence of the Presidential Protection Unit in Ntungamo District and in Rukoni Sub-county it was under the command of one Muganga. He claims that the said Presidential Protection Unit harassed campaign agents of the petitioner and on 15th February 2006 he was intimidated by the Presidential Protection Unit as he was coming from Hon Ruzindana's home on the ground that he should leave the petitioner's task force.

He alleged that on polling day at Rukoni Sub-county headquarters at around 10:00 p.m., he found Bajungu, the acting Sub-county Chief together with Katsigazi the GISO, LDU and other presiding officers opening boxes and changing declaration forms. (He attaches a photograph he claims he took on that day, but the scene does not clearly corroborate his claims. He objected to the conduct to the Gombolola Chief but he was immediately arrested and kept in that place until he was taken to Ntungamo Police Station at 2.30 a.m.

Mugaiga Stanley, a UPDF soldier deployed in the Special Investigations Department of the Presidential Protection Unit (PPU) denied allegations made by Dr. Katebarirwe that he was in Ntungamo on 15th February 2006, commanding the PPU. He said that around 17th February 2006, he was off duty in Ntungamo attending to his sick parents. He claimed that apart from the small number of PPU that was guarding the First Lady

during her campaigns and advance teams which came to the district on the dates the President was visiting the district, it was not true that during the campaign period there was extra ordinary presence of the PPU soldiers in Ntungamo District. He denied that the PPU harassed any campaign agents of the Petitioner.

Mwesigwa Rukutana, a Member of Parliament for Rushenyi Ntungamo District, and a Parliamentary candidate for that Constituency denied the allegation that he ordered the detention of Karugaba Charles, Butalema James, Alex Kamuhangire, Ssali Mukago and Kagonyera Constance, at Ntungamo Police Station. He claimed that on the morning of the polling day he received a telephone call from his agent Sam Bamwine informing him that security personnel had arrested 3 people moving from house to house bribing voters with money and sachets of salt and giving them appointment letters and asking them to vote for the Petitioner, Dan Mugarura the FDC candidate and Maureen Nakukweera Kyakana the FDC Woman District Parliamentary candidate, and that the arrested people had been detained at Ngoma Local Police Post where Wanainchi were threatening to lynch them. He drove to the Police Post to verify the reports and on arrival he found that a crowd had gathered and were demanding to have the arrested persons so that they would punish them. He advised the officer in charge of the post to transfer the culprits to Ntungamo Police Station for due process of law to take place.

He claims further that the District Returning Officer, Bakulu Mpagi, got involved in an argument with one Justus Turyatemba and the Presiding Officer at Ruyinza Primary School Polling Station regarding who should vote. He joined in the argument and explained that everybody appearing on the register had a right to vote and that the incapacitated and elderly voters could be assisted to vote. He alleged that the argument between him and Turyatemba was a heated one, but denies slapping him or chasing any agent of the petitioner as alleged by Constance Kagonyera and Ssali Mugago. After being assured by the Returning Officer that he would handle the matter, he entered his vehicle and left the scene.

The main complaint in these allegations is the presence of a high number of soldiers of Presidential Guard Brigade (PGB) previously referred to as Presidential Protection Unit (PPU) in Ntungamo District, and their apparent involvement in intimidating and

harassing supporters of FDC. It is not clear how the FDC deponents got to know the exact number of the soldiers deployed which Ruzindana put at 743. The number of soldiers deployed has been disputed by Mugaiga Stanley who claimed that there was a small number of soldiers guarding the First Lady during her campaign and advance teams when the President was about to visit the District. The presence of soldiers per se should not have caused intimidation but their conduct. It seems to me that there were some instances of general intimidation by the soldiers in the District. The specific cases of intimidation were by and large not established.

In respect of Kabale District, Jack Sabiti, who was a Parliamentary candidate for Rukiga County and coordinator for FDC in Kabale and Kisoro Districts, made many allegations regarding intimidation during the election period. He alleged that on 22nd February 2006, police and military personnel intercepted vehicle number UAB051M which was carrying letters to the Petitioner's poling agents as well as his and FDC Woman Parliamentary candidate, Maclean Kamusene in Rukiga County. The letters were confiscated as a result of which the petitioner did not have agents at most polling stations in time.

He claims that the Petitioner's agents at Rutengye III were chased away by the Presiding Officer and only allowed back on intervention of the Returning Officer after several hours. He alleges that in Karujanga Parish, Rubayo Sub-county Katuna security operatives intimidated and harassed voters. He claims that on the eve of elections Captain Matsiko went around showing war films and telling the people what to expect if they voted for FDC. He alleges further that at Kayambe Polling Stations in Kamwezi Sub-county, the FDC agents were chased away and people were forced to vote for the 2nd Respondent, and the "dead, the absent and the fictitious ones were all voted for and this resulted into over 100% turn out. Finally Sabiti claims that the Chairman LC III Bulanda Sub-country together with the GISO Matiya beat up FDC polling agents who ran away from polling stations. Mr. Sabiti avers that the above information was ***"true to the best of his knowledge"*** but he does not state whether he witnessed all these incidents. His evidence is otherwise mere hearsay which is of no value unless corroborated by independent evidence.

Katwakiira Edward who is Chairman of FDC Rukiga County, Kabale District and an election monitor for FDC in that constituency alleged that on the evening of 22nd February 2006 he was arrested on the way to Jack Sabiti's home where he was going to deliver appointment letters of polling agents for the Petitioner. He claims that the car he was traveling in was stopped by Captain Matsiko Henry of the NRM Secretariat who ordered them out of the car. He opened the car boot and checked the vehicle. He had soldiers and he was also a police patrol pick-up No. UP0555 with policemen Captain Matsiko Henry also had a Government pick-up Reg. UG0023B. They arrested him and put him on the police pick up, alleging that he was traveling at night and confiscated all documents he had.

He claims further that Captain Henry Matsiko who is a civil servant and who was using a government vehicle terrorized the people of Rukiga in the days towards the said elections and was involved in arresting and detaining most of candidate Besigye's supporters in Rukiga Constituency. After his arrest he was driven to Kabale Police at night and thrown in the filthy police cells. He spent the whole of 23rd February 2006 in detention. He stated that there were many other people who were candidate Besigye's agents, monitors or all chairmen task force at different levels in detention. He claimed that he did not vote and the purpose of my illegal detention was to scare their supporters and to stop him from monitoring the malpractices that characterized the election in Rukiga constituency. He was released on police bond without a charge. He attached a Police Form 18 which shows that he was charged with inciting violence.

Turyamureeba Mande of Rwamucucu Rukiga County, Kabale District, stated that he was FDC chairman of Nyakagabagaba Parish and a monitor for elections in the parish. He was among those arrested on 23rd February 2006 missing while going to vote, and put in a double cabin pick up full of soldiers which included Bosco. The soldiers on the pick up were armed with pistols and big guns. They demanded to know whether there were FDC supporters at the Kihorezo play ground polling station and the people there denied it. But soldiers ordered everybody to vote for the 2nd Respondent and accordingly they were assisted to do so.

He was detained at Kabale Police Station where he found many others detained without charge. He was released the following day. He claims that the purpose of his unlawful arrest and detained was to scare FDC supporters of his parish of whom he was their chairperson and where the petitioner had more supporters than the 2nd Respondent.

Turyasingura Joseph, a campaign agent for the Petitioner in Nyabirema Parish in Rukiga Constituency Kabale District, claims that on polling day while he was going to vote at Kakahinda Polling Station he was grabbed, beaten and dumped in a double cabin vehicle driven by Pte Bosco Byamugisha attached to the Directorate of Military Intelligence, who was with Lt. Kakooza and two other soldiers. He was driven away. The attackers telephoned some people and informed them that they had arrested a big fish and the famous Katakunda Polling Station was now finished. He was incarcerated at Kabale Police Station for the whole day until he was released on police bond. The police bond indicates that he was charged inciting violence.

Kainamura Bernard who was an FDC monitor in Nyabirema parish in Kabale District claimed that he was arrested at Kabale Polling Station at gun point by men in a double cabin pick-up and taken to Kabale Police Station where he found many other FDC supporters who spent the whole day there without voting.

Saturday Aloysius, a Police Officer attached to Kashamba Police Post Kabale District denied the allegation by Jack Sabiti that any agent was chased away. He alleges that during the polling exercise, one FDC agent, called Mulindwa Edison was found bribing voters outside the polling station after which he left on his own accord. Jack Sabiti requested the Returning Officer to replace Mulindwa with Turyasingura Aphrous.

The Respondents adduced evidence in rebuttal. Matiya Arinaitwe, the Gombolola Internal Security Officer at Butanda Sub-county in Kabale District denied the allegations by Jack Sabiti that he intimidated any person in Butanda Sub-county. Major Henry Matsiko, the Commandant of National Leadership Institute Kyankwanzi, denied allegations of Katwakura Edward that he was involved in arresting him on 22nd February 2006, nor terrorizing any person in Rukiga County.

He denied using a Government vehicle UG0023 B on that day he was driving a motor vehicle Reg. No. UAE077E.

Niwagaba Milton, presiding officer at Rutengye III polling station in Kabale District, denied allegations of Jack Sabiti that FDC polling agent Mulindwa Edison was chased away from the polling station but he went away by himself and was replaced by Turyasingura Aphrous, appointed by Jack Sabiti. He was instructed by the Returning Officer to observe a distance of one meter between the polling officials and where the agents were sitting.

Looking at the evidence as a whole I believe the evidence adduced on behalf of the Petitioner that there was intimidation against his supporters particularly in Rukiga County in Kabale District. This was characterized by arrest and detention of his supporters.

In Bushenyi District, Abenaitwe Ezra, the General Secretary for FDC in Bushenyi District claimed to have witnessed several actions of intimidation and overnight campaigns by agents of the 2nd Respondent. He alleged that the 2nd Respondent's agents spread propaganda that war would break up in the country if the Petitioner won the elections. He claimed that the agents of the 2nd Respondent staged film shows with war scenes and told voters that if they voted the Petitioner into power, the same would happen to the country.

He alleged that Hon Kabwegyere Tarsis, Member of Parliament for Igara West, Hon Nduhura Richard, a Member of Parliament for Igara West, and Hon Karooro Okurut Mary, were staging a mobile cinema late at night with war scenes and filmed the 2001 Presidential campaigns and were urging people to vote for the 2nd Respondent. He claims that he reported the matter to the District Police Commander and the Electoral Commission offices in Bushenyi and they were later dropped.

Prof. Tarsis Kabwegyere, the Member of Parliament elect of Igara West Constituency in answer to the affidavit of Abenaitwe Ezra stated that he attended a recorded music performance by Kads Band at Bushenyi Town sometime during the presidential elections. He denied that the show was a cinema, but a musical performance and the audience danced. He claimed that the said musical recording ***inter alia*** depicted

pictures of Uganda's history, NRA struggle during 1981–1985 period economic and social developments by the Government since 1986. He denied that he addressed the audience at the show, nor urged the audience to vote for the 2nd Respondent.

Dr. Richard Nduhura, the Member of Parliament elect for Igara East Constituency in answer to the affidavit of Ezra Abenaitwe denied staging any show referred to by Ezra. He recalls that prior to the Election day, he attended a show of the musical album by the Kads Band that was staged at Bushenyi Town from 7.30 to about 8.15 p.m. During the show he merely danced to the music and greeted a number of people in the audience, but he did not address the audience in the trading centre.

Willy Kamukama, the proprietor of Kads Band, a musical entertainment group stated that the Band produced a musical video under the Kads Band Kisanja Album. Its production started in 2004 and was concluded in October 2005. The songs composed reflected the Uganda of the past, how Uganda was and how they felt Uganda should be in the future. He explained that the message in the album was to remind Ugandans of the past with the view that, they should avoid wars and maintain the stability which the country has enjoyed since 1986.

He admitted that the Band staged various shows at Ishaka and Bushenyi using a mobile van. He also admitted that the said album depicts war situations of the past and the message was that Ugandans should avoid wars in the future. He also admitted that Hon. Prof. Kabwegyere, Hon Richard Nduhura and Hon. Karoro Okurut attended some of the shows but they did not sponsor the shows which were under the sponsorship of his band. He denied that the shows were staged late in the night.

It is admitted that music shows by Kads Band were staged in Bushenyi District. It is also clear that the shows involved war scenes but depicted in the context of the historical and political background of Uganda. It may be the scenes scared some people or the songs discouraged supporters of FDC. But, it has not been established to my satisfaction that the intention of mounting these shows was to intimidate people, nor did it have the effect of intimidating them. None of those intimidated swore any affidavit to that effect. In my opinion, the shows were a mere campaign strategy by NRM.

In respect of Kanungu District, Mayombo Dick, the Kanungu District FDC Task Force and a monitor for the Petitioner in Kihihi Sub-county in Kinkizi West Constituency, alleged that on polling day, at Samalia Polling Station, at 6.30 p.m. Mrs. Jackline Mbabazi instructed the presiding officer that voting should take place on the open table. The presiding officer called Muteraba insisted on secret ballot where upon Zepher Mugisha who was in company of Mrs. Mbabazi telephoned the District Registrar Muhwezi Laban who came and took over from the presiding officer whom he sent away. He claims further that Hon. Amama Mbabazi arrived with soldiers escorting him in army vehicle No. H4DF669 with 6 armed soldiers which parked at the polling station and armed soldiers surrounded the place causing terror and fear among voters and agents.

He alleged that voting continued into the night and agents of the 2nd Respondent were giving people money and taking them to the ballot box and ticking the ballots in favour of the 2nd Respondent. He claimed that RDC called Ben Ruronga came to the polling station and intimidated the agents of the Petitioner. He alleges that because it was at night the presence of soldiers at the station, caused constant fear in the population and systematic bribery many voters voted for the 2nd Respondent.

Byarugaba Charles, the District Chairman of FDC Task Force for the Petitioner in Kanungu District, claimed that on 22nd February 2006 he was arrested by police around 9.00 p.m. on his way to his home while coming from Rutenga where he had gone to meet parish coordinators and agents. Upon his arrest, the police took his money amounting to Shs.687,500/=, 80 Euros and $8 part of which was transport allowance or lunch for agents and members at the polling stations the following day. He was detained for a whole night while the NRM camp made announcements that he had been arrested and detained which demoralized their supporters, coordinators and agents. He claims he was arrested on false allegation that he was bribing voters.

He alleges that throughout the campaign period in Kanungu District the NRM maintained that a vote for FDC Presidential candidate was a vote for war and this was aired on the said radio Kinkizi FM. He states that the campaign agents for the NRM further staged films at Kanungu and Kihiihi towns which showed wars of past

presidents, Amin and Obote at which the population was informed that failure to vote for the 2nd Respondent would take the country back to those days of terror and chaos, thereby denying the Petitioner votes. He alleges that the campaigns were characterized by threats of war, intimidation and imprisonment of FDC supporters, and massive bribery.

The allegations made by Dick Mayombo and Byarugaba Charles were refuted by several affidavits sworn in favour of the Respondents. Hon. Amama Mbabazi, Minister of Defence at the material time and Secretary General of the NRM, who was also candidate for Member of Parliament for Kinkizi West Constituency Kanungu District, denied the allegations made by Dick Mayombo and Byarugaba Charles. He admitted passing b y Samaria Polling Station to see how the election was going on. He was escorted by military escorts who are ordinary attached to his office as Minister of Defence. He instructed the escorts to park at a distance from the polling stations and remain in the vehicle No. H4DF669. He did not observe any terror, fear or unease among the voters occasioned by the presence of his escorts. He saw voters, including Mrs. Mbabazi voting normally in basins and not open on the table. He claimed that the District Registrar was only assisting the presiding officer to manage the large number of voters.

Hon. Mbabazi also denied allegations made by Byarugaba Charles regarding the ownership of Kinkizi FM which he said is a private limited liability company operating as a Commercial Business Enterprise. He stated that the campaign of NRM in Kanungu District was based on the achievements of Uganda under the Movement Government and programmes of the NRM Manifesto. He denied that Kanungu District NRM Task Force staged films anywhere in the district showing wars of Presidents Amin and Obote or sponsored broadcasts on Kinkizi FM that a vote for the Petitioner was a vote for war. He asserted that both the Presidential and Parliamentary campaigns in Kanungu District were peaceful, non-violent and conducted in accordance with the law.

Jacqueline Mbabazi also denied the allegations made by Dick Mayombo. She stated that on polling day at 4.30 p.m. she arrived at Samaria polling station, in Kihiihi Sub-county in Kinkizi West to vote and she lined up0 and eventually voted for her

candidate as guided by election officials. She attached photographs taken during the process of voting showing her voting in a basin. She denied instructing the presiding officer to vote at his table. She stated that it is not true that Hon. Amama Mbabazi's escorts surrounded the place and caused fear and terror among voters and agents, as they remained in his car which was parked on the road side quite a distance away from the polling station. She left the polling station at around 6.40 p.m. closely followed by Hon. Mbabazi leaving, Mr. Garuga Musinguzi the opponent Parliamentary candidate of Hon. Amama Mbabazi.

Eliot Kabangira, the Station Manager and News Editor of Kinkizi FM denied allegations made by Charles Byarugaba that the radio belongs to Hon. Amama Mbabazi, but it is a private limited company. However, he admitted that the radio in its news briefs on the morning of the polling day had a news item that Byarugaba had been arrested the previous day in Rutega Sub-county with shs.687,500/= on suspicion of bribing voters.

Barageine James, a voter at Samaria Polling Station in Kanungu District, denied the allegations made by Mayombo Dick. He states that he was at the polling station the whole day and denied that Mrs. Jacqueline Mbabazi instructed the presiding officer Mr. Muteraba that voting should take place on the open table. He also denied that Hon. Amama Mbabazi military escorts did not surround the polling station but remained at their vehicle while the voting went on calmly. He further denied that there were agents of the 2nd Respondent giving money to voters and taking them to the ballot box to tick ballots in favour of the 2nd Respondent. He arrested that RDC Ben Rukonga did not intimidate agents of the Petitioner as he only passed briefly at the polling station to inquire how the election exercise was going on.

On evaluation of evidence from both sides I find that the general allegations of intimidation made by the Petitioner have not established. There was no sufficient proof to establish that the broadcasts on Kinkizi FM intimidated the people or supporters of FDC in particular to vote for the 2nd Respondent. The allegation of military presence at polling station by escorts of Hon. Amama Mbabazi has not been proved nor the effect of their presence in the vicinity of the polling stations.

Byarugaba Charles may have been arrested on suspicion of inciting violence or even bribing voters and therefore of having committed an offence.

In Mbarara District, Damali Nagawa who was LC1 Chairperson and FDC Coordinator for Ruti ward, in Nyamutanga Division, deponed that on 23rd February 2006, at 6.00a.m, while she was going to distribute appointment letters to agents, she was arrested at gun-point by GISO and several LDUs who were on a pickup. They took her to the Central Police Station where several other supporters of FDC were brought. By 3.00 p.m. there were about 300 people in the cells and when Charles Atamba and Ms Edith Byanyima came and pleaded for them, they were released without charge on police bond. She does not indicate why she was arrested and Edith Byanyima did not support her claim of assisting those arrested to be released. Her claims appear incredible.

From Kiruhura District Edith Byanyima who was on FDC monitor in that District claimed to have traveled throughout the whole district and observed many irregularities. Among the irregularities were the presence of a group of soldiers and local defence units (LDUs) being led by Captain Bushaija, a Councilor with District Local Council, who were overseeing what was happening at Sanga and Kanjareru Polling Stations. She also alleges that at Rushera Polling Station, the Petitioner's agents had been chased away and ballot boxes were not sealed. When she protested she was informed that the boxes came without seals.

She claims further that at Nyakashari Polling Station when she found that agents for the petitioner, had been chased away, she appointed Mapozi and Kagezi, but they too were chased away and she had to plead for them to be allowed to stay, though the presiding officer refused them to sign the results declaration forms. She alleged that there were more stations where agents were chased away for objecting to ballot stuffing or refusig to sign results declaration forms.

Byanyima's allegations of chasing away agents were denied by the Presiding Officers at the polling stations mentioned. The Presiding Officers were Musinde Rogers for Rushere, Twogyereho Robert for Nyakasharara and Mugume Arthur for Kanyaryeru. Captain (Rtd) Bashaija and Rwakashayi Samuel, a Polling Constable at Kanyereru

also denied the allegation of the presence of a group of soldiers and LDUs at the polling station, and the threat to the people. I am not satisfied that the allegation of intimidation by Byanyima has been proved.

There was also some allegation of intimidation from Kamwenge District. James Birungi Ozo of Kahunge Sub-county, in Kabaale county, who was the FDC Election Monitor in Kyenjojo and Kamwenge Districts, alleged that on polling day as he was monitoring elections he met about fifteen LDUs/SPCs moving in a pick-up Reg No.UAB 837K driven by a man wearing an NRM T-Shirt and Cap, holding sticks and guns each and were under the command of one Bimbona a GISO, Muhejoro Sub-county and another man called Commander Katare, the LDU Commander in Kamwenge District. He followed them in his vehicle Toyota Corolla No.UAF 251L to one polling station called Kabale II Nyamuzo Polling Station in Mahyoro Sub-county and when they arrived they disebarked and moved around the polling station with their sticks and guns threatening voters lining up and shouting ***"where are the FDCs here and show you? Let them vote for Besigye and see!"*** They were generally threatening FDC polling station agents. Ozo then narrates,

> ***"4. That we confronted them and asked them why they were threatening voters and why they carried sticks (Kiboko in Rukiga) at a polling station, instead when they realized that I was Ozo the FDC Regional Coordinator, they turned their wrath on me and almost beat me up but I was rescued by the polling station policeman and they reminded me of 2001 how I was surrounded and beaten at Mahyoro Town because of Besigye.***
>
> ***5. That I and the 2 people, Beyunga Asaph and Kyosimwe Sicola were ordered to leave immediately without even talking to our agents and Mr. Kattare almost slapped me and I reported this case to Kamwenge Police Station, where I found other similar cases of intimidation against this group had already been report. The DPC Kamwenge directed me to an officer to record the statement and take action.***
>
> ***6. That I found that FDC voters were at this station were indeed very scared."***

There was no serious attempt to challenge these allegations though rather exaggerated and in my opinion, the allegations of intimidation were proved.

In Eastern Uganda, there were allegations of intimidation in Mbale, Pallisa and Iganga Districts. In Mbale District, the allegations were made in respect of Bungokho Constituency South in Musoola Trading Centre. Several witnesses swore affidavits to this effect. Among them were Musimbi Edward, Wanja, Milton Watyekele, Wamono George and Nafuna Irene. They claimed that during the months of January and February 2006, before polling day, armed vehicles were moving around the whole village which scared them and many old people. On 22nd February 2006, gunfire rocked the village at night, which created a lot of fear and people decided to vote for NRM to avoid war. They further alleged that on 23rd February 2006, at Musoola Trading Centre Joram Mayatsa, District Chairman of NRM came with a military policeman armed with a gun and live ammunition at the polling station around mid afternoon which influenced the people's voting. They claimed that people in the village had taken a long time without seeing armed men and their presence made many people to decide to vote for the 2nd respondent. It is not clear how the deponents came to know how the voters voted.

Joram Mayatsa, the Mbale District NRM Chairman, denied the allegations made by James Wetaka, Musimbi Edward, Khaitsa Lofisa and Nabalayo Mary, among others. He claimed not to be aware of any armed vehicles that moved around Buyaka Parish or any part of Mbale during the months of January and February before 23rd February 2006, as alleged by the said deponents. He stated that on polling day, he requested the District Police Commander of Mbale District to provide him with a Police escort and he gave him one Policeman whom he moved with throughout the day for his coordination activities. He did not have a military policeman armed with a gun.

Nashao James Wateya, the presiding officer at Musoola Trading Centre Polling Station denied the allegations that the NRM District Chairman Mbale, Joram Mayatsa came to his polling station with armed military policemen and caused fear and intimidation of the voters who were lining up. He stated that such incident never occurred and the allegation is false.

Nathan Nandala Mafabi the Coordinator of FDC for Elgon Zone alleged that in that capacity he received reports on the conduct of the Presidential and Parliamentary

elections. He claims that the elections in Elgon Zone were characterized by bribery, intimidation, ballot stuffing and outright denial of registered voters of their right to vote and partisan polling officials.

He alleges further that in Bulamuli County, the FDC polling agents were chased from the polling stations and the ballot boxes stuffed. He claims that he witnessed massive intimidation of voters in Sironko District in as much as the ***"Mambas"*** and the military personnel were deployed in villages and places such as Bugusege Trading Centre, Budadiri Trading Centre and Buteza. He alleges that the intimidation of voters was done with the connivance of the NRM leadership in the District. On polling day, he claims, he saw the Movement Chairman Massa Gidudu moving around the District in a pick up full of army men and intimidating people.

Despite the denial by Mayatsa and Wateya, I believe the evidence given for the petitioner that there was intimidation of voters by military or security men in Musoola Trading Centre in Bungokho Constituency South, in the months of January and February in the run up for the general elections. The allegations made by Hon Nandala Mafabi appear not to have been disputed by affidavits in answer. Some of the allegations are hearsay like reports he received, but some of the allegations are based on his own knowledge and I accept them as proved.

In Iganga District, Abdu Katuntu, Chairman of the FDC in Bugweri County, where he was the FDC Parliamentary Candidate for the 2006 general election, and FDC Coordinator for Iganga and Mayuge Districts, deponed as regards what happened during the campaigns particularly in Bugweri County. He alleged that a group of armed men wearing NRM Party Colours camped at Busese Mixed Primary School and traversed Bugweri County campaigning for the 2nd Respondent and Mr. Kirunda Kivenjija who was the NRM Parliamentary Candidate. The group was led by Lt. Mulindwa also known as Surambuya. They moved from village to village threatening and intimidating people. They assaulted a number of FDC supporters and several cases were reported to Idudi Police Post.

Katuntu further alleges that on 21st January 2006, the group attacked Idudi Trading Centre, shot in the air and took away the effigy of the Petitioner after assaulting a

number of people. The matter was again reported to the Police. On 22nd January 2006 the group again attacked Idudi Trading Centre assaulting many people who were identified as FDC supporters. During the Idudi siege, they continued shooting while others were defacing the posters of the petitioner and the deponent. Mr. Katuntu states that the group was armed with AK 47 assault rifles, pistols and sticks. He attached copies of photographs he took during the incident.

He rang the Minister of Internal Affairs complaining of the terror meted out by this armed group. The Minister promised to disarm the group. The group temporarily left the area, but returned after ten days, moving around in vehicles with covered number plates.

Mr. Kantuntu alleges that on the eve of elections, the group arrested two of the FDC campaign managers from Bukoleka and detained them at their camp at Busese Mixed Primary School. The camp remained there even on polling day though the school was a polling station. On the eve of the elections, they invaded Busembatya Town Council and arrested many FDC polling agents. He also claims that many FDC agents reported to him that they tortured and maimed. He concludes that there wide spread intimidation and torture of FDC supporters in Bugweri County, in Iganga District. There was no satisfactory evidence adduced to challenge these allegations and therefore I find that they are established.

In Pallisa District Tefiro Kaweera, a Polling agent for the Petitioner in Midiri Primary School A-Z Polling station, in Kibuku County, alleged that while at the polling station one Kabbibbi Musa and Kaweru Daba of UPDF came and started terrorizing and coercing people to vote for the 2nd Respondent. Tazenya Mustafa of the same county who was an FDC Assistant supervisor supported the allegation made by Kaweera. However, Lt. Kaweru Daba denied the allegation by Tefiro Kawera that he moved in the company of Kabbibi or Musa nor of intimidating anyone. He claimed the polling exercise went on and ended peacefully. I am not satisfied with the bare denial given by Lt Daba. I believe the evidence of Kaweera and Tazenya that Daba came with some soldiers who intimidated voters.

Multiple Voting and Ballot Stuffing:

This Court found that the principles of equal suffrage, transparency of the vote and secrecy of the ballot were undermined by multiple voting and vote stuffing. The right to vote is guaranteed by the Constitution, and the equality and secrecy of the vote are provided for under the Presidential Elections Act.

Article 59(1) of the Constitution provides that every citizen of Uganda of eighteen years of age or above has a right to vote. Under Section 32(1) of the Presidential Elections Act, a person shall not vote or attempt to vote more than once at an election irrespective of the number of offices he or she holds relevant to the election. The Presidential Elections Act provides under Section 31(1) that voting at every election shall be by secret ballot using one ballot box each polling station for all candidates in accordance with the Act. It is also provided under the same section that a presiding officer shall not inquire about or attempt to see for whom a voter intends to vote, and any person who contravenes this provision commits an offence.

In his petition, the Petitioner alleged in paragraph 8(b) that contrary to Section 31 of the Presidential Elections Act, the 1st Respondent allowed multiple voting and vote stuffing in many electoral districts of Uganda. He did not mention in his affidavit any single district or incident where these malpractices occurred. However he relied on the evidence of the Pte Allan Barigye and Major (Rtd). Rubaramira Ruranga, among others, to establish the allegation. Pte Barigye seems to have been the star witness on this ground. Learned Councel for the Petitioner placed heavy reliance on his evidence. He swore two affidavits one on 15th March 2006 and the second one on 16th March 2006.

In his first affidavit Pte Barigye stated that he was stationed at the 2nd Division, Mbarara Barracks. He claimed that he and his colleagues in the barracks were ordered by Captain Chris Ndyabagye, the Divisional Intelligence Officer, to vote several times for the 2nd Respondent. He alleged that he together with many of his colleagues were given 10 voters cards each belonging to their other colleagues e.g. those who died, those in Southern Sudan and Northern Uganda, those abroad for studies and others on unknown missions and they were asked to use them to vote. He was then ordered together with others to carry those cards under shirt sleeves in order

to keep voting again and again, using one card at a time. He together with others were required to hand over each card after it use to Brig. Hardison Mukasa in order to be distributed to some one elsewhere.

Barigye claims that having voted several times he retained 5 cards as serialized below:

- Ngwabusha Thomas, ID No. 11260769
- Birungi Fred, ID No.11261663
- Atwifuka Robert, ID No.11436311
- Achidri Walter, ID No.11261508
- Bangumya Ambrose, ID No.12997157

In addition, he avers, that each of them was given 17 ballot papers with 16 of them already pre-ticked in favour of the 2nd Respondent. He claims that he refused to put them in the ballot box and pocketed them instead. The presiding officer saw Him and his four other colleagues and reported them to the Division Commander and they were arrested soon thereafter. He managed to escape and right how he was on the run while the four colleagues were still held up in prison.

He alleged further that while in prison he managed to secretly send the ballot papers to his mother but she too was scared to keep them and destroyed them instead. He claimed that four of his colleagues namely Wandera Rogers, Kiiza Moses, Kakuru Ivan and Tumusiime Emmauel were still in prison.

In his second affidavit, sworn a day after the first one, Pte Barigye gave more detailed information which contradicted his earlier evidence. He stated that he has been stationed in Mbarara Barracks since 2003. He alleged that on 20 February 2006, Capt, Ahimbisibwe from the office of the Chief Political Commissioner in Bombo came to Mbarara Barracks. The soldiers were summoned at a parade which was addressed by Capt. Ahimbisibwe. Capt. Ahimbisibwe informed the soldiers that they were required to use their follow soldiers registration cards to vote for the 2nd Respondent. Capt. Ahimbisibwe promised to come back on 22nd February to give

them details and he returned in the evening, in a double cabin pick-up with five men in civilian clothes.

He alleged further that Capt. Ahimbisibwe addressed them and told them that each of them would be given 17 ballot papers with 16 of them pre-ticked in favour of the 2nd Respondent and that they would tick the 17th ballot at the voting table. Capt. Ahimbisibwe ordered them to hide the 16 pre-ticked ballot papers in folded long sleeves of their shirts and to cast them in the ballot box at the time of casting the 17th ballot paper.

Pte Barigye claimed further that Capt. Ahimbisibwe and Capt. Chris Ndabagye the Division Intelligence Officer distributed to each of them the 17 ballot papers. He stated that he proceeded with ten of his fellow soldiers to the polling station, but they agreed that they would not be part of the fraud. On reaching the polling station, they stood there for a short while and then turned and returned into the barracks without casting any vote. He saw other soldiers with whom they were at the parade obey the orders of Capt. Ahimbisibwe.

On their way back, Lt. Balamu instructed them to go to the water tanks where some one was waiting for them. Between the water tanks hidden from view they found Capt. Ahimbisibwe, Capt. Ndabagye and another person who was introduced as an officer from the Electoral Commission. Pte Barigye stated further that on the ground between them was a heap of voters cards. Capt. Ahimbisibwe asked each of them to pick voters cards from the heap and he picked five. He claimed that Capt. Ahimbisibwe instructed them to go to the Presiding Officers at the polling stations and not hand over the cards but simply tell the presiding officer the name on the card and the presiding officer would tick any name on the register and give them the ballot papers. Capt. Ahimbisibwe instructed them to tick the ballots in favour of the 2nd Respondent. They were also instructed to put cards already used in a different pocket so as not to mix them. They were further instructed to handover the cards to Brigadier Hardison Mukasa after the exercise.

Pte Barigye alleged that the polling officials at the polling stations distributing ballot papers were soldiers approved by the Electoral officials at the District. He claimed to

have voted three times at Lubiri Cell I Polling Station and two times at Kasaru outside Quarter Guard Polling Station and on all occasions the ballot papers were handed to him already ticked in favour of the 2nd Respondent. He stated that in voting five times he used the cards of Ngwabusha Thomas, Birungi Fred, Akwifuka Robert, Achidri Walter and Bagumya Ambrose whom he heard that they were soldiers serving in Northern Uganda.

He states that he was disgusted by the manipulation and did not return the voters cards as instructed. After voting, Capt. Ahimbisibwe came at 6.30 p.m. and arrested several soldiers including himself for not following his orders. He was imprisoned at quarterguard with Wandera Rogers, Kiiza Musoke, Kakuru Ivan and Tumusiime Emmanuel. He was detained till 8th March 2006 when he escaped from the barracks and went to his house and retrieved the 17 ballot papers, and went to his home. He explained to his mother what had happened and showed her the ballot papers. The next morning he left home and went into hiding. Later when he returned home in the evening his mother informed him that she had found the ballot papers under the mattress where he had hidden them and burnt them because army officers and District Internal Security Officers had come looking for him. He claimed that Wandera, Kiiza, Kakuru and Tumusiime were still detained at the time he sworn the affidavit on 10 March 2006.

The affidavit of Major (Rtd) Rubaramira Ruranga was relied up to support the allegations made by Pte Barigye. Major Ruranga stated in paragraph 17 of his affidavit as follows:

> ***"17. That I know in polling stations outside the Quarter Guard being the Gazetted polling stations for soldiers and their dependants most of the people who voted from those polling stations are not employed by UPDF or ordinarily residents of the area. Annexed hereto soldiers at Makenke Polling Stations and surrendered to me by Pte Allan Barigye No.184580."***

Photocopies of about 30 voter's cards were attached, but no original was produced. He does not mention multiple voting by Pte Barigye or any other person.

Mr. Wandera Ogalo, submitted that the evidence of Barigye was corroborated by Annexture D attached to Major Ruranga's affidavit. Affidavit D2 was FHRI Election Report, 25 February 006 where it was stated at page 7:

> ***"At Lubiri Polling Station outside Makenke Barracks in Mbarara, agents of the candidates were not allowed anywhere near the polling area. The FHRI Monitor noted several incidents of multiple voting. When he raised the incident, the Regional Police Commander was called and he took down the monitors details and threatened to have him thrown into jail he didn't keep quiet."***

It seems to me that Pte Barigye was called to support the allegations made by FHRI Election Report. It is interesting to note that the monitor was allowed to note the malpractices whereas the agents of the candidates were not allowed anywhere near the polling area. Pte Barigye did not mention in his two affidavits that he handed 33 voters cards to Major (Rtd) Ruranga, as claimed by the latter.

There are also significant contradictions in the affidavits of Pte Barigye. In the first affidavit, he states that he picked 5 cards from a heap, whereas in the second affidavit he claims that he was given 17 cards and ordered to carry them under his sleeves. In the first affidavit he states that while he was in prison he managed to secretly send the ballot papers to his mother but she too was scared to keep them and destroyed them instead. In the second affidavit, he claims that on 8th March 2006, he escaped from the barracks and went to his house where he retrieved the 17 ballot papers and then went home and showed them to his mother. The next day he went into hiding and when he returned home in the evening she informed him that she had found the ballot papers under the mattress where he had hidden them and burnt them because security officers had come looking for him. These are glaring contradictions. The court summoned Pte Barigye to attend court for cross-examination, but he failed to appear.

The allegations made by Pte Barigye were seriously challenged by the evidence of the army officers allegedly involved in the malpractices, including those he claimed had been arrested with him. They all denied his allegations. Brig. Hardison Mukasa, the Commanding Officer of the 2nd Division of UPDF, deponed that he did not personally know Pte Allan Barigye but from the records he has established that he joined the

UPDF 2nd Division Mbarara in 2005 and not 2003 as he alleged, and that he applied to pursue a Craft Course in Block Laying and Concrete/Electric Installation at Kadogo Community Polytechnic School in Mbarara. He denied knowing any one by the name of Captain Ahimbisibwe.

He explained that civic education was carried out at the barracks in Mbarara with his knowledge and supervision of Capt. Baker Kahiramu, the Divisional Political Commissioner, but did not include any order to the soldiers to vote for any particular candidate. He denied the allegations that soldiers were given more than one voters cards, and sated that the cards were issued by Electoral Commission officials directly to the individual soldiers and neither the administration nor himself were involved in the issuance or distribution of voters cards. He denied the allegation that on polling day he was collecting voters' cards.

He stated that it was not true that any soldiers of his division were engaged in multiple voting, and all polling stations were located outside the barracks and were manned by civilians who were responsible for the entire voting process and the election materials and the division administration was not involved in the polling process. He denied issuing any ballot papers to Barigye or receiving any reports from any presiding officer regarding the commission of electoral offences by officers or men nor did he arrest or cause the arrest of Barigye, Kiiza Moses, Wandera Rogers, Kakuru Ivan or Tumusiime Emmauel as alleged by Barigye. He also denied that these people were still in prison at the 2nd Division barracks.

He explained that he has established from the barracks lock-up that none of the above individuals was imprisoned on or about the 23rd February 2006. He attached a copy of the lock-up book. He has also established that Wandera Rogers, and Kakuru Ivan are not soldiers of the 2nd Division of UPDF Tumusiime Emmanuel is not based in Mbarara but is based in Bwindi Kanungu District.

Captain Romeo Deus Ndyabagye, the Intelligence Officer of the 2nd Division of the UPDF denied knowledge of Pte Barigye. He denied carrying out any briefing regarding elections, as this was the work of Capt. Baker Kahirima. He did not know Capt. Ahimbisibwe. He denied the allegation that soldiers were given more than one

voters cards and required to hand them over to the commanding officer. He also denied handling ballot papers or any election materials. He further denied that Barigye and the soldiers he mentioned were arrested on polling day. He confirmed that Wandera Rogers and Kakuru Ivan are not soldiers of 2nd Division.

Lt. Balamu Byarugaba the Intelligence Officer of 17th Air Defence Regiment of the 2nd Division of UPDF denied knowing Pte Allan Barigye or meeting him on polling day. He stated that on polling day he was at Mbarara where he voted at 9.00 a.m. and continued with his duties on that day that required supervision of highway security. He denied knowing Captain Ahimbisibwe or seeing Capt. Romeo Ndyabagye on that day.

Pte. Wandera Rogers stated that he is a soldier in records office in the Air defence Division of UDPF in Nakasongola. He admitted knowing Pte Barigye who he met during the basic training course in Moroto and later at Acholi Pii in Pader which they attended in 2003. Later they attended Air Defence Course in Nakasongola in 2004. After completion mid 2005, he was deployed in the Records Office of Air Defence Garrison while Barigye went to Kadogo Community Polytechnic in Mbarara. He averred that he had not seen Barigye since mid 2005. He stated that on polling day he was at his duty station in Nakasongola where he voted. He attached a copy of his details from the voter's register to confirm his registration. He denied being in Mbarara on polling day or being involved in any election malpractices. He admitted knowing Kiiza Moses who worked with him and played football with him in Nakasongola. He denied knowing Emmanuel Tumusiime or Kakuru Ivan.

Private Kiiza Moses, a soldier in the 13th Regiment of the Air Defence Division attached to the 2nd Division of UPDF denied being in Mbarara on polling day or being involved in election malpractices. He also denied being arrested. He admitted knowing Pte Barigye whom he met during the Air Defence Training Courseat Nakasongola in 2004. He claimed he has been in Nakasongola since up to 8th March 2006 when he returned to 2nd Division Mbarara. He averred that he voted in Nakasongola and attached a copy of details from the Voters Register to confirm this. He stated that he last saw Barigye in 2004 in Nakasongola.

Private Emmanuel Tumusiime a soldier on the 17th Battalion of the 2nd Division of UPDF based in Bwindi, Kanungu District denied knowing Pte Barigye, nor being imprisoned with Wandera Rogers, Kiiza Moses or Kakuru Ivan as alleged by Pte Barigye. He deponed that on polling day he was at his duty station in Bwindi where he voted. He attached a copy of his details in the Voter Register to confirm his claim. He stated that since he joined UPDF in 2003, he had never been stationed in Mbarara, nor was he ever involved in election malpractices there.

I find the evidence adduced by the 1st Respondent in rebuttal of the allegations of multiple voting and vote stuffing by Pte Barigye consistent and credible. On other hand, the evidence of Pte Barigye is inconsistent, contradictory, uncorroborated and incredible. I do not believe it. I am not satisfied that his allegations of multiple voting and vote stuffing by Pte Barigye have been proved.

There were other allegations of multiple voting and vote stuffing in Mbarara District. Muhwezi James a polling agent in Kamukuzi 2 Kakyeka Centre (M-2) polling station in Mbarara District, alleged that during the voting exercise there were attempts by the presiding officer, a one Senzira, to chase him and his colleague from the polling station in the process he saw the same presiding officer issuing bundles of pre-ticked all in favour of the 2nd Respondent ballot papers to several movement supporters personally known to him. He claims to have reported the matter to Police Station and he was subsequently arrested. There was no affidavit to refute these allegations.

Judith Komuhangi, a polling agent of the petitioner at Lubiri K-L polling station in Mbarara Municipality states in her affidavit that she witnessed several irregularities at the polling station against which she protested with no response from the presiding officer. She depones that there was multiple voting for the 2nd Respondent and pre-ticking of the Respondent's name on the ballot papers.

She states further that one Mrs. Bwita (the wife of LC 1 Chairman of Lubiri Cell) came with 8 people who were not registered but were given bundles of ballots which they stuffed in the ballot box. She claims that the Divisional Intelligence Officer Capt. Chris Ndyabagye was responsible for the multiple voting and the chaos at the

polling station. As a result of her protects there was a scuffle, and she did not sign the Declaration Forms because of the chaos and irregularities.

Captain Romeo Ndyabagye, the Intelligence Officer of the 2nd Division of UPDF denied allegations by Judith Komuhangi that he was responsible for multiple voting and chaos at Lubiri K-L polling station. He also denied knowing Komuhangi. He stated that on polling day he was part of the Regional Election Security Coordinating Committee for 15 districts of Western Uganda headed by the Regional Police Commander. He voted at 8.00 a.m. and proceeded to carry out his duties and did not engage in election activities.

I accept the evidence of Muhwezi which was not seriously challenged that there was multiple voting and vote stuffing at Kamukuzi 2 Kakyeka Centre (M-Z) polling station in Mbarara. Despite denials by Captain Ndyabagye, I believe the evidence of Komuhangi that there was multiple voting and vote stuffing at Lubiri K-L Polling Station in Mbarara Municipality.

From Kabale District, Jack Sabiti claims in his affidavit that in many polling stations in Kanyabugunya Primary School and Bufundi Subcounty, Kacerere I, II, III and IV, voters were required to tick the ballot papers at the first table. He alleges that at Kiyanozi Priamry School one Phiona a Polling Assistant assist Orikiriza Medius, Ndihohabwe Julius and Karugi Morice vote several times and the petitioner's polling agents were chased away. He also claims that Edson Amanya issued pre-ticked ballot in favour of 2nd Respondent and voters just carried the ballot papers to the ballot boxes.

Sabiti claims further that at Kigurwe Polling Station in Buhara and Bubare Primary School at Bwindi Trading Centre there was multiple voting but he does not elaborate. He alleges that at Ngoma Polling Station there was no secret voting as voting took place in classrooms without further explanation. He states that the presiding officer Amanya Edson chased away FDC agents from the first table who influenced multiple voting, but he does not explain how this was done. In any case much of this information appears to be hearsay and of little value.

Several affidavits were sworn to challenge the allegations made by Sabiti, by Presiding Officers and Polling Constables Francis Museveni, who was the Presiding Officer at Kacerere, Polling Station denied the allegations made by Jack Sabiti. He deponed that the voting went on smoothly and after counting the votes all the FDC agents present during the counting signed the Declaration of Results Form without raising any complaint. He denied that any voter was bribed or forced to vote for the 2nd Respondent and that the voting was by secret ballot basis and not on tables which were spread out.

Bamwine Sam, a polling assistant at Mugyera Polling Station, Reshenyi County in Ntungamo District denied allegations by Nansiima Julian that supported of the 2nd Respondent were given more than three ballot papers and that polling officers voted many times for the 2nd Respondent. He also denied voters being given pre-ticked papers in favour of the respondent to put them in the ballot box.

Birungi Robert the presiding officer at Nyakagyezi, polling station in Kinkizi East Constituency in Kanungu District denied the allegations made by Asiimwe Ivan Kasigaire that Margaret the wife of Councillor Mugisha Peter took over the polling station and voted many times for most of the women at this station. He asserted that Margaret voted only once. He denied all her allegations about agents of the 2nd Respondent in multiple voting or hat they voted on behalf of others. He also asserted that ballots cast were not more than the registered voters at the polling station and attached a photocopy of the Declaration or Results Forum to this effect.

Similarly Kagoma Benon the Polling Constable at Kacerere III Polling Station denied the allegations by Sabiti, that voters were required to vote at the first table, but ticked their votes in a basis on another table. Tomukunzi Lindoviko the presidig officer at Kacerere II made similar denials and asserted that the election was free and fair and peaceful and that the two agents of the petitioner signed Declaration of Results Form (DRF) without raising any complaint. A copy of the DRF was attached. Kamara Willy a Polling Constable of Kanyabugunga Polling Station also denied allegations by Sabiti and maintained that he did not see any person ticking ballot papers in the first table, but they voted on another table. He averred that the election exercise was free and fair and there was not coercion of voters by security agents.

The 1st Respondent presented evidence of polling officials who were supervising the elections at the various polling stations where Jack Sabiti alleged that multiple voting and other irregularities took place. Sabiti did not claim that he was an eyewitness to these incidents. I am unable to accept his evidence in view of the credible challenge to it. I find that Sabiti's allegations of multiple voting and vote stuffing have not been proved to my satisfaction.

From Rukungiri District, Karyarugokwe Ambrose, a cameraman based in Rukungiri Town deponed that on voting day, he was asked by Chairman of FDC Rukungiri, Mr. Ronald Kaginda to provide a video coverage for the Presidential elections, in Nyakisenyi and Nyaruranje sub-counties. At Nyakisenyi Primary School, he saw the Presiding Officer ticking ballots on the table and giving out pre-ticked ballots.

He called the Chief Administrative Officer (CAO) Mr. Frank Ntaho and reported the matter. The CAO dispatched a team from his office headed by the Assistant CAO, Mr. Muhumuza Dan, who came to the polling station and interviewed voters who and confirmed that they were being given pre-ticked ballots. The Assistant CAO removed the presiding officer from that station and also changed the polling assistants.

At Nyarusanje sub-county, Nyakatunga Trading Centre Polling Station, he found that FDC agents had been arrested by the Gombolola Internal Security Officer. He captured the incident on his video, but no copy was annexed to the affidavit. He also claimed that he captured on the video, able bodied voters helping each other to vote, but no video was produced in Court.

Ntaho Frank, the Returning Officer for Rukungiri District, denied the allegations made by Karyarugokwe that the presiding officer was ticking ballot papers and giving them out to voters. He admitted receiving a complaint against the presiding officer Owesigire Perry at Nyarubaare Primary School Polling Station that he was allowing voters to tick from his table. He sent the county elections supervisor, Mr. Dan Muhumuza to investigate the complaint about ticking ballot papers but there was general complaint that the Presiding Officer was not managing the station property. After consultation, they decided to reshuffle the polling officials, and Ms

Tumugabwire. Vanice became the presiding officer. Oweyisigire became the polling assistant in charge of applying ink to voter's fingers. With regard to the arrest of FDC agents Ntaho stated that his investigation revealed that one Mwesigwa Edward was arrested on the orders of the presiding officer because he was trying to vote twice and he was not one of the FDC agents at the polling station.

It is admitted by Ntaho that there was a problem with his presiding officer and he had to change him. I do not take his evidence as disputing what Karyarugokwe said that he saw ballot stuffing taking place at the polling station. I accept the evidence of Karyarugokwe with the result that I find his allegations proved.

In respect of Sembabule District, Yowana Tebasabelwa, FDC agent in charge of Kyebando polling station in Sembabule District, claims that he witnessed the stuffing of ballot boxes by Moses Nisima, Rubajjema Kamuhabwe John, Rev. Bolad Matovu, and Michael Ssentongo. He saw them ask the presiding officer Kisakye Stanley to giver them all the ballot papers at the polling station which he did. The group then in full view of everybody started ticking for the 2nd Respondent and stuffing the ballot boxes with their pre-ticked papers. He stated that he and others protested against the presiding officer and the group but instead he was hit on the chest on the orders of the presiding officer by police constable. Some agents were also beaten, making all of them to flee for their lives. He was unable to sign the declaration forms.

Moses Nansiime, a polling agent at Mitima Polling Station, on Sembabule District, denied allegations by Tebasobelwa that he was engaged in ballot stuffing and multiple voting at Kyebando Polling Station, on polling day. He stated that on that he went to Mitima polling stations at 7.00 p.m. and later went to Kyebando polling station at 2.00 p.m. and cast his vote and thereafter returned to Mitima polling station. He recalls meeting Matovu and Nganda after casting his vote. Nganda informed him that he had received reports that he had stolen the ballot papers and boxes from the polling station. He denied the allegation and Nganda admitted that he could see that boxes and ballot papers had not been stolen. He denied seeing Tebasobelwa at the polling station.

John Nkamuhabwa a polling agent at Kyebando polling station denied allegations made by Tebasobelwa. He stated that he saw Rev. Bolad Matovu, Moses Nansina and

Michael Sentogo vote once at the said polling station with one ballot for the Presidential election. He admitted that a policeman and Parliamentary Candidate Nganda came and inquired whether ballot boxes and papers had been stolen and they were informed that it was not true. He denied that there was any massive rigging at the station as Joy Katongole the FDC Women Candidates agent signed the Declaration of Results Form, a copy of which was attached.

Steven Kuteesa, a special Police Constable attached to Sembabule Police Station denied allegations by Tebasobelwa that the presiding officer, Stanley Kisakye gave ballot papers to Moses Nansiima Rubajjema Kamuhabwe, Rev. Bolad Matovu and Michael Sentongo nor did they demand for ballot papers as alleged by Tebasobelwa. He denied that the said people ticked ballot papers in favour of the 2nd Respondent and stuffed the ballot boxes as alleged by Tebasobelwa.

Rubagyema Grace Tandeka, a resident of Kyebando, also denied allegations by Tebasobelwa that she asked the presiding officer for more than one ballot paper or that she stuffed any ballot box with pre-ticked papers. She claimed she voted at about 10.00 a.m. and never went back to the polling station. Rev. Bolad Matovu, a retired clergyman of Sembabule parish denied the allegations by Tebasobelwa that he was engaged in ballot stuffing and multiple voting at Kyebando polling station. He confirmed that a policeman and a Parliamentary Candidate Mr. Nganda came and confirmed that no boxes or ballot papers had been stolen form the polling station as alleged.

Michael Sentogo a voter at Kyebando polling station in Sembabule District denied that the allegations by Tebasobelwa or any other person that he pre-ticked ballot papers and stuffed them in boxes. He did not see the police constable beating Tebasobelwa who left the polling station on his own after being teased by voters that his candidate had lost the election.

The allegations made by Tebasobelwa have been challenged by credible evidence of Nandiime, Namuhambwa, Kuteesa, Rubagyema and Sentongo adduced by the 1st Respondent. There was no evidence adduced to support his allegations. In my view it would be unsafe to accept his evidence. I find the allegation not established.

From Kamwenge District, James Birungi Ozo the FDC Election Monitor for Kyenjojo and Kamwenge District, alleged that on the sub-county of Mahyoro, at Bukururunga Polling Station, 09, Mahyoro 02, Kitagwenda 054 they used a black box for the Presidential election and he found evidence of multiple voting where the presiding officer refused to reveal his names was found folding five, three or more ballots and giving them to voters to tick and put in the box when they put him to task to explain why he was doing so and he asked for forgiveness their agent informed him that he had complained to the policeman but they had ignored him.

He also claims that from the same polling station, when a ballot box was brought to Kamwenge Returning Officer's office and counted in his presence, he saw ballots that were bundled together with corresponding serial numbers like 842425 and 8424254, 8424255 were ticked with the same pen and were found bundled together and ticked in favour of the 2nd Respondent. This evidence was not seriously disputed and I accept it and find that the allegation therein has been established.

In respect of Pallisa District, Mpiima Kalonerio who was the presiding officer at Kobolwa P/S Polling Station deponed that on polling day at about 2.00 p.m. there was a heavy down pour as a result of which he asked the voters to go to the nearby classrooms and shelter from the rains. At about 2.30 p.m. a yellow number-less pick-up came with many people armed with sticks. He alleges that when they alighted from the vehicle they locked the voters inside and returned to the room where they held him hostage, grabbed the ballot papers and started ticking against the 2nd Respondent and Parliamentary candidates Hon. Jennifer Namuyangu and Kamba Saleh. He sneaked out and called the Police Officer in charge of Kibuku County, Mr. Bamunoba, who came after 30 minutes with a patrol car, and arrested some of the culprits while others fled in disarray. The police confiscated all the election materials and took them to the Pallisa Central Police Station. He later made a statement at Pallisa CPS.

David Odong, the FDC Parliamentary candidate for Kibuku County corroborated the evidence of Mpiima. He stated that while he was monitoring his agents at Omukongoro Trading Centre Polling Station, there arrived a yellow pick-up without

number plates carrying several people on board with sticks and who were donning yellow NRM T-shirts and three UPDF soldiers in full uniform. The soldiers jumped off the pick up, grabbed the Presiding Officer, the Polling Assistants and chased away Polling Agents of the Petitioner, the UPC, DP and Bwanika Presidential candidates as well as those of Rainer Kafiire.

The men ordered the agents of the 2nd Respondent and Kamba Saleh and Jennifer Namuyangu (both NRM Parliamentary candidates) for Kibuku Constituency and Pallisa district Woman Representative respectively) to begin ticking ballot papers in favour of the 2nd Respondent and other NRM candidates. After about 10 minutes, the men jumped on the yellow pickup and drove off. He immediately called police and later learnt that the group had been arrested at Kobolwa Primary School Polling Station.

Okodoi Milton, an Election Constable at Mukongoro Trading Centre Polling Station answered the affidavit of David Odong. He denied seeing Odong on polling day. He admitted seeing a yellow pickup on which there came about 10 men wearing civilian clothes and about 3 who were in clothes resembling army uniform. The men were not wearing NRM T-shirts. These men interfered with the voting exercise by grabbing ballot papers and stuffing them into the Presidential candidates' and women Parliamentary candidates' ballot boxes. He does not known how many ballot papers they ticked but they were from one ballot booklet. He did not know for whom the ballots were ticked. The voting exercise was not completed as immediately these men left the place, the Presiding Officer gathered the voting materials and took them to the Sub-county Headquarters at Tirinyi. The results of this polling station were not declared.

Kintu Polycarp who was the Presiding Officer of Narioko Kampala Trading Centre Polling Station Centre admitted that at about 1.50 p.m. a group of young men traveling in a yellow pickup came to his station, grabbed a booklet of ballot papers for Presidential and direct Parliamentary candidates, ticked them as if they were voting but left them with instructions to him that he should put them in the ballot boxes. After about 20 minutes, one Tamwenya Charles arrived at the scene demanding the report of what had transpired. When he was pressed to identify himself, he said he

was a lawyer. Then it started raining till they started to count the votes. At 4.00 p.m. the Assistant District Returning Officer came and demanded to know what had transpired and he explained that he had considered the ticked ballot papers as spoiled. He later made his report to the Returning Officer, Tirinyi Sub-county. He denied the allegation that the boys came wielding clubs, wires, iron bars or that they held him hostage at the OC Pallisa Central Police Station ever came to the polling station.

Mubbala Dawson of Buseta in Pallisa District claimed that when he was standing in the queue at Buyerya Primary School Polling Station, he saw the Presiding Officer issuing more than one ballot paper to a certain category of voters who ticked all but forgot one of them in the basin. He also alleged that the polling constable picked the ballot card returned it to the Presiding Officer who issued it to another voter without explanation whatsoever. He could not establish the name of the person who was engaged in multiple voting.

Kaano Sammuel denied allegations made by Mubbala Dawson. He stated that on polling day he was the Presiding Officer for Buyalya Primary School Polling Station and he received 550 ballot papers, out of which 386 were cast, 29 ballots rejected and 2 were spoilt. Only 164 ballots were not cast therefore it is not true that he issued more than one ballot papers to any voter.

Kaigo Geoffrey, an election monitor with DEMGROUP at Kamba Polling Station deponed on how some people in a yellow numberless pickup came and directed all voters to vote for the 2nd Respondent and Parliamentary candidates, Kamba and Namuyangu. They left and came back in the afternoon, and ordered the Presiding Officer to hand over all the electoral materials. The group began ticking the remaining ballots in favour of NRM candidates. Shortly afterwards, the police came and carried away the polling materials.

Tefiro Kaweesa of Buseta, Kibuku County in Pallisa District who was the polling agent for the Petitioner at Midiri Primary School A-Z Polling Station claimed that the Presiding Officer Jerra Charles was issuing more than one ballot papers already ticked in favour of the 2nd Respondent. As a result of that malpractice, the station ran out of ballot papers when the registered voters were still in the queue, prompting the

Presiding Officer to pressurize the Presiding Officer of the neigbouring polling station, Midiri N-Z to surrender some of the ballot papers for his polling station.

Okoth Albert is the head of CID for Pallisa District. He stated on polling day at 2 p.m. he received a report that at a place called Kobohwa Polling Station, there was a group of unruly peo9ple who had assaulted the agent of Kafire, one Parliamentary candidate for Kibuku Constituency. He went there heading a crew of 7 policemen. They arrested three of the culprits and impounded the vehicle they were traveling in, but the other eight people were charged with assault.

The evidence of ballot stuffing from Pallisa District is overwhelming. Indeed most affidavits admit the allegation. I find that the allegation has been established in the polling stations concerned. It will be recalled that results from these polling stations were cancelled as a result of such malpractices.

Finally from Yumbe District, Chabo Yasin who was the supervisor and monitor of elections for FDC in Midingo Sub-county Yumbe District, alleged that on polling day at about 12.30 p.m. he saw and intercepted an omnibus motor vehicle Hiace Toyota without number plate driven by one Azubo Rashid Hippo, a campaign agent of the 2nd Respondent, with 5 ballot boxes of pre-ticked papers which was coming from the quarter guard of UPDF quarter guard at Oluga Detach, in Midigo Sub-county.

He claims that after intercepting the omnibus, a crowd gathered and inquired how the ballot boxes were in possession of the said Azubo who was neither a returning officer nor an employee of the 1st Respondent. Azubo then made a phone call whereupon he immediately saw armed men in a lorry and an army vehicle with two stars in which Major General Ali Bamuze, a renowned serving UPDF officer and a former chairman of the defunct rebel group, and another of Hon Nusura Tiperu which came with army men who started firing live bullets and beating people. He alleges that eventually, the ballot boxes were transferred into Major General Ali Bamuze's vehicle and driven off to unknown destination.

Azubu Rashid Hippo an NRM mobilizer heading the West Nile Task Force denied the allegations made by Chabo Yasin whom he admitted knowing as an FDC coordinator

in Midingo Sub-county in Yumbe District. He astated that on polling day after voting ended a motor vehicle No. UAF482N carrying FDC supporters came to Midigo Traing Centre and began spreading rumours that he had ballot boxes in his car registration No. UAF3478M. Chabo Yasin and Manoa Achile Milla jointly organised with FDC supporters to attack him. Under the advice of the GISO soldiers from Kerwa were called for his security and they proceeded to Yumbe via Midigo Trading Centre where they met Major General Ali Bamuze who was on his way to Kerwe. Maj. Gen. Bamuze stopped their vehicle inquired from the soldiers about the situation in Kerwa, and they replied that it was normal.

On reaching Midigo, Hippo claims that they met a big violent crowd armed with pangas, stones and knives ready to attack them. The soldiers got out of his car and calmed down the crowd. He denied that the soldiers had live ammunition or beat up the crowd as alleged. He and Maj. Gen. Bamuze got out of their cars and showed the crowd that they were not carrying ballot boxes. He denied that any ballot boxes were transferred from his car into Maj. Gen. Bamuze's vehicle. After the crowd was satisfied that they were no ballot boxes in their cars, they dispersed and they proceeded to Yumbe where they arrived at 7.30p.m.

Major General Ali Bamuze of UPDF, denied knowing Chabo Yasin or meeting him, but he knows Azubu as an NRM mobiliser heading West Nile Task-Force. He stated that after voting at about 1.30 p.m. he went to visit Hon. Nusura Tiperu in Yumbe town around 5.00 p.m. While he was there he received information from Major Abubakar that there had been a rebel incursion at Kerwa at the Uganda/Sudan boarder about 25 miles from Yumbe town. He immediately proceeded to Kerwa in company of two soldiers and Hon. Nusura Tiperu in his official vehicle Reg. No. UG00668. on the way to Kerwa, they met Azubo with two soldiers in a mini-bus on their way back from Kerwa. He waved to them down upon which they informed him that there was no rebel incursion at Kerwa as had been reported to him. He denied Chabo's allegations that army men fired live bullets and beat people. He also averred that it is not true that ballot boxes were transferred into his car. He stated that there is no military detach in Midingo Sub-county.

The allegations made by Chabo Yasin have not been supported by other independent evidence. On the contrary, the allegations have been seriously disputed by credible evidence adduced by the 1st Respondent. I am not satisfied that the allegations by Chabo Yasin have been proved.

Effect of non Compliance with the Provisions and Principles of the Act on the Results of the Election:

The third issue in this petition was whether if either issue No.1 or 2 on both are answered in the affirmative, such non compliance with the said laws and principles affected the results of the election in a substantial manner. This Court found, by a majority of four to three, that it was not proved to the satisfaction of the Court that the failure to comply with the provisions and principles as found on the first and second issues, affected the results of the Presidential election in a substantial manner. I was among the majority members of the Court, and I now give my reasons for answering the issue in the negative.

As I have already pointed out, Article 104(1) of the Constitution provides that subject to the provisions of this Article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission as President was not validly elected. Clause(9) of that Article provides that Parliament shall make such laws as may be necessary for the purpose of this Article, including laws for grounds of annulment and rules of procedure. Parliament enacted the Presidential Elections Act in which it specified the grounds for annulment of the election. The grounds for annulment or invalidation of a Presidential Election are specified in Section 59(6) of the Presidential Elections Act, and it may be necessary to quote them. They are as follows:

> ***"(6) The election of a candidate as President shall only be annulled on any of the following grounds if it is proved to the satisfaction of the Court –***
>
> **(a)** ***non-compliance with the provisions of this Act, if the Court is satisfied hat the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner;***

(b) that the candidate was at the time of his or her election not qualified or was not disqualified for election as President; or

(c) ***that an offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."***

The Presidential Elections Act has therefore defined three different grounds on which a Presidential election can be annulled or invalidated. The third issue is concerned with the application of Section 6(a) while Section 6(c) of the Act is relevant to the fourth issue.

Mr. Wandera Ogalo rightly submitted that the burden of proof lies on the petitioner to prove his allegations and that the standard of proof is above balance of probabilities, but not beyond reasonable doubt. This principle of law was established in the Presidential Petition No. 1 of 2001, ***(Rtd) Col. Dr. Kiiza Besigye vs Y K Museveni and Electoral Commission.*** He submitted that while he was mindful of Article 132(4) of the Constitution which allows this Court to depart from its previous decisions, the Court ought to look at the nature of the non-compliance. He argued that non-compliance with the principles must be taken to have affected the results in a substantial manner. It was his contention that the principles are the yardstick of an election; they are what will determine whether there was an election or not.

Learned counsel contended that the petitioner had adduced evidence which showed disenfranchisement throughout the country. He referred to a report of Dr. Odwee which showed that in 38% of polling stations there were instances where voters were turned away. He stated that this equals 7,000 polling stations out of 19,000 polling stations. He submitted that if voters can be turned away at 7,000 polling stations this is a fact which will substantially affect the result. He argued that there is no need to make a head count to determine the exact number of people turned away.

Mr. Wandera Ogalo further submitted that the second example of substantial effect is the intimidation of voters. He argued that they had adduced evidence to show that there was wide-spread intimidation. What was required in his view, was to look at the

effect on the voters. Learned counsel requested this Court to take judicial notice of the fact that there are many radio stations which could have splashed out the news of the murder of FDC supporters in Kampala. He submitted that this intimidation goes to the root of the matter of election. In the alternative he submitted that if the numbers are required, the Court should take into account ballot stuffing and invited the Court to determine whether at the end of the whole process the votes of each candidate could have been different in a substantial manner.

Learned Counsel asked the Court to take into account the effect of all irregularities. He submitted that the irregularities seriously reduced the majority of the winning candidate. He stated that he had adduced evidence on his side to indicate the narrowing down of the margin between 59% and 50% which would attract a re-run. He relied on the affidavit of Dr. Janathan Odwee, a statistician who is a Senior Lecturer at Makerere. Dr. Odwee was summoned to come to Court but he failed to do so. However, his affidavit was considered after the Respondents had an opportunity to file affidavits in answer to his.

I have already referred to the affidavit of Dr. Odwee in respect of disenfranchisement of voters in the first issue. Mr Wandera Ogalo referred to the main findings of Dr. Odwee. In paragraph 10, he states that in the districts of Rakai, Lira, Mbale, Sironko, Pallisa, Bushenyi, and Iganga results from several polling stations were not included in the totals declared by the 1st Respondent. The total number of voters denied to express themselves as to who was their candidate was 21,315. Dr. Odwee also listed in paragraph 12 polling stations where he alleged that the 1st Respondent manipulated the tally sheets and distorted results from some polling stations. The list of those polling stations was considered in the first issue in respect of disenfranchisement. He alleges further that another method of manipulating the final results was to increase and or decrease the final results as compared with the provisional results. In paragraph 13 he states,

> ***"The method is well illustrated by an example of Apac District where the totals between the provisional and final figures are not supported by the number of registered voters. I observed that the provisional results missed two polling stations but when the final results came the totals for the Petitioner had a difference of 1,587 votes which***

could have come from the two polling stations judging by the votes cast in respect of the other constituencies whose results formed part of the provisional declarations."

Dr. Odwee states that he considered the population distribution of Uganda as published by the Uganda Bureau of Statistics March 2005 as well as the gazetted registered voters for 2006 Presidential and Parliamentary Elections, the results of the 2001 and 2006 Presidential Elections and realized that the areas that predominantly voted for the 2nd Respondent in 2001 had apparent excess number of voters while that predominantly voted for the opposition had lower number of voters registered. He claimed that according to the Uganda Population and Census Report, children under 18 years constitute 56% of the overall population and further that the Northern Region enjoys the highest population growth while the Western and Central Regions have the lowest. He then makes scientific deductions about Isingiro as follows:

"17. That in accordance with the above scientific deductions it is inconceivable how for example Isingiro with a population of 2,002,727 would have 94,994 registered voters while Adjumani with a population of 202,290 would have only 47,447 registered voters, or Jinja with a population of 387,573 would have 163,681 registered voters although Mbale which by then included Manafa District with a population of 718,240 appropriately reflects the right proportion of 162,767 registered voters: The proportion for Mbale between a population of 162,767 registered voters: The proportion for Mbale between a population and the registered voters would have been the general picture throughout the country"

He finds it odd after examining the tally sheets of both Isingiro and Kiruhura Districts that the voter turn up was almost 100% in both Districts, a pattern which is not shared by other Districts and he claims that he noted that almost all the votes cast were for the 2nd Respondent.

After examining the tally sheets supplied by the 1st Respondent and declaration of results forms supplied to him and other documents necessary for his study and analysis, he came to the conclusion that the 2nd Respondent could not have received the number of votes declared in his favour nor the percentage assigned to him. He then concludes,

> ***"20. That going by the above study and considering the population growth and distribution in Uganda and after taking into account the votes cast of 38.8% of the valid votes cast whose declaration of results forms were availed to me, I have come to the conclusion that the 2nd Respondent did not secure the percentage assigned to him by the 1st Respondent but his percentage was 48.8% while that of the Petitioner was 47.7%."***

Dr. Odwee gave the basis of his conclusion in paragraphs 21 to 23 of his affidavit as follows:

> ***"21. That I have compared the results herein with the results in respect of the same polling stations in the Electoral Commission results and the results are almost similar and qualify to give a representative sample which is above 5-10% normally considered as sufficient to give the estimates of parameters.***
>
> ***22. That the 38.8% is more representative and in our case the 100% of the percentage I have used is equivalent to 68,800 which is number of valid votes that influenced the results and for one to gain or lose a percentage point, he has to gain or lose 68,800 votes.***
>
> **23.** ***That with the 38.8% sample there is no scientific explanation for only one person to gain consistently against others and acquire 10% points and with the 38.8% results, the deviation from the actual results substantively reduces and is very minimal in the range of 0% to 1.5% deviation."***

Mr. Tibaruha, the learned Solicitor General, for the 1st Respondent addressed us on the allegations of deletion of names, multiple voting and vote stuffing, declaration of results, and failure to take measures to ensure free and fair elections. He submitted that in terms of Section 59 of the Presidential Elections Act the petitioner had to adduce evidence to the satisfaction of the Court in order to succeed in the petition. Such evidence must leave the Court in no doubt that there was non-compliance with the provisions and principles of the Act. It was his contention that on the basis of submissions of Mr. Nkurunziza and Mr. Matsiko, the issue cannot be answered in the affirmative.

He submitted further that assuming that this Court determines issues No 1 and 2 on the affirmative, the Court cannot nullify the elections because the non-compliance did

not affect the elections in a substantial manner. As to what is meant by ***"substantial manner"*** learned counsel relied on the decision of this Court in an earlier Petition, ***(Rtd) Col Kiiza Besigye vs. Y K Museveni and Electoral Commission, Election Petition No. 1 of 2001.*** He referred to judgments of the Chief Justice, Karokora JSC, and Mulenga JSC, where it was held that numbers are important. It was therefore the submission of Mr. Tibaruha, that the Petitioner should have demonstrated that the non-compliance affected the results in a substantial manner; i.e. that the voting margin of 1,580,309 which is the difference between the votes cast for the petitioner and the 2nd Respondent would have been significantly reduced.

Learned Solicitor General emphasised that numbers must be used in making adjustment for any proved irregularities. He requested Court to take into account the following matters:

1. The number of votes of winning candidate must be considered and in this case it is over 1.5 million votes.

2. The Petitioner has not shown that 1.5 million votes would not have been obtained except for the irregularities.

3. The Court must take into account the fact that the results were the results of the whole electorate nor only where the irregularities took place. In this case the petitioner raised isolated cases of irregularities.

4. The court must take into account the number of polling stations where the irregularities took place in relation to the whole country i.e. 189 out of 19,000 polling stations which amounts to 0.8%.

Therefore, he submitted, the petitioner had failed to prove that there were irregularities which affected the results of the election in a substantial manner. He contended that the Court should not deem substantial non-compliance to affect the results in a substantial manner.

In answer to the affidavit of Dr. Odwee, the 1st Respondent filed affidavits of Dr. Nazararius Tumwesigye, Andrew Mukulu and Wamala Joshua. I shall refer to their

evidence and opinions while considering the submissions of Mr. Kabatsi who addressed us on this matter on behalf of the 1st Respondent. The main submission of Mr. Kabatsi was that Dr. Odwee's affidavit evidence was very unreliable because the study and analysis was based on incorrect premises, the study was not thoroughly conducted and was biased and finally the study and analysis provided no report setting out the premises, methodology, analysis and conclusions or findings that were embodied in the affidavit.

Learned counsel argued that the study and analysis itself does not establish the clear methodology of his work normally required in an analysis of this kind. He referred to the affidavit of Dr. Nazarus Tumwesigye who is an accomplished researcher and publicist in this field. Dr. Tumwesigye states in paragraph 4 of his affidavit that in order to carry out a study of this kind, one ought to establish clear methods. He also referred to the book entitled ***Survey Methods of Social Investigation,*** by Clause Moser and Graham Kalton, 2nd edn**,** 1979 pages 43-44 where it is stated that the first task is to lay down survey objectives and that failure to think out the objectives of a survey must inevitably undermine its intrinsic value.

Mr. Kabatsi submitted that the sample was selected in an incorrect way. He referred to paragraphs 5 – 8 of Dr. Tumwesigye's affidavit where he stated,

> ***"5. That the normal methods are the sampling strategy, sample size determination and analysis techniques to be used. Failure to disclose the methods brings into question the credibility and reliability of the study and final results.***
>
> **6.** ***That the methodology used by Dr. Odwee has not been disclosed as would be required of any data analysis.***
>
> **7.** ***That reading paragraphs 6 and 7 of the affidavit, Dr. Odwee was not supplied with some Declaration of Results Forms by the Petitioner which sample size he did not determine and whose selections procedure was not scientific.***
>
> **8.** ***That the sampling strategy must be random and the usual sampling technique would be the <u>Simple Random Method</u> in which all polling stations would have an equal chance of being selected. The deponent did not use this technique because not all polling stations had an equal chance of being selected.***

9. ***That failure to scientifically select a sample as shown above leads to a biased outcome. In this case, the sample was selected by the Petitioner and not the analyst, the outcome of the study is biased."***

Learned Counsel referred to page 79 of the ***Survey Methods of Social Investigation*** (supra) where principles which underlie sample design are listed in paragraph 5.1, and when bias in the selection of sample can arise. The authors state that the first principle is the desire to avoid bias in the selection procedure and the second broadly to achieve the maximum precision for a given outlay of resources. They stated that bias in the selection can arise:

"(i) if the sampling is done by non-random method which generally means that the selection is consciously or unconsciously influenced by human choice;

(ii) ***if the sampling frame (list, index or other population record) which serves as the basis for selection does not cover the population adequately, completely or accurately;***

(iii) ***if some sections of the population are impossible to find or refuse to co-operate."***

Mr. Kabatsi submitted that if these principles are not observed, the defects are incurable. It was his contention that on this ground alone Dr. Odwee's report is fatally flawed and the conclusions and findings cannot be supported.

Learned Counsel argued further that the report has no evidence of statistical analysis. There is a need for a survey report. He referred to paragraph 10 of the affidavit of Dr. Tumwesigye where he stated:

"That I have found no evidence of statistical analysis in the affidavit of Dr. Odwee and the annextures thereto. Annextures I and J of the affidavit are simply evidence of the entry of data into a computer to generate tables and charts to show the frequency of votes per candidate. A proper statistical analysis ought to produce a report to include the models used, a list of factors and tests of significance of importance of each factor, and tests of significance of relationships between the factors considered. Dr. Odwee did not produce such a report."

Mr. Kabatsi underscored the importance of the report. He referred to page 471 of ***Survey Methods of Social Investigation*** (supra) at which this point is emphasised:

> ***"Technical reports should be issued for survey of particular importance and those using new techniques and procedure of special interest. In addition to covering such fundamental points and resources available for the survey, the report should deal in detail with technical statistical aspects of the sampling design, execution and analysis; the operational and other special aspects should also be fully covered."***

He submitted that even on this score alone, Dr. Odwee's evidence should be rejected.

The next ground for attack on Dr. Odwee's evidence was that his study does exhibit clear evidence bias, for instance, in paragraphs 6, 12 and 13 where he talks of discovering ***"fabrications"*** and not discrepancies and where he alleges that the 1st Respondent ***"manipulated"*** the results.

With regard to the issue of provisional and final results, Mr. Kabatsi submitted that the 1st Respondent accepted that at the time the results were declared, the total results were not in. He contended that Dr. Odwee is not entitled to conclude that the difference between provisional and final results was manipulation, and that this issue of bias tainted his report, and this compiled with scientific flaws leaves his evidence of absolutely no value.

Another problem with Dr. Odwee's affidavit, Mr. Kabatsi submitted, was that Dr. Odwee appears to have operated and came to conclusions without a margin of error. He referred to paragraph 20 of Dr. Odwee's affidavit where the latter comes out with definite figures of the results to be assigned to the Petitioner and the 2nd Respondent namely, that the 2nd Respondent secured 48.8% while the Petitioner secured 47.7% with no margin of error given. He referred to the affidavit of Dr. Tumwesigye where he stated that using a sample of 38.8% should have been presented with a margin of error. Dr. Tumwesigye stated that the margin of error was likely to be very high i.e. above 10%. Mr. Kabatsi argued that such a margin of error was very real and no definite decision can be based on it. He also submitted that the size of the sample does not make it representative because of the proportion. He relied on paragraph 22 of Dr. Tumwesigye's affidavit.

With regard to the comparison made by Dr. Odwee between registered voters in 2006 and the population census of 2002 and the population census of 2002, Mr. Kabatsi submitted that Dr. Odwee assumes that nothing happened between 2000 and 2006, when making findings on district populations and that the two figures do not relate to the same subject. In this connection, the affidavit of Mr. Andrew Mukulu, Director of Population and Social Statistics in the Uganda Bureau of Statistics and a holder of a Masters Degree on Population Studies was also relied upon.

In his affidavit, Mr. Mukulu stated that the population distribution of Uganda as published by the Uganda Bureau of Statistics in March 2005 was a result of the 2002 Uganda Population and Housing Census. The 2002 Uganda Population and Housing Census results represent the number of people who were in Uganda on the night of 2002. He attached to his affidavit relevant part of the report annexture A. According to page 26 of the Report, Figure 5.2 Northern Uganda had the highest growth rate and central region, the lowest. Mr. Mukulu stated that people born in 1990 are not yet voters. Learned Counsel pointed out that the report also shows that between 1980 and 1991, central and western regions had the highest rates of growth, and the people in these regions are not voters.

Finally, Mr. Kabatsi submitted that Dr. Odwee's claim that from his preliminary study of the tally sheets, declarations of results forms given to him by the petitioner as well as the voters' registers, he discovered that there were several discrepancies, anomalies and gaps in the tally sheets which have no explanation offered by the 1st Respondent, is not true. He referred to the affidavit of Mr. Joshua Wamala, which denies presence of ghost polling stations and explained that the confusion was caused by using similar codes which were more authentic. Mr. Wamala also denied the claim by Dr. Odwee that the 1st Respondent manipulated the tally sheets or distorted the results from any station. He also disputed Dr. Odwee's claim that there was an accumulated loss or gain of 1 million votes as this claim was unsubstantiated.

In the Presidential Election Petition of No. 1 ***Col (Rtd) Kizza_Besigye vs. Museveni Y.K. and Electoral Commission*** (supra), this Court took time to define, explain and discuss the law relating to Presidential Election Petitions, and particularly the

question how non-compliance with the law and principles could be determined to have affected the result in a substantial manner. Article 132 (4) of the Constitution provides that the Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decision of the Supreme Court on questions of law. This provision contitutionalises the doctrine of ***stare decisis*** or precedent which is essential for promoting certainty and uniformity in judicial decisions. The doctrine is flexible in allowing the final Court to depart from its previous decision in exceptional cases to promote change so that the law keeps abreast with changing social circumstances. (See ***C.A Dodhia vs National & Grindlays Bank Ltd*** (1970) E.A. 195, at page 199. We were asked to depart from the principles enunciated in Presidential Election Petition No.1 of 2001, but I see no reason to compel me not to follow them as I consider them still sound and valid.

One of the principles established in the Presidential Election Petition No.1 of 2001 was that the burden of proof lies on the petitioner to satisfy the court on balance of probabilities that the non-compliance with the law and principles affected the result of the election in a substantial manner. The standard of proof is higher than in an ordinary civil case and is similar to standard of proof required to establish fraud, but it is not as high as in criminal cases where proof beyond reasonable doubt is required.

In the Presidential Petition No.1 of 2005 (supra), this Court referred to a number of English, Nigerian, Tanzanian and Ugandan authorities defining the phrase ***"affected the results in a substantial manner"***. I shall refer to only a few of them.

In ***Mbowe v. Eliufoo*** (1967) EA 240, at page 242, Georges CJ, in the Court of Appeal of Tanzania, said

> ***"In my view in the phrase "affected the result," the word "result" means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected after making adjustments for the effect of proved irregularities, the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules"***.

In ***Ibrahim vs. Shagari & Others*** (1985) LRC (Const) 1, the Supreme Court of Nigeria considered a similar law which stated that ***"an election shall not be invalidated by reason of the non-compliance with Part II of the Act if appears to the Court …. that the election was conducted substantially in accordance with the provisions of the said Part II and that non-compliance did not affect the result of the election."*** The Court observed, at page 21,

> ***"The Court is the sole judge and if it is satisfied that the election has been conducted substantially in accordance with Part II of the Act, it will not invalidate it. The wording of Section 123 is such that it presumes that there will be some minor breaches of regulations but the election will only be voided if the non-compliance so resulting and established in court by credible evidence is substantial. Further the court will take into account the effect if any which such non-compliance with the provisions of Part II of the Electoral Act 1982 has had in the result of the election."***

In ***Clare Eastern Division Case*** (1892) 4 QM & H 162, at page 162, ***Ruffle v Rogers*** (1982) QB 1220, it was held that the ***"result"*** means the success of one candidate over another, and not merely an alteration in the number of votes given to each candidate. In other words the result of an election is the outcome of the election in terms of performance by the candidates and the number of votes each obtained. The results of an election are reflected in a return filed by the Electoral Commission.

In the Presidential Election Petition No.1 of 2001 I defined the phrase 'substantial effect' as follows:

> ***"What then is a substantial effect? This phrase has not been defined in the Statute or judicial decisions. But the cases of Hackney (1874) XXX1 L.T. 69, and Morgan v Simpson (1974) 3 All ER 722, attempted to define what the words substantial effect meant. I agree with the opinion of Grove J (in the Hackney Case). The effect must be calculated to really influence the result in a significant manner. In order to assess the effect the court has to evaluate the whole process of the election to determine how it affected the result, and then assess the degree of the effect. In this process of evaluation it cannot be said that numbers are not important, just as the conditions which produced those numbers.***

Numbers are useful in making adjustments for the irregularities. The crucial point is that there must be cogent evidence direct or circumstantial to establish not only the effect of non-compliance or irregularities but to satisfy the court that the effect on the result was substantial."

In that case, I also observed that a value judgment is relevant in considering the process of the election and the principles underlying the process. At the end of the elections a value judgment can only be made that an election was not free and fair but that is not the result of the election. It is only one of the principles of non-compliance which may render the election to be set aside if it has affected the result in a substantial manner.

In his judgment in the Presidential Election Petition No.1 of 2001, Mulenga JSC explained the meaning of the phrase ***"affected the result of the election in a substantial manner"*** as follows:

"Issue No.3 in this petition relates to the application of paragraph (a) of that subsection {58(6)}. It is centred on the meaning of the phrase "affected the result of the election in a substantial manner". The result of an election may be perceived in two senses.

On one hand, it may be perceived in the sense that one candidate has won, and the other contesting candidates have lost the election. In that sense, if it is said that a stated factor affected the result, it implies that the declared winner would not have won but for that stated factor; and vice versa.

On the other hand, the result of an election may be perceived in the sense of what votes each candidate obtained. In that sense to say that a given factor affected the result implies that the votes obtained by each candidate would have been different if that factor had not occurred or existed.

In the latter perception unlike in the former, degrees of effect, such as insignificant or substantial, have practical effect. To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in S.58(6) (a)can only mean that the votes candidates obtained would have been different in substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is

> ***sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt."***

Karokora JSC agreed that numbers are important in considering the effect of the irregularities;

> ***"In my opinion, there is no way we can avoid considering numbers of votes a candidate got over the other. If the numbers of votes were used in determining the winner of the election how can we hear the election petition, challenging the winner, that he unfairly won the election without considering the numbers. For instance, if the 1st Respondent obtained 5,123,360 votes while the Petitioner got 2,055,795 votes how can we hold that the 1st Respondent was not validly elected without considering the numbers which he (1st Respondent) obtained over the petitioner because of non-compliance with the provisions of the Act? We obviously have to consider the numbers got from each polling station and District."***

On the other hand, Tsekooko JSC who was among the members of the Court, who wrote a minority judgment said,

> ***"In my considered opinion an accumulation or sum total of the non-compliance with the provisions and principles of the Act is the value yardstick for measuring the effect of non-compliance with the provisions and principles laid down in the Act."***

The point to emphasize is that Sections 59(6) of the Presidential Elections Act anticipates that some non-compliances or irregularities of the law or principles may occur during the election, but an election should not be annulled unless they have affected it in a substantial manner. The doctrine of substantial justice is now part of our constitutional jurisprudence. Article 126(2)(e) of the Constitution provides that in adjudicating cases of both a civil and criminal nature, the courts shall subject to the law, apply the principle, among others, that ***"Substantial justice shall be administered without undue regard to technicalities".*** Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice. It is significant to note that a similar provision exists in Section 61(1) (a) of the Parliamentary Elections Act requiring proof of substantial effect on the result of

the election as one of the grounds for annulling such an election. The principle of substantial justice does not conflict with the principle of a free and fair election. The fundamental or primary consideration in an election contest should be whether the will of the people has been affected.

In determining the effect of the irregularities on the result of the election, the court should consider whether there has been substantial compliance with the law and principles and the nature, extent, degree and gravity of non-compliance. The court should also consider whether the irregularities complained of adversely affected the sanctity of the election. The court must finally consider whether after taking all these factors into account the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt.

In ***Anderson Kambela Mazoka and 3 Others Vs. Levy Patrick_Mwanawasa and 3 Others***, Presidential Petition No. SCZ/01/02/03/2002, the Supreme Court of Zambia referred to its earlier decision in the case of ***Lewanika & Others Vs Chiluba***, where it had considered whether the defects in the Presidential election had substantially affected the result and where the Court had observed,

> ***"The bottom line, however, was whether given the national character of the exercise where all the voters in the country formed a single constituency, it can be said that the proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true will of the majority of the voters.***
>
> ***We are satisfied on the evidence before us that the elections while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs such elections. The few examples of isolated attempts at rigging only served to confirm that there were only few superficial and desultory efforts rather than any large scale, comprehensive and deep rooted rigging as suggested by the witnesses who spoke of aborted democracy."***

In the **Mwanawasa** Case, the Court went on to hold as follows:

> ***"We are satisfied on the evidence before us that the elections, while not being totally perfect as found and discussed, were substantially in conformity with the law and practice. The few partially-proved allegations are not indicative that the majority of the voters were prevented from electing the candidate whom they preferred or that the election was so flawed that the dereliction of duty (by Electoral Commission) seriously affected the result which could no longer reasonably be said to reflect the free choice and free will of the majority of the voters.***
>
> ***We therefore determine and declare that the 1st Respondent, Levy Patrick Mwanawasa, was duly and validly elected as President of the Republic of Zambia."***

I agree with the principles enunciated in the above decisions.

I shall now examine the nature, extent, degree and gravity of the non-compliances with the law and principles which were proved, and consider their effect on the result of the election. With regards to the first issue, the Court found that there was non-compliance with the law in disenfranchisement of voters. Disenfranchisement did not occur in most districts of Uganda as claimed by the Petitioner. It was proved to have occurred only in the districts of Kampala, Nebbi, Iganga, Masindi, Sironko, Mbale, and Busia. Disenfranchisement appeared to have affected mainly urban areas where mobility of residents is high. Many voters who changed residence may have been affected by the deletion of their names since they could only vote where they reside or originate. Merely working in those urban centres was insufficient qualification. Some voters were transferred to other polling stations after splitting polling stations.

There was no proof that many voters who registered after the return of the Petitioner were deliberately removed from the register or that they were his supporters. I found that the total number of those disenfranchised were about 150,000 since many voters were in the register but did not know their polling stations. There was no proof that the majority of those disenfranchised were supporters of the Petitioner, and would have voted for him. Even if all the 150,000 voters were supporters of the Petitioner, their votes would not have had substantial effect on the result as they would not significantly reduced the winning majority.

The Court also found that there was non-compliance with the law in the counting and tallying of results. Discrepancies between tally sheets and declaration of results forms were found in some polling stations in Hoima, Bundibugyo, Kamwenge, Pallisa, Kampala and Mbale. The 1st Respondent admitted that there were errors in six polling stations which amounted to 962 votes in respect of the Petitioner which is 0.013% of the total votes cast. The Petitioner alleged that he lost one million votes as suggested by Dr. Odwee. But the figure of one million has no basis and remained merely speculative as Dr. Odwee's study of the results was not scientifically carried out as we shall see later.

Once again the loss of 962 votes by the Petitioner even if added to 150,000 votes lost through disenfranchisement could not have affected the result in a substantial manner given the margin of votes between him and the 2nd Respondent which was over 1.5 million votes. The allegation of failure to cancel the results where gross irregularities or malpractices occurred or the failure to declare results in accordance with the law were not proved. In my view there was substantial compliance with the provisions of the law.

With regard to the second issue, the Court found that the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country. The Court also found that the principles of equal suffrage, transparency of the vote and secrecy of the ballot were undermined by multiple voting and vote stuffing in some areas.

As regards bribery, there was a failure to prove in most cases that persons who were given money, articles or commodities like soap, sugar, or salt were voters. There was also a failure to distinguish which were genuine payments by a party to its agents or supporters to facilitate campaigns or elections. In any allegation of bribery, it is important to establish the motive which animates the giver.

From the evidence, I find that bribery had been proved in a few districts of Mbale, Tororo and Iganga. Again these were in isolated and few constituencies, parishes or polling stations. It was not wide spread. The effect of bribery in these areas on the result or indeed the election was not established, and in my view it could not have

been substantial. It seems to me that the use of money in this election was employed not only by the NRM but also by FDC as some of its agents were also arrested with large sums of money. This apparent indiscriminate distribution of money to agents or voters needs to be regulated and controlled.

The allegations of intimidation and violence were by far the most serious malpractices which were proved. They were proved in the districts of Kampala, Tororo, Kabale, Kamwenge, Mbale, Iganga, and Pallisa. They were not proved in Ntungamo, Bushenyi, Kanungu, Mbarara and Kiruhura. The allegations which were proved involved assault, arrest, detention and intimidation of supporters of the Petitioner by military and security personnel and party functionaries. These incidents were clearly unfortunate and undesirable and must have had some effect on the Petitioner's supporters. However, it was not established that these acts of intimidation had substantial effect on the result of the election. There were some voters who claimed that as a result of intimidation they or others so intimidated decided to vote for the 2nd Respondent. These were very few. Some voters were prevented from voting through arrest and detention, but their number was not established.

I am aware that there are many FM Stations which could have spread the news of intimidation and violence meted out in Kampala by the shooting of three FDC supporters at Bulange or indeed the assault of Major (Rtd.) Rubaramira Ruranga at FDC Headquarters at Najanankumbi. But no evidence was adduced of the broadcasts that were made on these incidents. Moreover, the national coverage of such FM Stations was not established. More importantly, the effect of such news on voters in Kampala or country wide was not established. It is possible that such intimidation did not affect the result of the election and the Petitioner or FDC may have received overwhelming voters in some of the areas where intimidation occurred as in Kampala.

The Court also found that the principles of equal suffrage, transparency of the vote and secrecy of the ballot were undermined by multiple voting and vote stuffing in some areas. The Petitioner had alleged that these malpractices occurred in many districts of Uganda. However, the Petitioner was only able to prove multiple voting

and ballot stuffing in two polling stations in Mbarara District, two polling stations in Rukungiri District, three polling stations in Kamwenge District and seven polling stations in Pallisa District. He failed to prove such malpractices as alleged in the districts of Kabale, Sembabule, and Yumbe. The malpractices were therefore not widespread in many districts or indeed many polling stations as alleged. They were only proved in three districts, involving less than ten polling stations. In Pallisa District, the results in the affected polling stations were cancelled. It is my view that the principles contained in the law were substantially complied with by the 1st Respondent.

An attempt was made by the Petitioner through the affidavit of Dr. Odwee to prove the effect of the malpractices on the result of the election. Dr. Odwee made a finding that the Petitioner lost about one million votes through the malpractices, particularly the inaccuracy in the counting and tallying of results. He concluded that the 2nd Respondent did not secure the percentage assigned to him by 1st Respondent but his percentage was 48.8% while that of the Petitioner was 47.7%.

Dr. Odwee's findings were seriously challenged by the evidence of Dr. Tumwesigye, Andrew Mukulu and Wamala Joshua, and in the submissions of Mr. Kabatsi. I accept the submission of Mr. Kabatsi that Dr. Odwee's affidavit evidence was unreliable because the study and analysis was based on incorrect premises, it was not thoroughly conducted and was biased, and the analysis provided no report setting out the premises, methodology, analysis and conclusions or findings that were embodied in the affidavit. The study and analysis itself did not establish clear methodology of his work normally required in an analysis of this kind. Dr. Odwee failed to lay down the objectives of his survey which undermined the intrinsic value of the study. The sample was selected in an incorrect manner. Dr. Odwee was supplied with some declaration of results forms selected by the Petitioner which sample he did not determine and whose procedure was not scientific. The sample was not representative because of its small proportion.

I accept the evidence of Dr. Tumwesigye that the sampling strategy must be random and that the usual sampling technique would be the Simple Random Method in which all polling stations would have an equal chance of being selected. Dr. Odwee did not

use this technique because not all polling stations had an equal chance of being selected. The failure to scientifically select the sample led to a biased outcome. As pointed out earlier in this judgment, the sample was selected by the Petitioner, not the analyst and therefore the study was biased. These views are supported by the author of Survey Methods of Social Investigation (supra). The results by Dr. Odwee exhibited evidence of a bias.

Dr. Odwee's report was also faulted on account that it showed no evidence of statistical analysis. There was no survey report produced. Technical reports should be issued for survey of particular importance and those using new techniques and procedure of special interest. In addition to covering fundamental points and resources available for the survey, the report should in detail with technical statistical aspects of the sampling design, execution and analysis. The operational and other special aspects should also be fully covered. See ***Survey methods of Social Investigation*** (supra), page 471. There were other shortcomings in Dr. Odwee's evidence. The study exhibited clear evidence of bias for instance where he talks of discovering ***"fabrications"*** and not discrepancies and where he alleges that the 1st Respondent ***"manipulated"*** the results.

In ***Musisi Dirisa & 3 Others Vs Sielico (U) Ltd,*** Civil Appeal No. 25/89 (SC) this Court was held that a doctor or any expert witness must provide a scientific base for his opinion before his findings can be accepted by the Court. **Phipson on the Law of Evidence** by Roland Burrows (9th edn 1952) at page 400 states that ***"experts give evidence and do not decide the issue"***. In ***Sarkar on Evidence*** by Sudipto Sarkar and V. R. Manohar, (14th edn 1993) Vol. 1 at page 820 the authors reiterate that ***"the evidence of an export is not conclusive".*** They observe,

> ***"An expert is fallible like all other witnesses and the real value of his evidence consists in the logical inferences which he draws from what he has himself observed, not from what he merely surmises or he has been told by others. Therefore in cross examining him, it is advisable to get at the grounds on which he bases his opinion."***

The authors warn on the proneness of experts to be biased in favour of the party calling them,

> ***"There is specific difficulty in dealing with the evidence of expert witnesses. Such evidence must always be received with caution. They are often partisans – that is they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who paid them to give evidence. At the same time such witnesses are in a position of advantage, for they have had that special training and experience which the judge and jury are without, and the absence of which renders necessary the presence of such witnesses. Expert witnesses are too far prone to take upon themselves the duty of deciding the questions in issue in the action, instead of confining themselves to stating fairly and clearly their real opinion on the matter. Their duty is merely to assist the court by calling attention to, and explaining matters of the true significance of which would not be clear to persons who have received no scientific training or have had no special experience in such matters."***

In the present case, I find that Dr. Odwee was prone to exhibiting bias as well as deciding matters in issue for which he showed no scientific basis. These grounds are sufficient to render the evidence of Dr. Odwee unreliable and insufficient to prove that the proven irregularities affected the result of the elections in a substantial manner.

I shall finally consider the conclusions in the reports of independent local and international observers. The reports generally show firstly that the results announced by the 1st Respondent were by and large accurate, and secondly that although there were shortcomings in the election which rendered it not entirely free and fair, the election was generally peaceful, transparent and held in an atmosphere in which freedom of expression and association were more respected, which enabled the will of the people to be expressed so that the results reflected the wishes of those who were able to vote.

In its report dated 25 February the Democracy Monitoring Group 2006, (DEMGROUP) made the following overall assessment of the elections;

> ***"The elections of 23 February 2006 presented the people of Uganda with the opportunity to exercise their democratic right to vote for candidates of their choice. DEMGROUP notes that voting was generally peaceful in most parts of the country. Nevertheless, there were some incidents of intimidation and violence in some parts of the country including Pallisa and Tororo Districts."***

After observing that the pre-election atmosphere was not entirely conducive to a free and fair electoral process, due to little time available for campaign by political parties, absence of equal treatment of all candidates by the state media, and use of state resources by the Movement, (lack of level playing field), the Group concluded.

> ***"In the circumstances, DEMGROUP is of the view that the elections of 23 February 2006, though important in the evolution of democratic process in Uganda, had several shortcomings which rendered the exercise short of our expectation of a free and fair contest."***

It should be noted that many of the grounds upon which the DEMGROUP based its opinion like little time for campaign, absence of equal treatment for all candidates by state media, and use of state resources, were not among the complaints upon which the petition was based and there was no evidence led on them or submission made on them. This Court could not have considered matters not specifically pleaded, argued or proved by the petitioner. In ***Ibrahim vs Shagari*** (supra) at page 24 Anamasi JSC in the Supreme Court of Nigeria observed:

> ***"Although it seems obvious it needs to be emphasised that Courts of law can only decide issues in controversy between parties on the basis of evidence before them. It would be invidious if it were otherwise."***

However, the DEMGROUP after carrying out its own statistical analysis using a methodology known as ***"Parallel Vote Tabulation"*** (PVT) based on a nation-wide weighted sample of 383 polling stations came to more or less similar results to those announced by the 1st Respondent. The National PTV results for Presidential Elections 2006 were as follows:

Candidate	National Results	Error Margin at 95%
Abed Bwanika	0.9%	0.1%
Besigye Kizza	36.9%	2.6%
Miria Obote Kalule	1.1%	0.5%
Sebaama Lizito	2.3%	0.6%
Yoweri Kaguta Museveni	58.8%	2.8%

This analysis compares favourably with the results announced by the 1st Respondent which gave the following national results:

Abed Bwanika	0.95%
Besigye Kizza	37.36%
Miria Obote Kalule	0.82%
Sebaama Lizito	1.58%
Yoweri Kaguta Museveni	59.22%

The DEMGROUP report therefore confirms that the results announced by the 1st Respondent were accurate. The report thus throws serious doubts on the claims by Dr. Odwee that the petitioner lost one million votes through inaccurate counting and tallying or other malpractices.

HURINET-UGANDA (HURINET-U) in its **Press Statement on General Elections 2006** dated 15 March 2006 concluded,

> ***"From the observations made by HURINET-U, it is clear that there were incidents of pre-election violence, inducing fear within the electorate, barring certain candidates from freely participating in the election process, lack of adequate voter education, signs of partiality by the police, and use of excessive force to deal with some supporters of the opposition. During the election, there was clear indication that the election officials were not adequately trained on conducting elections and the electorate in the remote areas was largely ignorant of voting procedures. There were also incidents of violence and voter intimidation. Violence has***

> ***continued after the election with one death and serious injuries being far recorded.***
>
> ***In light of all the above incidents, HURINET-U is of the opinion that the elections of 2006 were not conducted in a free and fair environment placing some doubt on their outcome and final result."***

This statement deals with both Presidential and Parliamentary elections. Therefore it is more generalized and some of its criticisms like barring certain candidates from freely participating in the process may not be applicable to the Presidential election. Certainly there was no complaint about this aspect in the petition. Lack of adequate voter education was noted by the Court but once again it did not form a ground of complaint in the petition and no evidence was led on it.

In its **Report on Observations of Election Monitoring** by Action for Development (ACFODE) 2006, the organization concluded,

> ***"Generally, the elections were seen to be free but the whole process was not fairly done. There was unseen intimidation due to presence of the army since women were told that if they don't vote the incumbent war would break. Citing many irregularities by our monitors in different polling stations was an indication that the elections were not free and fair. The Electoral Commission did not conduct voter education very well and the election officers were not properly trained to handle all the processes in a fair manner."***

This report concludes that the elections were generally free though not entirely fair due to intimidation especially of women. Unfortunately, we received no evidence that women were a specific target for intimidation.

The **Final Report of the European Union Election Observation Mission on the Presidential and Parliamentary Elections 23 February 2006** in its executive summary concluded that the Presidential and Parliamentary elections were generally transparent, relatively peaceful and were held in an atmosphere in which freedom of expression, assembly and association were more widely respected than hitherto. The Report went on to record improvements in the conduct of these elections as follows:

> ***"They demonstrated improvements in comparison to previous elections in a number of areas. The elections were the first in 26 years to be carried out under a multiparty system, and therefore an important milestone in the development of Ugandan democracy. Once again the Ugandan people demonstrated strong commitment to determining their political future by participating in large numbers and expressing their own choice between continuity and change."***

This evaluation is positive in favour of the general conduct of the elections, the participation of the people, and the fact that the people were able to express their choice on who they wanted to be their leaders. I entirely agree with the opinion of the European Union Observation Mission in this significant conclusion.

The Observation Mission however, pointed out some shortcomings in the elections and political organisations. The Mission observed,

> ***"Overall, however, the elections fell short of full compliance with international principles for genuine democratic elections, in particular because a level playing field was not in place. Despite the adoption of a multiparty system, the structures of the Movement system and its officially sanctioned organs remained intact, active and funded by the state throughout the election period, with the effect that the President and his part enjoyed substantial advantages over their opponents which went further than the usual advantages of incumbency and existing legal presidential privileges. Further the President and his party the National Resistance Movement (NRM) utilised state resources in support of their campaign, including use of government cars, personnel and advertising, and received overwhelming and positive coverage on state television and radio."***

While I agree with the report that the presidential election fell short of full compliance with the international principles of genuine democratic elections because of the failure to comply with several provisions and principles of the electoral law, I must point out that the shortcomings pointed out by Observation Mission were not pleaded nor proved in this petition. The Petitioner never complained about absence of the level-playing field caused by the funding of the Movement organs, the use of state resources by the 2nd Respondent as incumbent President during campaign and the unequal access to state media. As a result no affidavit evidence was adduced on

these matters and I am not satisfied that they have been proved. Consequently, it was not established that these alleged irregularities had affected the results of the election in a substantial manner or at all.

Lastly the **Report of the Commonwealth Observer Group on the Uganda Presidential and Parliamentary Elections 23 February 2006** published by the Commonwealth Secretariat, London on 3rd March 2006, concluded that the elections provided for conditions which enabled the will of the people to be expressed and that the results reflected the wishes of those who were able to vote. While noting some shortcomings in the elections, the report also concluded that the elections represented a significant step forward in the political transition from a single party system to a multiparty democracy.

In view of the relevance of these two conclusions to the third issue, I shall quote the pertinent paragraphs:

- ***"We believe that the poll count and results process provided for the conditions which enabled the will of the people to be expressed and that the results of the elections reflected the wishes of those who were able to vote. There were some serious irregularities and significant shortcomings and there is scope for substantial improvement. Nevertheless, we commend the effort made by the Electoral Commission and the determination of the people to exercise their democratic rights.***

- ***The environment in which the elections were held had a number of negative features which meant that the candidates were not competing on a level playing field: the failure to ensure a clear distinction between the ruling party and the state, the use of public resources to provide an advantage to the ruling party, the lack of balance in media coverage (especially on the part of the state-owned media) the creation of a climate of apprehension amongst the public and opposition party supporters as a result of the use of the security forces, and the alleged use of financial and material inducements."***

The Report ended on a positive note:

> ***"These elections represent a significant step forward. They are important part of the transition from a single-party system to a multiparty democracy. That transition is by no means complete. We wish Uganda well as it seeks to embrace a new multiparty system and works to remove the single party culture."***

Although once again irregularities which were not raised in the petition were referred to in the Report, I am in agreement with the general thrust of the Report. It is conclusive proof that the elections though with some shortcomings enabled the will of the people of Uganda to be expressed and the results of the election reflected the wishes of those who were able to vote who were the overwhelming majority. This means in effect that the irregularities did not affect the results in a substantial manner. I also agree with the Commonwealth Observer Group that the 1st Respondent exhibited significant improvement in the conduct of these elections, which were the first multiparty elections since 1980, and also the first time the Presidential and Parliamentary elections were held on the same day. For these reasons I answered the third issue in the negative.

Allegations of illegal Practices or Electoral Offences against the 2nd Respondent:

The fourth issue was whether any illegal practices or electoral offences alleged in the petition were committed by the 2nd Respondent personally or by his agents with his knowledge and consent or approval. This Court by a majority of five to two, answered the issue in the negative. I was among the majority members of the Court.

In paragraph 11 of the petition, the Petitioner lists the various illegal practices and offences committed by the 2nd Respondent personally while campaigning. These are stated as follows:

> ***"(a) Used words or made statements that were malicious contrary to S.24(5)(b) of the Presidential Elections Act.***
>
> ***(b) Made statements containing sectarian words or innuendos against your Petitioner and or his party and other candidates contrary to S.24(5)(c) of the Presidential Elections Act.***

(c) Made abusive, insulting and or derogatory statements against the Petitioner, FDC and other candidates contrary to S.24(5) (d) of the Presidential Elections Act.

(d) Made exaggeration of the Petitioner's period of service in government and the reason why he was moved from the several portfolios your Petitioner held the Petitioner in Government and he also variously ridiculed the Petitioner contrary to Section 24(5)(e) of the Presidential Elections Act.

(e) Used derisive or mudslinging words against the Petitioner.

(f) Used defamatory and or insulting words contrary to Section 23(3)(b) of the Presidential Elections Act.

(g) The 2nd Respondent made statements which were false either knowingly at a rally or recklessly namely:

(i) ***That the FDC in frustrated efforts to build another dam.***

(ii) ***That I was working in alliance with Kony PRA and other Terrorists.***

(iii) ***That I was an opportunist and a desert."***

In paragraph 12, the Petitioner contended that the 2nd Respondent committed acts of bribery of the electorate by his agents with either his consent and or approval. The alleged acts were listed as follows:

"(a) Bribery of voters just before and during the elections contrary to S.64 of the Presidential Elections Act.

(b) Attempting and interfering with the free exercise of the franchise of voters contrary to S.26(c) of the Presidential Elections Act.

(c) By agents procuring the votes of individuals by giving out tarpaulins, saucepans, water containers, salt, sugar and other beverages and making promises of giving such beverages."

Paragraph 11(g) was added to the petition after we allowed an application by the petitioner for amendment of the petition. We did so in the interest of justice, as we were of the view that the respondents would not be thereby prejudiced by the amendment.

The 2nd Respondent denied all the allegations in paragraphs 11 and 12 of the plaint. I shall first deal with the allegations made in paragraph 11 of the petition against the 2nd Respondent.

Alleged Malicious, Abusive, Defamatory or False Statements Made by the 2nd Respondent

In his affidavit in support of the petition, the Petitioner stated in paragraphs 10 to 20 the statements which formed the basis of his complaint. He averred as follows:

> ***"10. That on 17th January 2006 while campaigning in Jinja the 2nd Respondent referred to me as a false prophet and referred to the opposition as night dancers.***
>
> ***11. That on 14th January 2006, while campaigning in Kasangati the 2nd Respondent referred to UPC and DP as failures and FDC as non starters.***
>
> ***12. That on 27th December 2005 while campaigning in Luzira the 2nd Respondent stated that the FDC controlled Parliament had frustrated all his efforts to build two new Hydro Power Dams at Bujagali and Karuma and that if it was not FDC, Uganda would have 700 additional megawatts.***
>
> ***13. That on 4th February 2006 while campaigning in Koboko the 2nd Respondent stated that opposition politicians are liars and mentally sick.***
>
> ***14. That on the 2nd February 2006 while speaking on Radio Mega in Gulu the 2nd Respondent stated that I was liable for the suffering of the people of Northern Uganda because I was linked to the Lords Resistance Army Rebels and I am working with terrorists.***
>
> ***15. That on 9th February 2006, while campaigning in Hoima, the 2nd Respondent said that I was a liar who had no programme, who was greedy for political power. The 2nd Respondent further restated that FDC was in alliance with LRA Rebel Group, which rebel group was named as a terrorist organisation.***
>
> ***16. The 2nd Respondent wrote an article published in the New Vision of 10th February 2006, in which he inter alia called me a traitor, an opportunist and a rebel.***

17. That on 15th February 2006, the 2nd Respondent published an Article in the New Vision newspaper in which the 2nd Respondent stated that I was one of those who designed the 1995 Constitution in such a way as to weaken the President.

18. That on 1st February 2006, while campaigning at Apac, the 2nd Respondent, stated that I was one of those responsible for the Barlonyo Massacre, where armed thugs or rebels attacked an internally displaced people camp and massacred hundreds of innocent civilians.

19. That while campaigning in Luwero on 23rd December 2005, the 2nd Respondent referred to me as unpatriotic.

20. That while campaigning at Boma Ground Fort Portal on 6th January 2006, the 2nd Respondent referred to DP and UPC as failures and FDC as scattered millet."

There was no other evidence called in support of these allegations, nor were the exact words used or statements made by the 2nd Respondent reproduced or adduced as is the normal practice in cases of false or defamatory statements. However, the Petitioner made a supplementary affidavit dated 18th March 2006 in reply to the 2nd Respondents affidavit in support to his answer to the petition.

The Petitioner did not relate his allegations in the petition in paragraph 11, to his affidavit in support. As a result I do not know which statements were malicious, abusive, insulting, derogatory, exaggeration, divisive, mudsling, defamatory or insulting. The Petitioner ought to have given the particulars of his charges, not merely statement of charges. For instance in the statement that the 2nd Respondent referred to him as a false prophet and the opposition as night dancers, the Petitioner did not state whether such statement is abusive, malicious, derogatory or defamatory.

These allegations or charges appear bad in law for duplicity and vagueness and for lack of particulars connecting them with the specific allegations. No evidence was called to amplify the allegations. It was left for counsel for the Petitioner to attempt to connect the affidavit to the allegations in the petition but this was not sufficient to discharge the burden which lay on the Petitioner to establish the allegations to the

satisfaction of the Court. These being electoral offences, the burden was even heavier because proof of one of them is sufficient ground for annulment of the election.

In answer to the allegations made in paragraph 11, the 2nd Respondent swore an affidavit dated 12th March 2006, in which he denied making the alleged statements. He reproduced a recording of the actual statements he had made and the reasons for making them. The main reason for making the statements was to react to statements or allegations made by the Petitioner in order to counter the false and misleading statements that the petitioner had made during the campaign.

Mr. John Matovu, learned counsel for the Petitioner submitted that there are two categories of offences under Section 24 (5) of the Presidential Elections Act. The first category consists of offence of strict liability under paragraphs (b) to (g), which do not require proof of ***mens rea.*** It was his contention that once a candidate admits to have made such a statement, then his intention is irrelevant and justification is no defence. The second category consists of the offence under paragraph () which requires proof of ***mens rea.***

Section 24 (5) of the Presidential elections Act states:

> ***"(5) A candidate shall not while campaigning, do any of the following:***
>
> ***(a) making statements which are false -***
>
> **(i)** ***knowing them to be false; or***
>
> **(ii)** ***in respect of which the maker is reckless whether they are true or false;***
>
> ***(b) making malicious statements;***
>
> ***(c) making statements containing sectarian words or innuendoes.***
>
> ***(d) making abusive, insulting or derogatory statements;***
>
> **(d)** ***making exaggerations or using caricatures of the candidate or using words of ridicule;***

(e) ***using songs, poems and images with any of the effects described in the foregoing paragraphs."***

Any person who contravenes the provisions of subsection5) of section 24 of the Presidential elections Act commits an offence and is liable to a fine or imprisonment. Under Section 59(6) of the same Act, the election of a President may be annulled by proof that an offence under this Act was committed in connection with the election of the candidate personally or with his or her knowledge and consent or approval.

Learned counsel for the petitioner contended that in paragraph 11 the Petitioner alleges that the 2nd Respondent used words which were malicious, sectarian, abusive, derogatory exaggerated and mudslinging. He submitted that the 2nd Respondent admitted on the face of it in paragraph 8 of his affidavit that he had to counter the allegations by the Petitioner which he heard from the media based on the Petitioners slogan of ***"Agende."*** Submitting on paragraph 13 of the 2nd Respondent's affidavit where he refers to the problem of shortage of power caused by FDC members in Parliament, learned counsel argued that the 2nd Respondent was volunteering information against himself, but was quick to add that the statement was false because FDC was not in control of Parliament. In support of this argument, Mr. Matovu referred to Para.11 of the Petitioners supplementary affidavit where he states that during the material time, the Movement System was still in place, and there were no political parties in Parliament. He also referred to the affidavit of Salaamu Musumba where she states that the Committee on Natural Resources had only Movement members. He submitted that the statement is not only false but it is defamatory of the Petitioner and known Members of FDC, and it is also derogatory.

Mr. Matovu submitted that the 2nd Respondent made malicious statement contrary to Section 24(5) (b) of the Presidential Elections Act. He referred to ***Blacks Law Dictionary*** page 956 where the word malicious is defined as "***the intentional doing of a wrong act without just cause, with intent to inflict injury."*** With regard to allegations in paragraphs 12, 13, 15, 17, 18 and 19 of the Petitioners affidavit, learned counsel submitted that the 2nd Respondent's affidavit contains admissions to the allegations. He contended that the statements regarding the high tariffs and Bujjagali

dam were false and malicious. He argued that the 2nd Respondent confirms making the allegation of mental sickness – that ***"these people are literally and metaphorically sick "*** **–** which statement was untrue and there was no excuse for making it.

Learned counsel contended that the statements alleged in paragraph 17 was malicious as it alleged that the Petitioner committed Treason and was transmitted on Mega Radio which covers Gulu and Northern Uganda where people had been killed and maimed by Kony. He discarded the affidavits of Brig. Sam Kolo and Brig. Banya who allegedly worked with Kony, as hearsay. He submitted that the 2nd Respondents attempts to justify or explain away the statement does not help. He submitted that to refer the Petitioner as an opportunist is abusive or insulting. He cited ***Blacks Law Dictionary*** where ***"abusive"*** is defined as ***"to wrong in speech, disparage or malign."*** The statement that the Petitioner was a deserter by going to South Africa was malicious, insulting or derogatory as the Petitioner attached a certificate of discharge from the UPDF on this affidavit.

Mr. Matovu emphasised that under Section 24 () (b) to (g), all the petitioner has to prove is that the 2nd Respondent made a statement contrary to those provisions. He submitted that the only thing the respondent can do is to deny the statement, but conceding or trying to explain why the statement was made could only confirm that the statement was made. He contended that motive is no defence, but only a mitigating circumstance. Knowledge or recklessness was only required under Section 24 (5) (9), as there was no requirement for intention. He submitted that proof of any of these allegations or grounds is sufficient to nullify the election.

With regard to the second category of offences which require proof of ***mens area***, Mr. Matovu relied on paragraphs 12, 15, 16 and 18 of the Petitioner's affidavit. The alleged false statements were that FDC frustrated the building of Bujagali dam, that the Petitioner was working in alliance with Kony, PRA and other terrorists, and was therefore a traitor and a rebel, and that the Petitioner was responsible for the Barlonyo massacre. It was Mr. Matovu's submission that the 2nd Respondent made these false statements knowingly or recklessly during campaigns.

In reply Dr. Byamugisha for the 2nd Respondent submitted that the charges brought under Section 24(a) to (f) of the Presidential Elections Act did not set out the facts upon which the Petitioner relies as required by Rules 5 and 7 of the Presidential Elections Procedure Rules. He contended that paragraph 10 of the petition did not contain any particulars of the offences. He referred to Bullen and Leake and Jacobs ***Precedents of Pleadings*** 12th edn 1975 at page 626 where it is stated that libel must be set out verbatim in the statement of claim. The authors state,

> ***"The libel must be set out verbatim in the statement of claim, it is not enough to set out its substance or effect as "the precise words of the document are themselves material." (see Ord. 18 v 7(2); Collins V Jones (1955) IQB 564). The book, 1 newspaper or other document from which the words are taken should be identified by date or description. Where the defamatory matter is part of a longer passage, the defamatory part only need be set out provided the remainder of the passage would not vary the meaning of the defamatory matter Syndenham v. Man (1617) Cro. Jac 407) where the defamatory matter arises out of long Article or "feature" in a newspaper, the plaintiff must set forth in his statement of claim the particular passages referring to him of which he complains and the respects in which such passages are alleged to be defamatory {DDSA Pharmaceuticals Ltd. V. Times Newspapers Ltd (1973) 1 Q.B. 21 CA} and if the part complained of is not clearly severable firm the next of a single publication; the whole publication must be set fourth in the statement of claim, even though the defendants may be entitled to plead justification or fair comment in respect of the other parts of the publication (S. & K. Holdings Ltd V Througmorton Publications Ltd (1972) 1 WLR 1036."***

I accept the submission of Dr. Byamugisha that the charges in the petition relating to false, malicious or defamatory statements were defectfully framed as they did not set out verbatim the statements complained of in the Petition. Words take their meaning from the context, and if the context or background is not provided or the full statement reproduced, their malicious or defamatory effect may not be easy to discover. The particulars of the statement also enable the respondent or defendant to know what case he or she has to meet and defend. In the present statement, the Petitioner made bare assertions of what was said by the 2nd Respondent and the Court was only lucky that the 2nd Respondent volunteered to reproduce verbatim the

statements he made which were allegedly complained of, which in effect offered the context and explanations why they were made.

The second preliminary point made by Dr. Byamugisha was that the Petition disclosed no cause of action in paragraphs 14, 16 and 17 as the facts constituting the alleged cause of action were not specifically pleaded as required by O. VI r 2 of the Rules of Civil Procedure. He contended that section 24(5) applies to a candidate while campaigning but the Petitioner did not state in paragraphs 14, 16 and 17 of his affidavit that the statements were made while the 2nd Respondent was campaigning as it was done in other paragraphs. He relied on the decision of the Supreme Court of India in ***Charan Lal Salin vs Grane Zail Singh & Another*** (1985) LRC (Const.) 31, where in a Presidential Election petition, the Court held that in an election petition, the facts constituting the alleged cause of action must be specifically pleaded with precision, otherwise the respondent is put at an advantage. The Court said at page 42,

> ***"The relevant question for consideration for the decision of the issue is whether there is any pleading in the petition to the effect that the offence of undue influence was committed with the consent of the returned candidate. Admittedly, there is no pleading of consent. It is then no answer to say that the petitioners have pleaded connivance and according to dictionaries connivance means consent. The plea of consent is one thing; the fact that connivance means consent (assuming it does) is quite another. It is not open to a petitioner in an Election Petition to plead in terms of synonyms. In these petitions, pleadings have to be precise, specific and unambiguous so as to put the respondent on notice. The rule of pleading is that facts constituting the cause of action must be specifically pleaded is as fundamental as it is elementary."***

The Court concluded that since admittedly there was no pleading in the Election Petition that the offence of undue influence was committed with the consent of the returned candidate, the petition must be held to disclose no cause of action for setting aside the election of the returned candidate under section 18(1)(a) of the Act.

It is clear from the averments made paragraphs 14, 16 and 17 of his affidavit in support of the petition that the words ***"while campaigning"*** were omitted whereas in the remaining paragraphs the words were included. It is also clear that the section

states that ***"a candidate shall not while campaigning do any of the following –*** The failure by the Petitioner to include the words while campaigning in his charges against the 2nd Respondent makes them defective.

Learned counsel for the 2nd Respondent further submitted that there is a presumption that ***mens rea*** , is required in any offence. He relied on the authority of ***He Haw Teh vs R*** (1986) LRC (Crim) 5533, where it was held that knowledge of having narcotics was a necessary element of the offence. The Court cited the principle laid down in ***Sheras v De Rutzen*** (1895) 1 Q.B. 918 at P.921, as follows

> ***"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence, but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."***

It is clear that the offences under section 24(50(b) to (f) do not contain words suggesting the element of ***mens rea*** like ***"maliciously" "knowingly"*** or ***"intentionally".*** However, there is no indication either that there was an intention to create offences of strict liability where the intention of the maker or candidate was irrelevant. This point is connected with the second factor to consider in deciding whether ***mens rea*** has been displaced, namely the subject matter with which the Statute deals. The Presidential Election Act deals with Presidential elections, a subject of great importance to the country. It also deals with campaigns for Presidential elections and the need to allow candidates the greatest latitude in freedom of speech to be able to canvas for votes through promoting their political agendas or manifestos through the various public media. The object of the offences is to promote peaceful, orderly campaigns where all candidates tolerate and respect each others opposing views. Free and effective campaign cannot be undertaken if statements not intended to insult, annoy, or defame are prohibited. It is my opinion therefore that these are not offences of strict liability but ***mens rea*** is a necessary element of the office.

Dr. Byamugisha further submitted that section 23(2) of the Presidential Elections Act provides for unhindered freedom of expression and access to information which must be read together with Section 24. Section 23(2) provides,

> ***"(2) Subject to the Constitution and any other law, every candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of the right to campaign under this Act."***

He referred to the decision of this Court in ***Charles Onyango Obbo & Another vs Attorney General*** Constitutional Appeal No 2 of 2002 where it was held that the limitation on freedom of expression and speech must be acceptable in a free and democratic society since the primary objective of the Constitution is to guarantee the enjoyment of fundamental rights, and the restrictions are secondary. In that case, this Court underscored the importance of freedom of speech to free and democratic society and held that freedom of speech could not be limited or restricted except where there were compelling a social or public interest. The Court held that the offence of publishing false news was inconsistent and on contravention of the Constitution.

Mulenga, JSC in his lead judgment, after citing Articles 29 and 43 of the Constitution, stated,

> ***"Co-existence in the same Constitution, of protection and limitation of the rights, necessarily generates two compelling interests. On the one hand there is interest to uphold and protect the rights guaranteed by the Constitution. On the other, there is the interest to keep the enjoyment of the individual rights in check, on social considerations, which are also set out in the Constitution. Where there is a conflict between interests, the Court resolves it having regard to the different objectives of the Constitution. As I said earlier in this judgment, protection of the guaranteed rights is a primary objective of the Constitution. Limiting their enjoyment is an exception to the protection and is therefore a secondary objective. Although the Constitution provides for both it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to the right strictly warranted by the exceptional circumstances permissible. The exceptional***

> ***circumstances set out in Clause (1) of Article 43 are the prejudice or violation of protected rights of others and prejudice to each of the social values categorized as public interest."***

The learned Justice of the Supreme Court cited with approval the opinion of the Indian Supreme Court in ***Rangarajan vs Jagi van Ram & Others,*** (1990) LRC (Const.) 412 at page 427 as follows:

> ***"There does indeed have to be a compromise between the interest of freedom of expression and social interest. But we cannot simply balance the two interests as if they were of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or farfetched. It should be proximate and (have) direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg.'"***

Learned counsel for the 2nd Respondent also relied on a book entitled ***The Bill of Rights Handbook by de Waal, I Currie and G. Erasmus*** (4th edn 2001) where the authors discuss the South African Bill of Rights. Counsel submitted that the legislature must be presumed to have intended to further the values underlying the Constitution and that therefore a very liberal interpretation must be on Section 23(2), so that freedom of expression is unhindered.

In the ***Bill of Rights Handbook***, (supra) the authors state:

> ***"Section 39(2) places a general duty on every Court, tribunal or forum to promote the spirit, purport and objectives of the Bill of Rights when interpreting any legislation. Statutory interpretation must positively promote the Bill of Rights and other provisions of the Constitution particularly the fundamental values of the Constitution discussed in Chapter 1 above. In other words, the legislature is presumed to have intended to further the values underlying the Bill of Rights by passing legislation that is in accordance with the Bill of rights unless the contrary is established. The general duty to promote the Bill of Rights becomes particularly important***

> ***when it is possible to avoid an inconsistency between a legislative provision and the Bill of rights by interpreting the legislation so that it conforms with the Bill of Rights. Under the Interim Constitution such a process of interpretation became to be known as "reading down." According to S.35(2) (1) where legislation was capable of being read in two ways – as a violation of fundamental rights or, if read more restrictively, as not a violation of rights – the latter reading was to be preferred."***

The authors conclude,

> ***"A narrow construction of a legislative provision may sometimes result in avoiding an alleged conflict between the provision and the Bill of Rights. On the other occasions the Statute may have to be generously interpreted to avoid conflict. The point is that if the statutory provision is genuinely ambiguous or otherwise unclear, the interpretation which conforms with the Bill of Rights must be chosen."***

In relation to election offences Dr. Byamugisha referred to ***Halsbury's Laws of England*** Vol.IV Page 227 which quotes the case of ***Ellis vs National Union of Conservative and Constitutional Associations*** (1900) 44 Sol. Jo.750 where it was held that the words ***"Radical Traitors"*** were not within the prohibited statements since they were a statement of opinion rather than fact.

In a book entitled ***Elections Laws:*** Being a Commentaries on the Representation of the People Act of India 1951, by S K Gosh 3rd Edn. 1998, the need to consider the real thrust of the speech instead of dissecting its particular words is emphasised. The author states,

> ***"Speeches delivered in an election meeting by leaders of political parties should be appreciated dispassionately by keeping in mind the context in which such speeches are made. The Supreme Court has indicated a note of caution that in election speeches appeals are made by candidates of opposing political parties often in an atmosphere surcharged with partisan feelings and emotions. Use of hyperboles or exaggerated language or adoption of metaphors and extravagance of expression in attacking one party or a candidate are very common and Court should consider whether the real thrust of the speech was really intended to generate improper passions on the score of religious, caste,***

community etc. In deciding whether a party or collaborators had indulged in corrupt practice regard must be had to the substance of the matter rather than mere form or phraseology."

I am persuaded by the above authorities learned counsel for the 2nd Respondent has cited. Article 29(a) of the Constitution guarantees the freedom of speech and expression and other media. This freedom can only be limited under Article 43 of the Constitution when its enjoyment prejudices the fundamental or other human right and freedoms of others or the public interest. Article 41 guarantees every citizen a rights of access to information in the possession of the State or other organ of the State except where the release of the information is likely to prejudice the security of sovereignty of the State or interfere with the right to the privacy of any other person.

Section 23 of the Presidential Elections Act is intended to further the objectives of the above Articles of the Constitution by promoting free and unhindered freedom of expression by candidates in a Presidential election. Therefore a liberal interpretation must be placed on Section 23 while a narrow or restrictive interpretation is placed on Section 24 which places some restrictions on freedom of expression by criminalizing certain statements made by candidates while campaigning.

In considering the statements complained of the context in which they were made must be taken into account instead of analyzing each offensive word. As we have seen use of hyperbole or colourful language, may be employed to drive points home or to counter criticisms from other candidates. It is also clear that a candidate is not guilty of making such statements if he had reasonable grounds for believing the statements to be true.

I shall now proceed to consider the specific impugned statements allegedly made by the 2nd Respondent. In paragraph 10 of his affidavit, the Petitioner alleged that on 17th January 2006 while campaigning in Jinja the 2nd Respondent referred to him as a false prophet and referred to the opposition as a night dancers.

In reply, the 2nd Respondent stated in his affidavit that during the campaign period he had personally read and heard from the media and his supporters that the thrust of the

Petitioner and his party's campaign was based on the ***"Agende"*** slogan meaning that ***"he must be removed from the presidency"*** and they gave reasons which included many falsehoods and misleading statements which he had to counter during his campaign.

According to the 2nd Respondent some of the reasons they were giving included the following falsehoods:

> ***"a. Universal Primary Education (UPE) popularly known as "Bonna Basome," meaning that "let them be stunted," "Boona Beinare" in Runyankore/Rukiga meaning "let them all be doomed";***
>
> ***b. Universal Secondary Education (USE) would also fail like UPE;***
>
> ***c. I had sold off Lake Victoria to foreigners;***
>
> ***d. Uganda Revenue Authority was full of my relatives;***
>
> ***e. I was keeping people in IDP camps because I had sold off to foreigners, land of the Acholi, Langi and Iteso;***
>
> ***f. All the fish was being eaten by me, members of my family and village while the people had been left to eat "Migongowazi" meaning fish skeletons;***
>
> ***g. I was responsible for the death of the late francis Ayume, the late gad Wilson Toko and the late James Wapakhabulo;***
>
> ***h. If I were elected President, Uganda would be plunged into chaos and war, and I had to counter all these falsehoods and misleading statements during my campaign."***

Mukasa John, a cameraman working with Media Plus, a production company that records film footage for documents and supplies video coverage to international and national Media Houses and the public for business, swore an affidavit in support of the 2nd Respondents claim that the Petitioner had made false statements during the campaign to which he had to respond.

Mukasa stated that he personally recorded the speeches at the rallies of the Petitioner and his party officials, while his colleagues recorded other Presidential Candidates. The footage was purchased by Lawyers of the 2nd Respondent. I shall refer to his recordings as I consider the various allegations made by the Petitioner, and the replies by the 2nd Respondent.

The 2nd Respondent denied making the statement alleged by the Petitioner in paragraph 10 of his affidavit. He stated in paragraph 10 of his affidavit that what he said in Jinja while talking about feeder roads was as follows:

> ***"In Arua, they have not been having any main tarmac road. Here we are fighting for feeder roads. They do not have any road. For us we cannot support construction of feeder roads when there, they do not have any road. If you are a leader of Uganda, where do you start? Do you start with more feeder roads where there are main roads? Or you attend to those who do not have any main road? Do not accept false prophets who come to you and tell you this lie and then that lie. Personally I do not believe in them. I have come here to undo those lies.***

This statement did not refer specifically to the Petitioner or any other Presidential candidate. Even if it did so, I find nothing insulting or derogatory of the Petitioner in the use of hyperbole like ***"false prophets."*** The 2nd Respondent did not refer to the opposition as night dancers as alleged by the Petitioner.

In paragraph 11 the Petitioner complained that on 14th January 2006, while campaigning in Kasangati the 2nd Respondent referred to UPC and DP as failures and FDC as non-starters. In paragraph 20 the Petitioner alleged that while campaigning at Boma Ground Fort Portal on 6th January 2006, the 2nd Respondent referred to DP and UPC as failures and FDC as scattered millet.

The 2nd Respondent denied making such statement. Instead the 2nd Respondent reproduces in paragraph 12 of his affidavit what he said,

> ***"The Movement has governed Uganda basing itself on three pillars. The first one is good governance, the second is proper economic management and the third is effective***

management of the army, UPC had failed to do this and DP had not even started. Now about FDC. When you are threshing millet, you first make a heap, and then you thresh the heap. Then there is some millet scatters. So you cannot leave the heap and follow the millet that has scattered. You have to remain with the heap until it is softened and then you go with the broom and collect the millet that has scattered. Time will come when we shall look for them and bring them back."

I do not see how the above statement can be said to be insulting derogatory or abusive of the parties mentioned. It is legitimate criticism of the parties, and the 2nd Respondent must be held to be entitled to his opinion.

In paragraph 12, the Petitioner alleged that on 27th December 2005 while campaigning in Luzira the 2nd Respondent stated that the FDC controlled Parliament had frustrated all his efforts to build two new Hydro Power dams at Bujagali and Karuma and that if it was not for FDC, Uganda would have 7000 additional megawatts.

In his reply the 2nd Respondent stated in paragraph 13 of his affidavit that what he has had said is as follows:

"The problem of his electricity tariffs. That problem was created by the FDC when they were still controlling Parliament. They were not many but we had not exposed them yet. We had plans to build two power stations, one at Bujagali and one at Karuma or Kalagala. Those people who are now FDC paralysed the building of Bujagali and Karuma or Kalagala. They were trying to get us to make a mistake. They thought we were going to get angry and use the army so that we become tyrants. They thought they were going to throw use off balance by using the Constitution which had limited the powers of the President because Parliament had to permit the President to do this or that. If only these people had not sabotaged us we would have increased the capacity by about 600 – n700 MW and we would therefore have a capacity of about 1100MW. The leaders who were in Parliament sabotaged those plans. Now we have removed them, that is why I asked you that let us open up so that they can go where they want to go."

The Petitioner adduced the evidence of Proscovia Salaamu Musumba, who was a Member of the 6th Parliament and FDC Deputy Vice President of FDC, who stated that the statement that it was the FDC Members of Parliament who frustrated the building of other dams at Karuma, Bujjagali or Kalagala; was totally false. She admitted that during the 6th Parliament there was a debate on whether to have extra dams at the above sites, and that the matter was discussed by the Committee on National Economy, which presented a report to Parliament.

Ms Musumba states further that at that time all members of Parliament had been elected on individual merit, and the Committee on National Economy had Movement Members who belonged to Government's own Movement caucus, and that at no time did the Committee have any members of FDC as it was not in place at the time. She concludes that all decisions made by Parliament at the time were made as a legislative organ of the Movement Political System that did not have members with different political affiliation.

In reply to the allegations made by Proscovia Salaamu Musumba, Hon Daudi Migereko, who served as Minister of State for Energy in the Ministry of Energy and Mineral Development between July 2001 and January 2005, stated that in December 2001 he traveled to Washington DC with the Commissioner of Energy to meet with officials of the World Bank, to speed up the financing of the Bujjagali Project by the World Bank, They were advised that the Board would not be in a position to deal with the matter on account of new issues that had arisen, but they were not given the details at the time.

Hon Migereko states further that on arrival in Kampala, he was informed by Mr. Christian Wright who was the Country Manager of AES Nile Power, the Bujjagali Concessionaire that the reason the World Bank was hesitant to agree was because some members of Parliament had written to the World Bank opposing the construction of the dam. Mr. Wright availed him a copy of an email written to the President of the World Bank by Geoffrey Ekanya, Nandala Mafabi, Dr Frank Nabwiso and Salaamu Musumba, among others on 13th December 2001. He attached a copy of the email. He states that these persons are known members of FDC Party who stood on the Party's ticket during the last Parliamentary elections.

He states further that in or around February 2002, the Bujjagali project development was denied a Guarantee by the Multilateral International Guarantee Agency (MIGA) Board on account of the high political risk and one of the reasons given was that the Board was not certain that the Ugandan legislature supported the project based on the issues raised in the email. Upon of the failure to secure the MIGA guarantee the Export Credit Agencies of Norway, Sweden and Switzerland who were key financiers withdraw from the project.

I have perused the email and confirmed that the names Ekanya, Mafabi, Musumba and Nabwiso are among the signatories of the email who signed as concerned Members of Parliament of Uganda. They expressed several concerns including corruption, lack of transparency, spirits, conflict interests, and compensation. They concluded,

> ***"Given the above and many other unresolved issues, we the undersigned members of the Seventh Parliament of Uganda feel that this project should not be approved by the World Bank Board of Directors until most of these issues are resolved."***

In ***Harrocks vs Lowe*** (1972) IWLR 1630, Lord Denning held that malice is usually to be found when there is personal spite or ill will, or when the defendant does not honestly believe what he says to be true. He approved a statement by the trial judge in an action for libel where he had said,

> ***"If the defendant honestly believed his statement to be true he is not to be held malicious merely because such belief was not based on any reasonable grounds; or because he was hastily, credulous, or foolish in jumping to a conclusion, irrational, indiscreet, stupid, pig-headed or obstinate in his belief."***

Lord Denning concluded,

> ***"To that string of adjectives, I would add that he is not to be held malicious merely because he was angry or prejudiced, even unreasonably prejudiced, against the plaintiff, so long as he honestly believed what he said was true. Such is the law as I have always understood it to be."***

I accept the evidence of the 2nd Respondent and Hon Migereko and I therefore do not find the statement complained of false, malicious or defamatory of the Petitioner.

In paragraph 13, the Petitioner alleged that on 4th February 2006, while campaign in Koboko the 2nd Respondent stated that opposition politicians are liars and mentally sick. The 2nd Respondent denied making such a statement and stated in paragraph 15 that he had said the following:

> ***"There are liars who come here and tell you lies. They tell you that Museveni is the one who caused the death of Wapakhabulo, Ayume. He is the one who caused the death of Gad Toko. How can I cause these deaths? These were driving in cars. Their own cars not even cars under my control. How could I cause their death? How could I access those vehicles? And why? Like Francis Ayume was a very close supporter of mine. Why kill Ayume and not kill the bad ones. So that shows you that these people are sick. They are sick literally and metaphorically. These are just wasting your time. These are liars. Then they are saying UPE is useless but we should instead pay that money to the primary teachers. Before we introduced UPE there were only 2.5 million children in primary schools in Uganda. We now have 7.7 million children in the primary schools. Now these people would like us to send home these 5 million children so they stay at home without education. This is criminal to say that 5 million children should stay at home without education and we just pay some few teachers and civil servants and you forget about millions of Ugandans. That was the colonial system and that's how it used to work."***

This statement was made in response to a statement made by the Petitioner while campaigning in Koboko on 28th January 2006. According to the recording of Mukasa John, the Petitioner stated,

> ***".....It is a pity that some of the good leaders of this area are now no longer there. Our good friend Francis Ayume who was working with Museveni gave his advice, he told him you are wrong to change the constitution to continue to leading this country at this time. The problem is that President Museveni does not want anybody to tell him the truth. The leaders of NRM who have told him the truth, he has got rid***

> ***of them. Even some of his close friends who they grew up together from Primary School. They told him, but he removed them, James Wapakhabulo told him you are wrong to seek to continue in government, he removed him. It is therefore sad that the leader in Kobok who could tell President Museveni the truth that you should not change the constitution, that this is wrong has also left in a similar way. So the people who are still working with Museveni must remember that Museveni will only take his direction, will only take his evil ways. You can only join him if you want to follow his evil ways. If you tell him you are following the wrong way, our President, then you are his enemy immediately, he must get rid of you.'***

It is clear that the Petitioner made strong allegations against the 2nd Respondent which the latter was entitled to refute during his campaign. The 2nd Respondent however did not specifically refer to the Petitioner but to those who were telling lies against him. The statement complained of was neither false abusive or defamatory of the Petitioner. It was intended only to set the record correct or to promote the truth.

In ***Hibbs (Clerk) vs Wilkinson*** I F & F 607, at page 873, the plaintiff alleged in a libel suit, that the defendant was influenced by ***"malice which overcame his sense of truth and honesty,",*** Erle CJ, stated to the jury that ***"this is an action which is not maintainable without malice; which in law means a wrong motive. Nothing is more important than to draw the line duly between fair discussion for the promotion of truth and publications for the asperation of personal character."***

Lord Chief Justice Erle, concluded,

> ***"If you are of opinion upon the whole of this inquiry, that the defendant wrote what he did for the purpose of maintaining the truth sincerely having that object in view, without any corrupt motive, and that language he used, even although it may be exaggerated, was prompted by the desire to maintain the truth, and that the exaggerated language was proved by similar language on the other side and which might well have accounted for the use of strong expressions then you are at liberty to find the defendant not guilty. This doctrine was laid down long ago by Lord Ellenbborongh, in a case report by Lord Campbell in these terms:***
>
> > ***"Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is***

> ***essentially necessary to the truth of history and the advancement of science. That publication I shall never consider a libel which has for its object, not to injure the reputation of anyone but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality.""***

I entirely agree with the above observations and find that the allegation under this head has not been proved to my satisfaction.

The petitioner alleged in paragraph 14 of his affidavit that on 2nd February 2006 while speaking on Radio Mega in Gulu the 2nd Respondent stated that he was liable for the suffering of the people of Northern Uganda because he was linked to the Lords Resistance Army Rebels and that he was working with terrorists. In reply to this allegation the 2nd Respondent in paragraph 17 of his affidavit denied the allegation and stated what he had said while appearing on Mega FM in Gulu on that day as follows:

> ***"Now therefore the area is peaceful and this peace has come from the work of the army and the work of the citizens of Acholi and Lango who are against terrorism. These political challenges always bring out the characters of the different political forces. In this conflict against Kony, the people who have been standing against killing, it has been on one side of opposing groups. Either supporting terrorism or indifferent. Not talking against, they spend their time attacking the government. This means they sympathize with these terrorist. You know that the groups killing people have been supported by Sudan. They don't talk about Sudan. They spend their time attacking the NRM government. They always lok lok arac about NRM and UPDF. They never never lok lok arac about Kony and Sudan. So why do they not speak against Kony, why don't they speak against the Sudan government? Why don't they speak against these killers and instead they are always attacking the NRM and the UPDF. That means they sympathise with these terrorists. In the case of Reform Agenda which is now FDC, Besigye's group, they went further and they let people work with Kony. They sent Opoka and another fellow called Bataringaya and a group of them working with Kony took part in a number of terrorist attacks until they were killed by Otti on the instructions of Kony, because Otti and Kony had been suspecting them of trying to usurp the leadership of the Kony groups. It is only NRM***

which has stood consistently against the <u>luneko</u> (killers) of the people of Uganda."

The 2nd Respondent adduced the evidence of Brigadier Sam Kolo and Brigadier Kenneth Banya in support of the statement he made. Brigadier Sam Koro who was a member and senior commander of the Lords Resistance Army (LRA) since January 1988 to 16 February 2005 when he voluntarily came out of the rebellion, stated that during June 2002, while he was in the company of Brigadier Vicent Otti and other Commanders, they met Commander Kwoyo introduced a man from his Unit named James Opoka to brig. Otti. He also introduced other two men who were with Opoka. The two men were distributed to other Units while Opoka stayed in his Unit for a period of one month.

During the time Opoka stayed in his Unit, he observed that Opoka was very intelligent man who appeared well educated with much interest in politics. He stated that Opoka had in his possession two satellite telephone sets on which he frequently talked at a distance from everyone else. On inquiries from them as to who he was talking about and with whom, Opoka always refused to disclose them saying that what he was talking about and with who was a top secret. This conduct made them to begin to suspect his motives.

Later on his request, Opoka was removed and assigned to another Unit under Col Caesar Acel Lam, the Director of Military Intelligence. After sometime, Vicent Otti informed them that Opoka had requested assistance from the LRA to help him recruit fighters to join him and his Peoples Redemption Army (PRA) to fight the government of Uganda which had according to Opoka cheated them in elections. Opoka was present when this information was communicated and he kept silent. Brig. Koro states further that he suggested that the request be forwarded to Joseph Kony at his headquarters in Southern Sudan for him to decide on the requested assistance and this was accepted by Brig. Otti and other Commanders present. He later learnt from Col. Ceser Acel Lam that Opoka had been summoned by Kony to meet him and that Opoka had been escorted to the place. He was also summoned by Kony and he found there Opoka, Brig. Otti and Brig. Banya and other Commanders. An operational meeting was held at which Opoka was relieved of his satellite telephone sets on

Kony's orders. Opoka left with the group commanded by Brig. Otti. Two weeks later, he was informed that Opoka had been executed at river Kit in Southern Sudan by Brig, Otti, on the orders of Joseph Kony.

Brigadier Kenneth Banya who was another Senior Commander of LRA confirmed what Brig. Koro had said that the was present when Brig Otti introduced Opoka to the meeting in March 2003. Her never met Opoka again but learnt later after he had been captured by UPDF that Opoka had been killed by Brig. Otti.

Dr. Byamugisha rightly submitted, in my view, that the allegation in paragraph 14 did not disclose any offence since the 2nd Respondent was answering questions put to him by a radio presenter, and it was not shown that it was made during campaign. Secondly it was not mentioned in the statement that the petitioner was responsible for the suffering of the people of Northern Uganda or that he was a terrorist. The 2nd Respondent adduced evidence, which I accept showing that James Opoka, an FDC functionary had joined the LRA where subsequently met his death. I find the allegation not proved.

In paragraph 15 of his affidavit, the Petitioner alleged that on 9th February 2006 while campaigning in Hoima the 2nd Respondent said that the Petitioner was a liar who had no programme and who was greedy for political power. He also alleged that the 2nd Respondent restated that FDC was in alliance with LRA Rebel Group which rebel group was named as a terrorist organisation.

The 2nd respondent denied the above allegation. He stated that he did restate that FDC was in alliance with LRA Rebel Group, and relied on what he had averred in paragraph 17 of his affidavit above. The 2nd respondent stated in paragraph 19 of his affidavit that what he had said in Hoima while addressing people in Runyankole/Runyoro was as follows:

> ***"Do you leave the main heap and go for scattered seeds (entarakire)? The FDCs, what took them out of the Movement? It is because of their performance. You know all of them they were in the Movement. We gave them work. Some were hiding themselves in the Movement, others were in the Movement and they failed to do the work. Because of***

> ***that the FDC do not have anything significant that they are going to do and because of that the Movement is the only organisation which has all the requirements to maintain peace in Uganda.***

I have already dealt with allegation that FDC was in alliance with LRA rebel group. As regards the allegation that FDC was greedy for power, it is not borne out in the statement. The statement that FDC does not have anything significant they are going to do is mere expression of opinion. This is not abusive or derogatory.

The Petitioner alleged in paragraph 16 of his affidavit that the 2nd Respondent wrote an article published in the ***New Vision*** of 10th February 2006 in which he ***inter alia*** called the Petitioner a traitor, an opportunist and a rebel. In reply, the 2nd Respondent stated in paragraph 21 that what he wrote in response to very negative stories in the ***Red Pepper*** was that ***"The Red Pepper is fond of writing, screaming and scaring stories about how Besigye has got PLAN "B" of waging war against the democratically elected Government of Uganda after he loses elections….."*** In further reply of the allegations in paragraph 16, the 2nd Respondent stated that what he wrote was as follows:

> ***"OUR OWN PLAN "B"***
> ***Then Besigye fled and went to South Africa and started gallivanting around the Great Lakes Region trying to raise a rebel force. Opoka of the Besigye group joined Kony and carried out ambushes on Karuma road. The peoples Redemption Army(PRA), a group led by people previously associated with Besigye, set up bases in Ituri and was co-operating with UPC of Rubanga, a Congolese Militia Leader, that had acquired 13,000 guns from a certain source. In order to give free reign to PRA, Rubanga's group attacked our 53rd Battalion in Bunia. We promptly put into action our own plan "B" by the 53rd Battalion repelling the attacks by thousands of Rubanga militiamen. At the same time a whole Division at Nyaruvur, Nebbi, entered through Mahagi Port. We cleared the whole area of UPC and PRA. We, then handed the area to MONUC around May 2003. That was the end of Besigye's and PRA's Plan "B." Besides, on the night following announcement of the results, a group in Kasese burnt some vehicles of civilians using petrol."***

He also states that he added the following:

> ***"Besigye is an opportunist.***
> ***Besigye is, at the same time, an opportunistic beneficiary to our Pan – Africanist contributions. He was misusing the hospitality of the African National Congress (ANC) government in South Africa. We had to stand with ANC in the late 1980s and early 1990s. We had to stand with RPF from 1990 and, even, later. We had to stand with the SPLA for their sake and ours. Besigye was National Political Commissioner (NPC). Minister of State, a Commander in Masaka and Chief of Logistics and Engineering (CLE) during most of this time. He was, therefore, a member of the decision-making bodies of the NRM Government and UPDF. What contribution did he make in this fora in relation to these conflicts? Did he have alternative advice from what was done? In fact these conflicts were unavoidable in my opinion. They were part of the de-decolonisation. Why, then, should Besigye, opportunistically, use their effects on the rate of industrialization and job-creation. That means that he is a demagogue and opportunist. I am very proud that Uganda participated in these conflicts and, therefore, contributed to the long-term liberation and political re-organisation of central and South Africa. We now have and shall have, even more, business opportunities. The MTN from South Africa, for instance, has solved our telecommunications problems. It has also created some employment. Yet South Africa eleven years ago, was a no go area for Ugandans."***

Dr Byamugisha submitted that the 2nd Respondent did not make the statement while campaigning but he was replying to the ***Red Pepper.*** The 2nd Respondent wrote the statement as President of Uganda and signed as such. He submitted further that the petitioner has no ground to complain about statements made in newspaper in response to his which he did not deny. He contended that the President had to assure the country of security. He pointed out that the words ***"Traitor"*** or ***"Rebel"*** were not used in the statement, but the words that the Petitioner was opportunistic were used. He submitted that the 2nd Respondent was entitled to his opinion.

I entirely agree with learned counsel for the 2nd Respondent. In the first place, the Petitioner did not claim nor was it true that the 2nd Respondent made the impugned statement while campaigning. On the contrary he was merely responding to statements made by the Petitioner and published in newspaper which required the reaction of the Head of State who signed as President, not Candidate Museveni. I find no substance in the allegation.

In paragraph 17 the petitioner alleged that on 15 February 2006, the 2nd Respondent published an article in the ***New Vision*** newspaper in which he stated that the petitioner was one of those who designed the 1995 Constitution in such a way as to weaken the President. In reply the 2nd Respondent admitted that he had stated that the Petitioner was one the Members of the Constituent Assembly which weakened the Presidency in the 1995 Constitut6ion and this was a fact, and that the position was corrected in the 2005 Constitution (Amendment) Act. I do not find the allegation proved.

The Petitioner claimed in paragraph 18 that on 1st February 2006, that while campaigning at Apac the 2nd Respondent stated that the Petitioner was one of those responsible for the Barlonyo massacre, where armed thugs or rebels attacked an internally displaced people camp and massacred innocent civilians. The 2nd Respondent denied the allegation and stated in paragraph 18, what he said while campaigning at Apac on 1st February 2006 which was as follows:

> ***"Besigye was here telling you that he would stop, he will remove the IDP camps. How would he remove them? You can only remove them by defeating Kony because Kony is the one who created them. Besigye ran away to South Africa. He is a deserter. He left us fighting here; he deserted to South Africa. He left us alone in the fight against Sudan, against Kony. We have defeated Kony with you. Now Besigye has come to drive around on tarmac roads which he did not build. He is now driving on tarmac roads going to West Nile. Was he there when we were building the road? The road from Karuma to Alwinyo to Packwach, was he there? Was he there fighting when we were defeating Kony, fighting Kony and defeating them? He was not! These are the type who want to harvest where they did not sow. The Bible says whatever a man sows that is what he reaps. Besigye sowed desertion he should harvest desertion in the ballot box. When Kony was killing people in Barlonyo where was Besigye? In fact Besigye's group was on the Kony side. Some of his people had joined Kony. Some of his people like Opoka were with Kony. So therefore, you people, the people of Lango you should ally yourselves with the reliable group like NRM."***

Dr. Byamugisha submitted that the 2nd respondent explained in the statement why he referred to the petitioner as a deserter, that is that he went to South Africa. He did not mean that the Petitioner deserted from the Army. He contended that the statement does not say that the Petitioner was responsible for Barlonyo massacres and no innuendo was pleaded. It was fair comment during election campaign.

In my view the statement complained of was not proved to be false nor malicious. The Petitioner was not called an army deserter but one who merely deserted his group (NRM) and went to South Africa. It is a true fact that he went to South Africa where he lived until he came to participate in the elections. To allege that he went to South Africa is neither false nor derogatory of him. There was no allegation that the Petitioner was responsible for the Barlonyo Massacre. I therefore find the allegation not proved.

The Petitioner alleged that while campaigning in Luwero on 23rd December 2005 the 2nd Respondent referred to him as unpatriotic. The 2nd Respondent denied referring to the Petitioner as unpatriotic and even if he did so, it would be merely an expression of his opinion which would not necessary be abusive, malicious or defamatory.

Finally in paragraph 20, the Petitioner alleged that the while campaigning at Boma Ground Fort Portal, the 2nd Respondent referred to DP and UPC as failures and FDC as scattered millet. I have already considered this allegation and for the reasons already given, I find that the allegation has not been established.

In the result I found that none of the allegations made against the 2nd Respondent of making false, abusive, malicious derogatory or defamatory statements against the Petitioner were proved to my satisfaction.

Alleged Bribery by the 2nd Respondent:

The second limb of illegal practices allegedly committed by the 2nd Respondent was bribery by himself or his agents. Mr. Matovu, learned counsel for the Petitioner contended that the 2nd Respondent personally gave bribes. He referred to affidavits

from two people who claimed to have received bribes directly from the 2nd Respondent. These are Umar Bashir, and Henry Lukwaya. He submitted that the 2nd Respondent admitted instructing an Aide to give money to Umah Bashir for transport. He pointed out that it was not in dispute that Bashir was given 100,000/=. Counsel contended that the money was not given for transport as claimed by the 2nd Respondent but to influence Bashir to vote for the 2nd Respondent. It was his contention that the money was given with the consent of the 2nd Respondent.

Mr. Matovu then referred to the affidavit of Kamatenedi where she deponed about receipt of money in Rukungiri by one Uraka, three days before election day and that Mr. Karokora gave out the money. He also referred to the affidavit of Major (Rtd) Rubaramira Ruranga, where he alleged that Gen Salim Saleh gave out bribes in Kamuli. Mr. Matovu had promised to produce a video recording of this incident involving Gen. Salim Sale, but he failed to do so. Learned Counsel submitted that the affidavits of Bashir and Rubaramira Ruranga were sufficient to prove that the 2nd Respondent personally committed the offence of bribery and through his agents with his approval or consent. He also referred to the affidavit of Salaamu Musumba which I have already considered when dealing with the aspect of bribery under issue No.2

Learned counsel submitted further that bribes were committed through party agents or functionaries or through people who appeared to be vigilantees who operated during polling day. In respect of party functionaries he referred to the affidavit of Eric Mugalu who saw money being given out to voters by a Movement Treasurer in Kamuli, and was arrested at Nawaikoke Sub-county. He submitted that once an act of bribery was carried out the 2nd Respondent took the benefit of it as well as the burden.

In reply, Dr. Byamugisha submitted that the allegations of bribery of voters by the 2nd Respondent must be supported by affidavit, but the Petitioners affidavit had no facts in support of this allegation and therefore it discloses no cause of action. As regards the Petitioners claim of agents procuring votes for individuals he submitted that this was not borne out by the facts in the affidavit.

Learned counsel argued that what was available was the affidavit of Salaamu Musumba which does not disclose the facts of the offence. He pointed out that Musumba made allegations against NRM dishing out money and she concluded that she knew this to the best of her knowledge without being a member of NRM. Counsel submitted that the 2nd Respondent in his affidavit answered fully the allegations made by Salaamu Musumba.

Dr Byamugisha contended that under Section 64(3) of the Presidential Elections Act, bribery does not include food or refreshment; and facilitation would include hiring tents and fuel for vehicles. It was his submission that money given out by the NRM on 20th February 2006, was to facilitate agents in terms of transport lunch, stationery etc, and that money was sent to party functions not party agents to facilitate elections.

He referred to the definition of bribery in Section 64 and contended that bribery means influencing one to vote by giving of money of gift, and that money must be given to a voter. He relied on the judgment of this Court in Presidential Election No 1 of 2001(supra) for the proposition that it must be proved that the person who received the money was a voter. He submitted that there was no voter named to have received money from the 2nd Respondent.

He referred to the affidavit of Umah Bashir who claimed that he was given money to cross over to NRM and started campaigning for the 2nd Respondent. He contended that the most important thing is that Bashir does not say that he was a voter. In view of the heavy reliance placed on the evidence of Umar Bashir and Henry Lukwaya, it is necessary to review it in detail.

In his affidavit, Umar Bashir, of Lungujja Rubaga Division, Kampala District, states that on 24 December 2006 at around 7.30 p.m. one Esther Najjembe came to him and Lumu Fred Iga, Rashid and other whose names he could not establish and took them to Sam Sam Hotel in Bakuli. They found there some other people he did not know. After sitting down, Esther Najjembe started addressing them and asking them why they did not support the movement and the 2nd Respondent as a Presidential

candidate. After giving their reasons of poverty and unemployment, Najjembe told them that the 2nd Respondent was ready to meet and address their concerns.

Immediately after the brief, Najjembe took them to State House Nakasero where they arrived at 10.00 p.m. At about midnight, they were ushered before the 2nd Respondent who took them through his manifesto and went on to ask why they did not support him. They reiterated the reasons they had given to Najjembe, and the 2nd Respondent advised them to form groups through which he would channel financial assistance. They were informed that the financial assistance would be given on condition that they crossed over and started campaigning for the 2nd Respondent; and they agreed to do so.

Bashir further states that the 2nd Respondent asked one of his Aides to give them some money and he personally received Shs.100,000/=(one hundred thousand shillings only). According to him, the 2nd Respondent promised to give them more money if he proved that they had seen light and crossed to the right camp, when they meet him again on 24th December 2005.

Bashir states that from then onwards he deserted FDC Party, the one he genuinely supported because the person who gave them money told them that each of them who received the money would be trailed to ensure that they complied. He claims he brought this matter to the attention of Hon Betty Kamya, MP Rubanga North who advised him to stay in NRM saying that he could still be useful to the Party even while there and he did as advised.

Evidence was also adduced of Henry Lukwaya, another resident of Lugujja, in Kampala District. He stated in his affidavit that he was the Lugunja Parish Youth Chairperson and a registered voter in Lungujja Parish. He stated that on 27 December 2005, he was approached by one, Mugabi Robert, who complained to him that he was the one who had made it impossible to hang up the 2nd Respondents posters in Lugunjja and that the 2nd Respondent wanted to meet all youth in the constituency who did not support him and that they would give him something if they supported him.

He claims that Mugabi introduced him to Esther Najjembe who arranged for a group of about 40 youths to go to State House Nakasero to meet the 2nd Respondent. Some of these youth who went to State House were Bashir Kakooza of Lugunjja, Chief Mbowa of Lusaze, Lumu Fred, Yunusu Kasirye and Katende, all of Lugunjja and Isima Kabega of Kibibi.

They boarded 2(two) vans and one (I) coaster bus from a location known as Sam Sam Hotel, Mengo. They reached State House Nakasero and immediately went to a restaurant where they were served dinner at about 11.00 a.m. The 2nd Respondent came to meet them at out 1.00 a.m. He asked them whether they were FDC youths and why they did not support him. They held discussions for about one hour. The 2nd Respondent advised them to form youth groups or associations through which he would channel funds to them. He also asked them to vote for him.

Lukwaya claims that he knew for a fact that on 24 December 2005 a group of youths who included Chief Mbowa. Bashir Kakooza. Lumu Fred, Isima Lubega and Katende visited State House prior to their visit and had received Shs.100,000/= each as a Christmas gift while in State House. He claims further to have reported the matter to Beti Kamya who arranged a press Conference at FDC and publicity condemned the act. He stated that the relevant newspaper cutting about the press conference was attached to the affidavit, whereas not.

The 2nd Respondent and Esther Najjemba swore affidavits in reply to the affidavits given by Bashir and Lukwaya. In reply to the affidavit of Bashir, the 2nd Respondent stated that he knew Esther Najjemba as a political mobiliser since 1980 who was a Movement Mobiliser for Rubaga Division for the 1996 and 2001 General Elections. Upon her request, he allowed her to come and see him with a number of young people whom she said were Movement Mobilisers in 2001. By the time he met them which was about 1.00 a.m, he was preparing to travel to Rwakitura for Christmas and therefore he did not have much time for them. Before he left, the group gave him a number of reasons why they had come to see him. The reasons were that they were opposed to the idea of an elected Katikiro for Buganda, that they was unemployment

among the youths, that the tuition fees were too high, that taxes on businessmen were too high and that there was general poverty. With regard to poverty he advised them, as he had done to others, to form development association through which they could access Government funding budgeted for poverty eradication.

The 2nd Respondent further stated that before leaving for Rwakitura he asked his Principal Private Secretary to get a State House Legal Officer to assist the group in forming associations. He also instructed her to arrange for their transport back home and promised to meet them after Christmas.

The 2nd Respondent denied the allegations that he took the group through his manifesto or that he asked them to support him. He denied advising them to form groups through which he would channel financial assistance to them. He also denied asking them to cross over and campaign for him because they were brought to him as NRM Mobilisers. He further denied asking his aides to give them money in return for their transport. He stated that he met the group again on 27 December 2005, but he was too tired and he only greeted them and asked his Principal Private Secretary to arrange for another meeting after the elections.

In reply to the affidavit of Lukwaya, the 2nd Respondent stated that the dinner which was provided to the group is a common practice for visitors at State House. He denied asking the group whether they were FDC Youth or why they did not support him as he knew they had come to him as NRM Mobilisers. He stated that he did not ask them to vote for him and his advice to form association was not because he was going to channel funds to them immediately or at all, but it was because they could access Government funding budgeted for poverty eradication.

The evidence contained in the affidavit of the 2nd Respondent was amply corroborated by the affidavit of Najjembe Esther, a businesswoman and NRM Mobiliser in Rubaga Division. She confirmed that she was a mobiliser for UPM in 1980 and for the NRM in 1996 and 2001. She stated that in 1996 she was a woman mobiliser for Najjanankumbi 1 and 2, and Kabowa, and in 2001 she was elected unopposed a Woman Representative for Rubaga Division.

In reply to the affidavit of Bashir, she stated that his true name was Umar Bashir Kakooza; who was a Movement Supporter in 1996 and 2001. She also knew Lumu Fred, Iga Rashid, both Boda Boda riders of Lungujja, Kitunzi, and they were Movement Supporters in 1996 and 2001. Through her coordination he invited them and others to Sam Sam Hotel in Mengo for the purpose of mobilizing them to vote for the NRM. During their discussions they raised the issues which the 2nd Respondent has already stated in his affidavit. She telephoned the Principal Private Secretary requesting an appointment with the 2nd Respondent to explain to him the concerns of the youth, and she gave her the appointment.

She stated further that she collected the said youth to go with her and to present their problems. They arrived at State House at 10.00 a.m but the 2nd Respondent could not see them until 1.00 a.m because of his busy schedule. When they met him, four of them stated their problems but they were not discussed because it was late and the 2nd Respondent was leaving for Rwakitura for Christmas. She confirmed that the President did not take them through the NRM Manisfesto nor did he say that the financial assistance would be given to them on condition that they crossed over and campaigned for him. She stated that before the 2nd Respondent left, he instructed the Principal private Secretary to get a Legal officer to assist them register an association. She admitted that the 2nd Respondent instructed the Principal Private Secretary to make transport arrangements for them to reach their homes. He promised to meet them after Christmas for all discussions of the problems but did not promise to give them money at the next meeting.

In reply to the affidavit of Lukwaya, Najjemba states that a subsequent meeting with the 2nd Respondent was arranged for them by the Principal Private Secretary on 27 December 2005. She admitted that they traveled from Sam Sam Hotel in two vehicles. When they arrived at State House, the 2nd Respondent was busy and they went for dinner. They did not see the 2nd Respondent till about 1.30 a.m. and by that time he was too tired to discuss their problems.

She denied that the 2nd Respondent asked them whether they were FDC youth or why they did not support them. He did not ask them to vote for him nor given them any money. He instructed the Principal Private Secretary to make them another appointment after the Presidential elections.

The main contention by the Petitioner is that the Shs.100,000/= received by Bashir was a bribe given to him by the 2nd Respondent personally or by his agent, the Principal Private Secretary. There is no dispute that Shs. 100,000/= was given to Bashir by the Principal Private Secretary to the 2nd Respondent on 24 December 2004 at State House. The bone of contention is for what purpose was the money given? What was the motive? According to Bashir, the money was given to him and others to cross to NRM and campaign for the 2nd Respondent. But according to the 2nd Respondent and Najjemba, the money was given for transport. Indeed the 2nd Respondent did not use the word money when he asked his aide to give the group transport home. They could have been transported in vehicles since it was very late at night. Bashir is the only person who claims money was given to influence him to cross from FDC to NRM. Lukwaya does not claim to have received any money. According to Najjemba, Bashir and others were already NRM supporters but they wanted some of their problems to be attended to by the 2nd Respondent. Indeed the 2nd respondent gave them advice on how to fight poverty by forming associations through which they would access Government funds for poverty eradication. No reason was given why the 2nd Respondent picked on Bashir and his group in particular for bribing to join NRM, and the explanation by Najjemba as to how they came to go to State House is the more credible. I reject the claim of Bashir that he was given a bribe of Shs.100,000 to influence him to campaign for the 2nd Respondent. I accept the evidence given by the 2nd Respondent and Najjemba on this issue.

However, another serious flaw in the evidence of Bashir is the absence of evidence that he was a voter. His affidavit is silent on the matter unlike that of Lukwaya. Unless one is a voter, he or she cannot be influenced to vote for a candidate. On this score also the allegation of bribery by Bashir fails.

The second allegation of bribery against the 2nd Respondent was that he committed acts of bribery by his agents with either his knowledge and consent or approval, by attempting and interfering with the free exercise of the franchise of voters contrary to Section 26(c) of the Presidential Elections Act. Attempts were made to prove this allegation by evidence tending to show that names of voters were taken down in exercise books to indicate how they were to vote in the elections. This allegation was not proved and seems to have been abandoned. In any case, I do not see how such acts could amount to bribery.

Thirdly, the Petitioner alleged in paragraph 12(c) of the petition that the 2nd Respondent committed acts of bribery of the electorate by his agents with either his consent and or approval, by agents procuring the votes of individuals by giving out tarpaulins, saucepans, water containers, salt, sugar or other beverages and making promises of giving such beverages.

In considering the allegation of bribery under the second issue, I found that most of the allegations were not proved. The mere distribution of money to agents or their supporters did not amount to bribery unless corrupt motive and the status of the receiver of the money as a voter were established. In order to bring home the charges of bribery against the 2nd Respondent, it must be proved that the bribe was given out by his agent with his knowledge, consent and or approval. Many people who were found distributing money were deemed to be agents of the 2nd Respondent without necessary proof. Some of the people could have been agents of Parliamentary candidates.

In **Election Laws** (supra) at page 153, the authors explain the scope of the authority given to an agent of a candidate as follows:

> ***"The act amounting to a corrupt practice must be done by a candidate or his election agent or by any other person with the consent of a candidate or his election agent. A leader of a political party is not necessarily an agent of every candidate of that party. An agent is ordinarily a person authorized by a candidate to act on his behalf on a general authority conferred on him by the candidate. Ordinarily***

> ***The agent is the understudy of the candidate and has to act under the instructions given to him, being under his control. The position of a leader is different and he does not act under the instructions of a candidate or under his control. The candidate is held to be bound by act of his agent because of the authority given by the candidate to perform an act on his behalf. There is no such a relationship between the candidate and the leader, in the a bract merely because he is a leader of that party. For this reason, consent of the candidate or his election agent is necessary when the act is done by any other person."***

According to the affidavit of the 2nd Respondent each of his agents was appointed by a letter in writing, a copy of which was attached to his affidavit. In that letter there were specific instructions against bribery and commission of electoral offences. Therefore even if the people involved in bribery activities had been appointed his agents, they would have exceeded their authority as agents by committing acts of bribery. They would not be acting with his knowledge and consent, and or approval.

In **Halsburys Laws of England** 4th edn Vol. 15, page 555, paragraph 729, it is stated,

> ***"A candidate whose express instructions had been disregarded by his election agent has been excused in respect of an excessive expenditure beyond the authorized maximum."***

I find that it was not proved to my satisfaction that any agent of the 2nd Respondent committed bribery with the knowledge, consent or approval of the 2nd Respondent.

Accordingly, the Petitioner failed to prove the allegations of bribery against the 2nd Respondent. It was for these reasons that I answered the fourth issue negative.

Having dismissed the petition, the reliefs of ordering a re-run or a recount were not available to the Petitioner. The Court by unanimous decision made no order as to costs. This was the first national multiparty election for over two decades and in my view the petition served the public interest of testing the legality and fairness of the election which could affect the legitimacy of the election and help promote public confidence in the electoral process.

I think that this was a public interest litigation akin to the Presidential Election Petition No. 1 of 2001 where we ordered each party to bear its own costs.

It was for the above reasons that I dismissed the petition and made no order as to costs. Consequently, it is ordered that the money deposited as security for costs should be refunded to the Petitioner.

In our summary judgment announcing our decision in this petition, we observed that we were constrained to comment on a number of matters which had given us grave concern. The first matter was the continued involvement of the security forces in the conduct of elections where they committed acts of intimidation, violence and partisan harassment. While the involvement of the security forces was lesser than in 2001, I think that every effort be made to reduce their involvement except where they are required to provide security necessary to ensure free and fair elections. The security agencies should strictly carry out their duties in accordance with the law.

The second matter was the massive disenfranchisement of voters by deleting their names from the voters' register, without their knowledge or being heard. While there was marked improvement in the compilation of the voters' register, the 1st Respondent should take measures to ensure that the procedure for de-registration of voters is fair and transparent and that efforts are made to publish in good time new polling stations so that voters are able to ascertain where they are expected to vote. But the voters also have a duty to participate in the updating of the register and to ensure that their names are on the register, as well as to ascertain where they are expected to vote.

The third matter was the apparent partisan and partial conduct of some electoral officials like presiding offers and other polling officials who engaged in electoral malpractices like multiple voting and vote stuffing. The 1st Respondent needs to provide suitable training as well as effective supervision of such officials.

The fourth matter of concern was the apparent inadequacy of voter education. This appears to have contributed to the disenfranchisement of voters who should be empowered through civic competence to better exercise their rights and meet their obligations during the electoral process.

The Court also noted with dismay the failure of the 1st Respondent to avail to the Court Reports of Returning Officers on the ground that they were not available while

it is mandatory for the Returning Officers to transmit them to the 1st Respondent. I think that the reports should be submitted as soon as the elections are completed. The 1st Respondent should determine the period having regard to the need to have the reports available in case results of the election are challenged in Court and the reports are required as evidence.

Finally, the Court found that certain provisions in the electoral law were contradictory and inadequate, such as Sections 24(5 and 59(6)(a) of the Presidential Elections Act, and Section 25 of the Electoral Commission Act, and recommended that they should be reviewed. The Court was of the considered opinion that all institutions should urgently address the above concerns in order to improve electoral democracy in the country.

In my view, there is also a need to review and increase the period of ten days within which to file the petition and the period of thirty days within which the Court is to declare its findings, as provided for in Article 104 of the Constitution and Sections 59 of the Presidential Elections Act. The period within which the petition should be determined should be increased to at least sixty days to give the parties and the Court sufficient time to prepare, present, hear and determine the petition. The Presidential Elections (Electoral Petitions) Rules 2001 which require evidence at the hearing of the petition to be presented by affidavit should be reviewed to provide for the calling and examination of witnesses instead of relying on affidavits, many of which may be false or are made under suspicious circumstances and therefore not safe to be relied upon, without cross examination of the deponents.

Dated at Mengo this 31st day of January 2007.

B J Odoki
CHIEF JUSTICE

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, ODER, TSEKOOKO, KAROKORA, MULENGA, KENYEIHAMBA AND KATUREEBE, JJSC)

ELECTION PETITION NO.1 OF 2006.

BETWEEN

COL. (RTD) DR. KIZZA BESIGYE :::::::::::::::::::::::: PETITIONER

VERSUS

1. ELECTORAL COMMISSION]

:::::::::::::::::::::::::::: RESPONDENTS

2. MUSEVENI YOWERI KAGUTA]

REASONS OF TSEKOOKO, JSC., FOR THE COURT'S DECISION

The conclusions I reached in this petition were based on the evidence available and on the belief that the framers of the current constitution must have invisioned that the country will be governed under a constitutional democracy where there is free and fair democratic elections and in the belief that each branch of the state would do its duty properly and with due diligence.

Last year Col. (RTD) Dr. Kizza Besigye, the Petitioner, contested in the presidential election with four other candidates. The others were **DR.ABED BWANIKA,**

MAMA OBOTE MIRIA KALULE, SSEBAANA JOHN KIZITO AND YOWERI KAGUTA MUSEVENI. The last named who was the incumbent President of Uganda is the second respondent in this petition. The election was conducted under a multiparty system of politics. Apart from Dr. A.Bwanika, the other candidates were sponsored by their respective political parties, namely: The Uganda People's Congress (UPC) sponsored Mama Obote Miria Kalule, the Democratic Party (DP) sponsored Ssebana John Kizito and National Resistance Movement (NRM) sponsored Yoweri Kaguta Museveni. The petitioner was sponsored by his party, the Forum for Democratic Change (FDC). The petitioner was in fact nominated in absentia while he was in custody at Luzira on a charge of treason. The contest was for the office of the President of this country. The Electoral Commission, the first respondent, which organised the election, declared on 25th February 2006, the second respondent the winner. He polled 4,078,911 votes, representing 59.28% of the valid votes cast. The petitioner, who polled 2,570,603 votes, representing 37.36% of the votes cast, considered himself aggrieved by the result of the presidential election. On 7th March, 2006, he petitioned this Court and set out complaints upon which he based his dissatisfaction. He asked the Court:

- To declare that Yoweri Kaguta Museveni was not validly elected as President.
- To order that a re-run be held.
- To order for a recount.

In the petition, the petitioner raised complaints against each of the two respondents and their agents and/or servants, for acts and or omissions which he contends contravened and or were contrary to the provisions of the Constitution, of the Electoral Commission Act, 1997, (ECA) and of the Presidential Elections Act, 2005 [PEA].

He also contended, in paragraph six of the petition, that S.59 (6) (a) of the PEA is contrary to the provisions of clause (1) of Article 104 of the Constitution and applied for the issue to be referred to the Constitutional Court for interpretation under paragraph (b) of clause (5) of Article 137 of the Constitution.

In paragraphs 7, 8 9 and 10, the petitioner stated his grievances against the 1st respondent in the following words:

"7 In the FURTHER ALTERNATIVES but without prejudice with the foregoing paragraph the Election of the 2nd Respondent was invalid on the ground that the election was not conducted in accordance with the principles laid down in the Provisions of the Presidential Elections Act and that such non- compliance affects (sic) the result in a substantial manner.

8 *Your petitioner avers that the entire Electoral process on the 23rd day of February, 2006 Presidential Elections, beginning with the campaign period up to the polling day was characterised with intimidation, lace (sic) of freedom and transparency, unfairness and violence and commission of numerous electoral offences and illegal practices contrary to the provisions of the Presidential Elections Act, Electoral Commission Act and the Constitution.*

(a) Contrary to S.19 (3) and S.50 of the Electoral Commission Act, the 1st Respondent disenfranchised voters by deleting their names from the voters roll/register.

(b) Contrary to S.32 of the Presidential Elections Act, the 1st Respondent allowed multiple voting and vote stuffing in many electoral districts in Uganda.

(c) Contrary to S.57 of the President Elections Act the 1st Respondent failed to cancel results of polling stations where gross malpractices and irregularities took place in particular the districts of Kiruhura, Manafa and Pallisa.

(d) Failing to declare the results of the Election in accordance with S.56 and S.57 (4) of the Presidential Elections Act and Electoral Commission Act.

(e) Contrary to S.12 (e) and (f) of the Electoral Commission Act, failing to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness.

(f) Contrary to section 9 of the Presidential Elections Act the 2nd Respondent was neither sponsored as a candidate by a registered political organisation or party or as an independent candidate.

(g) Misleading voters by printing and using ballot papers which indicated that the 2nd Respondent's party was the NRM, which is not a registered party participating in the elections.

(h) Misleading the voters by allowing the use of a symbol of the "Bus" which was used by the Movement's Political System during the referenda.

9 *Your petitioner avers that the 2nd Respondent benefited from the above non-compliance with the provisions of the Presidential Elections Act and Electoral Commission Act.*

10 *IN THE ALTERNATIVE and without prejudice failing to declare the result of the Election in accordance with Article 103 (4)"*

In its answer to the petition, the first respondent asserted that the petitioner has no real grievance within the meaning of Article 104 (1) of the Constitution and denied most of the allegations contained in the petition and asserted that it validly declared the second respondent elected as president. It averred that if there was any non-compliance such non-compliance did not affect the result of the election in a substantial manner and that the election was held under conditions of freedom and fairness. To the accompanying affidavit of the Chairman of the Commission, Engineer Dr. Badru M.Kiggundu were annexed copies of observers reports of the European Union (R2) and of the Commonwealth (R3) to support the commission's stand that the elections were properly conducted.

The Petitioner's case against the 2nd Respondent is that he personally, or by his agents with his knowledge and consent or approval, committed illegal practices and offences in contravention of S.24(5) (b) to 24(5) (9) of the PEA and Section 23 (3) (b) of the ECA. These include publication of false, insulting, derogatory, derisive statements about the Petitioner alone, his party or the petitioner and the other Presidential Candidates, offering money and gifts to voters;

In respect of the 2nd respondent, the petitioner alleged in paragraphs 11 and 12 as follows:

"*11. Your Petitioner avers that the 2nd Respondent personally committed the following illegal practices and or offences, while campaigning:*

(a) Used words or made statements that were malicious contrary to S.24 (5) (b) of the Presidential Elections Act.

(b) Made statements containing sectarian words or innuendos against your petitioner and or his party and other candidates contrary to S.24 (5) (c) of the Presidential Elections Act.

(c) Made abusive insulting and or derogatory statements against the petitioner, F.D.C and other candidates contrary to S.24 (5) (d) of the Presidential Elections Act.

(d) Made exaggerations of the Petitioner's period of service in the government and the reason why he was removed from the several portfolios your petitioner held in government and he also variously ridiculed the petitioner contrary to S.24 (5) (e) of the Presidential Elections Act.

(e) Used derisive or mudslinging words against the petitioner.

(f) Used defamatory and or insulting words contrary to section 23(3) (b) of the Presidential Elections Act.

(g) The 2nd Respondent Statements which were false either knowingly at a rally or recklessly namely:

(i) That the F.D.C frustrated efforts to build another dam.

(ii) That I was working in alliance with Kony, PRA and other terrorists.

(iii) That I was an opportunist and a deserter.

12. *The Petitioner further contends that the 2nd Respondent committed acts of bribery of the electorate by his agents with either his consent and or approval;*

(a) Bribery of voters just before and during the elections contrary to S.64 of the Presidential Elections Act.

(b) Attempting and interfering with the free exercise of the franchise of voters contrary to S.26(c) of the Presidential Elections Act.

(c) By agent procuring the votes of individuals by giving out tarplins, saucepans, water containers' salt, sugar and other beverages and making promises of giving such beverages.

Annexed to the petition was the mandatory affidavit required by Rule 4 (7) of the **Presidential Elections (Election Petitions) Rules, 2001** sworn by the Petitioner. Subsequently the petitioner lodged two supplementary affidavits together with nearly 200 other affidavits from his witnesses in support of his petition.

In his answer to the petition, the 2nd respondent denied that the petitioner had any real or genuine grievous within the meaning of Article 104(1) of the Constitution or S 59 (1) of the PEA. He asserted that on 25th February, 2005, he was validly elected as President and no recount was called for and that he was elected in accordance with the principles laid down in the PEA and denied most of the allegations made against him, contending that the entire presidential electoral process was conducted under conditions of freedom and fairness. He admitted making certain statements during his campaign and reproduced the alleged statements in his affidavit accompanying his answer to the petition which he deponed he actually made.

In answer to paragraph six of the petition, both respondents contended that there was no question to be referred to the Constitutional Court and asserted that this Court has exclusive jurisdiction to inquire into and determine all questions arising in a presidential election petition.

There are two matters I ought to mention at this stage. The first relates to election monitors or observers. Before the elections, the first respondent accredited a number of local and foreign institutions or groups of individuals as election monitors or observers. The prominent foreign groups are the Commonwealth election observers group and the European Union team. They monitored the electioneering process before the election day. They observed the voting and in some cases the announcement of the election results. They issued preliminary reports R3 and R2 respectively on 24/2/2006. Among the local monitors/observers are (1) Democracy Observes Group (Demogroup), Human Rights-network (Hurinet), Foundation for Human Rights Initiatives (FHRI). These in various ways monitored the preparations

for elections, the electioneering, the voting and the announcement of results. Each of these groups produced its own report on the election process and the declaration of results. I shall be referring to these reports in the course of these reasons. Naturally each candidate or his or her party monitored the elections in their own way.

The second matter to be noted is that the Commission formed a National Electoral Liaison Consultative Forum (NELCF) which was chaired by one of the Commissioners, Mr. Steven D. Ongaria. Apart from him, some officials of the commission were included. These were the Head of the Commission's Legal Department, its Public Relations officer, a Senior Elections Officer and an Electoral Liaison officer. Each of the political parties was, or was expected, to be represented by two persons on the NELCF. Replicas of NELCF were supposed to be formed at District level. The purpose of NELCF was, according to Commissioner Ongaria, to exchange ideas and resolve challenges related to the Presidential election. NELCF held its first meeting on 20/12/2005. That was some time after electioneering had started.

The Petitioner's counsel were led by Mr. Dan Ogalo Wandera and his deputy was Mr. John Matovu. Other members of the team included M. Mbabazi and Y. Nsibambi.

The first respondent was represented by a team led by Mr. Lucian Tibaruha, the Solicitor General. The other members included Mr. Joseph Matsiko, Ag. Director of Civil Litigation and Mr. Peter Kabatsi. Dr. Joseph Byamugisha led a ten team of Counsel to represent the second respondent.

The following issues were framed for decision by this Court.

1. Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act in the Conduct of the 2006 Presidential Elections.

2. Whether the said Election was not conducted in accordance with the principles laid down in the Constitution, Presidential Elections Act and the Electoral Commission Act.

3. Whether if either issue 1 or 2 or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner.

4. Whether any illegal practices or electoral offences alleged in the petition were committed by the 2nd Respondent personally or by his agents with his knowledge and consent or approval.
5. Whether the petitioner is entitled to the reliefs sought.

Before I discuss these issues, I should say something about the question of whether an annulment of a presidential election can only be made under the provisions of subsection (6) of S.59 of the PEA. This arises from the interpretation to be placed on Subsection (2) of Section 1 of the PEA. It states that **"The Commission Act shall be construed as one with this Act."** It seems clear to me that the ECA has to be considered along with matters stated in subsection 6 of S.59 of the PEA in deciding on annulment.

PRELIMINARY MATTERS

1. REFERENCE TO THE CONSTITUTIONAL COURT

In paragraph 6 of his petition, the petitioner contended that the provisions of Section 59(6) (a) of the Presidential Elections Act, 2005 are contrary to or inconsistent with the provisions of Clause (1) of Article 104 of the Constitution.

At the beginning of the hearing of the petition, Mr. John Matovu, one of the petitioner's counsel, moved court to refer the matter to the Constitutional Court for interpretation under Article 137 (5) (b) of the Constitution. Mr. Kabatsi, second counsel for the first respondent and Dr. Byamugisha, lead counsel for the second respondent, opposed the application. We rejected the application and promised to

incorporate our reasons in our judgment. In our decision which we delivered on 6th April, 2006, we set out reasons why we rejected the application. For emphasis, I wish to add that Article 137 sets our two main scenarios under which the Constitutional Court may be moved.

The first scenario is provided by Clause (3) of the article and the second scenario is provided for under Clause (5) of the same article.

The two clauses read as follows.

137 (3) Any person who alleges that -

(a) an Act of Parliament or any other law or anything in or done under the authority of any law; or

(b) any act or omission by any person or authority,

is inconsistent with or in contravention of any provisions of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

137 (5) Where any question as to the interpretation of this Constitution arises in ***any proceedings in a court of law*** *other than a Field Court Martial, the Court-*

(a) may if it is of the opinion that the question involves a substantial question of law; and

(b) shall if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause (1) of this Article.

Under Clause (3) any aggrieved party can petition the Constitutional Court on matters stipulated by the clause, whereas under clause (5) there is a condition precedent which is the existence of court proceedings.

Clearly under clause (3) the right of the petitioner (or any other person) to challenge S.59 (6) (a) of the PEA by petitioning the Constitutional Court was in existence before filing this Presidential Election Petition. He was, or should have been, aware of the alleged inconsistency before the Presidential Election was held on 23/2/2006 and before this petition was filed. The question as to the interpretation never arose in the proceedings of this petition.

In my considered opinion, Clause (5) can be invoked only in instances where, during the progress of a case in any civilian court, either the Court on its own, or a party, discovers any question requiring an interpretation of the Constitution. I think that the scope of the right is narrower under clause (5) than under clause (3). This is because under Clause (5) a specific question which arises in a proceeding must be identified and framed before it is referred to the Constitutional Court. It goes there as a reference. In this case, clause (3) was not applicable because the alleged right to petition existed long before the petition was filed and arose, not during the hearing of, but independently of, the petition. In my opinion to adopt the course for which the petitioner asked can easily lead to abuse of court process and ultimately even to undue delays in disposal of cases filed in court.

I do not think that the framers of our Constitution intended that a petitioner had two alternative ways by which to institute a petition based on allegations of inconsistency or contravention as suggested in this petition.

This objection is in substance similar to objections raised by respondents in the Zambian's Presidential Election Petition SC.2/EP/01/02/03 of 2002 **(Anderson Kambela Masoka, Lt.Gen.S.Tembo** and **G.W.Myanda Vs. Levy Patrick Mwanawasa, the Electoral Commission** and **Attorney-General)** which was cited to us by Dr. Byamugisha. The respondents challenged the jurisdiction of the Supreme Court of Zambia to hear and determine the three consolidated Presidential Election Petitions partly on the grounds that because the petition had not been heard and determined within the limitation period of 180 days stipulated by law, the Supreme Court had no jurisdiction to hear it after the lapse of 180 days since it was filed.

Under Article 41(2) of the Zambian Constitution,

> **"(2) Any question that may arise as to whether:**
>
> **(a)……**
>
> **(b) any person has been validly elected as president under Article 34……..**
>
> **shall be referred and determined by the full bench of the Supreme Court."**

The Supreme Court held that this provision clothed it with mandate to determine whether any person had been validly elected as President even after the expiry of the limitation period. The point was really that it was only the Supreme Court of Zambia

which must dispose of the Presidential Election Petition. This is similar to the position in Uganda.

2. OBJECTIONS TO ADMISSIBILITY OF CERTAIN AFFIDAVITS

The petitioner tendered evidence by way of affidavits from over nearly 200 deponents, himself inclusive, in support of his allegations. Likewise the two respondents tendered evidence by way of affidavits including affidavits from officials of the first respondent and the affidavits of the second respondent personally. They total to nearly 300 affidavits.

Counsel for the two respondents objected to the admissibility of very many of the affidavits tendered by, or on behalf of the petitioner, after the petitioner's counsel had presented the case of the petitioner.

Mr. Didus Nkurunziza, one of counsel assisting Dr. Byamugisha, made submissions on behalf of counsel for the two respondents, in support of the objections. For purposes of these objections, Mr. Nkurunziza classified the objectionable affidavits into four categories and advanced several arguments in support of the objections to each category of affidavits. Normally the objections should have been raised before the general submissions of counsel for the petitioner were made. This was not possible because of the time constraints imposed by Clauses (2) and (3) of Article 104 of the Constitution and by S.59 (2) and (3) of the PEA. So we allowed counsel for the respondents to belatedly raise the objections to the various affidavits. Of course this method has inherent risks.

The four categories are:

- Affidavits which contravene the law;
- Affidavits which do not disclose a cause of action or evidence of a complaint.
- Affidavits containing statements which have no basis or have no probative or evidential value.
- Affidavits specifically referred to or read by petitioner's counsel and which have been answered by affidavits in response by or on behalf of the two respondents.

The belated raising of objections to affidavits in the first three categories though made for convenience owing to the short time frame within which the petition had to be decided, present difficulties of sorts. These affidavits are part of the evidence to which the respondents have replied by corresponding affidavits. Those replies in effect clarified some points which were bases of objections. As it will appear later in these reasons, an example is the affidavit of Salaamu Musumba to which the second respondent replied.

2.1 AFFIDAVITS CONTRAVENING THE LAW

Mr. Nkurunziza submitted that by virtue of S.67 (1) of the **Advocates Act,** it is mandatory that any instrument that has been drawn or prepared relating to any legal proceedings must bear the name and address of the person who draws it. He singled out eleven affidavits. Seven of them purport to have been prepared by: M/s Mwene-Kahima & Mwebesa, Advocates, of Mbarara and four other affidavits which do not bear any endorsement on them. Learned counsel urged us to ignore all the eleven affidavits on the basis that they are forgeries because

Mr. Mwene-Kahima, the Managing Partner of the firm, swore an affidavit claiming that his firm did not draw nor prepare those eleven affidavits nor any other affidavit. On behalf of the petitioner, Mr.Dan Ogalo Wandera prefaced his reply to this point of the first category of affidavits that Mr. Nkurunziza's submission raises a legal issue as well as serious ethical issues. On the legal issue, learned counsel concurred that it is mandatory that instruments must be endorsed as stated by Mr. Nkurunziza but submitted that all the contested affidavits have been endorsed by the firm of Mwene-Kahima and Mwebesa, Advocates. Therefore the legal requirements were met. So the court should rely on those affidavits.

On the ethical issue, Mr. Ogalo Wandera contended that the affidavits were drawn in the Kabale Branch of Mwene-Kahima & Mwebesa, Advocates, where a Mr. Murumba works and from where that advocate prepared the affidavits. Mr. Ogalo intimated that Mr. Murumba was in Court and was prepared to give evidence in court to support this fact.

Subsection (1) of S.67 of the Advocates Act reads this way:

"Every person who draws or prepares any instrument to which S.66 applies shall endorse or cause to be endorsed on it his or her name and address; and any such person omitting to do or falsely endorsing or causing to be endorsed any of such requirements commits an offence".

Does the provision say, such instrument must not be relied upon in court? The answer is no.

I have perused the contested affidavits sworn by Turyasingura Joseph, Kainamira Bernard, Byaruhanga Johnson, Turyamureba Mande, Katwakura Edward, Twinomukago Vanice and of Ensinikweri Godfrey, and noted that although the address of the firm (Mwene-Kahima, Mwebesa and Co. Advocates) is given as P.O Box 343, Mbarara, these affidavits show that they were in fact sworn before a Magistrate in Kabale, apparently where the seven deponents originate. This appears to support Mr. Ogalo Wandera's submission that the affidavits were prepared in Kabale. I accept Mr. Ogalo Wandera's statement that these affidavits were drawn in Kabale and were endorsed by the firm. The fact that a Mr. Murumba, the lawyer who prepared them, was available in court to swear to their authenticity supports their genuiness. I have also perused the other four affidavits deponed by Aryeija Simon, Byaruhanga Charles, Mayombo Dick and Asiimwe Ivan Kasigaire which again bear the seal of Kabale Magistrates Court as the Commissioner administering the Oath. These four do not bear the endorsement of the firm or person drawing them.

In my view the omission to endorse these four affidavits with the name of the person or firm which prepared them is not fatal. They are not rendered inadmissible merely because of absence of endorsement. The above provision does not prohibit use of such affidavits in court. I do not think that it is proper to reject these four affidavits merely because of non-endorsement. Forgery generally means making a false document in order that it may be used as genuine. I am not persuaded by Mwene-Kahima's affidavit that these affidavits are forgeries. He is vague about when his two assistants left his firm. In any case the breach of the law complained of is just a technicality. It is not fatal. Does the fact that these affidavits were drawn by a firm of lawyers not now representing the petitioner render them inadmissible? No objection was raised based on that ground. Whatever the case that is immaterial. They have been placed on record by the petitioner.

I would not reject these eleven affidavits. In my opinion, each affidavit should be evaluated along with the other affidavits presented by both sides so as to determine its evidential value.

2.2 AFFIDAVITS THAT DO NOT DISCLOSE OR PROVE A CAUSE OF ACTION OR ANY EVIDENCE OF COMPLAINT

Mr. Nkurunziza contended that many affidavits sworn in support of the petition do not prove a cause of action or are not evidence of any complaint. Such affidavit like that of deponent Alegi Gilbert of Nebbi District complain about disenfranchisement. Each deponent swore that they registered as voters, mentioning stations where they were registered. They deponed that when they visited the polling stations on the day of voting, their names were not in the voters register. Counsel attempted to fault the deponents on the basis that each of them should have verified during the period of 21 days display of the register whether or not they were on the register. Learned counsel, therefore, asserted persistently, that these deponents have no right to fault the first respondent for the absence of their names from the register.

Mr. Nkurunziza relied on the two supplementary affidavits sworn by
Mr. Nsimbi Charles, both of which were sworn on 22nd March 2006.
Mr. Nsimbi is described as the Head of Voter Registration at the Electrol Commission (1st Respondent) where his duties include registering voters, maintaining the voters register and issuing voters cards. In his affidavits both the original sworn on 21/03/2006 and the said two supplementaries, he states that he examined his records including the national register of voters and found that:

- Many of deponents who complained that their names were not on the register were actually on the register. He listed these.
- Many deponents who complained that their names were not on the register had had their names removed on the recommendations of Parish Tribunals because the complainants neither reside nor work there. He has listed these.

  (May I point out here that during the meeting of the National Electoral Liaison Consultative Forum (NELCF) on 12th January, 2006, political parties representatives complained that the Commission display officials keep the

registers in their houses and that tribunals were not active. This is reflected in the minutes annexed to the affidavit of Commissioner Ongaria).

- Deponents who complained that their names were not on the register had not been registered at all or were registered at stations different from where they claim they should have been registered.

Mr. Nsimbi had on the previous day (21/03/2006) sworn another rather lengthy affidavit. In it he pointed out that the voters register was updated from 29th September to 30th October, 2005. This was followed by display of the register from 22nd December 2005 to 11th January, 2006, which was eventually extended to 17th January 2006. The objective of the display **"was to enable persons who had registered to check and confirm the corrections of their particulars".** He then lists about four different forms each of which would be completed for a particular purpose.

What puzzles me in the display exercise, though, is first the period of display, i.e., 22nd December 2005 to mid – January 2006. This is a period when Ugandans are normally busy on Christmas and New Year activities. This is a notorious fact. I have known many people, both low and high, who abandon offices at this time to prepare for, and participate in Christmas and New Year holidays and festivities. It would be a miracle to expect ordinary Ugandans to religiously inspect registers during such period or indeed to expect display officials to be in one place all the time displaying the registers. This is particularly so, in as much as there does not appear to have been reasonable and adequate education of the public about the registration and the display exercises. Many Ugandans watched and heard the **"education exercise"** on TV and radios occasionally. Again occasionally one could see advertisement in a news paper. How accessible are these facilities to ordinary voters who must be the majority?

Mr. Ogalo Wandera responded to the objection to the said affidavits generally during his rejoinder to the general submissions of counsel for both respondents.

The gist of his contention in support of the deponents who complained of disenfranchisement is that evidence in the affidavits shows massive disenfranchisement of voters in such districts as Busia, Iganga, Kampala, Mbale, Nebbi, Sironko and Pallisa. He relied on the affidavits of the deponents. These

include Atukwage Rogers (Mbarara), Obedigu Richard (Nebbi) Nafula Christine and Namakula Sarah (Idudi), Kagoya Fatuma and Kabode Abdu (Iganga). The question of the disenfranchisement is relevant to the first and second issues framed for decision by this Court. In any event, the two supplementary affidavits of Nsimbi largely do support the claims of the deponents. He was obviously based in Kampala. He only gives explanations why names were removed or were missing from the register. I do not, with respect, accept Mr. Nkurunziza's contention that citizens who have, for instance, applied for registration and in some cases obtained certificate of registration, should be faultered for not inspecting the register during the display, which display, as mentioned earlier, took place during the period of festivities. It is common knowledge that the display of registers was not all that smooth. Party representatives on NELCF complained that in some areas, display was not done daily or at particular places. In Nsimbi's supplementary affidavit (in Vol.8 in Para 5) he referred to the affidavits of Major (Rtd) Rubaramira Ruranga and that of L. Kizito.

- In paragraph 6, he lists 17 voters who are on his register.
- In paragraphs 7, 8, 9 and 10 he enumerates respectively 55, 15, 32 and I voters who were removed from the register because they neither reside nor work at the respective polling stations, namely, Children's Library, PS Munno's offices polling station, Katimba polling station and Kagugube polling station.
- In paras 11, 12 and 13 he similarly explains the removal of other voters.

There is no evidence anywhere showing that any of the voters who were removed from the register were afforded opportunity to show cause why they should not be removed. I note that the Commonwealth observers team observed and disapprovingly reported this aspect. Mr. Nkurunziza's faultering of the disenfranchised deponents reminds me of criticism of voters in **Morgan Vs. Simpson** (1974) 3 ALL ER.722, an English Election petition case where the result depended on the omission of voters to mark the ballot papers.

The case shows that a voter would go into one of a compartment and with the pencil provided in the compartment, place a cross (x) on the right-hand side of the ballot paper, opposite the name of the candidate for whom he votes. The voter will then fold up the ballot paper so as to show the official mark on the back, and leaving the compartment will, without showing the front of the paper to any person, show the

official mark on the back to the presiding officer, and then, in the presence of the presiding officer, put the paper into the ballot box, before leaving the polling station.

Denning, M. R. who presided over the appeal in the English Court of Appeal stated this:-

> ***Now those directions are more observed in the breach than in the letter. Rarely does a voter look to see that the ballot paper is stamped with the official mark. At least I never do. Rarely does a voter go back to the presiding officer and show him the official mark on the back. At least I never do. Often enough the polling station is not suited for it. It is so furnished that the natural thing is for the voter to go straight from the compartment to the ballot box and put his paper in it without showing it to the presiding officer. So I should think that the 44 mistakes were due largely to the fault of the officers in the polling stations and very little to the fault of the voters. If their votes are not to count, they are disfranchised without any real blame attaching to them."***

Similarly, I think that Ugandan voters who complained were disenfranchised without any real blame attaching to them.

During the hearing of the petition we noted from some Forms described as **particulars of persons deleted from the Registers,** which were annextures to Mr. Nsimbi's affidavit that the removals were all done on 16/01/2006 which was 37 days before polling day, and four days before the end of display which apparently ended on 21/1/2006. There is no evidence of how the discoveries of disqualified persons was made.

Mr. Nkurunziza relied on the provisions of Ss.23, 24 and 25 of the E C A to support his opinion that voters were properly removed from the register. Subsections (4) (5) and (6) of S.25 of the ECA are informative.

These subsections states:

> **"(4) An objection under Subs (3) shall be addressed to the returning officer through the Chairperson of the parish council of the person raising the objection.**

(5) The returning officer shall appoint a tribunal comprising five members to determine objections received by him or her under subjection (4).

(6) The tribunal shall comprise-

(a) at least three members of the village executive committee, at least one of whom shall be a woman; and

(b) at least one each of the following –

(i) elders

(ii) chiefs.

I did not see any evidence of the objections except sheets indicating removals.

It is evident from the foregoing subsections that a parish council chairperson would be a major player in determining initially how objections would be made. **"Parish council"** is not defined. I can only infer that that parish council is basically the one set up under the Movement Act (Cap.261) perhaps read together with Local Government Act. Under S.22 (3), of the Movement Act, such council consists of all the chairpersons of the village movement committees. In my opinion the Local Government Act - Cap 243 - is not helpful.

The chairperson of the parish council who is also the chairperson of the parish movement committee is elected by the parish council. Parish movement committees are responsible to movement sub-county committee. And this manner of responsibility reaches the top of the National Executive Committee of the movement which is chaired by the leader of NRM who under the law current then is also the President of the Country and their party's Chairman. So removal of voters from the register initiated, as in this case, at parish level by an official of the movement raises grave suspicions. I say at this level because the forms attached to Mr. Nsimbi's affidavits alluded to earlier, show that the persons who recommended the removals were RC Officials and the RC's stamps on each card clearly shows this. These same recommenders are the same persons who sat on the committee (almost uniformly consisting of four members instead of five) which recommended to the returning officers the removal of any person. Clearly, according to Mr. Nsimbi, the removals were done as recommended by the Parish Tribunals. None of the persons whose removals were done appears to have ever been made aware of the removals. Since subs (8) of S.25 of ECA provide for review of decisions of tribunals, my opinion is

that such reviews could normally be made at the instance of a person affected by the removal. Such a person cannot challenge his/ her removal of which he/she is unaware. So they were condemned unheard contrary to rules of natural justice.

Without going further into this matter, I think that the whole exercise was tainted with unfairness from beginning to end. In my considered opinion, therefore, the removal of the deponents was against the principle of the right to vote which is anchored in the Constitution [Article 1 (4)] and Article 59 (ii)]; S.19 of the ECA and S.2 (1) and 30 (4) of the PEA. The affidavits in my view disclosed a cause of action.

2.3 AFFIDAVITS WHICH CONTAIN STATEMENTS THAT HAVE NO BASIS OR ANY PROBATIVE OR EVIDENTIAL VALUE.

Mr. Nkurunziza contended that these are affidavits which contain generalised allegations such as wide spread intimidation and wide spread bribery yet deponents did not have instances of personal knowledge of such wide spread activity. Learned counsel singled out para 10 of Ruzindana's affidavit and para 16 of Kamateneti Ingrid Turinawa affidavit. Counsel contended that these two witnesses did not indicate how they personally knew the matters alleged. Unfortunately, Mr. Nkuruzinza did not allude to the many related affidavits from Ntungamo District from where Ruzindana hails or from Rukungiri District where Kamateneti was based at the time material to this petition.

It is true that paragraphs of the affidavits of Ruzindana and Kamateneti are on the whole drawn in general terms. However, Ruzindana explained in the affidavit, for instance, how he was an MP of Ruhama Constituency where he contested for re-election under FDC (para 2) and was conversant with facts relating to elections in the Ntangamo District because he was a candidate in one of the constituency there and the petitioner was his presidential candidate. He indicates in para 3 that he was a member of FDC National Campaign Committee for the petitioner in charge of Research and was Deputy Secretary General. In that paragraph 10 complained of by Mr. Nkurunziza, Mr. Ruzindana shows that the information about countrywide spread of payment of Shs 50,000/= to all LC 1 chairpersons is based on his survey which he carried out among all his District coordinators that there was countrywide distribution

of the money. Indeed Annexture R2 AI (infra) supports Ruzindana as regards money distribution.

In the case of Kamateneti, she states in para 1 of her affidavit that "she was the National Secretary for women FDC." In Paragraphs 3 and 4 she averred as follows:

"3. That on the eve of the elections, the FDC District Election Task Force put in place a team of monitors to go around the District (of Rukungiri) to monitor on election and report to the District Task Force what was happening at various polling centres. The office also provided video camera to the team that was to cover Rukungiri Town Council, Nyarusanje and Nyakishenyi Sub counties.

4. *That on the election day the 23rd February 2006. I sat in the FDC office to receive reports from our FDC monitors".*

In the subsequent paragraphs, Kamateneti sets out what she received from FDC monitors and agents. In one instance she received information of pre-ticking of ballot papers in favour of the second respondent and the candidates of NRM who were contesting other positions. As a result she and the petitioner made a complaint to the District Returning Officer who caused his Assistant Returning Officer and the District Registrar to investigate the complaint. These two apparently took half-hearted remedial action eventually.

In the circumstances of this petition, it cannot be said that the affidavits have no basis or value. I think that the proper approach is to evaluate these affidavits alongside those of the respondent's affidavits in reply in order to establish the credibility of the deponents on related facts. Obvious hearsay should be ignored.

Mind you, there were lamentations during the hearing of the petition about the short time available within which parties were able to assemble evidence. While shortage of time is no good excuse for shoddy work, such complaints if genuine, must be taken into account in assessing the value of evidence available.

2.4 AFFIDAVITS SPECIFICALLY REFERRED TO BY PETITIONER'S COUNSEL.

Mr. Nkurunziza referred to the affidavit of Pte. Barigye. Learned counsel dwelt on it and referred us to the counter affidavits from the respondents' six witnesses whose purpose was to contradict Pte. Barigye and show that he was unreliable. They are all soldiers. Two of them (Brig.Mukasa and Capt. Ndyabagye) were Barigye's superiors in the army. This submission on this category of affidavit is to be considered later at the appropriate place in the course of my discussion of each of issues No.1, 2, 3 and 4. The contentions of Mr. Nkurunziza really concern evaluation of the credibility of witnesses. For instance he contends that affidavit refers to both ballot papers and registration cards. I think that the context is important in understanding what Barigye referred to. If Barigye had given oral evidence, or if he had been cross-examined on his affidavit, his credibility would have been better assessed, I think.

Before I leave the question of objections, I want to refer to a passage in the Presidential Election Petition Judgment of the Supreme Court of Zambia to which the respondents' counsel referred in relation to the standard of proof. It is an internet copy. This is **A.K.Mazoka & 2 others Vs P. Mwanawasa & 2 others** (supra). Apparently, there, in Zambia, the petitioners had led evidence which in part was a departure from the pleadings (petitions) and so partly raised a new cause. Counsel for the respondents cross-examined the petitioners' witnesses at length on those new matters and apparently indeed adduced evidence in rebuttal of the new matters. Much later during submissions, the respondents' counsel objected to the admissibility of, or reliance by the Court on the said evidence. The Supreme Court alluded to some of its previous decisions on the issue and concluded that:

> ***"In our considered opinion, the respondents having not objected to evidence immediately it was adduced, this Court is not precluded from considering that evidence. At the end of the day, the issue will depend on the weight the court will attach to the evidence which was let in on unpleaded issues. At this late stage, we cannot therefore exclude the evidence adduced and allowed without objection. This, however, does not mean that we condone in any way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case the court will always exclude matters not pleaded more so where an objection has been raised."***

With respect, I think that this passage equally applies to our situation in this case. The main differences are two. First, in Zambia, witnesses gave oral evidence which was supplemented with documentary evidence. In the present petition evidence was based on affidavits of deponents for each side. In our case instead of cross-examining witnesses for the petitioner, the respondents filed counter affidavits. In effect parties left the court to assess the evidential value of the competeting affidavits. The second distinction is that in Zambia, the trial of the petition lasted a long time and so the respondents' counsel apparently had more than ample time to raise objections which they raised after objectionable evidence had been received by court. In this petition, every side was under pressure to present their case within the limited time allowed by law. However the essence of the holding by the Zambia Supreme Court is sound and persuasive on this particular point of raising objection belatedly.

In the Presidential Election Petition No.1 of 2001 between the same parties virtually similar objections were raised as those raised by learned counsel in this petition. I said then and I say so again that trial of election petition is governed by a special Act and special rules of procedure. See Order 45 Rule 4 of CPR. These laws emphasize expeditious disposal of a presidentional election petition. Therefore placing undue reliance on technicalities can lead to unwarranted injustice.

CONSIDERATION OF THE ISSUES

The five issues were argued separately.

Counsel for the petitioner first argued issue 4, followed by issue 1, 2 and then 3. Issue 5 which is about reliefs was argued half-heartedly.

It will be noticed as I go along that evidence of many witnesses cuts across the first four issues. Certainly that is the case particularly in the cases of bribery, harassment, violence and intimidation. Evidence on these is from many parts of the country.

If I may mention instances of witnesses whose evidence cuts across the four issues: Examples are : Mr. Augustine Ruzindana, Mr. Jack Sabiiti, Ms Kamatenite, Mr.Turyasingura, Mr. Ozo, Mr. Ekanya, Mr. Katuntu of Iganga, Patrick Kitimbo, Iganga District.

I now proceed to give my reasons in support of my opinions on the issues beginning with the first issue. I would like to repeat what I said in my reasons in Presidential Election Petition No1 of 2001 on trial by affidavits. There are inherent problems in conducting the hearing of and deciding a petition of this importance on the basis of only volumes of affidavits and annextures thereto. Any experienced trial judge will agree that trying a case, or a petition, by way of oral testimony has obvious advantages. The impression which a trial judge gets from, for instance, observation of demeanours of witnesses, is totally missing from a trial based on affidavits only. Affidavit evidence is unlikely to elicit the bad out of a witness. Falsehoods are unlikely to be exposed easily. Oral testimony is particularly helpful because a court can intervene and seek clarification from a witness about what he/ she states. In this petition, like that of 2001, matters were not made any better because there were very many affidavits upon which counsel never commented because of limited time. Where any comments were made, comments were hurriedly made. Most affidavits were referred to en masse. Of course where trials are based on oral testimony, there is the fear of the consequences of witnesses not turning up in time or at all? I do not think that that would be good enough reason for not receiving oral evidence. I hope that the authorities concerned will consider these points and amend the relevant laws especially the PEA and rules made thereunder, so that future Presidential Election Petitions are tried on the basis of oral testimony or both oral and affidavit evidence with emphasis on oral testimony.

For conveniences, I will in some instances use the acronyms “PS” for polling station or stations, “PO” for presiding officer or officers and “RO” for returig officer(s).

THE 1ST ISSUE

WHETHER THERE WAS NON-COMPLIANCE WITH THE PROVISIONS OF THE CONSTITUTION, THE PRESIDENTIAL ELECTIONS ACT AND THE ELECTORAL COMMISSION ACT IN THE CONDUCT OF THE 2006 PRESIDENTIAL ELECTION.

This issue arises from paragraphs 5 and 8 of the amended petition, especially the latter paragraph.8.

In our decision of 6th April, 2006, we found that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act (PEA) and the Electoral

Commission Act (ECA) in the conduct of the 2006 Presidential Elections by the 1st respondent in the following instances:

(a) In disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote;

(b) In the counting and tallying of results.

It is fair to state that the Court's decision on this issue was a compromise position. This is illustrated by the answers which each of the members of this Court gave to both the 3rd and the 4th issues.

DISENFRANCHISEMENT

Mr. Dan Ogalo Wandera, lead counsel for the petitioner, first referred us to paragraph 8 (a) of the petition in which the petitioner alleged breach of sections 19(3) and 50 of the ECA.

I have already reproduced it but for easy reference I quote it again:

> ***"8 Your petitioner avers that the entire electoral process on the 23rd day of February, 2006 Presidential Election, beginning with the campaign period up to the polling day was characterised by acts of intimidation, lace (sic) of freedom and transparency, unfairness and violence and commission of numerous electoral offences and illegal practices contrary to the provisions of the Presidential Elections Act; Electoral Commission Act and the Constitution.***
>
> ***(a)Contrary to S.19 (3) and S.50 of the Electoral Commission Act, the 1st Respondent disenfranchised voters by deleting their names from the voters roll/register"***

Mr. Ogalo argued that by reason of S.19 (3), a voter is entitled to vote in a place where he/she resides or he is registered. The provision read thus:

> ***"19 (3) subject to this Act, a voter has a right to vote in a parish or ward where he or she is registered."***

Learned counsel contended that during the 2006 presidential election names of many voters' were deleted from the register.

He relied on the affidavits of Major (Rtd) Ruranga Rubaramira as well as the affidavits of very many other deponents that were filed in support of the petition. The various deponents swore that they could not vote because their names were missing from the voters register. To the affidavits of Rubaramira were annexed a number of reports made by accredited election observers. These observers were accredited by the first Respondent to observe or monitor the electoral process and the voting. Among these were Commonwealth Observers, European Union, DEM-group, Hurinet Uganda, Foundation for Human Rights Initiatives (FHRI). Mr. Ogalo Wandera contended that the deponents proved the allegation of country wide disenfranchisement. Examples are deponents from the Districts of Bushenyi, Busia, Iganga, Kampala, Mbale, Nebbi, Pallisa and Ntungamo. Counsel contended that deponents had voters cards in some cases or registration certificates in other cases. Photocopies of these were annexed to the affidavits as exhibits. He contended that there is ample evidence proving this issue.

Mr. Joseph Matsiko, the Ag. Director of Civil Litigation, replied on behalf of the two respondents. He adopted the submissions of Mr Nkurunziza which the latter made as already indicated on the four categories of affidavits supporting the petition. Mr. Matsiko contended that the affidavit evidence tendered in Court did no prove the allegations in the petition.

Responding to Mr. Ogalo Wandera's submissions on para 8 (a), i.e., **DISENFRANCHISEMENT,** of many voters, Mr. Matsiko contended that the petitioner did not in his petition or in the accompanying affidavit indicate the number of voters who registered after his return from exile and who were disenfranchised. Nor did be enumerate the districts affected by this. Mr. Matsiko repeated again Mr. Nkurunziza's opinions and contended that the affidavit of Major Ruranga Rubaramira contains hearsay, is deficient, defective and unreliable. He cited in support the decision of this Court in Presidential Election Petition No.1 of 2001, **[Col. (Rtd) Dr. Besigye Kizza Vs Electoral Commissions & Museveni Yoweri Kaguta]** Vol.II Supreme Court Bound Volumes of the decision (Reasons of Odoki CJ, Karokora and Mulenga JJSC).

The learned Ag. Director of Civil Litigation contended that since Major Ruranga Rubaramira did not, in his affidavit, name the FDC agents from whom he received

reports about disenfranchisement, such agents even if they swore affidavits cannot corroborate the Major's evidence.

Mr. Matsiko, like Mr. Nkurunziza, argued that a voter's right is shown by the presence of a voter's name on the register and for this he relied on S.19 (1) (a) of the ECA. And like Mr. Nkurunziza, Mr. Matsiko contended that voters should have inspected the register during the display period to ascertain whether or not they were in fact on the register. He referred to several paragraphs of the affidavits of Dr. B.Kigundu, the Chairman of 1st Respondent and, that of Mr. Nsimbi, an official of the commission, in which the latter attempted to show the position of the register and why some voters were removed. Mr. Matsiko argued surprisingly that the allegations of disenfranchisement were not proved. He prayed that we answer this issue in the negative.

I begin with the first Article of our Constitution which proclaims the people as sovereign and also proclaims the principles of regular, free and fair elections. In terms of clause (4) of the Article,

> ***"The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."***

Clearly therefore, the people have a constitutional right to freely participate in choosing who is to govern them. The people's right to vote and the responsibility of the state to help citizens to participate in voting is emphasised in Article 59 of the same Constitution. That Article states:

(1) Every citizen of Uganda of eighteen years of age or above has a right to vote.

(2) It is the duty of every citizen of Uganda of eighteen years of age or above, to register as a voter for public elections and referenda.

(3) <u>The state shall take all necessary steps to ensure that all citizens qualified to vote, register and exercise their right to vote.</u>

Clearly the right to vote is constitutional and the state is commanded by the Constitution to ensure that all citizens qualified to vote register and exercise their right to vote. On the face of it, it appears to me that S.19 of the Electoral

Commission Act curtailed the citizen's right by stipulating that they can only vote where they originate or reside. For it seems to me that voting where one originates or resides is really a matter of convenience. It cannot be used to disenfranchise a potential voter once he has registered or applied for registration in a particular area of Uganda.

I am not persuaded by the explanations given by Mr. Nsimbi that some voters had to have their names removed because of the recommendation of Parish Councils. Disenfranchising citizens without affording them opportunity to be heard on the matter appears to me to be contrary both to the letter and the spirit of Article.59 of the Constitution.

I do not accept contentions of both Mr. Matsiko, and Mr. Nkurunziza that the affidavits of major Rubaramira and other deponents are valueless and do not support the complaints of the petitioner nor of the voters who have sworn the affidavits. About 90 deponents were able to swear affidavits in support of the complaints about disenfranchisement from different parts of the country. Some local election observers groups as well as the European Union observers report (R2) support the major.

Rubaramira indicated what his status was at the material time, i.e., the FDC National Electoral Commissioner. His claim that he was involved in monitoring the electoral process throughout the country was not disputed. His other claim that he made complaints to the first respondent about irregularities was not denied. Indeed the fact of removal from the register, at least of some voters, is acknowledged in their respective affidavits by both Dr. Kigundu and Mr. Nsimbi. These two officials rely on technicalities to support their stand that the removal was according to law. They appear not to appreciate that the Supreme law of the land, namely the Constitution requires the state to enable citizens to register and to vote. An official should not hurry to disenfranchise a citizen without a sound basis.

Apart from Major Ruranga Rubaramira, volume I(b) of the affidavits of the petitioners' supporters shows that at least 54 were disenfranchised. Wetaka Paul, Siroko District visited no less than 6 stations on 23/2/2006. His name was missing. Similarly Vol.2 (d) has affidavits of no less than 41 witnesses to the same effect. These witnesses are from different parts of the country.

The deponents' names were removed without being afforded opportunity to show cause why they should not be removed from the register. Secondly as observed earlier, the tribunals which initiated the removal exercise do not appear to have been independent or transparent in as much as half the members of the tribunals were members of Movement Parish Councils and who, according to the Movement Act, were members of the Movement of which the 2nd Respondent was its President. Here the question of fairness on the part of the tribunal is questionable. The Electoral Commission Act was enacted in 1997. It provided for objections to be routed through the Chairman of a parish council (which council is made up of executive committee of LCs). The Tribunal, according to S.6 of ECA, shall comprise- **(a) at least three members of the village executive committee."**

The forms annexed to Mr. Nsimbi's affidavit show that the tribunals that recommended removal of persons who had registered were made up of 4 members two of whom were RC officials. It is odd that these two RC officials were the same persons who recommended the removal of the voters **(see annextures to Nsimbi's affidavit).** Lack of transparency and fairness in the removal exercise is too obvious to be dwelt upon. I am amazed that those in charge of the policy of the PEA and the legislature which enacted the PEA 2005 never considered and remedied that obvious anomaly.

It may be true that the petitioner did not mention by name in his affidavit the voters who were removed. But his supporters have sworn affidavits, to which Mr. Nsimbi responded.

It is not unreasonable for the petitioner to claim that voters who registered after his return from exile were mostly the ones who were deregistered. It is not unreasonable because the chairpersons of the Parish Council where deregistration occurred cannot be said to have acted with apparent impartiality in as much as they or members of their council (as official stamps show) were the same ones who recommended the removal. They simply endorsed their own recommendations!!

It puzzles me that this type of situation was allowed to go on up to 23/2/2006, the day of the Presidential Elections, despite the fact that the Presidential Elections Act was enacted in November, 2005, nearly 8 years after he ECA was enacted in 1997.

The former Act provided for Presidential Elections under multiparty politics and, therefore, the employment of chairmen of Parish Councils (who are members of movement hierarchy) should have been corrected when the PEA 2005 was enacted so that a semblance of neutral tribunals were put in place.

I note from the minutes of the 6th meeting of the Nation Electoral Liaison Committee (NELCF) held on 12/01/2006 (see Commissioner Stephen Ongaria's affidavit – Annex ECG) that representatives of political parties complained at that late time that **"display officials keep registers in their houses"**. It was also reported that **"tribunals were not active on the ground hence fears of deleting genuine voters"**.

As stated earlier, the various reports of the monitors who were accredited by the 1st Respondent corroborate Rubaramira on the issue of disenfranchisement. These observers, such as the Demo group, had monitors at virtually every polling station. **FHRI, Hurinet, (Uganda), the Commonwealth observers** and European Union observers group reports all support Rubaramira in varying degrees. I have noted that the foreign observers were indeed over cautious in their reports about what took place. Rubaramira is also supported by the many deponents themselves to whom I have referred already, who were victims of disenfranchisement. Needless to say, I have to rely on the evidence before me in arriving at my conclusions.

Like Mr. Nkurunziza, Mr. Matsiko relied on reasons given by only three of the members of this Court in the 2001 Presidential Election Petition No.1 of 2001. The Court consisted of five members and each member gave reasons and relied on certain authorities to support his opinion on the status of the various affidavits where their reliability was questionable. On that occasion I held that even if some paragraphs of the affidavits might contain hearsay matters and even if a deponent did not specify the source of certain information contained in the affidavit, those were not sufficient grounds for declaring a whole affidavit defective or a nullity. In my reasons I referred to such cases as M.B. **Nandala Vs Fr. Lyding** (1963) EA 706, **Mayers & Another Vs Akira Ranch (1969) EA 169, Zola Vs Ralli** (1969) EA 691 and **Rossage Vs Rossage** (1960) I.W.R. 249. At page 15, I stated –

"I think that the inclusion of the words 'belief' or information." is in some cases superfluous and does not render each affidavit invalid, at any rate not the whole of each affidavit.

In my opinion it would be improper in this petition to strike out wholly affidavits which are found to contain so called hearsay evidence in some parts where the offending parts of the same affidavit can be severed from the rest of the affidavit without rendering the remaining parts meaningless."

I have not been persuaded that I was wrong in that opinion and that what I stated in 2001 does not apply to the affidavits of Rubaramira and other deponents in this petition.

It is because of these reasons that I agreed on 6th April, 2006, that the constitution, ECA and PEA provisions were violated when many voters were removed from the register and were denied their right to vote. It was an unjustified disenfranchisement.

COUNTING AND TALLYING OF RESULTS

In our decision of 06/04/2006, we held that there was non-compliance with the provisions of the Constitution, the ECA and PEA in the counting and tallying of the results. This point has an obvious bearing on multiple voting and ballot stuffing. In their report (R2) released on 24/2/2006, the European Union Observers state **" Counting procedures were also generally followed in polling stations observed, although in over half of counts observed, recouncilliation did not take place at the start of the process and in close to half the cases, results were not immediately posted."** Therein lay the danger. The petitioner alleged in para 8(b) to (d) of his amended petition as follows:

"8 (b) Contrary to S.32 of the Presidential Elections Act, the 1st Respondent allowed multiple voting and vote stuffing in many electoral districts in Uganda.

(c) Contrary to S.32 of the Presidential Elections Act, the 1st Respondent failed to cancel results of polling stations where gross malpractices and

irregularities took place in particular in the districts of Kiruhura, Manafwa and Pallisa.

(d) Failing to declare the results of the election in accordance with S.56 and S.57 (4) of the Presidential Elections Act …….. and Electoral Commission Act.

Section 32 of the Presidential Elections Act governs voting at the presidential election. According to subs (1) thereof,

" 32 (1) A person shall not vote or attempt to vote more than once at an election irrespective of the number of offices held by the person relevant to the election."

S.56 of the Presidential Election Act is concerned with the work of a returning officer. After adding up and declaring results for each candidate, a returning officer must complete relevant return forms and thereafter transmit them to the Commission.

Mr. Ogalo Wandera relied on the second affidavit of Pte. Barigye, the affidavit of Major Rubaramira and of ninety other deponents as evidence proving the allegations that there were country wide practice of multiple voting, pre-ticking and ballot stuffing in favour of the 2nd respondent. That Barigye voted at least 5 times and had 16 Pre-ticked ballot papers which were ticked in favour of the second respondent. According to this witness many other soldiers did the same.

On Pre-ticking, multiple voting and ballot stuffing, there are affidavits of Karyarugokwe Ambrose, Komujuni Anna both of Rukungiri, Yowana Tebasobelwa, and at least forty other deponents from different districts who deponed about multiple voting, pre-ticking and ballot stuffing.

In respect of para 8 (d) of the petition, Mr. Ogalo Wandera referred us to Ss.56 and 57 and to the contents of the affidavit of Major General Mugisha Muntu and contended that the Commission is required to first receive (from returning officers) return forms, reports of the elections, tally sheets and declaration of results forms as set our in S.56 (2) of ECA to enable the Commission to ascertain, publish and declare the results in a presidential election. He submitted that in the instant petition

the Commission declared the results before receiving the said documents. In that connection counsel relied on the information contained in the affidavit of Major General Mugisha Muntu. He also referred to the affidavits of Kamateneti Ingrid Turinawe and Kiroko Sam both from Rukungiri District: Kiroko was denied viewing the forms to verify their contents. Beti Olive.N.Kamya of Kampala District in her affidavit swore that there was a difference of 8,145 votes between the results noted by herself and what was announced by the electoral commission in respect of her constituency of Rubaga North for the petitioner. Ms. Edith Byanyima of Kiruhura District in her affidavit lists the irregularities she observed in Kiruhura District. I will later reproduce her affidavit in another context. These include interference in voting by security people, e.g., Captain Basheija. Other irregularities include presiding officers refusing to allow agents of the petitioner to observe voting or to verify declaration forms.

Kamatenite annexed a report by Mugume R.Kaginda, a Returning Officer. Counsel referred to Taaka Kevin (Busia District) to which were annextures of results and a report by an Assistant Returning Officer. This report details what happened. Taaka, was herself a candidate for women, Busia District M.P. She was the petitioner's coordinator and swore that in some polling stations presiding officers refused agents of the petitioner to see declaration of results forms.

In opposition, Mr. Matsiko contended that the allegations of ballot stuffing and multiple voting were not proved. He contended that Major Rubaramira's affidavits were contradicted by that of Barigye about the number of cards produced by the latter. So the two witnesses should not be believed nor relied upon. He contended, correctly, that because of ballot stuffing in Pallisa District, results of elections in some 7 affected polling stations were cancelled. He argued again surprisingly, that there is no evidence of ballot stuffing or multiple voting.

Regarding failure to declare results in accordance with Ss.56 and 57 of PEA, as alleged in para 8 (d) of the Petition, Mr. Matsiko submitted that the petitioner did not prove the allegation. He argued that Subs (1) of S.57 does not provide any specific method of ascertaining the results and contended that the Commission has wide discretion to employ any transparent method to ascertain the results. He relied

on Clause 7 of Article 103 of the Constitution for the view that the clause does not restrict the method of ascertaining. That clause reads as follows:

> **"The Electoral Commission shall ascertain, publish and declare in writing under its seal, the results of the presidential election within forty eight hours from close of polling."**

He relied on the affidavit of Mr. Wamala, an official of the Electoral Commission, the 1st respondent, for the view that results can be received by telephone or fax and, therefore, these are among the means available for sending results to the commission. (From this last submission by Mr. Matsiko, he impliedly admitted that original documents setting out formal returns were not available to the Commission at the time the results were declared).

He referred to the affidavit of Mr. Nyakojjo Sam another official of the Commission, who deponed to the old and current methods of transparency in transmitting results. He argued that the holding of a meeting between the Commission and the representatives of participating political parties is evidence of transparency even though some of those representatives were unhappy with resultant decisions. He prayed that this ground should fail.

Mr. Matsiko ignored the affidavit of Major-General Mugisha Muntu whose responsibility at the National Counting Centre was to ensure that results were properly received, ascertained and declared according to the relevant law. The General shows in his two affidavits that the law was not followed.

Mr. Matsiko opined that because clause (7) of Article 103 does not specify a mode of ascertaining results, the 1st respondent was free to employ any mode of ascertaining the results. He thus appears to ignore the provision of clause (9) which provides that Parliament shall, by law, prescribe the procedure for the election and assumption of office by a president. Had he appreciated the import of Clause (9) he would have agreed that that law is the PEA which in S.56 governs the duties of returning officers. That section was enacted in 2005, very much later after telephones and faxes were in use. Yet that law did not refer to the use of these facilities by the Commission.

S.56 directs the returning officers to, immediately after adding the votes, declare the number of votes obtained by each candidate, complete a return in the prescribe form and transmit to the commission:

- the completed return form,
- a report of the elections in the returning officers district,
- tally sheets; and
- declaration of results forms.

Freedom & Fairness

In Para 8 (c) the petitioner alleged that Contrary to S.12 (e) and (f) of the ECA, the commission failed to take measures to ensure conditions of freedom and fairness during the electoral process. Intimidation and violence against agents of a candidate have a bearing on counting and tallying of results and validity of declaration of results forms.

Mr. Matsiko submitted that Kamatenite Ingrid Turinawe should not be believed on what she deponed to as having happened in Rukungiri District because her informers did not swear affidavits to support her. Similarly, and like Mr. Nkurunziza, he rubbished, as hearsay evidence, portions of the contents of the affidavits of Ruzindana and Salaam Musumba whose affidavits refer to bribery and intimidation. In the case of Ruzindana, he testified about wide spread intimidation and bribery by agents of the 2nd respondent in his constituency of Ruhama and Ntungamo District in particular and generally in the country. According to learned counsel the petitioner failed to adduce credible evidence to show that the presidential election was not free and fair.

Multiple voting and Ballot stuffing.

This has a bearing on the counting and tallying of results.

The two respondents have provided counter affidavits in reply to the affidavits supporting the allegations of the petitioner. The fact that there was multiple voting and ballot stuffing in some seven or so polling stations in Pallisa District in Eastern Uganda was incontrovertible. As a result the Assistant Returning Officer of the District nullified those results. Some of the perpetrators of ballot stuffing and multiple voting wore army uniforms as testified to by Tazanya Musitafa, who was

FDC's Assistant Supervisor in charge of Buseta sub county, Pallisa District. He found Lt. Kaweru Daba and his paramilitary group terrorising and addressing people to vote for the 2nd Respondent. He is supported by among others, Tamwenya Charles. The group hounded out of the polling stations agents of other parliamentary and presidential candidates except those of the 2nd Respondent. Similarly Bwire Swaib testified about the same Lt. Kaweru's group at another polling station where polling officials were giving out ballot papers to people not eligible to vote at the station. On polling day, Mpima Kolonerio, presiding officer, was held hostage in Pallisa by the same group as they stuffed ballot papers at Kabowa station. Of course, Mpima later, for some strange reason, swore another affidavit in support of the respondents to disown some of the statements he had stated in his earlier affidavit!! But other witnesses to what happened to him and to the polling process have given their affidavits in proof of what happened.

Dr. Katebariwe testified about what happened in Rukoni sub country of Ntungamo District in Western Uganda.

According to Dr. Katebariwe's affidavit, para 4-

> ***"On polling day at Rukoni Sub country headquarters at around 10.00 p.m I found Bajungu, the Ag. Sub county Chief for Rukoni Sub County together with Katsigazi, the GISO, LDUs and other presiding officers opening ballot boxes and changing the declaration forms. I took a photograph of the proceedings copy is attached hereto enclosed as "A".***

The photograph depicts what took place that night -

Rukoni Sub County is in Ruhama constituency of Mr. Ruzindana for which he was contesting for re-election. He was contesting with Mrs. Janet. K. Museveni, the wife of the second respondent. Witnesses refer to the heavy presence of the army especially the Presidential Brigade Guard soldiers.

Dr. Katebariwe must have been very brave. Despite being arrested and detained till 2.30 a.m, he lived to tell what he saw.

His evidence supports what Ruzindana deponed to in his own affidavit about intimidation and interference by army personnel and other security agencies in the electoral process.

Bajungu admits that he was the Sub county Chief and an election supervisor of Rukoni SubCounty. He also admits that he is in the photograph taken by Dr Katebariwe but claims simply that it was taken **"while I was receiving sealed envelopes containing declaration forms from various presiding officers."** Why should Dr. Katebariwe take a photograph of an official innocently engaged in simple innocent activity? GISO Katsigazi admits being at Rukoni sub county claiming-

> ***"I only passed by Rukoni Subcounty headquarters to supervise the security situation in the area."***

He did this at 10.00 p.m. Why? I have said before, and I repeat it here, that army or security personnel, other than police personnel, are not suitable for ordinary electoral duties. The functions should be discharged by police.

Dr. Katebariwe talks of extra ordinary presence of members of the Presidential Protection Unit (Presidential Guard Brigade) in Ntungamo District and in Rukoni Subcounty in Ruhama constituency. In that subcounty the Unit was under the command of Mugaga Stanley. The latter admits that he is a member of that PP Unit and that at the material time he was at Lushome in Rukoni. But he claims that he was attending to his sick parents. His parents may have been sick. However, I am not convinced by his denials.

I have no hesitation in accepting Dr. Katebariwe's honest account that officials of the 1st respondent, i.e, the presiding officers, the sub county chief, in collusion with GISO and LDUs altered the declaration forms results in Rukoni Subcountry area and that PPU harassed the supporters of the petitioner. A similar graphic account is given by James Birungi Ozo who was FDC elections monitor in Kamwenge and Kyenjojo Districts. I will later reproduce his affidavit under issue No.3. He was badly roughed up by armed groups of LDUs, GISO who roamed about in the company of a man wearing NRM T-Shirt harassing voters at polling stations. The harassment of voters, ballot stuffing and multiple voting cut across Ntungamo District and the country as the evidence in the affidavits of witnesses from the Districts of Ntungamo, Kabale, Kisoro, Rukungiri, Bushenyi, Kihurura, Ibanda and Kamwenge (in the West), Nebbi and Arua in the North; Busia, Sironko, Mbale, and Iganga Districts (in the East) and Kampala and Mukono District (Central) illustrate.

Hon .Geofrey Ekanya, MP Tororo County, who was the Zonal coordinator for FDC in Tororo and Busia Districts, in his affidavit also depones about some of these malpractices. According to Ekanya, he and the RDC called Kasibante Dauda addressed rallies in Tororo and Butaleja Districts where the RDC intimidated supporters of the petitioner. The RDC and a woman called Felista Etyang told people who do not support NRM that the Army would be deployed to deal with them. According to Ekanya, two days before polling day, the Army was actually deployed in Tororo and Malaba Towns and in other areas in Tororo District. Military vehicles popularly called Mamba, were deployed and they cruised around Tororo and Malaba Towns and in the subcountries of Mela and Kwapa. (There are affidavits from Bungokho County, Mbale District, showing that a similar thing was at this time going on in Mbale District). This frightened the population and sent pervasive fear among voters which was no doubt emphasised by the roughing up of voters by Mr. Fox Odoi, a Legal Assistant to the 2nd Respondent.

Contrary to the assertion of the Chairman of the 1st respondent and of Messers Nsimbi and Wamala, there is ample evidence proving that the counting and tallying of results, before the declaration of the results were declared, was done contrary to the provisions of the ECA and PEA. Even if the evidence of Pte. Barigye is discarded, there is other ample evidence to support this finding.

Those were some of my reasons why I answered the first issue in the positive, namely, that there was non-compliance with the provisions of the Constitution, the PEA and the ECA in the conduct of the Presidential Elections of 2006.

ISSUE NO.2.

Whether the said election was not conducted in accordance with the principles laid down in the Constitution, Presidential Elections Act and Electoral Commission Act.

This issue arises from the petitioner's allegations set out in paragraph 8 of the amended petition which I reproduced earlier in these reasons. It will be noticed that evidence and arguments on the first and this issue are interrelated.

On 6th April, 2006, we stated that there was non-compliance with the principles laid down in the **Constitution, the Presidential Elections Act, and the Electoral Commission Act** in the following areas:

(a) *the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country.*

(b) *The principles of equal suffrage, transparency of the vote and secrecy of the ballot were undermined by multiple voting and vote stuffing in some areas.*

I must again say that the decision of the court on this issue was a compromise.

Mr. Ogalo Wandera cited five principles which characterise a free and fair democratic election. These principles were summarised by Odoki, CJ, in the reasons which he gave in support of the court's decision in a similar petition between the same parties in Presidential Election Petition No.1 of 2001 **in Besigye Kizza Vs Museveni Yoweri Kaguta and Electoral Commission.**

At page 34 of his reasons for the judgment of the Court, the learned Chief Justice summarised these principles thus: -

- *The Election must be free and fair.*
- *The election must be by universal adult sufferage which underpins the right to register and to vote.*
- *The election must be conducted in accordance with the law and procedure laid down by Parliament.*
- *There must be transparency in the conduct of elections.*

- *The result of the election must be based on the majority of the votes cast.*

These principles are indeed derived from the current Constitution and the Electoral Commission Act, 1997.

Thus clause (4) of Article 1 of the Constitution states-

> ***" 1 (4) The people shall express their will and consent on who shall govern them and how they should be governed through regular, free and fair elections of their representatives or through referenda."***

The right to vote is enshrined in Article. 59(1). The secrecy of the vote and the transparency of counting the vote and of the declaration of the results are set out in Articles 68 and 103 and are echoed in part VII, of the PEA, i.e. sections 48, 51, 54 and 57.

Mr. Ogola Wandera argued that the affidavits evidence of numerous deponents supporting the petition show that voters were deprived of the right to vote [see Rubaramira, Voters from the Districts of Kampala, Busia, Mbale, Nebbi, Ntungamo, Bushenyi, among others]. Learned counsel also argued that Ss.56 and 57 (4) of the PEA required that there is accuracy in counting votes and announcing results in a timely manner. In turn this requires that tally sheets be completed immediately after, so as to reflect the votes cast for each candidate. There is need, for a returning officer to announce the results before transmitting details to the Commission. This is transparency. Learned counsel relied on the affidavits of Major General Mugisha Muntu in support of his argument that the presidential election results were announced before the Commission received the necessary documents stipulated in S.56 of PEA. Under that section, declaration forms compiled by presiding officers must be transmitted to the Commission for the purposes of announcing the national results. Counsel opined that Dr. Kigundu, the Chairman of the Commission, did not satisfactorily explain this in his affidavits.

INTIMIDATION

Mr. Ogalo Wandera contended that there was countrywide spread intimidation of voters. He singled out the killing of three people at Mengo by Lt. Magara of the RDC's office, Kampala, the intimidation of voters in Tororo District especially on

the voting day (23/2/2006) by Fox Odoi, the Legal Assistant to the 2nd Respondent who in company of armed LDUs wielded a gun and fired it during broad daytime. This is deponed to by Hon. Ekanya in his affidavit.

Some of the threats, such as those in Bugiri were reported in writing by the petitioners' agent to the first respondent and to the CID Headquarters (See FDC letter dated 28th January, 2006) receipt of which is acknowledged by the two addressees. Apparently the 1st respondent did not reply to the letter.

The letter reads as follows: -

28th January, 2006.

The Secretary,

Electoral Commission,

Jinja Road,

KAMPALA.

The Officer-In-Charge,

Electoral Offences Squad,

Criminal Investigations Department,

KAMPALA.

Gentlemen,

RE:
1. ***CHARLES KITOSI LCIII, CHAIRMAN, MUTUMBA 2. SUBCOUNTY.***
2. ***JOSEPH WANGIRA OSINYA NRM CHAIRMAN, BANDA SUBCOUNTY***
3. ***TITO OKWARE SUBCOUNTY COUNCILOR, BUINJA SUBCOUNTY***
4. ***MUKISA JULIUS, BUSWALE SUBCOUNTY***
5. ***OUNDO KUUCHA, MUTUMBA SUBCOUNTY***
6. ***BARASA ONDYEGE, BANDA SUBCOUNTY***
7. ***NGUABE MUHULO, BANDA SUBCOUNTY***

We refer to the above named persons who are candidate Museveni's agents in Bugiri District and wish to bring to your attention the following:

Each of the said agents is moving in the villages with exercise books. Each interviews a voter asking for his/her name, demand to see the voters registration card and ask who the voter is going to cast the vote for in presidential and

parliamentary elections. All the particulars are then recorded in the exercise books. After this, the voter is informed that the agent has been asked by the Government to take these particulars to enable candidate Museveni and NRM make a decision about the voter.

The voter is left in no doubt that his or her decision will be subject of further action by the Government.

These actions are causing a lot of fear among voters and it is unfortunate that this countrywide exercise has not been stopped by the Electoral Commission.

Anyway, the abovementioned people are contravening section 26 © of the Presidential Elections Act which prohibits interference with the free exercise of the franchise of a voter. The offence carries a sentence of three years imprisonment.
The National Resistance Movement has through its spokesman sought to justify these crimes by claiming that the party is carrying out a census. ***This means that <u>these offences are being committed with the knowledge and approval of candidate Museveni</u> within the meaning of section 59 (6) (c) of the Presidential Election Act.***

We request you to immediately put a stop to these illegal practices.

Yours faithfully,

…….
Secretary Legal/
Constitutional and Human Rights Affairs.

cc. Returning Officer
Bugiri District

The letter implies that the exercise was countrywide.

Indeed, this type of threats or intimidation is mentioned by Charles Byaruhanga an FDC candidate in Kabaale constituency, in Kamwenge District, in Western Uganda, where an NRM Chairman also registered FDC supporters. Byaruhanga talks about threats and briberies and involvement of RDC E. Byabarema. FDC supporters were

assaulted. Byaruhanga reported some of the incidents to Obinga Onzi Gasper, the DPC, Kamwenge. This DPC admits receiving the report and took action.

On the secrecy of voting,
Mr. Ogalo Wandera relied on the contents of the second affidavit of Pte. Barigye and the counter affidavits filed by the respondents' witnesses

On the principle of equlity and fairness,
Mr. Wandera contended that his arguments about disenfranchisement apply to the violation of the principles of free and fair elections.
He contended that there was multiple voting and ballot stuffing throughout the country: see affidavits of Chabo Yasin of Yumbe District, Yowana Tebasobehwa of Sembabule District; Pte. Barigye, Judith Komuhangi and Muhwezi. J of Mbarara District, Assimwe. I .Kasigaire of Kanungu District; Mpiima K, a presiding officer in Pallisa, Bwire Swaibu of Pallisa District; Mubbala Dawsin, Kaigo Geofrey of Demogroup, Karyagowe.A, Komujuni.A. of Rukungiri District.

Mr. Matsiko for the respondents, contended that the allegations of ballot stuffing and multiple voting were not proved. He acknowledged that in Pallisa District, only seven (7) polling stations were affected and the Assistant Returning Officer (Higenyi) cancelled the results of those stations. As regards Barigye's affidavits and that of Major Rubaramira on multiple voting, Mr. Matsiko urgued court to ignore these two witnesses because they are inconsistent and contradictory to each other.

As regards the declaration of results in accordance with Ss.56 and 57 of PEA, Mr. Matsiko agreed that the Commission did not rely on the reports submitted by the Returning Officers. He argued that the petitioner had not proved the allegations in para 8 of his petition. He contended as he had done earlier that S.57 (1) of the PEA, does not provide a specific method of ascertaining results and therefore the commission has wide discretion to employ any transparent method to ascertain results. That clause (7) of Article 103 of the constitution does not restrict the

method of ascertaining the results. Counsel relied again on the affidavits of Mr. Wamala in support of his contention that results could be sent to the Commission by fax or by telephone. Learned counsel submitted that in the absence of any law prohibiting use of faxes or telephones, use of these means for transmitting results by returning officers was legitimate.

On transparency, he relied on the affidavit of Rwakojo the Commission Secretary. He contended that representatives of political parties participated in some decisions relating to the electoral process.

The affidavit of Pte.Barigye, attracted replies from six military personnel including Brig. Hudson Mukasa, the Commading Officer of 2nd Division, Mbarara. The other army witnesses are Pte.E. Tumusime, Pte. Kizza Moses, Lt Balamu Byarugaba, Pte. Wandera Rogers and Captain Remeo Nyabagye. The thrust of their evidence is to show that Barigye is a liar.

The Brigadier, naturally, would not know a private soldier such Barigye. He depended on his records which showed that Pte. Barigye joined army in July, 2005 and not 2003. The Brigadier denies Barigye's claims and swore -

(a) That soldiers were not given orders to vote for any presidential candidate.

(b) That soldiers were not given more than one voters cards,

(c) That on voting day he never collected voters cards,

(d) His soldiers were never engaged in multiple voting and

(e) That none of the soldiers mentioned by Pte. Barigye were arrested and the Brigadier annexed to his affidavit some five photocopies of an alleged list of soldiers detained in lock up.

Pte. E Tumusime in his affidavit denied knowledge of Pte. Barigye and of being imprisoned as claimed by Barigye. He voted in Kanungu and not Mbarara. Pte. Kizza Moses contradicts the Brigadier on when Barigye joined the army. The Brigadier seems to imply that barigye joined in July 2005 whereas Pte. Kizza swore that he met Barigye during air defence course in October, 2004 at Nakasongola. However Kizza denied being involved in election malpractices in Mbarara. He also denied being imprisoned as stated by Barigye. Lt Byarugaba the itelligence officer, of 2nd Division, does not know Barigye and denied what Barigye attributes to him on voting day. Pte. Wandera Rogers supports Barigye to the effect that in 2003

the later was in the army undertaking basic training course and in 2004 they both went on training in Nakasongola from where Barigye went to Kadogo Community Polytechnic in Mbarara in 2005. He denies being involved in election malpractices or being imprisoned. Cpt. R.D.Ndyabagye does not know Private Barigye and denied briefing soldiers about voting as claimed by Barigye. He denied involvement in issuing voters cards and the arrest of Barigye and group as claimed by Barigye.

On the question of ballot stuffing and multiple-voting the evidence of Muhwezi J. (Kakyeka polling centre) and Judith Komuhangi, in Mbarara District; of Asiimwe.I. Kasigaire at Nyakagyezi.I PS, (Kanungu District) of Bwire Swaib and Mubbala Dawson of Buseta subcounty, Pallisa District, and Kaigo Geofrey of Demgroup who saw people in yellow pickup and yellow T-shirts take over a polling station, where Mr. Mpiima Kolonerio, a presiding officer at Kobolwa Polling station was held hostage by people in the same numberless yellow pickup. According to Kaigo the group went to Kampala Trading Centre twice in the morning, the group ordered voters to vote for only the 2nd respondent and Namuyangu. In the afternoon, they returned, took over the station and ticked ballot papers in favour of R2 and Namuyangu.

According to Mpiima Kolonerio, these armed people in the numberless yellow pick-up-

"Alighted from the vehicle, locked voters inside (a classroom) and returned to the room where I was, held me hostage, grabbed the ballot papers and started ticking against presidential candidate Yoweri Museveni and Parliament candidates Hon. Jennipher Namuyangu and Kamba Saleh." These candidates were on NRM ticket. Namuyangu contested on women MP ticket while Kamba was for Kibuku county, constituency. Because of double dealing I do not place much relience on Mpiima's evidence. But there are other witnesses such as Kaigo and Tumwenya who saw what happened. Mpima Kolonerio was infact also proffered by the Respondents. He modified what he deponed earlier on 15/3/2006 in support of the petitioner. By drawing another affidavit for Mpiima, the conduct of the respondent's counsel tantamount to perverting justice. Tumwenya was the Petitioner's supervisor

in Kibuku Sub County. Kairaka Chris saw a presiding officer pre- ticking ballot papers in favour of the second Respondent.

In addition to Mpiima Kolonerio, the respondents produced affidavits of ASP Oyuku Jimmy Anthony, Pallisa Police station and Wairagala Godfrey. The latter's affidavit is to rebut Bwire Swaib's statements that ineligible persons were allowed to vote and that he (Wairagala) and Kaweru voted many times. He admits visiting many polling stations in Buseta subcounty to give lunch money to agents of candidate Lt.Kamba Saleh. He travelled in the same vehicle with Kaweru and Wampanda Stephen. The DPC just denies receiving a complaint from Bwire about conduct of Wairagala's group. Kaano Samuel replied to Mubbala's affidavit denying that as a Presiding Officer at Buyalya PS, he issued more that one ballot paper to any voters. Kintu Polycarp and ASP Bamunoba Ubaldo responded to the affidavit of Tamwenya Charles. Kintu was PO at Nanoko PS (Kampala T.C) where at 1.50pm men in a yellow pick up went and grabbed a booklet of ballot papers for Presidential and Parliamentary Candidates, ticked the papers and instructed Kintu to put those papers in the ballot boxes. After 20 minutes Tamwenya appeared and demanded to know what had transpired. It then started raining till the time of counting votes. When the RO arrived at 4.40pm, Kintu told him that he considered those ticked papers as spoiled. He denied being held hostage by the people in the yellow vehicle. Cadet ASP Bamunoba denied receiving a report from Tamwenya (the petitioner's supervisor in Kibuku subcounty) about what went on at Nanoko (or Mawako) polling station. He however responded to a telephone call report about commotion at Kobulwa PS where he found the Deputy District Registrary, the district CID Officer and the OC (police) Operations had impounded the vehicle of people causing the commotion. The Registrar had halted voting. That is the station where Mpiima Kolonerio was the PO. Indeed, Pabire Higenyi, the District Returning Officer, Pallisa District, confirmed in his affidavit that there were malpractices at Kobolwa, so he cancelled the election results of that station along with another PS. Higenyi swore his affidavit in reply to that of Anthony Adone who was the FDC Chairman in Pallisa District. The two affidavits relate to multiple malpractices. Both Adome (in para 11 of his affidavit) and Higenyi (in para 7 of his affidavit) agree that results of 2 stations were cancelled outright because of massive

malpractices. They both also agree that in at least 5 other stations the number of votes received were over and above the number of registered voters. The results were therefore nullified. This evidence proves allegations of multiple voting in parts of Pallisa District.

Asiimwe Ivan Kasigaire in Kanungu District an agent of the petitioner at Nyakagyezi polling station in his affidavit talks about multiple voting by Councillor Margaret, by polling agents of the 2nd Respondent. Polling Assistants and the Constable were partisan and did the same, despite Asiimwe's protests. Biruingi Robert (PO) and his assistant Byarugaba .F swore identical affidavits (except for their names) by simply denying what Asiimwe stated. I have no reason to doubt what Asiimwe swore.

Ms Judith Komuhangi was petitioners polling agent in Lubiri K-L Polling Station, in Mbarara Municipality. In her affidavit she accused Cpt .Chris Ndyabagye, Divisional Intelligence Officer, Mbarara, for causing multitple voting and chaos at the PO. She also accused a Mrs. Bwita for causing ineligible voters to vote. As a result of protests by Komuhangi, there was a scuffle. It will be recalled that Pte.Barigye implicated this same Captain in multiple voting. In his affidavit, the Captain devoted most of his affidavit in denying Barigyes statements. He denies knowledge of Komuhangi and what she states in her affidavit and asserted that although he voted, thereafter he was involved in duties of Regional Election Security co-ordinating committee headed by RPC. I do not believe the Captain

There is Hon. Ekanya from Tororo District and Hon. Nandala Mafabi and Rev. Phabiano Muduma who swore about what took place in Sironko District. There are affidavits of Asiimwe, Mayombo of Nkikizi, in Kanungu District deponing about massive preticking and voting at night. Respondents offered affidavits of Mrs.J. Mbabazi, Hon. Amama Mbabazi and Muhwezi. L to contradicts these.

Oginga Godfrey was FDC chairperson, Kichwanba subcounty, Bushenyi deponed about what took place there. There is James Barungi Ozo of Kamwenge District. Ozo was FDC elections monitor in Kyenjojo and Kamwenge Districts where he was terrorised by GISO and LDU armed groups who were accompanied by a man in an NRM T-Shirt.

The European Union Observers report (R2), annexed to Dr. Kiggundu's affidavit, shows that although these observers did not cover all the districts of Uganda, there was evidence of violence, threats thereof and intimidation as well as lack of level playing field.

There are many affidavits in further support of intimidation and violence. Samples are the affidavit of the Abdu Katuntu in Iganga District, and of the aforementioned Barungi Ozo. There is the affidavit of Augustine Ruzindana supported by affidavit of Dr. Katebariwe and Bisimaki in Ntungamo District. In that District we have affidavits of Karugaba Charles, Bakalema James, Kagumire, Alex Kamuhangire, Ssali Mukago, Kanyesige Kato and Kagonyera Constance. They all speak of harassment and, in some instances, assault and arrest by Hon. Mwesigwa Rukutana. He swore an affidavit in reply and infact admitted that Karugaba, Bakalema and Kamuhangire were arrested on 22/2/2006 by the ISOs and one of his own employees Kidokori allegedly because they were bribing voters or issuing FDC agents Appointment letters. The Hon. Mwesigwa Rukutana admits that on voting day, he caused these people to be transferred to and detained at Ntungamo Police Station. Kagonyera and Ssali Mukago in their affidavits talk about multiple voting, underage voting and violence by Mwesigwa Rukutana who indeed slapped A Taryatemba, the petitioner's agent, at Kanungu parish polling station, causing Kagonyera and Turyatemba to run away. Ssali Mukago was the petitioners coordinator in Bushenyi county (Constituency) Ntungamo District of which Hon. Mwesigwa Rukutana was the sitting MP and was seeking re-election. Ssali visited many polling stations where he noted malptractices such as multiple voting, underage voting and lack of secrecy and noted the chasing away of FDC agents. Though Hon. Mwesigwa Rukutana denies wrong doing, he, as stated earlier, admitted being involved in causing three deponents to be transferred to Ntungamo police station. He admitted his presence at Kagugu market polling station where he engaging in hot arguments with Bakulu Mpagi (RO), and an FDC agent Turyatemba about voting malpractices. I believe Ssali and Kagonyera in what they state and I find as a fact that the Hon.Mwesigwa Rukutana was involved in malptractices. The respondents offered the evidence of Bajungu Natuyamba, GISO Katsigazi Francis and Mugaiga of PPU to contradict Dr. Katebariwe. As shown later, Katebariwe's

evidence is credible. Nathan Nandala Mafabi from Sironko District is supported by Rev. P. Muduma about intimidation and multiple voting in the same Sironko District. The affidavit of Jack Sabiti is supported by Rukandema, D.Katwakura.A in Kabale District. Mushebo, Nafula, Nabulayo, Khaitsa and others deponed about Musoola, in Bungokho, in Mbale District. They were terrorised and intimidated by military personnel led by Mr. Joram Mayatsa, NRM Mbale District Chairman before and during election day. In his reply Mr. Mayatsa and Nashawo James Wateya, (a PO), denied the allegations. Mayatsa admitted that he was escorted by an armed police man. He makes no attempt to justify why he had to be escorted by an armed policeman, if election was being conducted under conditions of freedom or fairness. Indeed, Wateya contradicts Mayatsa by claiming that Mayatsa never went to his (Wateya's) polling station with an armed policeman.

As stated earlier, intimidation was widespread in the country. I have mentioned some of the witnesses in Mbarara District. Ms Damali Nagawa deponed about what happened in Mbarara. She was FDC Coordinator for Ruti Ward in Nyanutanga Division, Mbarara District. On 23/2/2006, she left home at 6.00 a.m for distribution of appointment letters to FDC polling agents and assign the agents to respective polling stations. She was in the company of an LC I Chairman. When she reached Ruti Trading Centre, she met with a GISO man and LDUs on a pick up. The GISO man told her that it was illegal for her to move around before 7.00 a.m. The LCI Chairman run away while Nagawa was arrested and taken to Mbarara Police Station where she was detained with about 300 other FDC supporters until 3.00 p.m when Charles Atanba, Stephen Katembeya and Edith Byanyima intervened before the group was released by the Police!!

Although Nagawa did not name the GISO man, he is Mpairwe Moses who is in charge of the Division. He responded to Nagawa's affidavit. According to him, on 23/2/2006 at about 5.00 a.m he received a phone message to the effect that Nagawa **"was involved in the distribution of sugar to voters."** He and his **"constables"** intercepted Nagawa who was in the company of an LC I official. The LCI man **"took off"** on his motorcycle. Mpairwe and group asked Nagawa where she was coming from and where she was going. According to him, Nagawa rudely responded telling him it was none of his business. But she stated that she was

distributing appointments letters to FDC polling agents, although she did not have those letters. All returned to Nagawa's home where they found two ladies who said they were waiting for Nagawa to assign them duties. Mpairwe and his group took Nagawa and the two ladies to LCI Chairman. The latter sighted the group and disappeared. He then consulted DISO (District Internal Security Organisation) officer and took Nagawa and the two women to Police. The OC, Mbarara Police Station also replied to Nagawa's affidavit and deponed that it is true Nagawa was one of the people who were arrested and taken to police on 23/2/2006 on allegations that she was one of the people involved in bribing voters. The OC denied that there were 300 people detained. He admits that Nagawa was eventually released because there was no merit in the complaint against her!!

Clearly the evidence of Nagawa has been substantially corroborated by the response from GISO and the OC. What the Nagawa evidence establishes is that in Mbarara, some FDC supporters and agents were intimidated and harassed even as late as on voting day. The OC does not really indicate the time of release but the time given by Nagawa must be accepted. The Nagawa incident and these affidavits of many other witnesses to intimidation by ISO security officers appear to point to the fact that ISO was heavily involved in intimidation of opponents of the 2nd respondent who happened to be the incumbent president under whose office is ISO (Internal Security Organisation) run. If such an incident occurred in one place or two or even three separate places, I would treat those as isolated incidents of some enthusiastic officials. In the case of Nagawa, Mr. Mpairwe, a Gombolola ISO Officer, his District Officer who gave orders for the arrest and detention of Nagawa, meaning that ISO was heavily involved in the elections.

Thus in Bushenyi District, Twinomujuni Appollo was FDC Chairman in Bihanga Subcounty. He cordinated and deployed polling agents for FDC. On polling day, at Nyakaziba polling station, he found Gilbert Bintabara, an ISO official with other men carrying guns and these men were threatening and telling voters to vote for the 2nd respondent. He chased away FDC polling agents and dared Twinomujuni to do whatever he wanted about it. When Twinomujuni tried to prevent Rutankundira, LC3 Movement Chairman from multiple voting, Byamugisha Gerevasio, a GISO pushed Twinomujuni away. After voting Bintabara ordered FDC agents **"to sign**

declaration forms if they wanted their lives" One Babigumura Peter a PO at Nyakaziba is among those who replied to Twinomujuni. Although he denied the presence of Twinomujuni at Nyakaziba, he admits the presence of Gilbert Bintabara (ISO), of GISO Byamugisha Getevasio and LC3 NRM Chairman C. Rutankundera. He did not see any of the three men do what Twinomujuni ascribed to them except that the GISO man Byamugisha spoke to the polling agents. On his part, GISO Byamugisha claimed he was in-charge of his sub county where he monitored security situation on the polling day and that indeed he visited Nyakiziba polling station and talked to polling agents who reported no problem. He denied that Bintabara had guns nor threatened people. He denied meeting Twinomujuni at polling station nor pushing him. He only met Twinomujuni in the evening at the subcounty where poling materials from different polling stations were being collected. Neither Byamugisha nor Babigyeni have provided any reason why Twinomujuni should implicate them. I believe Twinomujuni's version of what happened.

Again there is the affidavit of Turyasungura Joseph of Nyabirerema, Rukiga constituency of Kabale District. He was a campaign agent for the petitioner for the presidency and for Jack Sabiiti for the constituency.

On polling day at Kakatenda polling station, he saw Rubaramira Bernard, Mrs Kabarisa and Apollo Nyegamehe giving money to voters and urging them to vote for the 2nd Respondent. When he intervened, LDU Commander, Buherezo, who was accompanied by four other armed LDUs chased him away. Shortly after, Pte. Byamugisha, of the Directorate of Military Intelligence arrived driving a double cabin pick up carrying Lt. Kakooza and two other soldiers who were brandishing pistols. These army men grabbed Turyasingura, beat him up and dumped him on the pickup and drove to and kept him at Kabale police station where he was detained till evening where he was released when the voting was over.

As the army men drove away, they telephoned some one and reported to have got hold of a big fish. Turyasingura deponed that his arrest caused many FDC supporters to go into hiding. A similar story is told by Kainamura of Nyabirerema parish who was picked by armed men at Kabaare polling station dumped on a pickup and driven to and detained at Kabale police station till after the voting. I

must mention that these two deponents are among the 11 deponenets to whose affidavits Mr. Nkurunziza objected on the ground that the affidavits were disowned by advocate Mwene Kahima and that they contravened S.64 of Advocates Act.

Mr. Apollo Nyagamehe was NRM District task force in charge of NRM agents in Bukinda Subcounty. He denied statements by Jack Sabiiti and Turyasingura that he together with Rubura Rubaramira, Mrs. Kabirisa bribed voters with money, sugar, salt and soap on 23/2/2006.

Franco Bindeeba was the Presiding Officer at Kabaare polling station. He stated that *"there was no incident where Kainamura was picked up by armed men, placed at gun point and or placed on a pick up and driven away. He never saw terror and chasing away of voters."*

Apollo Nyagamehe does not say whether Turyasingura was at the station stated in the affidavit neither does Franco Bindeba say so in respect of Kainamura. Mr. Kafeero Moses, OC, Kabale police station, claimed that Kainanura was arrested and charged on suspicion of bribing.

Interestingly, both Turyasingura and Kainamura produced police form 18 showing that they were detained but released on 24/2/2006 on bond where Jack Sabiiti and Rev. Fr. Gaitano were sureties for the two men. The police form (Bond) shows that the two men were charged with inciting violence and not bribing, as Kafeero claimed.

I believe the stories told by both Turyasingura and Kainamura. As I stated earlier, while giving reasons why their affidavits should be admitted, the alleged irregularity in the drawing and filing of the affidavits does not diminish their evidential value.

Turyamureeba Mande, an FDC Chairman of Nyakagabagaba parish, in Kabale District, depones about similar facts as Turyasingura. He coordinated election activities for the petitioner in the parish. On polling day he went to Kihorezo polling station to vote at 11.00 a.m. On reaching there, a pick up full of soldiers armed with guns and pistols arrived. Among the soldiers was Bosco. The witness was identified to the armed soldiers as FDC Chairman. The soldiers cocked their guns and **"one of them put a pistol on my (witness's) head and arrested"** him. He was put into the pick up which was then locked. The armed soldiers then demanded to know if there were any other FDC supporters. Voters were scared and

said no. The soldiers ordered everybody to vote for the 2nd respondent. The witness was then driven to Kabale police station where he was detained overnight. He never voted. He was released on police bond the following day when again Jack Sabiiti and Rev. Fr. Gaitano stood surety for him. Advocate Mwene-Kahima simply denied drawing Mandes' affidavit. I discussed this earlier. I believe the evidence of Turyaimureeba Mande which corroborates the evidence of the other three deponents about threats, violence and intimidation of voters by soldiers and other security agencies personnel.

In Kanungu District a sample of evidence on intimidation is the affidavit of Byarugaba Charles who was Chairman of Kanungu District FDC task force.

According to this man, during the campaign period NRM put forth the message that voting for the petitioner meant voting for war and that failure to vote for the second respondent means taking the country back to war and misery. Ordinarily this could be characterised as exercising freedom of expression in a campaign period. However he deponed that NRM agents staged war films in the two towns of Kanungu and Kihiihi showing film wars of former presidents Idi Amin and Obote. During the film shows, the audience was given the message that not voting the 2nd respondent meant voting for the past days of terror and chaos. He claimed in his affidavit that on the eve of election, i.e, 22/2/2006, at 9.00 p.m, the police arrested him on his way home after meeting his party parish agents and coordinators. The police removed shs 687,500/=, $8 and 80 Euros from him. That this money was intended to be paid to FDC polling agents as lunch allowances for 23/2/2006. His arrest was announced by NRM agents through out that night on Nkikiizi FM Radio allegedly owned by Hon. Amama Mbabazi and he opined that this demoralised FDC supporters. The Hon. Amama Mbabazi responded to some of Byarugaba's statements. He deponed that the radio is a limited liability company and a commercial enterprise. That the NRM campaign in Kanungu District was based on the achievements of Uganda and the Movement Government and Programmes set out in the NRM manifesto. In para 13 he stated that the Kanungu District NRM task force did not stage films anywhere in the district showing wars of Presidents Amin and Obote nor sponsor broadcasts on Kinkiizi FM Radio to the effect that a vote for candidate Besigye was a vote for war.

Although Muhwezi Laban's affidavit is headed **Reply to Affidavits of Mayombo and Byarugaba**, the affidavit says nothing about the latter's affidavit. Muhwezi was the Registrar of Kanungu District. The affidavit is at page 52/54 of R's Vol.III.

ASP Joab Wabwire, the OC Kanungu District Police Station also replied to Byarugaba's affidavit. He admits the arrest of Byarugaba at night and states that the police had received information that Byarugaba was driving around Rutenga Subcounty distributing money and hoes to voters. The OC states that at Rutega, he **heard** that Byarugaba **"had distributed money and hoes to voters which we recovered and exhibited at police."**

Then OC and his team went to Mafuga looking for Byarugaba. They arrested him and on searching him removed from him shs 687,500/= which was exhibited. That Byarugaba was subsequently charged with the offence of bribery.

It should be noted here that the OC does not say he found Byarugaba carrying any hoe. He does not mention any individual from whom he recovered hoes or money allegedly given by Byarugaba. There is no evidence of any deponent saying he/she was bribed by Byarugaba. So the OC's evidence on bribery is valueless.

Elliot Kabangira swore as Manager and News Editor of Kinkiizi FM Radio. He echoes Hon. Mbabazi statements that Nkikiizi FM Radio is a private company. Kabangira, in para 5, denied that the radio station broadcast any announcements that Byarugaba Charles has been arrested or detained. He contradicted this in para 8 of the same affidavit by deponing that –

"Nkinkiizi FM included in its news brief on the morning of 23rd February, 2006, the news then that Byarugaba Charles had been arrested on 22nd February, 2006 and was in police custody as per the information from the police. The station has news in Runyankore Rukiga at 7.00 a.m, in Kishwahiri at 900 a.m and in English at 10.00 a.m."

According to this witness, the DPC had passed by the radio station and informed the witness that Byarugaba had been arrested and shs 687,500/= was found in his possession and was suspected to be for bribing voters. Here the arrest of Byarugaba is corroborated. The motive of the DPC reporting the arrest to a radio station manager is not easy to explain since apparently when Byarugaba was arrested, he was not found bribring any body. I have not seen any affidavit of any body claiming to have been bribed. I am inclined to believe Byarugaba that his arrest and

subsequent announcement on the radio of his arrest was ill-motivated intended to cause fear and fright among supporters of the petitioner who could hear about the arrest. This is the gist of Byarugaba's affidavit.

I may point out that although Hon. Mbabazi and Mr. Kabangira say the Nkinkizi FM radio is a private limited company commercial enterprise, each was careful not to mention the shareholders of that private company nor the real proprietor(s).

As already noted Mr. Ekanya detailed what Mr. Fox Odoi, a Legal Assistant to the second respondent, did on the polling day in Tororo Town. This is how Ekanya describes the situation, in paras 10 to 13 of his affidavit:

> ***"10. That on polling day Fox Odoi, the Legal Assistant of the second respondent terrorised voters in Tororo Municipality.***
>
> **11.** ***That I saw the said Fox Odoi armed with a gun accompanied by Local Defence Units blocking the road between Tororo and Mbale and forcing passengers out of the vehicle.***
>
> **12.** ***That I heard him order the LUDs to undress the passengers and to beat them up which LDUs did heartly using gun buts.***
>
> **13.** ***That the said Fox Odoi fired in the air and many voters run back to their homes and did not vote.***
>
> **14.** ***That he eventually dumped the passengers at the police station."***

In para 23 of the affidavit accompanying his petition, the petitioner raises this incident and alleged that his supports were harassed, assaulted and intimidated by Fox Odoi. This allegation is proved by Ekanya.

There is no evidence proving or suggesting that Odoi did all these things to advance his own personal activity. In his affidavit, he states that he was on his own things. This things are not metioned. Mr. Fox Odoi, in his affidavit, down plays his

activities. Some of the victims of his violence swore affidavits. One Epakasi Lawrence of Aukot village, Tororo District, swore such affidavit denying that he was assaulted by Odoi. However he admitted seeing Odoi together with **"policemen"** at the scene where the policemen arrested this unfortunate man and four other men. Epakasi claims he had already voted. Others were going to vote. After being detained at Tororo Police, he was taken to CID headquarters where he and the others made statements allegedly denying being assaulted by Mr. Odoi.

There are affidavits of Abenaitwe Ezera of Bushenyi to which are replies of affidavits by DPC Aguma J, Hon. Prof. T. Kabwegyere and Ntege. There is the evidence of Fred Kagumire, of Mbarara District and Edith Byanyima, in Kiruhura District.

Byanyima was assigned by the petitioner to supervise and monitor the polling day process in Kiruhura District. She deponed about what she noted, or what was reported to her by FDC agents, about intimidation, interference, in electoral process and chasing away of FDC agents from some polling stations. To her affidavit are replies by Musindi Rogers, a Presiding Officer, at Rusherere, Matsiko.H.E, an LC3 Chairman, Captain David Bashaija an LC5 Councillor, Kagaba Allen Mukyira, Rwakashaija S, George Kabagambe, LC2 Chairman, Mugume A, G.Byabakama, Kansiime.C, Presiding Officers.

At the risk of being lengthy, I will produce what Edith Byanyima swore about her experience in Kiruhura District and summarise the evidence of respondent's witnesses who replied to her affidavit.

1. *That I was appointed by the petitioner to supervise and monitor the voting process on polling day in Kiruhura District.*

2. *That I travelled through the district and observed many irregularities.*

3. *That at Sanga and Kanyereru polling station there was no secret ballot as voters were required to openly tick the ballot papers at the first table.*

4. *That at those two polling stations I saw captain Bashaija who is also a Councillor Local Council V leading a group of soldiers and local defence units and overseeing what happening at the polling stations.*

5. That I met several people who informed me they had not voted because of Bashaija and his men.

6. That at Rushere polling station the petitioner's agent had been chased away and ballot boxes were not sealed. When I protected to the presiding officer he too informed me the boxes had come without seals.

7. That at Omukatongole polling station I found the second respondent's agents seated on the same table with the residing officer John Mwesige and when I protested to him, he informed me the agents were very important persons in the area. I also observed that the ballot boxes were not sealed.

8. That at Rushonge polling station the Presiding Officer Justine Ingeine allowed underage persons to vote as well as people not in the roll nor holders of voters cards and that when I threatened to report him to police he stopped and said he would not repeat the same mistake.

9. That I reached Nyakasharira Polling station at 2:00 p.m only to find the petitioners agents chased away and so I appointed Mapozi and Kagezi and left. That when I reached the trading centre about 100 meters from the polling station Mapozi and Kagezi came running after me and informed me they had been chased as well.

10. That I went back at the polling station and pleaded with Matsiko Hope the councillor of the area to prevail on the presiding officer to be fair. When I went back in the evening to collect the declaration of results forms Kagezi and Mapozi both informed me that though they had been allowed to stand around, the presiding officer had refused to give the declaration forms.

11. That I reached Kirihura polling station at 3:00 pm and found that the petitioners polling agents had been chased away allegedly because they

were not registered voters. That I appointed Mbabazi Allen and Matsiko Edward.

12. *That I arrived at Rugongi I polling station and found the petitioners agent Zabandure Edward petrified. He pleaded to leave with me because he had questioned the ballot stuffing by Chairman LC.II Kabagambe Justus and has been threatened.*

13. *That I appointed Bakunde David and left with Zabandure. I later met Bakunde who informed me the presiding officer had refused to give him declaration forms.*

14. *That at Malina polling station the petitioner's agents refused to sign the declaration forms because of the ballot stuffing."*

Musindi Rogers, a PO for Rushere PS, in his reply to Byanyima's affidavit stated that what the latter deponed in para 6 is false and that he never saw Byanyima at his PS. Although he claimed in para 7 that no agent of the petitioner came to the PS, he in effected contradicted himself when he stated in the next paragraph that "the only person I saw representing the petitioner was Kagumire Fred who came at 2.30 p.m and asked about presence of any agents of the petitioner. Musindi does now tell us the answer he gave to Kagumire about the petitioner's agents. Matsiko Hope Eric, an LC.III Chairman of Keshunga subcounty deponed that what Byanyima stated in Paras 7,8 and 10 of her affidavit is false.

What is stated to be false in para 7 is the name of the presiding officer. While Byanyima mentions Mwesige, the LC.III Chairman mentions Tumwesige. As regards para 8 of Byanyima's affidavit, the Chairman claims that there was no polling station called Rushonge and that he does not know one Justice Ingeine. Byanyima deponed that the PO at Rushonge was Justine Ingeine who allowed the underaged to vote. Although Chairman Matsiko denies that Byanyima pleaded with him to prevail over the PO of Nyakasharira III to be fair, he admits having a brief dismission with Byanyima there. He does not mention what the discussion was about. Byanyima stated that she discovered that the petitioner's agents had been

chased away. She was forced to appoint new ones and so she appointed Mapozi and Kagezi. The Chairman admits that these two were agents but seems to suggest that they were not also chased away as stated by Byanyima.

Incidently the chairman's evidence seems to support Byanyima to the effect that she went around checking on PS and yet Musindi and some other PO whom Byanyima implicates in malpractices deny seeing her. Rushere PS manned by Musindi as well as Nyakasharira are in Keshunga Subcounty. It is improbable that Byanyima could visit Nyakasharira and leave out RushereI noticed that Akandwanaho Amoni, a polling assistant at Omukantongole polling station which is also in Keshunga saw Byanyima attempting to open ballot boxes there to check on sealing. This is evidence of the movement of Byanyima.

There is something peculiar about Chairman Matsiko. Although he swore that he was an LC3 Chairman and a registered voter, he does explain what was his role in polling matters which enabled him to know such particlulars as names of polling officers and particular polling stations so as to be able to challenge Byanyima on these. Matsiko's activities support the concerns expressed by the European Union Observers in their report about the continuation of the old NRM system up to the election day, despite the fact that these elections were held under multiparty political dispensation and that this led to lack of level field. The fact that Byanyima implored him to intercede points to the influence which LC officials could bring to bear an elections.

Retired army Captain Bashaija David, is another one who responded to Byanyima's affidavit in paras 4 and 5. She implicated the captain in leading a group of soldiers and LDUs at Sanga and Karyerera stations to make voters tick ballot papers openly. The captain is an LC5 Councillor in Kiruhura District where he is also Secretary for Defence. He knows Byanyima but claim he did not see her at Kibega PS where he voted at 11.00 a.m. He denied visiting the two polling stations as stated by Byanyima. I think that visiting at Kibega at 11.00 a.m is no proof that Byanyima was not there at a different time. I have found no explaination about why Byanyima should falsely accuse the captain who by virtue of his post as District defence secretary would normally supervise the LDUs.

Rwakashaija.S. was a polling constable at Kanyerera PS on 23/2/2006 and claimed that he never saw captain Bashaija there, alone or with LDUs, nor was there open voting. Allan Kagaba Rukira was a Presiding Office at Nombe III PS which is at Sanga subcounty Hqtrs. He stated that there was no PS known as Sanga. He denied that voters ticked ballot papers at presiding officers' table as claimed by Byanyima. I note that although Kagaba asserts that there was no polling station called Sanga, Captain Bashaija referred to such a station. In any case Kagaba admits that Nombe III is at Sanga subcounty Hqtrs which probably explains why Byanyima calls it Sanga as does the Captain.

The other witness is George Kabagambe. Like Matsiko (LC3) Kabagambe is an LC 2 Chairman in Rugonyi Parish, in the same Keshunga subcounty. In effect he denies that he is Kabagambe Justus whom Byanyima implicated in threatening Zabandure Edward, a petitioner's agent who had challenged Kabangambe because he (Kabagambe) was engaged in ballot stuffing. The chairman denies knowing Byanyima. He swore that although he knows Zabandure, he never saw the latter at the PS. Kabagambe is yet a member of the old NRM retained up to election day. I note that because Zabandure, an FDC agent at Rugongi, was petrified by Kabagambe's threats, Byanyima substituted Bakunde David for Zabandure at Rugongi PS. The PO of the station, Basiime Boaz, in effect corroborates Byanyima. Although Basiime denies seing Zabandure, he accepts that Bakunde David was an agent of the petitioner at the station. Kabagambe simply denied knowledge of Byanyima. Neither Kabagambe nor Basiime deny seeing Byanyima at Rugongi Polling Station.

Mugume Arthur was the presiding officer at Karyaryera. He deponed that he does not know Byanyima and that he was a presiding officer at Karyaryeru but not Kanyaryeru referred to by Byanyima in her affidavit. This appears to be a typing error. Indeed both captain Bashaija and Rwakashaija refer to the PS as Kanyanyeru and Kanyaryeru respectively, while referring to the same polling station. The other witness for the respondents is Geofrey Byabakama who was PO at Rushere1 (A-L). He deponed that it is not true as Byanyima stated in para 6 of her affidavit that there were FDC agents at the station nor were they chased away. That only NRM and foreign monitors had agents at the station. He denied knowing Byanyima. That may explain his failure to recognize her. Akandwanaho Amon, alluded to earlier, stated

that it is not true, as Byanyima says in her affidavit, that at Omukatongole, agents of 2nd respondent sat at the same table with PO. Interestingly, the actual presiding officer implicated by Byanyima does not appear to have sworn any affidavit denying being involved in the malpractices. It is chairman LC3, Matsiko, whose role in elections is not disclosed, appears to suggest that the name mentioned by Byanyima as that of PO is not correct.

Kansiime Caleb was PO at Rushare II PS where he arrived at 12.50 on polling day. This time is confusing. He denies that the petitioner had agents there as claimed by Byanyima. He denied seeing Byanyima at the station. Twongyereho Robert, presiding officer at Nyakasharura III PS, was the last of the respondents' witnesses who replied to Byanyima's affidavit. He admits that Mapoza (Asiimwe) and Kagyezi were FDC agents. He denies knowledge of Byanyima and does not know whether she visited his station or not.

Twongyereho is not honest. He denies seeing Byanyima at the station yet LC3 Chairman, Matsiko, says Byanyima was there and she held a discussion with him (the chairman) at that station. Of course the chairman does not disclose what the two discussed. I have no doubt in my mind that in the discussion Byanyima was pleading with the chairman to prevail upon the PO to be fair and to allow FDC agents to be present and do their agency work.

I have evaluated the evidence set out in affidavit of Byanyima and those of the tweleve offered by respondents. As I pointed out above, there are some contradictions and inconsistencies in the evidence of these witnesses of the respondents. Byanyima gives the image of a courageous woman who went about her coordinating work bravely in the Kiruhura district, the home district of an incumbent presidential candidate. I find as a fact that what she described is what happened and I accept her account and reject that given by the respondent's witnesses.

Kamateneti Ingrid Turinawe deponed about intimidation, violence and arrests of FDC agents and supporters in Rukungiri District. She annexed to her affidavit a letter from FDC Chairman, Rukungiri dated 24/2/2006 which is a summary of the complaints allegedly made by FDC to Rukungiri District Returning Officer. In

varying degrees the complaints included arrest of FDC agents, making FDC agents to sign declaration forms before voting, deployment of Army by RDC, bribery and, distribution of salt and soap to voters, lack of secrecy during voting, refusal by POs to hand over declaration forms to FDC agents, unsealed ballot boxes and multiple voting. Kamateneti's affidavit drew responses from the RDC, Mr. Byabakama Charles, Nkurunziza Francis, District Registrar, District Police Commander, Okoti R. Obwona, Ntaho Frank, the returning officer/CAO, Zedekiya Karokora, the then LC.5 Candidate for Chairmanship, DISO Bwogi Hadge Asuman and Ruraka Byaruhanga George an NRM Subcounty chairman, Kebisoni.

I have considered the evidence of these witnesses elsewhere but the general drift of these witnesses for the respondents is that they deny what Kamateneti state. Some of them, such as Zedekiya Karokora, admit the presence of NRM money but he says it was for facilitation of NRM electoral work. Nkurunziza was at least honest enough to admit that there were some unsealed boxes, which were eventually sealed. This was done after Kamateneti and the petitioner personally had reported the matter to the District Returning Officer where they found Nkururnziza.

About more malpractices there is the affidavit evidence of Mayombo Dick, Rukandene, Byaruhanga Charles of Kanungu District to which the Hon. Amama Mbabazi, Mrs J. Mbabazi; Mr. Elliot Kabangira, Mr. Ben Rullonga (RDC) responded.

I have read the affidavits of Major Henry Matsiko and other deponents who challenged what the petitioner's supporters deponed on what happened in Kabale District. Major Matsiko refuted what Jack Saabiiti stated about the former's role in electioneering process especially in acts of intimidations, bribery and showing of war films. But the election observers' reports such as those of Commonwealth Observers team, Action For Development, Demogroup, FHRI, and Hurinet, tend to corroborate the facts deponed to by supporters of the petitioner on allegations, inter alia, of intimidation by soldiers and other security personnel. Perusal of affidavit of Byarugaba.C, David Dongo Katwakwora, Twinomukago, Vanice and Ensinikweri Godfrey for the petitioner and those of the Hon. Amama Mbabazi, Mrs. J.Mbabazi,

Major H. Matsiko, Elliot Kabangiri for the respondents leads to a clear inescaple conclusion.

To quote the mild conclusions by Action for Development, they said-

> ***"Generally, the elections were seen to be free but the whole process was not fairly done. There was unseen intimidation due to the presence of army since women were told that if they don't vote the incumbent, war would break. Citing many irregularities by our monitors in different polling station was an indication that the elections were not free and fair."***

These pieces of evidence prove that the principles of free and fair election, transparency, etc, were trampled upon and were not complied with. Moreover the incidents cited by deponents are not isolated. If a legal Assistant to the 2nd Respondent, other soldiers, and Presidential Guard Brigade, LDUs, ISOs are involved in flouting the electoral law in very many districts across the country, the inescapable inference must be that this was an organised operation. At the material time the Secretary-General of NRM was the Minister of Defence. The second Respondent was the Command-in-Chief of the Army. In Western Ugandan, the evidence shows intimidation appears to have been the norm rather than the exception. I am unable to say that during a civilian election in Uganda of today security personnel such as ISO, PGB, LDU, on their own can cause army vehicles to rumble through some villages in such Districts as Mbale, Tororo, Ntungamo, or Bushenyi by accident. Similarly I can not understand how PGB, other soldiers, DISO and LDUs appear in sizeable numbers at polling stations where some of them threaten voters or direct voters to vote for the 2nd Respondent and members of Parliament contesting on the NRM ticket. Obviously the elections were not conducted in accordance with the principles laid down in the Constitution, the PEA and the ECA. One certainly makes the same irresistible conclusion when presiding officers from many stations across the country encourage or force pre-ticking, ballot stuffing and multiple voting: The same conclusion is made when so much money is splashed around in payment to poor voters or giving such poor voters gifts. NRM of which the 2nd Respondent is the leader has been leading the country for many

years even though as a political party or organisation, it was registered in 2005. Its presence and leadership was or should have been well known to the country and to the voters. The fact of introduction of multiparty election was known by NRM or at least by its leaders more than a year in advance of the elections held on 23/02/2006. So giving money and gifts around the country during the last one week or two weeks before the election day cannot be described as intended for just facilitation of NRM functionaries to buy such things as pens, pencils, etc. This must be money targeting the poor voters. In my opinion, this went against the principles of fair, free, democratic and transparent electioneering.

Even if the evidence of Pte. Barigye and of Major Ruranga Rubaramira is disregarded, the other evidence available does establish:-

(a) Violations of the principles of free and fair election, bribery, intimidation and violence and

(b) Multiple voting and vote stuffing. These contravened the law.

It was for the foregoing reasons that I concurred in the finding of the Court on the second issue and answered the issue in the affirmative.

ISSUE No.3.

WHETHER IF ISSUE 1 OR 2 OR BOTH ARE ANSWERED IN THE AFFIRMATIVE SUCH NON-COMPLIANCE WITH THE SAID LAWS AND PRINCIPLES AFFECTED THE RESULTS OF THE ELECTION IN A SUBSTANTIAL MANNER

In my opinion, this issue and the next issue (No.4), pose and will continue to pose some intellectual controversy as long as provision of S.59 (6) (a) remain as they are now. That is why in the Presidential Election Petition 1 of 2001 there was a split of 3 to 2 and in the present petition there is split on the bench (4-3) in favour of the respondents. It is perhaps a test of the operation of a constitutional democracy.

I was one of the minority of three Justices who believe that answering this issue in the positive is based on available evidence. There is evidence of wide spread harassment and intimidation of (voters and supporters of the petitioner) by agents of NRM and members of security forces including intelligence agencies in such districts as Mbale, Sironko, Bushenyi, Kabale, Rukungiri, Kanungu, Pallisa, Iganga,

Bugiri, (Kamuli), Kiruhura, Mbarara, Ntungamo, Tororo, Kyenjojo and Kamwenge. There is evidence of ballot stuffing, multiple voting, involving security and LC personnel. There is evidence of wide spread giving of money in very many districts as well as threats of war in some districts. Surely these must affect the results in a substantial manner. Evidence prove wide spread lack of fairness and freedom in electioneering and voting, let alone transparent counting of votes in some areas. Principles of fairness and freedom during elections were wounded.

On the 6th April, the answer of the Court read as follows:

> ***"On issue No.3, by a majority decision of four to three, we find that it was not proved to the satisfaction of the Court, that the failure to comply with the provisions and principles, as found on the first and second issues, affected the results of the presidential election in a substantial manner."***

The wording of issue No.3 is of course based on the contentions of the two sides as alleged in their respective pleadings. Those contentions are themselves based on para (a) of subsection (6) of S.59 of the Presidential Elections Act, 2005. This provision is identical to a similar provision in the PEA of 2000 which also split the court in answering a similar issue in Presidential Election Petition No.1 of 2001. The current provision reads this way-

> ***"59 (6) The election of a candidate as President shall only be annulled on any of the following grounds, if proved to the satisfaction of the court-***
> ***(a) non-compliance with the provisions of this Act, if the Court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner."***

Perhaps it is inappropriate to say that the Act laid down principles. Principles are read into an Act by interpretation. In other words, principles are inferred from the various provisions of the Act. Earlier in these reasons while explaining my views on issue No.2, I reproduced those principles as summarised in the 2001 Presidential Election Petition reasons for the judgment of the Court.

The question of affecting the result of an election **"in a substantial manner"** is the question on which we were divided. I must admit that the question is not clear cut.

It is not obvious because first it appears to depart from what Article 104 says. In clause (5) of the Article, the Constitution states that-

(5) After due inquiry under clause (3) of this Article, the Supreme Court may –

(a) ***dismiss the petition; or***

(b) ***declare which candidate was validly elected; or***

(c) ***annul the election.***

This clause does not prescribe that a decision of the Supreme Court shall be made on basis of substantial effect. It can be argued that because Parliament was given power to make laws about the election of a President, and annulment of the election, in enacting S.59 (6) Parliament obeyed the Constitution.

Secondly, by requiring that the non-compliance with the principles should affect the result of an election in a substantial manner, members of the court are driven, I think, into applying subjective tests which can even involve moral judgment. Perhaps S.59 (6) (a) in a way recognizes human frailty in the activities of mankind such as contesting for a political office.

The provision appears to me to imply a licence to candidates to cheat or flout the law but do it in such way that the cheating or flouting ought not to be so much as to amount to creating a substantial effect on the election result. The cheating must be such as can be tolerated by the courts!! This notion of substantial effect is found in the English law from which we drive our own law. The notion of **"substantial manner"** could be a recognition of many things. It can be argued that an election exercise such as that of a President of a country involves a lot of preparations by many actors. It can be agued that preparation for election should end soon or that the exercise even though it is done once in every so many years, it is costly and, therefore, some violation of the law need not be treated as fatal. Therefore a repeat of such an election is bound to cost the country more resources. As against these possible arguments, there are considerations of virtues of a free and fair democratic election. If the principles enshrined in our laws, and especially the Constitution, are properly observed during a free and fair democratic election, losing candidates and their supporters will surely be satisfied and, therefore, allow the country to develop peacefully. But if a presidential election is won through fraud, cheating or through the flouting of the law and the constitution, dissatisfied candidates and their followers may create instability and disaffection among the population. Allowing candidates licence to cheat even as little as cannot affect results would render the election

exercise a farce, a play thing or frivolous. Indeed tolerating cheating and fraud in elections can imply that holding elections itself is not desirable or necessarilly. Yet proper election should give legitimacy to winners.

On the question of standard and burden of proof, I will quote what I stated in Election Petition No.1 of 2001. At page 124 of my typed judgment, I said when referring to the 2000 PEA provision similar to present S.59 (6) (c) –

> ***"I think it is safer to apply the words (of the statute) themselves and say that the standard of proof required to nullify an election of a president after a presidential election, must be proof to the satisfaction of the justices trying the petition, namely proof so that the trial justices are sure that on the facts before them, one party and not the other party is entitled to judgment."***

Whether a petitioner has discharged the burden or not will invariably depend on the evidence adduced by the petitioner. For instance, I think that in cases of commission of an electoral offence or an illegal electoral practice where proof of such offence justifies nullification of the election of a president, the burden of proof might be lighter than the burden of proof that non-compliance with the provisions of PEA affected election results in a substantial manner. I say this because in the former case evidence in proof of a single case of bribery will suffice while in the latter case evidence must be adduced in respect of many incidents. The difference may possibly be on whether burden of proof is the same as the standard of proof.

Fortunately this Court is not the only Court faced with such a task in election matters. Other courts, both within Uganda and outside Uganda, have faced similar tasks. See the Uganda case of **Ojera Vs Returning Officer** (1962) EA 532(U) **and Tanzania case of Bura Vs Sarwatt** (1967) EA 234 (T) and to some extent **Morgan & Others Vs. Simpsons** (1974) 3 ALL E.R. 722 especially the judgment of Lord Denning, MR. See also the Nigeria Court of Appeal decision in **Alhaji Mohamed Dikko Yusuf and others Vs. Oluseguri Aremu Akikiota Obasanjo** and 53 others, CA/A/EP/1/2003. All these decisions arise from similar law which has its origin from the English law.

Be that as it may, by answering yes to both the first and the second issues this Court acknowledged violations of some relevant sections of ECA and the PEA and the principles underlying those sections. I have already given my reasons in support of the answer to both issues 1 and 2. I cited some of the Districts across the country where violations occurred. I also mentioned some witnesses from both sides in support of the petitioner or the respondents.

So how does a judge arrive at the conclusion, as I did, that non- compliance affected the result in a substantial manner? Or how does a judge arrive at the conclusion that the non-compliance did not affect the election results in a substantial manner? I think that before answering these questions, a judge must evaluate and appraise all the evidence of both sides not only in relation to this issue but also to the first two issues in order to reach his own conclusions. Would a judge in a constitutional democracy by annulling an election be interfering with a decision made by voters who are given power to choose who is to govern them? I think that Judges have a constitutional duty to annul an election where there is clear evidence of patent violations of the principles of free and fair democratic election such as the evidence of intimidation, threats and violence or the violation of the principle of one man one vote or the violation of the principle of transparency? On 23/2/2006, the voting day, in midmorning, voters are roughed up, arrested while on the way to voting and taken to police station and detained as happened in Tororo, by an apparently important official such as Fox Odoi. Similar incidents were carried out in many districts in Western Uganda. What effect does this have on those voters who have not voted or who are on their way to voting stations but hear about these?

There is a view that because in 2001, by a decision of 3 to 2, this Court answered a similarly worded issue in the negative, therefore, all of us on this court, are bound to answer the third issue in this Presidential Election Petition in the negative. Indeed, Mr. Ogalo Wandera, for the petitioner urged us to depart from the decision of 2001. He relied on Art. 132 (4). With respect, I do not agree. First the doctrine of binding precedent is set out in Art.132 (4). That relates to our exercise of appellate jurisdiction. In this petition, we are sitting as a trial court to exercise special jurisdiction conferred on us by Article 104 [especially clause (5) thereof].

Moreover as a trial court we must decide the petition on the basis of all the evidence tendered before us in this particular petition. Each case is decided on its own facts. What must be understood is that in this petition even though by coincidence the parties are the same as those in 2001 and the issues are framed in identical terms, in reality we have evidence from vastly different witnesses, except the petitioner and the 2nd respondent.

I think that here our decision does not rotate around settling a law. It is about assessment of facts as set forth in affidavits. It is the evaluation of the facts and not the settlement of law which is at issue.

I can foresee a real possibility of an incumbent who won a previous presidential election petition, (or any other election) some how encouraging his or her agents to employ the same malpractices, or modified malpractices but similar to previous ones, in order to win an election. He/she will be advised that he and his agents are in order to do any similar thing, however wrong, to win election because that thing was done previously and was accepted as proper by the Supreme Court of Uganda.

Another point is that whereas in 2001 only five of us sat, this time the full court is participating.

I now proceed to examine the evidence as adduced through witnesses' affidavits and the observers reports to show how non-compliance with the principles affected the results. As I hinted, there are many affidavits containing facts which cut across all the four issues.

In my opinion the non-compliance with the principles of the PEA affected the results in a substantial manner. In particular I think that-

(a) The principles of a democratic free and fair election were clearly violated substantially in that-

- There was no level playing field between the petitioner and the second respondent. All election observers and monitors agree on this.
- There was country wide spread intimidation, threats and violence against opponents and supporters of opponents of the 2nd respondent. It is remarkable that in areas where intimidation and violence were intense and extensive such as many parts in Western and Eastern Uganda, the petitioner

got less votes. Examples are districts of Kiruhura, Mbarara, Ntungamo, Bushenyi, Kabale, Kyenjojo, Kamwenge, Kanungu and Rukingiri, and Iganga. This is reflected in results announced by Dr. Kigundu, Chairman of the Electoral Commission, 1st Respondent.

- There was excessive involvement of security forces (including ISO) against the petitioner. This is evident in most of Western Uganda, a sizeable part of Eastern Uganda e.g. Pallisa, Mbale, Iganga and even in central Uganda, e.g.. where Lt. Magara shot dead supporters of the petitioner.
- There was bribery throughout the country.

(b) The principle of equal suffrage, transparency of the vote and secrecy of the ballot were grossly undermined by-

- Multiple voting.
- Ballot stuffing.
- Under age voting.
- Bribery.

There are very many witnesses who testify to this. So do the accredited election observers, both local and foreign.

Mr. Ogalo Wandera made forceful arguments in relation to the clause **"Non-compliance affected the result of the election in a substantial manner,"** and urgued us to look at the nature of non-compliance. Learned counsel contended that non-compliance which negates the basic principles enumerated earlier in these reasons must be taken to have affected the results in a substantial manner. He opined that these principles are the yardstick of an election, i.e., the principles determine whether there was or there was no election or a gravely defective election. Counsel contended that the petitioner's evidence established disenfranchisement throughout the country contending that 38% of the polling stations had instances where voters were turned away which translates into 7000 polling stations. Turning away voters at such stations has substantial effect on election results because voters did not vote. In his opinion there is no need to make head count.

INTIMIDATION, THREATS AND VIOLENCE.

Learned counsel contended that there was widespread intimidation of and violence against voters. Counsel asked us to take judicial notice of the existence of many FM Radio Stations and argued that these stations give a lot of publicity to murders of supporters of an opposing presidential candidate such as that which occurred at Mengo. He also argued that the recording, as was done in the recent presidential and general elections, of names by NRM officials of voters who are supporters of the opposing candidate can and does cause fear and this would be particularly so where those in charge of recording the names make threats to non-supporters of NRM, as happened in such districts like Iganga, Kamwenge and Kyenjonjo Districts.

In the alternative learned counsel submitted that if numbers are to be taken into account in respect of affecting results in a substantial manner, then the court should consider the effect of **multiple voting and ballot stuffing**. Counsel urged court to determine whether, in view of multiple voting, ballot stuffing and disenfranchisement, at the end of the whole process the votes of each candidate would have affected the results in a substantial manner.

He contended that the effect of all the proved irregularities greatly reduced the majority margin. He further contended that the petitioner's evidence point to a narrowing majority and that the majority of 9% on the part of the second respondent is in doubt. In this regard, counsel relied on the report of Dr. Odwee, a statistician from Makerere University, who explained in his report and his affidavit how the results of votes for the petitioner and for 2nd respondent were affected.

Counsel concluded that the petitioner's evidence proved his case to the satisfaction of the court and prayed that the court declares that the second respondent was not validly elected.

Mr. Lucian Tibaruha, The Solicitor General argued issue No.3 on behalf of the two respondents with particular reference to subparas (a), (b) (d) and (e) of paragraph 8 of the petition. He adopted the submissions of Mr. Nkurunziza generally on the value and relevance of affidavits in support of the petition. He also adopted the submissions of Mr. Matsiko, which the latter made when responding to Mr. Ogalo Wandera's submission on the 1st and the 2nd issues.

According to the learned Solicitor-General, the phrase "to the satisfaction of the Court" used in S.59 (6) of the PEA, means that the petitioner must adduce evidence

to satisfy court that the evidence proves the allegations made in the petition. He contended that the evidence adduced on behalf of the petitioner does not establish the allegations so as to result in the annulment of the election of the 2nd respondent. He relied on the reasons given by the majority (Odoki .CJ, Karokora and Mulenga, JJSC.), in **Presidential Election Petition No.1 of 2001 (Col. Dr. Besigye Kizza Vs The Electoral Commission and Museveni Kaguta Yoweri)**

The learned Solicitor-General contended that in this petition, the petitioner should have indicated that the difference between the petitioner's total votes and the 2nd respondent's total votes were affected. According to the Solicitor-General:

(1) Numbers must be used to measure the effect of irregularities;

(2) The number of votes obtained by the 2nd Respondent, i.e, over 1.5 million votes, must be taken into account. The petitioner must show that irregularities affected this difference.

(3) Court must consider that the result of the election is that of the whole national constituency and not in isolated districts.

(4) Court must take into account the number of polling stations where irregularities took place in relation to the national total. 189 Polling Stations which is 0.8% must be related to over 19000 polling stations. He argued that 189 polling stations do not constitute "substantial."

The learned Solicitor-General contended that the petitioner failed to prove that there are any irregularities which affected the results in a substantial manner and so he urged us to answer issue 3 in the negative.

The evidence available shows that intimidation, threats and violence were perpetuated by a sizeable number of members of the security forces especially members of Internal Security Organisation (ISO), Presidential Protection Brigade/Unit, UPDF, LDUs and by NRM functionaries.

I have already referred to the evidence of some of the witnesses who deponed in the affidavits about intimidation, threats and violence. This is reflected particularly in the evidence of such witnesses as of Hon. Ekanya of Tororo District, Mr. Augustino Ruzindana, Dr. Katebariwe in Ntungamo District, of Abenaitwe Ezera the FDC Secretary- General in Bushenyi District as well as Mr. Byarugaba of Kanungu

District (the latter two heard agents of the 2nd respondent talk of war if he looses). There is evidence from Kabale District of Jack Sabiiti, Kanaimura, Turyamureeba Mande, Katwakura Edward, Twinomukego Vanice, Rukandena, and Ensimkweri Godfrey and of Damali Nagawa of Mbarara District. A typical example of intimidation and threats in the form of terror and use of security personnel is given by Turyasingura Joseph, who was a campaign agent of the petitioner in Nyabirerema parish, in Kabale District. According to him, on 23/2/2006, he found Rubaramira Bernard, Mrs Kabarisa and Apollo Nyegamahe distributing money to voters allegedly to vote for second respondent. When he intervened, LDUs harassed him. A double Cabin Pick-Up arrived at the scene carrying Pte. Bosco Byamugisha of the Military Intelligence together with Lt. Kakooza and two other soldiers. It is pertinent to quote what Turyasingura Joseph stated in paras 5 to 11 of his affidavit-

"5. That in a short while, a double cabin pickup with private numbers being driven by Pte Bosco Byamugisha attached to Directorate of Military Intelligence together with Lt. Kakooza, and two other soldiers both in civilian clothes and brandishing pistols stopped at the polling station.

6. That the armed men asked for me and people pointed at me and immediately I was grabbed, beaten and dumped in the double cabin and driven away.

7. That Nyabirerema Parish of which I am an LC.II Chairperson is an over whelmingly supportive area for Col. (Rtd). Dr. Kizza Besigye and candidate Museveni did not have any votes in this area.

8. That through systematic bribery which I witnessed and my subsequent arrest and detention and intimidation of other supporters, candidate Museveni managed to get some votes which were otherwise Col. Dr. Besigye's votes.

9. That when these armed men arrested me, they telephoned to some people and informed them that they had arrested a big fish and the famous Kakatunda Polling Station was now finished.

10. That I was denied my right to vote like many others who supported Col. Dr. Besigye as I was incarcerated at Kabale Police for that whole day until I was released in the evening and a copy of Police form 18 upon which I was released on police bond is attached hereto and marked "Annexture PI."

11. That after my unlawful arrest, many of our supporters went into hiding for fear of eminent arrest and did not vote."

Apollo Nyangambehe an NRM member of its task force in Kabale District swore an affidavit denying what Turyasungura and Jack Sabiiti deponed about. He does not suggest any motive why he was implicated.

This is how Mayombo Dick, a petitioner's elections monitor in Kinkizi West Constituency, Kanungu District, describes what happened there in paras 3 to 11 of his affidavit. He refers to voting at night which hampered identification of voters, preticking, intimidation, open voting and interference with petitioners' agents as follows:-

3. That on the said polling day I noted that the commencement of the elections was very late as voting began after 1:30 pm and ended at Night Under circumstances that ware not favourable for proper Identification of voters hence enabling massive fraud aided by partisan polling officials.

4. That at Samalia polling station at 6.30 p.m, Mrs. Jackline Mbabazi instructed the presiding officer that voting should take place on the open table.

5. That the presiding officer called Muteraba insisited on secret ballot whereupon one Zepher Mugisha who was in company of Mrs. Amama Mbabazi Telephoned the Registrar called Muhwezi Laban who arrived immediately and took over the station from the presiding officer and sent away the presiding officer.

6. That Hon. Amama Mbabazi also arrived with soldiers escorting him and army vehicle No.H4 DF 669 6 armed soldiers also parked at the station and

the armed soldiers surrounded the place causing terror and fear among voters and agents.

7. ***That voting continued into the night and Agents were unable to identify the people that were being issued ballots for casting on the lumps couldn't provide sufficient light.***

8. ***That the agents for candidate Museven including Abdu Muhire were giving money to people and taking them to the ballot box and ticking the ballots in favour of candidate Museveni.***

9. ***That the polling officials systematically invalidated ballot papers of known FDC supporters by pre-ticking candidate Abed Bwanika so that when FDC supporters tick on candidate Kizza Besigye the vote are invalidated.***

10. ***That the RDC called Ben Ruronga also came at the station and intimidated the agents of Dr. Kizza Besigye to allow people to vote with out disturbance of FDC agents.***

11. ***That because it was at night and presence of soldiers at the station caused constant fear in the population and the systematic bribery where voters were being given money and led to vote by candidate Museven's agents I saw candidate Kizza Besigye loosing his votes.***

Mrs. Jackline Mbabazi and the Hon. Amama Mbabazi, Mr.Muhwezi Laben (RO) Kanungu, the RDC, Ben Rullonga, Beni Mutera and some other witnesses have deponed denying only where malpractices are pointed out by Mayombo - Hon. Mbabazi and Mrs. J. Mbabazi admit the presence of soldiers as being his bodyguards as Minister of Defence. Mr. Barageine James, a retired subparish Chief, claimed he was at Samalia Polling Station. He does not disclose his role which obliged him to stay at the Polling Station throughout. He admits the soldiers presence but says they never interfered. Barageine agrees with Mayombo that voting started at 1.30 p.m and went on after 6.00 p.m when RO Muhwezi went to

the station and assisted the PO. This witness largely supports Mayombo on a several aspects of Mayombo's affidavit but only denies malpractices. His unexplained role at the station casts suspicion on his version. I accept the version given by Mayombo. While travelling with armed bodyguards is explainable, taking these armed military men to a polling station on a voting day was not explained satisfactorily by Hon. Mbabazi. On such voting occasions, one would expect plain cloth youths, supporters, to accompany a candidate rather than armed soldiers. S.42 of the Parliamentary Elections Act probibits the presence of arms close to polling station. So does S.43 of PEA. The intimidating presence of armed soldiers was undesirable and I think has effect on ordinary voters. There is no evidence suggesting any danger to the Minister so as to warrant moving with armed soldiers who hover around the polling station. This contravened the law.

In Kanungu District, many more witnesses in addition to Mayombo Dick deponed about intimidation. These include Asiimwe Ivan, Kasigarwe.

Let us look at what Mr. Abdu Katutu experienced in Iganga and Mayuge Districts in Eastern Uganda.

2. *That I am the Chairman of Forum for Democratic Change in Bugweri County where I was the FDC Parliamentary Candidate in the February 2006 general elections.*

3. *That I am the FDC National Coordinator for Iganga and Mayuge Districts.*

4. *That in the capacities above I participated and supervised the FDC campaigns in both Iganga and Mayuge districts.*

5. *That I am well versed with what happened during the campaigns in both districts and more particularly Bugweri County.*

6. *That a group of* ***armed men wearing NRM party colours*** *camped at Busesa mixed Primary School and traversed Bugweri County campaigning for the 2nd respondent and Mr. Kirunda Kivejinja who was the NRM Parliamentary candidate.*

7. *That the said group was led by a one Lt. Mulindwa also known as Surambaya.*

8. *That they moved from village to village threatening and intimidating people who do not support the petitioner (sic) and Mr. Kivejinja.*

9. *That they assaulted a number of FDC supporters and several cases were reported to Idudi police post vide following references. SD/17/22/01/06, SD 18/22/01/06, SD 19/22/01/06, SD 15/31/01/06, SD 17/31/01/06, SD 31/01/06, SD 13/19/02/08 etc.*

10. *That on the 21st January 2006, they attacked Idudi trading centre and took away the effigy of the FDC presidential candidate who is the petitioner after assaulting a number of people. This matter was reported to Idudi police post.*

11. *That on the 22nd January, 2006, they again attacked Idudi trading centre assaulting many people who were being reported to them as FDC supporters.*

12. *That they occupied the town for 2 hours and thereafter left for Bugiri District.*

13. *That during the Idudi Siege, they continued shooting while others in their group were defacing the posters of the petitioner and myself.*

14. *That the group was armed with AK 47 assault rifles, pistols and sticks. Copies of photographs taken by myself are attached hereto and marked collectively as Annexture "A".*

15. *That I personally rang the Minister of Internal Affairs Dr. Ruhakana Rugunda complaining of the terror by this armed group.*

16. *That the minister promised to disarm them and ensure they leave Bugweri county.*

17. *That they temporarily left but returned about 10 days to the election date.*

18. *That they continued moving around in coaster vehicles but with covered number plates.*

19. *That on the eve of elections, they arrested two of the FDC campaign manager from Bukoteka village and detained them at their camp at Busese mixed Primary School.*

20. *That their camp or tents remained at Busese mixed Primary School even on voting day whereas it was also a polling station.*

21. *That on the eve of elections, they invaded Busembyata town council and* ***arrested many FDC polling agents.***

22. *That the arrested FDC agents were tortured and maimed.*

23. *That the arrested FDC agents herein reported to me their story after elections.*

24. *That I make this affirmation in support of the petition to confirm that there was wide spread intimidation and torture of FDC supporters in Bugweri County, Iganga District.*

S.26 PEA and and S.24 of the Parliamentary Elections Act were breached, obviously. These sections prohibit interference with electioneering activities of other persons.

Clearly Katuntu exposed the epitome of utter disregard and contravention of laws and principles on democratic elections.

As already noted, in Mbale District, a number of deponents swore affidavits in proof of the fact of intimidation, threats, violence and bribery and especially the use of military might to intimidate voters: The following sample of deponents swore affidavits in proof: Mulinda Robert, Mutonyi Juliet, Khaita Lofisa, Khaitsa Margaret, Mwayafa Deo and Mushebo Charles of Musoola TC in Bungokho County. According to these witnesses, during campaign and on voting day agents of the second respondent gave voters between shs 200/= and 1000/= urging voters to vote for him. That during January and February army vehicles moved around in their villages and this scared people. On 22/2/2006, there was frightening shooting in the villages. On polling day NRM district chairman, Mayatsa, moved with armed military police.

The respondents adduced evidence by affidavits of Mr. Kizindo Ibrahim Salum, Mbale District Registrar/ Returning Officer to the effect that nobody reported any incidents of intimidation or bribery. Again Mr. Mayatsa Joram, Mbale District NRM Chairman, deponed that there was no intimidation by the army in Mbale as stated by Mutonyi Juliet and the others. As stated already he denied moving with soldiers but admitted moving with an armed police. He did not offer any explanation why, on polling day, he, as a politician, had to be escorted around by an armed police.

In Pallisa District, examples are Rev. Fr. Godfrey Okello, Mpima, Kafero Tanyebwa. According to Fr.Okello, he acted as a polling Assistant on 23/2/2006 at Buseta Subcounty. At 11.30 a.m a yellow pick up full of military men in Uniform came to his station and moved around the station. The men jumped out of the vehicle and beat up an agent of one parliamentary candidate. Fr. Okello was roughed up and was directed to tick ballot papers in favour of Lt. Kamba an NRM candidate. When he objected, the man of God was shoved aside and another polling Assistant was directed to tick the ballot papers. Other witnesses gave testimony to the same effect. Of course the respondent's evidence is that the results from seven polling stations in Pallisa were cancelled which is really an admission of what took place. The fact that military men brazenly roughed up a priest speaks volumes. Like his counterpart in Pallisa District, Rev. Phabiano Muduma was at Dunga Polling station, Sironko District. On the polling day, at 830 a.m, agents of the 2nd respondent and LCI chairmen, R.Gidudu and T. Kimasi, led groups of people who moved around polling

stations violently chasing away both supporters and agents of other presidential candidates. Thereafter there was multiple voting.

James Birungi Ozo was an FDC Election monitor in the Districts of Kyenjojo and Kamwenge, in Western Uganda. In his long affidavit, he describes how he, agents and supporters of FDC, were harassed, threatened, roughed up in both districts by armed LDUs, GISO and NRM agents. Voters were threatened, intimidated, bribed and some agents of FDC were chased away. There were malpractices such as preticking and ballot stuffing and voting at night. He is supported by Mr. Charles Byaruhanga, an FDC candidate for Kabaale constituency in Kamwenge District. It seems the terror unleashed by NRM functionaries frightened voters. Both Byaruhanga and Barungi Ozo mentioned some names including those of NRM chairman in Kamwenge District who are said to have indulged in the electioneering and election excesses such as using security personnel like LDUs in harassing, intimidating and even assaulting FDC supporters and voters generally. Charles Byaruhanga and Ozo reported some of the incidents to the Police. The Kamwenge District Police Commander agrees that Byaruhanga made such reports and in two instances the perpetrators of assault were arrested. Byaruhanga and Ozo in their affidavits speak of NRM chairmen dishing out money. The two speak of ballot stuffing on voting day. Ozo implicated Bumbona, a GISO of Mahyoro subcounty and Katare LDU commander in Kamwenge District, Dan Byamukama and Abbas Mutesasira, a member of NRM Kamwenge District task force. Byaruhanga implicated Tumwebaze Frank (NRM Parliamentary candidate) Biryabarema (RDC), Rugumayo Moses, Byaruhanga.G. (NRM chairman) Karamagi (GISO) among others. Those implicated swore respective affidavits in which each denied any wrong doing. The GISO man, S. Karamagi, denied any wrong doing or bribing as did Mutesasira. Frank Tumwebaze, who was implicated in moving around Kabaale constituency accompanied by the RDC plus NRM Chairman Byamukama denied moving with these two. He blamed two FDC agents for assaulting Rugumayo, an NRM agent. Similary the RDC denied campaigning for NRM or moving with either Byamukama, NRM District Chairman nor with candidate frank Tumwebaze. He claimed that Byaruhanga's affidavit contains falsehoods. Rugumayo blamed two FDC supporters for assaulting him after a video presentation which showed the

NRM achievements. Kamwenge NRM district Chairman Mr. Byamukama denied decampaigning the petitioner and denied any bribing. He swore that money given out was to facilitated NRM committees or agents. I have not read of any illmotive as to why they were implicated. They indulged in the malpractices and I so find.

At common law, a parliamentary election could be avoided on the grounds of irregularities by election officials, if the irregularities were so great as to prevent the election being a true election (**Hackney case** (1874) 2D.2 h.77 at page 81; **Wood Ward Vs Sarsons** (1875), L.R. 10 C.P. 733). This is in effect what the Solicitor-General contended. Later by statute, it was enacted in England that a Court, before declaring an election invalid on these grounds, must consider that the election was not conducted substantially in accordance with the elections law and the irregularities have affected the result: **Halsbury's Laws of England,** 3rd Ed., P244. See especially page 261. When giving my reasons in support of the position I took in the Presidential Election Petition No.1 of 2001, I considered, among other authorities, the English Court of Appeal decision in **Morgan Vs Simpson** (1974) 3 ALL.E.R.722. Lord Denning, M.R., stated that the origin of the principle with which we are concerned here was introduced by an English statute of 1872. In the **Morgan case**, the English Court of Appeal discussed positions where number of votes matter and where they do not matter.

It is my considered opinion that neither decision of the Supreme Court of Zambia (supra) nor that of the Nigerian Court of Appeal in **Obasanjo Petition** (supra) are of help. In the Zambia petition the irregularities appear to have been negligible or trivial.

In the 2001 Presidential Election Petition, I expressed the opinion, which I would repeat here, that Courts and Advocates in this country who rely on the Tanzania case of **Mbowe Vs Eliuffo (1967) EA**. appear not to appreciate the following statement by Georges, CJ. It appears at page 243.

> *"We now come to allegations (a) and (b), which I shall deal with together, because they are closely related and they are the most serious allegations in the petition. Each of them would constitute an illegal practice contrary to*

the National Assembly (Elections) (Amendment) Act 1965. In particular as far as (a) is concerned, ***HAD IT BEEN PROVED TO OUR SATISFACTION IT WOULD HAVE GONE SO DEEPLY INTO THE ROOT OF THE WHOLE ELECTION THAT IT WOULD HAVE BEEN DIFFICULT, HOWEVER LARGE THE MAJORITY MIGHT HAVE BEEN, TO SAY THAT IT DID NOT AFFECT THE RESULTS OF THE ELECTION."***

Here Chief Justice Georges was referring to allegations of threats by TANU youth wingers which the petitioner in that case failed to prove by evidence. That in my view is not the case in this petition. Here threats, intimidation and actual violence were meted out to the petitioner's supporters which was in some cases splashed out by the press as in the case of Lt. Magara killings at Mengo and that of assault by Lt. Col. Bugingo at FDC Headquarters in Najanankumbi as well as that of Mr. Fox odoi, the Legal Assistant to the 2nd Respondent. The first killed supporters of the petitioner. The second assaulted a very prominent member and official of the petitioner's party in full view of TV cameras. The third assaulted and fired a gun in the presence of supporters of the petitioner.

According to the affidavits of supporters of the petitioner,
Bushenyi District, is one of the districts in Western Uganda where various malpractices took place. Abenaitwe Ezra was the FDC District General Secretary. Though he made general statements in his affidavit, he deponed that he witnessed incidents of intimidation, overnight campaigns, by agents of the 2nd Respondent spreading war propaganda especially through war films that war will break out if the Petitioner was elected President. That the mobile film shows exhibited war scenes during which voters were told that war would break out if the petitioner was voted into power. That these shows were organised by Hon. T Kabwegyere, MP, Igara West, Dr. Ndahuura Richard, MP, Igara East and Hon. Karoro Okurut Mary, women MP for Bushenyi District. Abenaitwe deponed that he reported this matter to the District Police Commander, Bushenyi, and the Electoral Commission (1st Respondent) who caused the shows to stop. He deponed that one Basajjabalaba told voters that they should not vote for the petitioner because he suffers from AIDS and would collapse

during the campaigns. Basaijabalaba confirmed this in para 8 of his own affidavit. Abenaitwe further deponed that supporters of the 2nd Respondent gave money to voters and asked them to vote for the 2nd Respondent and that (presumably on polling day), "Nkuruho staged himself at entrance of one polling station" telling voters to vote the 2nd Respondent. So Abenaitwe reported this to police whereupon the District Police Commander told Nkuruho to stop.

This witness does not name dates and places when and where he witnessed the various incidents. But he is supported by affidavits in reply. One of the Respondents' witnesses who reacted to Abenaitwe's affidavit is ASP Aguma Joel, the District Police Commander, (DPC) Bushenyi District. He was very cautious in his affidavit where he deponed that he had not seen or heard of any report regarding Nkuruho's activities as stated by Abenaitwe and he denied that he told Nkuruho to stop what he was doing. The DPC admitted, though, that one night he received a telephone call from a "General Secretary of FDC" complaining that there was campaign going on at night at a Taxi Stage in Bushenyi Town. The DPC went to the Taxi Stage in Bushenyi Town where he saw many people watching a film show but he **"did not find there any known candidate either in the Presidential or Parliamentary elections addressing the gathering."** As what follows illustrates, the DPC does not appear to be truthful in this.

On his part, Professor T. Kabwegyere, MP, deponed that part of Bushenyi Town is in his Constituency and that what Abenaitwe referred to as a film show was in fact a musical performance which was shown before election day. He attended and during the performance, members of the audience danced. According to Hon. Kabwegyere "the musical recording, inter alia, depicted pictures of Uganda's history, the NRA struggle during 1981 – 1985 period, economic and social developments by the Government since 1986". He denied addressing the audience nor did he urge the audience to vote the 2nd Respondent.

Dr. Richard Nduhura also deponed that part of Bushenyi Town is in his constituency of Igara East. Prior to election day, he attended "a show of the musical album by Kads Band" in Bushenyi Town from about 7:30 p.m. to about 8:15 p.m. During the show he danced to the music with the audience. He greeted a number of people in the

audience but did not address the audience and did not urge the audience to vote for 2nd Respondent.

Hon. Mary Karoro Okurut was at the time contesting for Bushenyi Women District Parliamentary seat and was a sitting MP for the same. She was an agent of the 2nd Respondent during the Presidential election period. She denied intimidating any body or campaigning at night nor was she aware of any of the agents of the 2nd Respondent who did so in Bushenyi District. She never spread any propaganda that war would break out if the Petitioner won the Presidential elections. In paragraphs 8 and 9 of her affidavit, this is what she stated-

"*8. The shows referred to in paragraph 10 of the said affidavit (of Abenaitwe) were staged by Mr. Willy Kamukama, the proprietor of Kads Band, which produced a musical album which was screened during the said shows.*

9. That the said album which is recorded on a DVD is commercially available and among others it depicts the following:

(i) *Uganda's turbulent past history*

(ii) *Achievements by the NRM Government which included schools, roads, electricity, e.t.c.*

(iii) *Mistreatment of civilians at Road blocks by armies of previous regimes*

(iv) *Episodes during the bush war between 1981 to 1985"*

She denied that the shows were shown late at night. She attended one of such shows between 6:30 p.m. and 8:30 p.m. She did not address the audience.

The proprietor of the Kads Band, Mr. Willy Kamukama also swore an affidavit to the effect that the band is based in Kampala and from 2004 to October 2005 it produced a musical video under the Kads Band called **KISANJA ALBUM**. In paragraph 7 to 11 he deponed as follows:

"*7. That message in the said album was to remind Ugandans of the past with the view that, they should avoid wars and maintain stability which the country has enjoyed since 1986.*

8. That I have read an affidavit of Abenaitwe and understood its contents.

9. That the said band staged various shows of the said band at Ishaka and Bushenyi using a mobile van.

10. That it is correct that the said album depicts ***WAR SITUATIONS OF THE PAST AND THE MESSAGE WAS THAT UGANDANS SHOULD AVOID WARS IN THE FUTURE****.*

11. That it is correct that Hon. Professor Kabwegyere, Hon. Richard Nduhura and Karoro Okurut attended some of our shows. The said shows were staged under the sponsorship of my said band and not any of the said persons".

(It is well known in Uganda that **KISANJA** meant the third term, the subject of this petition).

What the affidavit of Abenaitwe and the four, who replied to it, reveal is that there were video shows. Although Professor Kabwegyere and Dr. Nduhura appear to imply that there could have been one show, Hon. Karoro Okurut and the proprietor of the Band suggest that there were several shows.

According to Kamukama, production of the video was concluded during October 2005. However neither himself nor any one else indicates the dates when the several shows were staged save that the MPs say the shows were staged before election date.

Reading through the affidavits of all the six deponents, it is clear that the shows were staged during the Presidential and Parliamentary campaigns. Although the three Honourable Members of Parliament deny that none of them addressed the audience, with respect I do not believe them. The objective of the shows was certainly to promote the campaign of the 2nd Respondent and since the shows were staged in the Constituencies of the three Members of Parliament who were contesting on the same ticket as the 2nd Respondent, the shows were really intended to promote each of these candidates. I doubt Kamukama's claim that nobody sponsored the shows since he said the Kads Band was commercial band.

I cannot believe that any of the Members of Parliament would lose the opportunity to address the audience which was readily available. The District Police Commander was obviously not candid about what he saw and whom he found in the shows.

Court did not watch any of the shows. I can only comment on what the affidavits revealed.

From the affidavit of Kamukama and that of Karoro Okurut one can draw the inevitable conclusion that the shows painted the image that if the 2nd Respondent was

not elected there would be chaos if not war. Showing a film or video about the achievements of the 2nd Respondent during campaign period is legitimate. But showing NRA bush war films, has more to do with instilling or pumping into voters fear, fright and anxiety. In that regard, Abenaitwe is correct in saying that the shows were intended to frighten, intimidate voters and to show that the election of the Petitioner would lead to war. A similar situation is portrayed by Byarugaba from Kanungu District in respect of Kinkizi FM Radio. Kanungu and Bushenyi are in the same region of Uganda.

Anybody who has watched war films can draw their own conclusions. For an ordinary person I think that watching war situations in a film during campaign for presidential elections, he/ she cannot avoid being fearful of and afraid of what the future holds if any other person is elected except the 2nd Respondent. The effect on the voter is obvious. Would the provisions of the Constitution and S.23 and S.24 of Presidential Elections Act permit such an exercise in the name of freedom of expression? I think not.

Other aspects about what went on in Bushenyi are given by different witnesses. Tibatisana Ephraim was the Petitioner's agent at Kyeibare Parish Headquarters in Ruhinda County, the constituency of Hon. Kahinda Otafiire, MP. According to Tibatisana, on polling day, Hon. Kahinda Otafiire arrived at the station in the company of soldiers and ordered agents to leave immediately. After pleas, he allowed agents to sit 40 metres away from where the presiding officer was. I may point out here that in its interim statement (Annexture 3 to Dr Kiggundu's accompanying affidavit) the Commonwealth observer group noted that ***"To a targe extent, the party agents were too far away to observe the checking of the register and identity documents properly"***. This supports Tibatisana. Later Tibatisana was refused to vote by a presiding officer because he was an FDC agent. Tibatisana moved closer to the presiding officer and noticed that the presiding officer gave several ballot papers to some voters to whom he paid shs 1,000/= and asked to tick the name of the 2nd Respondent. Hon. Kahinda Otafiire in reply deponed that he visited the station at 10:00 a.m to check on the progress of voting. He denied being in company of soldiers. He talked to a police constable and the presiding officer. He never chased away the FDC and other agents as claimed.

I find no reason to doubt what Tibatisana deponed. I believe Tibasana that the Minister arrived accompanied by 3 soldiers. The effect of soldier's presence on simple voters mind is obvious. In any case, the presence of armed persons at polling stations is out-lawed by both PEA (S.43) and Parliamentary Elections Act (S.42). The armed soldiers had no business at PS.

At this juncture I return to the facts in the **Morgan case** which concern numbers and when and where numbers matter.

At a local government election at which a total of 23.691 votes were cast, 82 ballot papers were properly rejected by the returning officer. Forty-four of those papers were rejected because they had not been stamped by polling clerks with the official mark as required by the local election rules. The 44 unstamped ballot papers had been issued at 18 different polling stations. Despite notices displayed at the polling stations, directing voters to see that ballot papers were stamped, the voters to whom the 44 papers had been issued had not noticed that the polling clerks had failed to stamp them. The returning officer himself had not been at fault. If the 44 ballot papers, had not been rejected, but had been counted, the petitioner, a candidate at the election, would have won the election by a majority of seven over the respondent. In consequence of the rejection of the 44 papers the respondent had a majority of 11 and so was declared to be the successful candidate. The petitioner sought an order that the election should be declared invalid under S.37(1) of a UK Act, the **Representation of the People Act,1949,** on the ground that it had not been conducted substantially in accordance with the law as to elections; alternatively that, even if it had been so conducted, the omissions of the polling clerks had affected the result.

The English Court of Appeal considered previous English decisions and facts of the case. It allowed the appeal and held that:

Under S.37 (1) an election court was required to declare an election invalid: -

(a) if irregularities in the conduct of the election had been such that it could not be said that the election had been "so conducted as to be substantially in accordance with the law as to elections," or

(b) if the irregularities had affected the result.

Accordingly, where breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that ***it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election has been affected.***

(ii) Although the election had been conducted substantially in accordance with the law as to local elections, the omission to stamp the 44 ballot papers had affected the result of the election which would therefore be declared invalid.

Learned counsel for the respondents appear to rely on the difference of 1.5 million votes which appear to separate the petitioner and the second respondent to argue that even if the petitioner had proved non-compliance with the provisions of the PEA, the non-compliance did not affect the results in a substantial manner. The English court decision in Morgan case and part of **Mbowe case** (supra) are against that argument. The question that must be answered is the circumstances under which the 1.5 million votes were obtained. In this petition the non- compliance with the principles of the PEA was not trivial in the sense that it consisted of officials being ignorant of the law. I have already referred to evidence about wide spread intimidations, threats, violence, assault and harassment of supporters of the petitioner. I have referred to bribery. There is evidence from the 2nd Respondent himself in paragraphs 9 and 10 of his affidavit, sworn on 21st March, 2006, in reply to that of Salaam Musumba. I will reproduce these presently.

In my opinion the difference in the number of votes cannot be the only basis for deciding whether the election results have been affected in a substantial manner. Intimidation, frightening and instilling fear of war among voters cannot be measured, for instance, when it is widespread. These acts are wholly unlawful and forbidden by our laws and do affect voting results.

The European Union observers group, at page 6 of its preliminary report (R2), issued on 24/2/2006 explained how the second respondent enjoyed substantial advantage on the use of existing movement organs; this is how the report reads:

"Despite the adoption of a multi-party system, the movement structures remained intact, active and funded by the State throughout the election period. The President and his party (the National Resistance Movement Organisation) utilised state resources, particularly through the old movement structures, in support of their campaign, including use of government cars, personnel and advertising, and received overwhelming and positive coverage on State television and radio. The NRMO and NRM with its organs share many of their senior staff. In many districts (for example Isingiro, Kyenjojo, Bundibugyo, Kamwenge, and Kabarole in the Western Region, all Buganda districts) they operate from the same offices. This situation occurred because the movement organs which had provided the organisational structure for the no-party-system were allowed to continue operations until the holding of the elections. Thus, through this existing Movement system the President and the NRMO candidates enjoyed substantial advantages over their opponents which went further than the normal advantages of incumbebcy."

And with regard to official media coverage this is how the observers report put it on the same page 6.

"The media monitored by the EU EOM, provided a variety of information and debate about the elections in general as well as the main candidates. This was reflected in a range of news coverage focusing on the main presidential candidates, which was complemented with talk show and discussion programmes broadcast on state and commercial radio and television.

However, in certain critical areas there were evident failings, most notably in the election coverage of the public broadcaster UBC TV and to a lesser extent UBC Radio. The incumbent candidate received 79.7 per cent of overall election related coverage on UBC TV, while the leading opposition candidate had 11.5 per cent and the remaining three presidential candidates received less than 9 per cent of coverage. UBC Radio's coverage accorded more airtime to opposition candidates, but the incumbent remained the candidate granted the largest percentage of

access with 55 percent of coverage on the station. The limited resources, absence of production capacity in the news department and a reliance on programming supplied by the parties and candidates. Coupled with the wide access granted to the Presidential Press Unit, this resulted in coverage of the presidential elections that was highly imbalanced in terms of access to UBC TV in favour of the incumbent. Commercial broadcasters provided a far greater range of coverage of the elections and this is represented in far wider coverage of the main opposition candidates."

FUNDUNG AND BRIBERY ALLEGATIONS

The 2nd Respondent swore the affidavit first as Chairman of both the NRM political organisation and secondly as Chairman of the Central Executive Committee of NRM. He was sponsored by NRM to contest for the office of President. It is therefore logical to infer that it was in his interest that funds disbursed were to promote his campaign and his success at the elections. The second Respondents' statements in his affidavit and particularly the contents of Annexture R2 A1 appear to support Mrs. Musumba and other witnesses who deponed about bribery. She deponed in paragraphs 3 to 19 of her affidavit this way -

2. That I was a candidate in the recently concluded Parliamentary Elections (for the same seat).

3. That I am one of the Vice Chairpersons for the Forum for Democratic Change and was involved in the Presidential campaigns and also monitored the voting process.

4. That the whole Presidential campaigns and voting process was marred by bribery of voters facilitated by the funds released by the National Resistance Movement Central Executive Committee chaired by the second respondent.

5. That each NRM Village/Branch received Ushs.100,000 paid in two instalments of Ushs. 50,000 each with the last one being paid on 17th day of February 2006 through Commercial Bank and received two days before polling day.

6. *That there are 43,365 villages in Uganda and NRM released Ushs. 4,336,500,000.*

7. *That to each sub county task force NRM released Ushs,400,000 paid in two instalments of Ushs. 200,000 per instalment with the last instalment being received at the sub counties two days before polling day.*

8. *That there are 670 sub counties in Uganda and accordingly NRM central Executive Committee released Ushs.388,000,000.*

9. *That to each District task force the Central Executive Committee of NRM paid U Shs 4,000,000 in two instalments of Ushs. 2,000,000 each, the last instalment arriving at the District two days before polling day.*

10. *That there are 69 District and the central Executive Committee of the RNM dispatched Ushs,276,000,000.*

11. *That to each NRM Parliamentary Candidate the party paid Ushs,4,000,000 paid in two instalments each, the last instalment of Ushs, 2,000,000 being paid two days before polling day.*

12. *That there are 215 Constituencies and the central Executive Committee of NRM releases a total of Ushs.860,000,000.*

13. *That each NRM candidate vying for the Woman District Parliamentary seat received Ushs.6,000,000 paid in two instalments of Ushs.3,000,000 each the last instalment being paid two days to polling day.*

14. *That there are 69 districts parliamentary seats and the NRM released Ushs.414,000,000 on its woman candidates.*

15. *That each NRM candidate vying for a municipality seat the Central Executive Committee of NRM disbursed to the thirteen (13) municipalities and five divisions in Kampala in two instalments the last being received two days to polling day.*

16. *That each NRM candidate vying for the local Council V seat received shillings 6,000,000 from the central executive Committee paid in two instalments of shillings 3,000,000 each with the last instalment received two days to polling day. With 69 district the party released shillings 414,000,000.*

17. *That each NRM candidate vying for a seat on the District Council received shillings 400,000 paid in two instalments of 200,000 the last such instalment being received two day before polling day.*

18. *That there 1340 council seats in the country and the central executive committee released a total of 536,000,000 shillings.*

19. *That to each NRM candidate vying for the sub county chairperson the central executive committee paid shillings 4000,000 in two instalments of 200,000 each with the last instalment being released two days to polling day. The committee released a total of shillings 268,000,000.*

20. *That to each NRM candidate vying for a sub county council seat the central Executive Committee of NRM released shillings 200,000 in two equal instalments with last instalment received two day to polling day.*

21. *There are two seats for each parish at the sub county and with 5314 parishes the central executive committee sent out shillings 2,125,600,000.*

22. *That to each NRM candidate for a municipality and city council seat the central executive committee released shillings 1,000,000 in two equal instalments with the last instalments received two days to polling say.*

23. That there are eighteen municipalities and five divisions of Kampala city with varying number of seats."

Although Musumba's claims especially as to the amounts of money given out were rubbished by counsel for the respondents, she is substantially supported by Zedikiya Karokora, the LC5 Chairman elect for Rukungiri District. He swore an affidavit as witness of the 2nd respondent, to contradict the affidavit of Kamatenite Ingrid Turinawe who had sworn that there was bribery in Rukungiri District. In paragraph seven of his affidavit, Karokora wholly corroborates Musumba's paragraphs 16, 17, 18, 19 among others.

The second respondent replied this way to Musumba's affidavit.

3. That I am the Chairman of the National Resistance Movement (NRM), a political organisation, and the Chairman of its Central Executive Committee and I swear this affidavit in that behalf.

4. That neither I nor the NRM Central Executive Committee authorised or released any funds to bribe voters in the Presidential Elections held on the 23rd February, 2006 or any elections of whatever description as alleged in paragraph 4 of Musumba's affidavit.

5. That after I was nominated as a Presidential Candidate for the said Presidential Elections, I chaired an NRM Central Executive Committee meeting to plan out and put in place strategies for all NRM candidates' campaigns at national, district, constituency and local levels including the ***raising of resources for those campaigns.***

6. That the Central Executive Committee, among other things, established a National Campaign Task Force chaired by the NRM Vice Chairman, AL Haji Moses Kigongo, to manage the overall strategies for the campaigns of all NRM candidates at national and lower levels, raise resources from our

supporters and well-wishers, coordinate and generally supervise all activities relating to the campaigns.

7. That the main strategy for the campaigns was physical voter contact tasked to the NRM branch/village task forces throughout country.

8. That the primary responsibility of each branch/village task force was to persuade each voter in its area to vote for me and all NRM candidates from village to national levels, while the Parish, Sub-County, Urban, District and national Task forces would deal mainly with coordination and supervision activities.

9. That a national budget for facilitating all NRM candidates: campaigns was prepared and approved by the Central Executive Committee. The resources were handled at the Central Executive Committee level and disbursed to the level below through the districts by payment voucher documents. A copy of a typical sample of the said payment voucher is attached hereto and marked as Annexture R2A1.

10. That the figure indicated in paragraphs 6 to 23, 25 and 27 of Musumba's affidavit are not true. There was no such regular pattern of distribution. And disbursements depended on amounts received at Central Executive Committee level and the facilitation needs at the various levels.

11. That all funds raised by the NRM for the campaigns as deponed to herein were exclusively spent on facilitation of the campaigns as stated in this affidavit and no money was ever disbursed for the purposes of bribing voters as falsely alleged by Proscovia Salaam Musumba in paragraph 26 of her affidavit.

Thus although counsel for both respondents rubbished Musumba's affidavit as valueless basically because she did not disclose the source of her information, in this affidavit, especially the voucher, annexeture R2 A1, (**post**) the second

respondent in reality confirmed the substance of Musumba's claim that NRM released a lot of money to all levels of its organs for campaigning.

The denial by the second respondent in para 10 of his affidavit that there was no such regular pattern of distribuation is contradicted by the affidavit of Zedekiya Karokora, LC5 Chairman elect of Rukungiri District. Karokora indicates in para 7 of his affidavit, that amounts reflected in R2 A1 are the amounts given out. The giving of money to voters has been confirmed in affidavits sworn by witnesses who received money, for example, several deponents from Musoola in Bungokho South constituency, in Mbale District, David Magulu in Kaliro District and also in Soroti and Tororo Districts. These are from the East of the country. There are deponents from the Districts of Kabale, Mbarara, Bushenyi, Kamwenge, Kyenjojo, Kanungu and Rukungiri (all in the West of the Country), Nebbi District in the North and Kampala in central. The various poll observers, especially Commonwealth and DEMGroup observers, all agree on the bribing and the giving of money during campaigning. The respondents tendered affidavits of witnesses challenging those of the petitioner's witnesses. In some instances the respondents' witnesses say they had money on polling day for facilitating their party agents.

The voucher R2 A1 says it all. This annexture was prepared on 17th February, 2006, just five days before the elections on 23/2/2006. It is not known when the intended disbursers received the money. But according to para 7 of Zedekiya Karokora's affidavit one of the receipients (Ruraka George) of such money received it on 20/2/2006, just 2 days before election. Even if it is assumed that the money was received on the same day,or few days after 17/2/2006, as in the case of Ruraka, releasing a colossal sum of Shs.81,850,000/= for mere facilitation (whatever that means) in a small urban District like Jinja is mind boggling. Of course Byarugaba, an agent of the petitioner in Kanungu, was arrested on 22/2/2006 while in possession of 687,500/= intended for allowances of agents of the petitioner. But as far as I know, nobody came out to swear that he was bribed with money or hoes by Byarugaba on behalf of the petitioner or of any other person.

I find it hard to believe that a political organization, like the NRM, which for all practical purposes has been in existence and had structures operating on the ground for many years, up to polling day, would find it necessary, at the eleventh hour, to rush such big sums of money to its various organs for mere "facilitation" of its

functionaries. The money must have been intended to facilitate voters rather than NRM agents. That is what the second respondent implies in paragraphs 7 and 8 – by "**physical voter contact**" and the "**responsibility of each branch/village task force was to persuade each voter in its area to vote for me.**"

The figures of Mrs. Musumba appear to be logical deductions from the information set out in the voucher. The core information is there.

The number of Districts, counties, constituencies, sub counties, parishes or villages are matters of which every one can take judicial notice.

On matters of payment of money, take the example of David Magulu from Kaliro. On 23/2/2006 Police hired his vehicle, so he could drive them on the election supervision work. According to him, on that day, Kaliro Police arrested Bwire Bakale P, the NRM District Treasurer, Musiba.S, an NRM agent, Basoga Saleh and Naizamba Wilber. According to this witness, these people who were giving money to voters were found with shs.800,000/= on arrest. Of course they swore affidavits denying that they were bribing voters. Magulu swore his affidavit which he signed on 18/3/2006. Strangely a second David Magulu (this time spelt as Maguru) swore another affidavit on 21/3/2006, which he thumpprinted, on behalf of the respondents attempting to disown the earlier affidavit, even though in para 4 of his latest affidavit he betrays himself by admitting that the names are his. However DPC Gerald Mbasa in his own affidavit, drawn by the same respondent's advocates admits, receiving a call reporting the buying of voters at Nawampiti mentioned by the first David Magulu. He hired an unnamed vehicled to take police to the scene. Police in fact arrested the four people mentioned by the first David Magulu. According to DPC, Bwire, the Treasurer was reported to be in possession of 329,000/= and police entered this in their CRB book. On his part Bwire admits the arrest and claims he was in possession of only 260,000/= from which he paid NRM agents, each 5000/=. Both Musiba and Basoga Saleh also admitted the arrest because of allegations that, they were giving out money to voters. The description of the vehicle driven by the first Magulu as a pickup is the same pickup as that driven by the second Magulu on same day and for the same mission. It was also a pick up though registration numbers differs a little. Surely in view of this what the original David Magulu said cannot be an invention. Where did the respondents get

the second Magulu? Was the first Magulu forced to modify his views? The second David Maguru must be a liar and I reject his evidence.

As mentioned already, there are witnesses who deponed to the giving of money to voters. Candidate Charles Byaruhanga of Kamwenge District talks of this in Kamwenge District. Ozo talks of this in both Kamwenge and Kyenjojo Districts.

Exh. R2 A1 speaks it all and therefore, I must quote its contents:-

National Resistant
Central Executive
Plot 10 Kyadondo Road, Box 7778 K'la. Tel: 346295,346279 Fax 256363

PAYMENT VOUCHER

No.DT1117

NAME: MZEE MUWUMBA SAMUEL
CHAIRPERSON JINJA DISTRICT

Date: 17-02-2006

Particulars	Amount
Facilitation to Village/Branch Task Force to procure pens, writing pads and refreshments during meeting to enhance the campaign effort. (395 villages in district x 50,000= per village)	19,750,000

Facilitation to Sub County Task Force to carry out campaign effort within their jurisdiction (12sub-counties in districts x 200,000= per sub-county.	2,400,000
Facilitation to District Task Force to carry out campaign effort within their jurisdiction	2,000,000
Party contribution to the NRM candidate for the seat of Member of Parliament 4 (constituency mp x 2,000,000=)	8,000,000
Party contribution to the NRM candidate for the seat of Member of Woman member of Parliament	3,00,0000
Party contribution to the NRM candidate for the seat of Municipality Chairperson	2,000,000
Party contribution to the NRM candidate for the seat of LCV Chairperson	3,000,000
Party contribution to the NRM candidate for the sea of District Councillors (24 Councillors x 200,000)	4,800,000
Party contribution to the NRM candidate for the seat of Sub-county Chairperson (12 Sub-counties x 200,000=).	2,400,000
Party contribution to the NRM candidate for the seat of Sub-county County Councillors (149 sc/councillors x 100,000	14,900,000
Party contribution to the NRM candidate for the seat of Municipality Councillors (26M/Councilors x 500,000)	13,000,000
Presidential Campaign rallies	
Polling Agents (315) polling station x 8p'ple) x 5,000	12,600.000
Special Operations	0
TOTAL	**87,850,000**

REPARED BY: **BERNADETTE** **DATE: 17-02-2006**	**AUTHORISED BY** **……** **DATE:** **……..**	**PASSED BY** **……** **DATE:……**	**RECEIVED BY** **……** **DATE: ……**

All these combined plus the use of money must surely have had substantial effect on the election results.

I accept that political parties are bound to use money in electioneering and this explains why the state gave some money to presidential candidates. But excessive spending commercialises elections which violates the electoral laws as to free and fair democtratic election.

There were other matters which impacted on the presidential election in 2006. The presence in many places during campaign and on polling day of military personnel and the use of NRM structures which had been in existence for years, during campaign and polling day; the use of Government resources and personnel like RDCs, as in Kamwenge, Kabale, Tororo and Butaleja Districts, GISO, DISO, money, shooting at supporters (at Mengo), conduct of officials of the second respondent such as Fox Odoi in Tororo and the use of Military in Iganga, Kabale, Bushenyi, Mbale, Kanungu, Ntungamo Districts, the use of tear gas to disperse supporters of opposition plus inadequate civil education all combined to affect the results.

It hardly requires a great stretch of imagination for a reasonable tribunal to conclude that the level of last hour spending of money alone or combined with other complaints such as proved intimidation, violence, or threats thereof would affect the election results in a substantial manner.

Mr.Wandera relied on the opinions of Dr. J.Odwee, an expert on statistics and contended that those opinions augment the case of the petitioner. The respondents in turn produced the opinions of Dr. Nazarius Mbona Tumwesigye to counter those of Dr.Odwee. I have gone through the reports and the affidavits of these two expert witnesses. They possibly would have been useful witnesses if clarifications of their respective reports were made orally in court. Time did not allow this to be made which is regrettable. Whatever the case I personally do not think that such clarification would have changed my opinion in this petition on this issue.

ISSUE No. 4.

WHETHER ANY ILLEGAL PRACTICES OR ANY ELECTORAL OFFENCES ALLEGED IN THE PETITION WERE COMMITTED BY THE SECOND RESPONDENT PERSONALLY, OR BY HIS AGENTS WITH HIS KNOWLEDGE AND CONSENT OR APPROVAL.

This issue arises from allegations in paragraphs 11 and 12 of the petition and the traversing of those allegations by the second respondent.

Mr. John Matovu opined, and later Mr. Wandera repeated this, that because the presidential election was held under multiparty politics under which four of the presidential candidates were sponsored by their respective parties, a candidate sponsored

by a party is responsible, or liable, for the activities and actions of his party agents. Bribery or illegal practices and electoral offences committed by such party agents would be taken to have been so committed with the knowledge of and consent or approval of a candidate.

On the burden of proof in an election petition, counsel relied on the opinion of Odoki, CJ., in **Presidential Election Petition No.1 of 2001** for the proposition that the standard of proof required in an election petition is proof to the satisfaction of the court. Indeed that is what the law states: See S.59 (6) of PEA. That was the general opinion of the Court in that petition. The Learned Chief Justice stated that it is a standard of proof that is very high ostensibly because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance. Further, learned counsel cited Ss.102 and 103 of the Evidence Act. (These two sections really set out the obvious, namely, that whoever wants court to believe a fact, he/she must adduce evidence to prove that fact). This is what Georges stated in **Mbowe Petition** (supra) at page 241D. Counsel contended that the standard is not proof beyond reasonable doubt. As regards averments in para 11 of the petition, learned counsel contended that the PEA, 2005, created various categories of offences whose objective was to oblige presidential candidates focus on issues contained in their respective manifestoes rather than indulge in mudslinging each other. He referred in particular to the offences created by paragraphs (a), (b) to (g) of subsection (5) of S.24 of the PEA and opined that S.24 (5) (b) outlaws sectarianism, while the other paragraphs create criminal offences whose objective is to prevent candidates from promoting incitement and also to encourage discipline among candidates. He distinguished offences created by S.24 (5) (a) which, according to counsel, require proof of mens rea, from offences under S.24 (5) (b) to (e), which, according to him, are offences of strict liability.

In his view, a candidate who commits offence of strict liability cannot justify the commission by explanation, as did the 2nd respondent. These offences are alleged or pleaded by the petitioner in paragraph 11 of his petition. The 2nd respondent answered these allegations in paragraphs 8 and 13 of his answer to the petition. According to counsel the statements of the 2nd respondent contained in his answer were false and defamatory and derogatory of the petitioner and the known members of FDC.

Mr. Matovu argued that in paragraphs 12, 13, 15, 18 and 19 of the petitioner's affidavit accompanying his petition, the petitioner alleged that the 2nd respondent made statements maliciously at various rallies and that those statements breached S.24 (5) (b) of PEA. He relied on **Black's Law Dictionary**, (page 956), **the intentional doing of a wrongful act,** etc. According to learned counsel the replies by the second respondent set out in paragraphs 13, 16, 17 to 20, 23, 25 and 26 of his answer are admissions of the commission of the offences alleged in the petition and so they do not constitute defences. Counsel dismissed the affidavits of Brigadiers Sam Kolo and Keneth Banya because each contains hearsay matters. Counsel argued that in paragraph 19 of his own affidavit, the second respondent set out a statement which is false, malicious and derogatory and contravenes S.24 (5) (d). Paragraph 22 shows that he wrote to the **New Vision** newspaper statements which, according to counsel, were malicious, derogatory, derisive, insulting and abusive. For the meaning of 'abusive' he again relied on **Blacks Law Dictionary, page 417**. And for the meaning of 'insult' he relied on **Phrases Legally Defined**. Counsel opined that under S.24 (5) paragraphs (b) to (g), the petitioner needs only to prove that the second respondent made statements contrary to those provisions, arguing that the 2nd Respondent admitted the commission of the electoral offences but gave explanations or motives which are no defences. Counsel contended (which is correct) further that proof of any one of these offences results in the annulment of the election.

BRIBES: Paragraph 12 of the Petition.

Mr. Matovu contended that both the 2nd Respondent and his agents gave bribes of two types, contrary to S.64 of PEA. He relied on paragraphs 2, 4, 5 of the affidavit of Umar Bashir (Kakoza) and the affidavit of Henry Lukwaya. According to counsel, the 2nd Respondent admits the giving of money in his affidavits. First, bribes were given through agents or his party functionaries: He relied on driver David Mugalu. Mugalu transported four agents of NRM who were allegedly bribing voters on 23/2/2006 in Kaliro to police station. The second types of bribes was given by vigilantes of the 2nd respondent on polling day.

Mr. Matovu relied on the affidavits of Salaamu Musumba, Kamateneti Ingrid Turinawe (Rukungiri) and Major Rubaramira (to which were annexed reports of election monitors or observers). Learned Counsel further contended that General Salim Saleh bribed voters.

(Essentially, it was Major Rubaramira, who, in his affidavit deponed that he had information that General Caleb Akwandwanaho aka Salim Saleh and an army officer bribed voters and supporters of FDC). In turn the General swore that by the time of elections on 23/2/2006, he had retired from the army and never bribed voters. He admitted that he actively campaigned for the second respondent.

Mr. Matovu submitted that the offence of disenfranchisement was orchestrated by NRM functionaries. Voters were removed from registers. This contravenes S.26 (c) of PEA, (attempting and or interfering with free exercise of franchise). He argued that the petitioner's complaint to the Commission about this is sufficient proof. (The complaints are set out in a letter dated 28th January, 2006, which the petitioner wrote to the Secretary of the 1st Respondent and to the Officer – in –Charge, Electoral offences Squad, CID, Kampala. I have already reproduced the contents thereof in these reasons. That letter was annexed to the petitioner's affidavit and its authenticity has not been challenged).

Dr. Byamugisha, on behalf of the 2nd respondent, replied to Mr. Matovu's submissions on the 4th issue.

PARTICULARS OF OFFENCE

Dr. Byamugisha first contended that the accompanying affidavit of the petitioner especially para 10 does not set out the particulars of the offences of which the petitioner complained. He relied on **Bullen, Leake and Jacobs, Precedents of Pleading** and contended that the petitioner should have pleaded particulars of the offences. He criticised Mr. Matovu for failure to provide authority for his proposition that the alleged offences constitute strict liability. Dr. Byamugisha relied on the Australian case of **He Kaw Teh Vs. R(1986) a LRC (Crim.)** page 553, where the High Court of Australia held that "the presumption that **Mens rea** is required before a person can be held guilty of a grave criminal offence was not displaced in relation to [(S.233 B(1) (b) of the Customs Act, 1901 of Australia].

In other words Dr. Byamugisha is of the view that the provisions cited by Mr. Matovu do not create strict liability. He contended that because allegations in the petition, if

accepted, are serious in that they result in nullification of the election, **mens rea** has to be proved.

CAUSE OF ACTION

Dr. Byamugisha contended also that the petition does not disclose a cause of action because it did not allege that there was malice. (I think that Para 11 (a) of the petition alleged malice). Counsel argued that it neither plead that the 2nd respondent was abusive nor that he called the petitioner a false prophet. Learned counsel relied on **Order 6 Rule 2 of CP Rules and Charan Lal Sahu Vs Singh & Another (1985) LRC (const.)** 31, a decision of the Supreme Court of India, where that Court discussed the need for precision in pleadings in election petitions.

Dr. Byamugisha submitted that paragraphs 10 to 20 of the petitioner's affidavit breached **Order 6 rules 2 of the CP Rules** in as much as they do not allege that the 2nd respondent made certain statements while campaigning in which case the allegations do not give the 2nd respondent a chance to respond to those allegations in a specific manner. He further contended that there is no evidence to support the allegation that the 2nd respondent contravened S.24 (5) of the PEA, because there was no evidence by affidavits read in court to support allegations in paras 10 to 20 of petitioner's affidavit, there was no cause of action.

May I observe here that the argument by learned counsel for the respondents that we should ignore affidavits supporting the petitioner which were not read or specifically referred to in court ignores the fact that the respondents' counsel never read out most of the affidavits of respondent's witnesses. He only produced an index of those affidavits and even then, some were not indexed. Should those be ignored, too? I don't think so.

FREEDOM OF EXPRESSION

Dr. Byamugisha urged court to bear in mind that under section 23(2) of PEA, candidates enjoy unhindered freedom of expression when campaigning for the presidential office. He relied on the decision of this Court (the judgment of Mulenga, JSC) in **Charles Onyango Obbo & Another Vs Attorney General Constitutional Appeal** No.2 of 2002 (pages 16 to 17 in regard to the extent of freedom of expression). Learned Counsel contended that if both S.24 (5) and S. 23 (3) (b) of the PEA are to be preserved as law, they have to be read in conformity with the Constitution. He relied on the **Bill of Rights**

Handbook 4th Ed. Para 3.7, headed **Indirect Application of the Bill of Rights To Legislation**.

At page 70, the author states that: -

> ***"Since the Bill of Rights binds all the original and delegated law-making actors, it will always apply directly to legislation. But, before a court may resort to direct application and invalidation, it must consider indirectly applying the Bill of Rights to the statutory provision by interpreting it in such a way as to conform to the Bill of Rights. The indirect application of the Bill of Rights to legislation has become known as "reading down."***

Thereafter the author discusses, at page 71, the meaning of "Reading Down" in relation to certain sections of the Constitution of South Africa which are on the Interpretation of the Bill of Rights.

Dr. Byamugisha urged us to make liberal interpretation of Ss.24 (5) and 23 (3) (b) which allow candidate's right to campaign. He relied on **Halsburys' Laws of England**, 3rd Ed. Vol.14 pages 226 and 227, paragraph 394, as well as **Election Laws 3rd Ed., by S. K.Gosh,** pages 149/150. The latter book is a commentary on the India election laws, especially regarding proof of allegations of corrupt practices. Dr. Byamugisha replied in answer to a question from court that if one section of PEA contradicts another, Court should uphold the section which is in conformity with the Constitution. He referred to paragraph 8 of the affidavit of the 2nd respondent accompanying his answer and submitted that in sub- paragraphs (a) to (h) of that affidavit, the 2nd respondent had to counter all the petitioner's accusations, falsehood and misleading statements, contending that what his client stated were correct and honest statements during a political campaign for the Presidency. He cited **Hibbs (Clerk) Vs Wilkinson** IF & F 873 at para 610, a case decided in 1859 and which is a case of libel. (Here learned counsel contradicts, by implication, his earlier contention that allegations in the petition did not show that his client's statements were made during campaigning. In fact the petitioner alleged that the statements were made during campaigns by the 2nd respondent and in para 11(a) of the petition the petitioner alleged malice.

Dr. Byamugisha urged that the contents of paras 10, 11, 12 & 13 of his client's affidavit, show that paragraphs 10 to 20 of the petitioner's affidavits cannot be true. According to Counsel, there is nothing false in para 12 of his clients affidavit, because politicians use colourful language which description is borrowed from the opinion of the Supreme Court of India (supra). Counsel justified what his client said explaining the need for the 2nd respondent to state what is contained in his affidavit and in that of Hon. Daudi Migereko to explain away Musumba's second affidavit, as well as affidavits of Nandala Mafabi, Ekanya and other MPs. These MPs of the last parliament were blamed for being responsible for shortage of electricity and whether or not these MPs were FDC members at that material time. Dr. Byamugisha further contended that the supplementary affidavit of the petitioner in reply to the 2nd respondent's answer cannot be used to support the petition as the reply was filed out of time. Counsel cited **Interfreight Forwarders Vs Uganda Development Bank** (at pages 2068 & 216) and **Norman Cameron Vs Sir Philip Fysh** (1904) HC of A 314) page 55 of R) The latter case appears to support the proposition that a petitioner cannot be allowed to belatedly introduce new facts to be relied upon to invalidate an election after the time allowed by law for presenting a petition has elapsed.

BRIBERY

Dr. Byamugisha submitted that bribery was originally not pleaded in the petition, but it was raised after the time of pleading. He contended that his client denied the bribery allegations pleaded in para 12 of the petition. He contended that counsel for the petitioner did not canvass it neither was evidence adduced to prove the allegation of bribery. So bribery was unsubstantiated. He also contended that there are no affidavits to support allegations of the giving out of saucepans, water containers and other gifts.

Learned counsel contended further, in effect, that Salaamu Musumba's affidavit on disbursement of money is valueless because Musumba did not disclose the source of her knowledge and that in any case the second respondent answered the allegations in his own affidavit. Learned Counsel then arged that money given out was for facilitation as defined in S.64 of PEA, which is different from bribery as defined in the same section.

Counsel argued that money given out as stated in the affidavit of the second respondent was for the facilitation of NRM party functionaries/agents. He contended that there is no

voter who has proved that he received money from the 2nd respondent. When counsel's attention was drawn to the affidavits of Zedekia Karokora who deponed about distribution of money by NRM task force in Rukungiri and of Umar Bashir, learned counsel contended that Bashir was only asked to cross over and campaign and that Bashir never claimed he was given money as a voter. Counsel rubbished the evidence of many witnesses (already mentioned in these reasons) who deponed that they were paid between 300/= and 500/= because, according to Dr. Byamugisha, this amount was miserable and not evidence of countrywide bribery within the scope of S.59 (6) (a) of PEA.

He made references to affidavits of Najjemba and of Henry Lukwiya and contended that shs 100,000/= paid on 24/12/2005 was not a bribe and that there was no evidence that Lukwiya was a voter.

In view of the provisions of S.64 (1) of the PEA, Dr. Byamugisha's views on this matter is with respect incorrect. Subs (1) of section 64 states as follows: -

"A person who, either before or during an election with intent either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery……"

He relied on **Gosh's Election Laws** (Supra), pages 348 and 354 which explains how the inference of guilt can be made and on corrupt practices generally. He prayed that we should answer the 4th issue in the negative.

Mr. Ogalo Wandera wound up on behalf of the petitioner. In effect he contended that the petition disclosed a cause of action and it satisfied **Rule 4(2) of the Presidential Elections (Election Petition) Rules, 2001**. He argued that affidavits filed subsequent to the lodging of the petition provided requisite facts and particulars and complied with the law.

I agree with the view that proof of commission of an electoral offence or a practice results in annulment of the election, as president, of a candidate proved to have personally or through any agent committed an offence. This is evident from the reading of S.64 (1) and S.59 (6)(c). The latter reads as follows:

" 59 (6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court-

(a)…….

(b) ……

(c) that an offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."

In the 2001 Presidential Election Petition, I had occasion to discuss S.58 (6) (c) of the Presidential Elections Act 2000 which is almost identical to the above quoted provision. At page 132, I said……

*"In the case before us, learned counsel were content to say that the standard of proof should be to the "**satisfaction of the Court,"** meaning that it is beyond the standard of the preponderance of probabilities and yet below the criminal law requirement of proof beyond reasonable doubt. This approach is about the same, as did **Lord Denning** in the **Bater case** (supra).*

Draftsmen of legislation appear to be in the habit of sticking to well trodden paths. I say this because the expression of proof to the satisfaction of the Court is used in many legislations (both penal and non-penal) and yet when Courts are called upon to try criminal cases arising under penal enactments, those Courts require the prosecution to prove criminal charges under investigation beyond reasonable doubt. I know it is convenient and perhaps, a matter of practical draughtsmanship for legislative draftsmen to follow the old path of precedent. However I wonder why draftsmen of our election laws have avoided the inclusion of the commonly used expression of "proof beyond reasonable doubt" in the various enactments such as PEA. For this reason, I do not, with respect, subscribe to the view that the expression "proving to the satisfaction of the Court" inevitably means proof beyond reasonable doubt. I think it is safer to apply the words

themselves and say that the standard of proof required to nullify an election of a President after a Presidential Election, must be proof to the satisfaction of the Justices trying the petition, namely proof so that the trial justices are sure that on the facts before them one party and not the other party is entitled to judgment."

Mr. Ogalo Wandera raised the important point about the agency relationship, in a multiparty politics election, between a presidential candidate and his or her agents who are party functionaries. Apart from making a passing reference on facilitation of party functionaries, Dr. Byamugisha did not, as far as I can recall, address us on the question of agency relationship between a candidate and his or her party's functionaries as regards responsibility or liability for acts of those agents in the conduct of electioneering under multiparty politics system elections.

Section 1 of PEA defines an agent as follows***:***

"Agent by reference to a candidate, includes a representative and polling agent of a candidate."

Under the Act a polling agent is an agent of a candidate. Obviously, a candidate would be bound by the acts of his polling agent such as the signing of declaration of results forms. The important question is how would a candidate be bound by such agent's offence(s) or illegal practice?

Under the law of agency, an agent is a person employed to act on behalf of another. An act of an agent done within the scope of this authority, binds his principal.

The definition in the Act does not say clearly whether party functionaries are or are not agents of a presidential candidate. However the affidavit of the 2nd Respondent explained aspects of this matter.

What about a representative? He/she is an agent. It is logical to infer from paragraphs 5 to 9 of the affidavit of the second respondent as to who would be an agent of a candidate. I reproduced these when I discussed the 3rd issue. Zedekiya Karokora confirms this in para 6 of his affidavit where he states that "the money I paid to Ruraka George and other sub county chairmen in Rukungiri District was received from the NRM National Task Force through the NRM task force for facilitation to the village or branch task forces to

procure pens, writing pads, refreshments during campaign organization meetings to enhance the campaign effort and to contribute to the NRM candidates for various seats.

The obvious inference that flows from the contents of the said paras 5 to 9 of the affidavit of the 2nd Respondent is that in so far as NRM was concerned, members of the branch or village task forces and NRM functionaries were agents of party candidates at all levels of elections. In particular, they were agents of the second respondent for purposes of the Presidential election. It is thus clear from his own affidavit that the 2nd respondent and the NRM Central Executive Committee authorised their agents to carry out electioneering for the 2nd respondent in the presidential election. Those agents were to contact individual voters and persuade those individual voters to vote for the 2nd respondent. So if a member of the task force succeeded in persuading any body to vote for the 2nd respondent, the act of persuading a voter to vote for the 2nd respondent would be presumed to have been done with the knowledge and consent of or approval of the 2nd respondent because he and the Central Executive Committee knew or consented and approved the fact that the branch or village task force will have to make personal contact with individual voters to woo such voters to vote for the 2nd respondent for the office of President. That is why the Central Executive Committee set aside money to be paid to the task force, or party functionaries, at all levels for the purpose of furthering the task of physical contact with voters and persuading, voters to vote for the 2nd Respondent or for an NRM candidate for any office.
The question that arises then is: where a candidate and or his party have, as in this case, authorised agents to use physical contact to persuade voters, in what manner and to what extent can the physical contact and persuasion go? In other words what are the limits of the authority thus given? Can it be reasonably inferred that the candidate consented to or approved the giving of money or gifts to voters? What is that giving? Is it bribing? Should the 2nd respondent be exonerated from the act of any agent or party functionary who bribes voters? Mr. Ogalo Wandera has argued that the 2nd respondent is liable or responsible for acts of bribery by agents or party functionaries.
Dr. Byamugisha made three pronged reply to this. First he submitted that bribery was not pleaded and secondly that there was no evidence to support any bribery. Again learned counsel contended, in reference to Umar Bashir Kakoza and Henry Lukwaya, that there was no evidence that any of them was a voter. Third he argues that even if there is evidence of bribery, such evidence is not wide spread. Learned Counsel rubbished the

evidence of witnesses such as those from Musoola in Mbale District or at Buseta (Janees Kiige) in Pallisa and Busia who deponed that the **2nd respondent's agents** paid them between shs 300/= and shs 1000/= as being trivial. That a whole president could not pay shs 300/= as a bribe. Learned counsel does not seem to appreciate that to a peasant shs 300/= or 500/= at a given moment is money. Moreover that little money is not alleged to have been limited to only one location. There is evidence of this in Mbale, in Pallisa, in Nebbi, in Kabale, Palisa, and so on.

S.23 of the PEA relates to equality of treatment, freedom of expression by and access to information of a presidential candidate during campaign period. Similarly S.24 sets out what are called rights of a presidential candidate during the campaign period. On some aspects the two sections appear to contradict each other. Rights given to candidates in S.23 are whittled away by S.24.

I have no hesitation in accepting the view that Ss. 23 and 24 of PEA should be read together with the Constitution. But I would not accede to the argument that S.23 gives licence to candidates to say what they imagine or what they please without limitation.

In order to appreciate the contentions of the parties regarding offences alleged to have been committed by the 2nd Respondent, the context of both S.23 (3) (b) and S.24 (5) has to be set out. This means setting out the two sections.

S. 23 On equal treatment, freedom of expression and access to information of candidate reads this way –

"(1) During the campaign period, every public officer and public authority and public institution shall, give equal treatment to all candidates and their agents.

(2) Subject to the Constitution and any other law, every candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of the right to campaign under this Act.

These above two sub sections together with S. 24 (1) and (2) (infra) or rights/entitlements of a candidate during campaign period.

Then subsection (3) states: -

(3) A person shall not, while campaigning, use any language-

(a) which constitutes incitement to public disorder, insurrection or violence or which threatens war; or

(b) which is defamatory or insulting or which constitutes incitement to hatred."

Relevant parts of section 24 on the rights of candidates reads this way. During campaigns –

24 (1) All presidential candidates shall be given equal treatment on the State owned media to present their programmes to the people.

(2) Subject to any other law, during the campaign period, any candidate may, either alone or in common with others, publish campaign materials in the form of books, booklets, pamphlets, leaflets, magazines, newspapers or posters intended to solicit votes from voters but shall, in any such publication specify particulars to identify the candidate or candidate concerned.

(3) A person shall not, during the campaign period print, publish or distribute, a news paper, circular or pamphlet containing an article, report, letter or other matter commenting on any issue relating to the election unless the author's name and address, or the authors' names and addresses, as the case may be, are set out at the end of the article, report, letter or other matter or, where part only of the article, report, letter or matter appears in any issue of a newspaper, circular, pamphlet or matter at the end of that part.

As stated earlier, subs (5) of S.24 appears to whittle down what S.23 gives as rights to candidates.

24. (5) A candidate shall not while campaigning, do any of the following: -

(a) making statements which are false –

(i) knowing them to be false, or

(ii) in respect of which the maker is reckless whether they are true or false;

(b) ***making malicious statements;***

(c) ***making statements containing sectarian words or innuendoes;***

(d) ***making abusive, insulting or derogatory statements;***

(e) ***making exaggerations or using caricatures of the candidate or using words of ridicule;***

(f) ***using derisive or mudslinging words against a candidate; or***

(g) ***using songs, poems and images with any of the effects described in the foregoing paragraphs.***

My understanding of the provisions of [S.24 (5)] is that the provision prohibits a candidate from doing any of the things specified by the provisions which in effect whittle away the rights of expression given to candidates under S.23 (2).

In the **Onyango Obbo case**, we were concerned with a free and democratic society. Onyango and his co-appellant had been or were being prosecuted for publishing false news under S.50 of the Penal Code Act. That section read:

> **"50 (1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour.**
>
> **(2) It shall be a defence to a charge under subs (1) if the accused proved that, prior to publication, he took such measures to verify the accuracy if such a statement, rumour or report as to lead unreasonable to believe that it was true".**

We held that the section was inconsistent with Article 29(1) (a) of the Constitution and was consequently null and void. The Article itself is one of the articles which guarantee Fundamental Human Right. It guarantees the right of freedom of speech and expression which includes freedom of the press.

I do not think that any reasonable person can challenge the idea that freedom of expression is necessary for a democracy and more so during electioneering. But when Parliament enacted S.23 and S.24 of the PEA it must have been aware of the necessity of freedom of expression during campaign before parliament enacted the two provisions. Any one who has watched, or participated in, elections in Uganda would appreciate the necessity of curbing excesses during election period. But how far can one go to do the curbing?

PLEADING BRIBERY

Was bribery pleaded or not? I answer yes. Let us look at the petition. In paragraph 12, the petitioner pleaded bribery by the 2nd respondent himself or by his agents. In 12 (c) he alleged that agents procured votes of individuals by giving out tarplins, saucepans, water containers, sugar, salt and other beverages.

Dr. Byamugisha argued in connection with commission of offences that no particulars were given in the affidavit accompanying the petition and therefore, that no cause of action is disclosed. It is true that the accompanying affidavit did not specifically plead particulars of bribing any named individual voters. However, in paragraph 4 of that affidavit, the petitioner pleaded generally that the elections were full of malpractices, irregularities and electoral offences. And in the 3rd and 4th paragraphs of the petitioner's summary of evidence it was alleged as follows: -

> *"Further the petitioner shall lead evidence to show that the 2nd respondent personally committed illegal practices and offences connected to the elections including but not limited to bribery of voters, interfering with the free franchise of the voters, made malicious, abusive, sectarian, derisive and defamatory statements against the petitioner contrary to the law.*
>
> *Further more the petitioner shall lead more evidence to show that the 2nd respondent's agents with his knowledge and consent procured votes by giving out valuables and that all the above acts affected the results of the election in substantial manner."*

This summary of evidence is given under authority of **Order 6 of Civil Procedure Rules** as amended by **Civil Procedure (Amendment) Rules 1998**. In that respect they form part of the pleadings. In paragraph 12 of his answer to the petition, the 2nd respondent denied the allegations contained in paragraph 12 of the petition. May I also point out, if I may, that by virtue of subrule 5 of Rule 8 of **the Presidential Elections (Election Petitions) Rules, 2001**,

> *"Where the respondent requires further particulars of the petition, he or she shall apply for the particulars together with the answer"*

Apparently, none of the two respondents, let alone the 2nd respondent, applied for any particulars. For if any had done so, according to sub rule (6) of Rule 8,

"The petitioner shall, subject to the directions of the Court, supply any particulars requested under sub rule 5 of this rule on or before the date set for trial of the petition".

The effect of this rule, as I understand it, is that more facts to support a petition are permissible after the lodging of a petition.

If this asking for particulars was not possible, the other course was for counsel for the respondents to ask, during the scheduling conference, for particulars to be provided. The respondents may reply to this by saying that they were not expected to build up the petitioner's case. However in the default of these two modes of seeking for particulars by the 2nd respondent, the petitioner filed affidavits of witnesses such Salaam Musumba, many from District of Mbale, Pallisa others from Districts of Ntungamo, Kabale, Bushenyi, Kamwenge, Kyenjojo, Rukungiri (Kamatenite Turinawe), Kanungu (Karokora) and Kampala District from Umar Bashir Kakooza, Mr. Lukwaya in support of allegations in his petition. As a result the 2nd respondent was personally able to swear affidavits on 21/3/2006 in reply denying the allegations as did many of his witnesses such as Francis Museveni Tuhimbisibwe Matia, Joram Mayatsa and James Wateya, Mbale and Washirekos.A.APC A.Bitwire. Hon. Amama Mbabazi, Muhwezi L, RDC Ben Rulonga and Apollo Nyagamehe in response to those affidavits.

In these circumstances, I do not agree that the case of **Norman Cameron Vs Sir Philip Fysh (Supra),** relied on by Dr. Byamugisha, supports his arguments. In the **Cameron Case**, an application to amend pleadings was made during the hearing of a petition to introduce a wholly new ground. That application was made belatedly. The writ appears to have been issued in accordance with the Australian Electoral Act. It had to be served on the respondent and apparently the petitioner had to file his facts (presumably a summary of evidence) in support of the petition within 40 days after the return of the writ. Facts of the petition were apparently filed in time but those facts did not contain the new ground for which the petitioner sought a belated amendment. Even then this application was made in the course of the hearing of the petition or before oral evidence was adduced. The position is clearly distinguishable from the present petition. In the present petition, evidence by way of affidavits alleging that there was bribery had been filed and so that evidence was on the record.

Dr. Byamugisha contended that no evidence was adduced to prove the bribery nor the giving of money or other gifts. I have indicated that there is evidence some of which Dr. Byamugisha rubbished as trivial because of the amount of money given. Again Dr. Byamugisha contended that the issue of bribery was not canvassed. I think, with respect, that bribery was canvassed.

First Mr. Ogalo Wandera asked court to refer to all the affidavits tendered in support of the petitioner. Some of those affidavits certainly depone about bribery. These include affidavits of Ensinikweri Godfrey, Twinomukago Vanice, Byaruhanga Johnson, Turyasingura Joseph (of Kabale),Ozi and Byaruhanga of Kamwenge, Salaamu Musumba, Musimbi Edward and Masaba Robert (of Mbale). Discussion about Mayombo.D of Kanungu District and Umar Bashir, Lukwaya, Esther Najjemba, an NRM mobilizer relating to shs 100,000/= of Kampala. Further in his closing address, Mr. Ogalo Wandera referred to Annexture C1 to Rubaramira's affidavit which report was hardly contradicted. That was a report by DEMOgroup of the election observers. Ogalo Wandera submitted that that report shows that there was rampant bribery both prior to and during the voting day. That was canvassing.

In my opinion, the petition and subsequent affidavits which were filed in support of that petition were sufficient to found a cause of action. I think that Rule 4 (7) was satisfied in as much as the subrule does not specify what particulars a petition must contain. I do not think that in the light of the said Rule 4 (7), Order 6 R2 of CPR was breached.

Consequently, there are three points for me to consider next namely: the people who did the bribing and who were bribed and whether if I believe the evidence, the 2nd respondent can be held responsible for any bribing.

Who did the bribing?

First let me begin with the law of agency in elections. In my reasons in the **President Election Petition No. 1 of 2001** between these same present parties, I held that because of the Movement Act, all the NRM functionaries were agents of the NRM Presidential Candidate. I have already said as much in these reasons. I find support of this in S.9 of PEA which states -

> "*Under the Multiparty Political System, nomination of a candidate may be made by a registered Political Organisation or Political Party sponsoring a candidate* …"

Further, under S.21 (3),

> *"… a candidate's agent may carry on campaign meetings on behalf of the candidate and otherwise carry on any campaign which the candidate is allowed to do under this Act"*.

This subsection clothes an agent with authority to do what a presidential candidate can do during campaign period. Naturally this has to take into account the provisions of S.59 (6) (c) which states **"that an offence was committed in connection with the election by the candidate personally or with his knowledge and consent or approval."**

There are a number of election petition cases decided from other jurisdictions which illustrate circumstances under which a candidate is bound, or is held responsible for or by the acts (or omissions) of his agents. In the ancient petitions of **Stanley Bridge Election Petition (1869) 20 LT.75** and **Bewdley Election Petition (1869) 19 LT. 676**, corrupt practices of an agent's clerk were imputed on a candidate.

The effect of the decision in Stanley Bridge case, as a general proposition, is that whenever a candidate or his agent employs a person to bring up a voter and **that person does corruptly what they intended should be done incorruptly; they must take the consequences.** Can this stand the test set by S.59 (6) (c) of the PEA? I think it does.

In another ancient petition of the **Borogh of Bodmin (1869) 20 LT 989,** the conduct of a canvassar who was not appointed agent was treated as evidence of agency for the candidate because what he did was for the purposes of advancing the candidate's election. In this petition, the 2nd respondent has deponed that his party's task forces throughout the country were tasked to contact voters and ask voters to vote for him. That clearly is abroad authority.

In the **Bewdley Election Petition**, the court found that in a Borough where there was campaign for parliamentary election, nearly 20 Public houses (Bars) were habitually kept open and whoever chose to present himself was supplied with a drink. The court stated that where that was done, i.e; where bars were kept open and voters were given drinks, it would be a perfect mockery to suppose that it was done without any corrupt intention. In that case, the candidate, Sir Richard Glass, had given money to Crowther and Paradoe, his agents. These two agents employed other people to ensure the provision of the drinks which was provided to voters.

The court concluded that -

> "It is quite true that Sir Richard Glass (candidate), in handing over money to Mr. Crowther, and in placing money in the hands of a person who was not returned as his agent for electioneering expenses, has infringed the Act of Parliament.
>
> **I cannot in the slightest degree doubt that where a fund is placed in the hands of an agent, and that agent expends the money in a corrupt manner, that that is evidence to show that the candidate intended that it should have been so spent**.
>
> **I do not believe that at any corrupt election any candidate has been foolish enough ever actually to say, SPEND THIS MONEY IN BRIBERY."**

Norwich Election Petition (1869) 19 LT 615 was a case of bribing voters. It was argued that even if an agent was proved to have bribed voters, or committed a corrupt practice or act, that could not be visited upon a candidate. It was argued further that there was a distinction between a person who committed the act on the part of the principal as an agent and the person who did so merely on his behalf. It was argued that before a candidate is made responsible for the act of a person who had been acting in his behalf, that act must be done with the privity and knowledge and consent of the candidate for whom it was done. When rejecting these arguments, Martin B., said -

> **"… any person authorised to canvass was an agent, and it does not signify whether or not he has been forbidden to bribe. If the candidate had told him honestly, "Do not bribe, I will not be responsible for it," and if bribery was committed, that bribery in my judgment would affect the candidate …**

In **Bradford Election Petition** (1869) 20 LT 729, an election court held that excessive spending of money in a constituency can be and is properly treated as strongest prima facie evidence of corrupt practices.

Dr. Byamugisha relied on **The Commentaries on the Representation of The People Act of India by Gosh,** 3rd Edition, 1998, for the propositions that:

a) Particulars of offences or illegal practices must be pleaded in the petition in order for the petition to disclose a cause of action; and
b) that illegal practices or electoral offences must be proved strictly.

Learned counsel did not supply us with the actual text of the provisions of the two Indian Statutes and the accompanying rules which provided background for the commentaries. I have not been able to lay my hands on any.

As a general observation I ought to point out, though, that from what I have read from pages 149 to 157 of the extract of that book provided by the learned counsel, the courts in India hold a view that consequences of upholding an election petition are very serious since a candidate who is unseated because of the success of the Petition does not only loose the seat, he is, in the case of proof of corrupt practices, also disqualified from holding public offices.

Further, unlike here in Uganda, such a candidate also can be convicted of criminal offences and be sentenced to imprisonment by the same court,. The proceedings are therefore **quasi-criminal in nature and the** Indian Courts insist that because of that the charges in a petition must be properly pleaded and strictly proved as in a criminal trial, i.e., proof must be beyond reasonable doubt.

In Uganda, Subsection (7) of S.59 of the PEA [and S.63 (7) of the Parliamentary Elections Act, 2005, respectively] bar this Court and the High Court from convicting any person of a criminal offence when hearing an election petition. Again the two laws do not penalise any person who commits electoral offences by way of disqualifying the offender from holding public office for any period. Indeed even the basic law, the Constitution, is silent on this latter aspect yet the previous Ugandan Elections laws provided for disqualification. That is why I believe that the burden of proof in election petition trials is closer to a balance of probabilities. As I said earlier, this Court held in **Presidential Election Petition No.1 of 2001** that the standard of proof of allegations in the petition are to the satisfaction of the court but not beyond reasonable doubt. That is in accord with S.59 (6) itself.

Furthermore, I think that at this stage the directive words of Article 126 (2) (e) must be born in mind when considering pleadings. Paragraph (e) of Clause (2) of Article 126 states -

> *"In adjudicating cases of both civil and criminal nature, the courts shall, subject to the law, apply the following principles –*
>
> *e) Substantive justice shall be administered without undue regard to technicalities".*

Dr. Byamugisha relied on Order 6 Rule 2 of the **Civil Procedure Rules** for the proposition that various particulars, e.g., dates when corrupt practices or electoral offences were committed and names of persons who received bribes should have been stated in the petition and or the accompanying affidavit.

The rule sates-

> *"In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, such particulars with dates shall be stated in the pleadings"*.

As I have stated the effect of this rule was modified by the introduction of the **Civil Procedure (Amendment) Rules, 1998**. The old rule 1 of Order 6 which preceded rule 2 was amend. The new 06 Rule 1 reads:-

> "*O.6 rule1*
>
> *a) Every pleading shall contain a brief statement of the material facts on which the party pleading relies for claim or defence as the case may be ...*
>
> *b) Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on …"*

I think that the effect of this amendment appears to me to modify rule 2 in that the summary of evidence to be adduced at the trial should normally provide the requisite particulars.

Interestingly an inquiry (a trial) of a Presidential Election Petition in Uganda is heard on the basis of evidence by affidavits, unlike conduct of Election Petition in India upon whose law Dr. Byamugisha relied. (See Rule 14). There, the evidence is adduced orally.

Moreover, although the import of Rule 22 of the **Presidential Elections (Election Petitions) Rules** is yet to be expounded, it appears to me that the effect of that rule is to minimize formal objections to the contents of a Presidential Election Petition. The rule reads -

> ***"22 proceedings upon a petition shall not be defeated by any formal objection or by miscarriage of any notice or any other document …"***

It is helpful to note Rule 4 of Order 45 of C P Rules which states:-

> ***"4 Any special rules of procedure not contained in these Rules which may have been or may be made by the High Court shall, where they conflict with these Rules, prevail and be deemed to govern the procedure in the matter therein mentioned."***

The expression **"by the High Court"** is immaterial. The Presidential Election (Elections Petition) Rules are special rules and accordingly the above rule makes those rules prevail.

I have said, and I repeat it here, that the necessity for a petitioner to lodge a petition within 10 days after a declaration of presidential election results inevitably makes processing a petition problematic. This is made no better by the requirement to try the petition and conclude it within 30 days after the petition is lodged in court. The combined effect makes it pretty difficult for parties, especially a petitioner, to lodge a perfect petition. Dr. Byamugisha cited the **Mwanawasa case** (infra) of Zambia. It seems that the Zambia law relevant to the filing, the hearing and determination of a presidential election petition is far much more liberal than our laws. A petition is supposed to be filed and determined within 180 days. In that case, a consolidated presidential election petition which was filed in early 2002 and which should have been concluded within 180 days, took over three years before it was concluded.

My participation in the hearing of the 2001 and this present petition makes me conclude that the period prescribed by Article 104 of our Constitution and by the Presidential Election Act within which the petition must be heard and determined is practically too short. I believe that the dictates of democratic governance require that a dispute challenging the validity of a presidential election should be heard and expeditiously determined within a practically reasonable time. Such reasonable time should be such that parties are able to assemble relevant evidence, lodge a petition and an answer thereto, do research and have ample time to present their respective cases. Thereafter the court should have sufficient time to adequately consider materials presented by parties before giving its judgment. The election of the President involves the whole country as a constituency. Whereas in this petition, there were over 200 Parliamentary constituencies and nearly 20000 polling station, for a petitioner (or petitioners) who may not have been an incumbent, or who may have entered the presidential race for the first time, to be able to assemble all relevant material evidence within the prescribed ten days is obviously not

easy. In saying so, I am not here condoning sloven preparations of any Presidential Petition or any other election petition, for that matter. The office of the President is the highest in the land. So contest for it in court should be properly done and the trial should follow procedures provided by the law. Although I do not share the opinion by my distinguished and learned brother, Dr.Justice Kanyeihamba, JSC, that our current law provides for an inquiry rather than a normal full trial, that opinion could carry sympathy in view of the very short period provided for the institution, the hearing and determination of a presidential election petition. I am however not persuaded that the use of the word **"inquire"** in Art 104 (3) and (5) displaces a trial as known in court practices in this country which is adversarial in nature.

Article 104 stipulates that a presidential election is to be challenged by a petition to this Court. Normally almost all forms of petitions in courts are tried by courts.

The use of the word **"Inquire"** rather than **"try"** in clause (3) of article 104 may be due to the draftman's interpretation of what the Constituent Assembly delegates agreed on or meant. The draftsman appears in other parts of the constitution to have used different other words to describe a trial. Thus in clause (4) (b) of Article 137 states:-

> "……..the Constitutional Court may-
>
> (b) refer the matter to the High Court to investigate and determine the appropriate redress."

And clause (7) of the same Article 137 states: -

> "Upon a petition being made…… the Court of Appeal shall proceed to hear and determine the petition……."

Again in Articles 86(1) and 140(1) the Constitution empowers the High Court to "hear" and determine matters referred to it. Incidentally clause (3) of Article 86 anticipates that aggrieved persons seeking to challenge the election of a Speaker, Deputy Speaker or MP would apply to High Court.

In all these, I understand the use of the words "investigate" and "hear" to really mean to try the matter. The same should apply to the word "inquire" in article 104. I have looked at the draft constitution which was debated by the Constituent Assembly resulting in the present Constitution. Clause 107 of the draft constitution anticipated the challenge to be by way of a petition presented to High Court which would hear and determine the same.

So a normal trial was anticipated. A decision of the High Court was appellable to this Court. This was to be the same procedure in respect of challenging an election of a member of parliament.

Be that as it may, I think that the petition, the accompanying affidavit read together with the petitioner's supplementary affidavits and the various affidavits sworn by other deponents, to some of which I have referred, in support of the petition, disclose a cause of action and give sufficient particulars of the alleged electoral offences and the alleged irregular practices. In fact the accompanying affidavit of the petitioner enumerated various dates on which the alleged various electoral offences were allegedly committed.
In my considered view, therefore, neither O.6 r.2 nor **Bullen Leake, Jacobs on Precedents** nor **Gosh's commentaries** on Indian election laws are good authority for the proposition that the petition did not disclose a cause or causes of action.

Dr. Byamugisha referred to a passage in the judgment of the Zambia Supreme Court in **Presidential Election Petitions No.1-3 of 2002 Anderson Kambela Mazoka & 2 Ors Vs Levi Patrick Mwanawasa (Supra).** In a unanimous judgment, the Supreme Court of Zambia reiterated its earlier view, after referring to the judgment of Lord Denning in **Bater Vs Bater (No. 2) (1950) 2 ALLER 458** the court approved what it had previously stated in Chiluba case thus:

> **"The bottom line however was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that the proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters. We are satisfied, on the evidence before us, that the elections while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs such elections; *the few examples of isolated attempts at rigging only served to confirm that there were only few superficial and desultory efforts rather than any large scale, comprehensive and deep rooted "rigging"* as suggested by the witness who spoke of aborted democracy.**

Apparently there was evidence in the Zambia Supreme Court trial that the alleged rigging or defects or flaws complained of in the petitions were isolated. That distinguishes the Zambian petition from the present petition. In the preceding pages, I have referred to affidavits of witnesses who support the allegations that bribery, intimidation and violence were widespread, the principle of secret ballot was violated in many areas, multiple voting was wide spread as was pre-ticking of ballot papers in favour of the 2nd Respondent.

If find it unnecessary to discuss most of the contentions about whether statements made by the second respondent were mudslinging, abusive, defamatory or delegatory.

UMAR BASHIR (KAKOZA) GROUP

On bribery I want to examine the evidence of Umar Bashir (Kakooza) and Lukwaya and compare it with that of Esther Najjemba. The allegations of bribery are set out in para 12 of the petition. The first two are witnesses of the petitioner while the last witness is of the 2nd Respondent who also himself swore an affidavit on the bribery question. It is pertinent to refer to that affidavit. Umar and Lukwaya deponed their affidavits on 18th March, 2006. According to Bashir's affidavit, a lady called Esther Najjemba addressed Bashir and a group of youths on the evening of 24th December 2005, at 7.30 p.m, at Sam Sam Hotel, in Bakuli, a suburb of Kampala. The group included Lumu, Fred and Iga Rashid. She expressed concern why Bashir group did not support the second respondent. During the meeting, the youths complained of poverty and unemployment. Esther took the group to State House, Nakasero, where they arrived at about 10.00 p.m. The group later met the 2nd respondent at about midnight. The 2nd 0respondent went through his manifesto with Bashir group and inquired why they did not support him. When they complained of poverty and unemployment, the 2nd respondent advised the group to form associations through which he would channel **financial assistance to them provided they crossed from FDC to NRM and campaigned for him.** The group agreed whereupon the 2nd respondent directed one of his AIDES to give each youth some money. Bashir was given shs 100,000/=.

The 2nd respondent promised to give more money if he proved they had crossed when he meets them again on 24/12/2005 (This must be 27/12/2005 because that is the date referred to by Lukwaya and by Esther Najjemba for the second meeting).

Because the AIDE who gave the money on 24/12/2005 warned Bashir and group that they would be **trailed if they did not cross from FDC**, Bashir **crossed to NRM**. He was thus perduaded by money not to vote for the petitioner. Bashir is corroborated substantially by Lukwaya who swore his affidavit on same day (18/3/2006) as Bashir. He was a chairperson of Lungujja parish youth group where he is a registered voter. Lungujja parish is in Rubaga North Constituency, Kampala. On 27/12/2005, Mugabi Robert an apparent supporter of 2nd respondent complained that Lukwaya had made it impossible to display President Museveni posters and told Lukwaya that the President wanted to meet all youths of the constituency who did not support him. Mugabi organised for the introduction of Lukwaya to Esther Najjemba who organised for about 40 youths to meet the 2nd respondent at State House, Nakasero. Among the youths who met the 2nd respondents were Umar Bashir Kakoza, Chief Mbowa of Lusaze, Lume Fred, Yunus Kasirye and Katende. They boarded a Coaster Bus from the same Sam Sam Hotel in Mengo. The group reached State House and were entertained to dinner up to 11.00 p.m. They held discussions with the 2nd Respondent for about one hour whereupon he advised them to form youth associations **through which he would channel funds for then immediately**. He asked the group to vote for him. Lukwaya deponed that on 24/12/2005 youths including Bashir had visited State House and each reported receiving shs 100,000/=. Among the youths were those mentioned above. Following this, Lukwaya reported the matter to Beti Kamya who apparently condemned the whole thing at a press conference.

Dr. Byamugisha had submitted that there was no evidence that Bashir and group were voters. The evidence of Lukwaya shows that he was a registered voter and he and Bashir had been campaigning for the movement since 1996. Najjemba corroborates him on this. Najjemba, has been a supporter of and moboiliser for NRM and the 2nd Respondent since 1996. She knew Bashir as NRM supporter in 1996 and 2001. In her affidavit, she referred to Bahir, Lumu Fred and Iga Fred and continued as follows: -

(d) That through my coordination I invited the three persons, among others, to Sam Sam Hotel in Mengo for the purpose of mobilising them to vote for the NRM.

(e) That during our discussions, they raised problems of theirs which government had failed to solve as follows:

i. *Youth unemployment*

ii. *High tuition fees.*

iii. *Very high taxes for businessmen.*

iv. *Poverty.*

(f) *That for the purpose of my mobilisation I had intended to meet the President to explain to him the problems the youth were facing which problems I had already received from various youth groups.*

(g) *That I telephoned the Principle Private Secretary requesting an appointment to meet the President and explain to him the concerns of the youth and she gave me the appointment.*

(h) *That I had collected the Youth aforesaid to go with me and present the President with their problems.*

(i) *That we arrived at State House at about 10.00 p.m but he could not see us until 1.00 a.m in the morning because of a busy schedule.*

(j) *That when we met him, four of us stated the problems we had come to discuss with the President, but they were not discussed because it was late and he was leaving for Rwakitura for Christmas.*

(k) *That he did not take us through his Manifesto or ask us why we did not support him.*

(l) *That however, before he left, he advised us to form Youth groups to fight poverty through the poverty eradication programme.*

(m) *That he did not say that he would himself channel financial assistance to those groups nor did he say that assistance from him would be provided on condition that we crossed over and campaigned for him.*

(n) *That before he left, he instructed the Principle Private Secretary to get the State House Legal Officer to assist them to register an Association. He also instructed her* ***to make an arrangements for us to reach our homes.***

(o) *That finally, he promised to meet us after Christmas for full discussions of the problems but he did not promise to give us any money at the next meeting.*

5. *That I have also read the affidavit of Henry Lukwaya dated 18th March, 2006 and reply to it as follows:*

i. *That a subsequent meeting with the President was arranged for us by the Principle Private Secretary on the 27th of December 2005.*

ii. *That we travelled from Sam Sam Hotel in two motor vehicles (a Coaster and a Minibus).*

iii. *That when we arrived at State House, the President was busy and we were asked to go for dinner in the meantime and this was a normal routine for visitors at State House as I had been there and experienced this several times before.*

iv. *That we did not see the President until about 1.30 a.m and by that time, he was again too tired to discuss our problems with us.*

v. *That the President did not ask us whether we were FDC Youth or why we did not support him.*

vi. *That the President instructed the Principle Private Secretary to* ***make us another appointment for after the Presidential elections.***

vii. *That he did not conclude by asking us to vote for him nor did he give us any money."*

Clearly in most material respects, Ms.Najjemba corroborates the testimony of both Bashir and Lukwaya. She naturally denies payment of money and the asking for these people by 2nd Respondent to vote for the second respondent which in the context of this petition is understandable and significant. Najjemba stated that the 2nd respondent instructed his **principal private secretary to make arrangements** for their transport home. On the facts I have no doubt that this was a euphemism for money payment.

If these people were not voters how could they be persuaded to mobilize for the NRM? If the 2nd respondent did not want the votes of this group what explanation is there for hosting them at State House on the eve of Christmas day and two days thereafter? What sound explanation is there why they had to see the President after a scheduled election? Was this not intended to thank them for crossing to NRM, mobilisation and for voting for him?

The second respondent replied to the affidavit of Bashir and Lukwaya on 21st March, 2006. In paragraphs 14,15,16 and 17 of his replying affidavit, which I quote earlier, the 2nd respondent answered Bashir and admitted meeting the group at Nakasero State House

and holding some discussion with the youth group. The Youth raised the issues of unemployment, high school fees and taxes and general poverty. He advised the group to form group associations through which they could get funds. In paragraph 16, he deponed -

> **"As I was leaving for Rwakitura, I asked my Principal Private Secretary to get a State House Legal Officer to assist them in forming the associations. I also instructed her to arrange for their transport back home and promised to meet them after Christmas."**

The instructions were given at night after mid-night.

In para 17 he denied going through his manifesto with the group and denied asking them for their support. He denied promising them financial support. He denied asking them to cross over and campaign for him because the group was taken to him as NRM mobilisers. He denied asking AIDES to give the group money for their support. But he admitted meeting them again on 27th December, 2005. He also admitted asking his Principal Private Secretary to arrange for another meeting after the elections. In paragraph 18, the 2nd respondent replied to the affidavit of Henry Lukwaya. He accepted hosting the Youths to dinner at State House, but denied asking whether they were FDC Youth or not, nor whether they would support or vote for him because they went to him as NRM mobilizers. Several matters come out of this evidence. By all accounts Najjemba acted as the agent of the second respondent because she was an NRM mobiliser. The Principal Private Secretary was obviously acting on instructions of the 2nd respondent and so she was his agent. Same with whoever was his legal assistant.

It is common knowledge that the President of Uganda has many advisors in different aspects of Uganda governance, politics and other public life. Further the 2nd respondent, as the leader of NRM must be having many advisors on same aspects within the NRM party. Among the obvious examples of advisors are Ministers, Ministers of State and Public Servants. In paras 5, 6 and 7of his replying affidavit to which I have just referred, the 2nd respondent deponed to the existence of Central Executive Committee of NRM and what it and its officials were tasked to do at National, District and Constituency levels during election campaigns.

I should think that in addition to special advisors like Ministers, Ministers of State, MPs, Public Servants, officials in the committees mentioned in paras 5 and 6 know and would advise the 2nd respondent on the perceived high level of unemployment among the youths, the high level of tuition fees, the high level of taxes and the prevalency of poverty. It therefore did not require some group of Youths (or FDC supporters) to get special appointment after the 2nd respondent had been nominated by his party as presidential candidate, for some surban Youths from Rubaga Division to visit the 2nd respondent at State House both on the eve of Christmas day and two days after Christmas, during festive period, in order for these Youths to inform the 2nd respondent about their concerns on the unemployment, high school fees and high taxes. I find the evidence of Bashir and Lukwaya credible. I believe them. These youths must have gone to State House to get money. Lukwaya deponed and he had proved that he was considered to be the one hindering the display of the 2nd respondent's posters. In other words, he and his group were hindering the campaign effort of the 2nd respondent and this has not been challenged by any other evidence. The real purpose of Najjemba leading the Youths to State House on 24th and 27th December, 2005 is not hard to find. It was to persuade the Youths by whatever means availed for them to abandon FDC leader and campaign for and vote for the 2nd respondent and I so find.

The price for the change over was money. If the Youths were poor and unemployed what better way of persuading them than giving them money on Christmas Eve. Then 2nd respondent promised to meet the same Youths after elections. The message is clear. Youths must have been told to work hard to ensure that 2nd respondent wins. Otherwise what was the objective of the message that he would meet the Youths after the elections??

The evidence as it is, does not prove that the 2nd respondent personally directly paid the money to the Youths. What Bashir proves and what can be inferred from the affidavits of Najjemba and the second respondent is that the Principal Private Secretary paid the money. From the evidence available so far, I think that any payment effected by that Principal Secretary was effected with the knowledge or consent and approval of the second respondent. That Secretary is the personal staff

of the 2nd respondent carrying out his instructions. She is therefore his agent in this respect for the purposes of the PEA.

So for all purposes and intents it has been proved that the 2nd respondent breached S.64 (1) of the PEA. This brings the conduct of 2nd respondent within the ambit of section 59 (6) (c) of PEA.

S.64 (1) reads this way: -

> *"64 (1) A person who, either before or during an election with intent, directly or indirectly, to influence another person to vote or to refrain from voting for any candidate, gives or provides or* ***causes to be given or provided any, money gift or other consideration to that other person, commits*** *an offence of bribery……..."*

It is unnecessary for me to elaborate on these provisions except to relate them to S.59 (6) © which also reads as follows:

> "59(6) The election of a candidate as President shall only be annulled on **any of the following grounds** if proved to the satisfaction of the Court.
>
> **(a)** ……
>
> **(b)** …….
>
> **(c)** That an offence under this Act was committed in connection with the election by the candidate personally or with **his or her knowledge and consent or approval."**

It is significant that both on 24th and 27th December, 2005, it was Esther Najjemba, a self confessed NRM moboliser or agent who led the youths to meet the second Respondent. She led them not to the NRM offices or Headquarters but to the official residence of the second respondent. What is more, these youth were attended to by no less an official than, among others, the Principal Private Secretary to the President, i.e. one of the Senior Personal officials who attend to the personal affairs of the 2nd respondent .That emphasises the importance attached to the two meetings and its purpose during night at the time of campaigning. These factors constitute very clear

and unambiguous evidence of personal knowledge, consent and approval of whatever took place on the two days.

Although the evidence of Umar Bashir and his group is sufficient for me to answer the 4th issue in the affirmative, I shall allude to other incidents to illustrate bribing by agents of the 2nd Respondent.

I have in mind Mr. Mayatsa the NRM party Chairman in Mbale District during the period of campaign and on the day of election. Witnesses such as Wataka James, Mutonyi Juliet, Khaitsa Lofisa, Timbukha Joseph, Musaki Eunice, Milton Watyekele and Nabalayo Mary, all depone to the fact that Mayatsa, the NRM, Mbale District Chairman and NRM election coordinator for same district bribed and intimidated voters. He simply denied this in his affidavit in response. I believe these witnesses. According to these witnesses, Mayatsa bribed and also intimidated voters by firing in the air and told voters to vote for the 2nd respondent. According to these witnesses, this made FDC supporters to change their mind and to vote for the 2nd respondent.

Mayatsa's admission that he only got a policeman with whom he moved around on 23/2/2006, the voting day, tends to support these witnesses who deponed that he moved around with an armed military policeman intimidating voters and telling them to vote for 2nd respondent. It does not matter whether the armed man was military police or ordinary policeman. Further the presence of arms at polling station on polling day is out lawed. There was no explanation for the presence of armed policeman who was not on official electoral duty.

Earlier, I referred to the reply affidavit of the 2nd respondent in which he indicated how the National Executive Committee of NRM, of which he is the chairman, distributed money to NRM leaders at the District level to enable them conduct campaigns for voters to vote for him and other NRM leaders. Zedekiya Karokora, Chairman, LC5 Rukungiri corroborates this. In my opinion what Jorum Mayatsa did was in reality executing and carrying out election work for the 2nd respondent. In terms of S.59 (6) (C), the second respondent would be regarded as having consented to or approved what Mayatsa did.

There is the evidence of James Ozo and Byaruhanga in Kamwenge District implicating NRM chairman in that District. There is the evidence of David Magulu

implicating the NRM District Treasurer, Mr. Bwire Bakale, in Kaliro District. He was an agent. There are other instances.

I also think that the conduct of Fox Odoi does make him an agent commiting electoral offences. I refer to the evidence of Geofrey Ekanya, the Member of Parliament for Tororo County. I have already summarised his evidence while discussing other issues especially the third issue. On the polling day (23/2/2006), Mr. Fox Odoi, a Legal Assistant to the 2nd Respondent (as President) terrorised voters in Tororo town. Mr. Odoi who according to Ekanya, was armed with a gun accompanied by gun weilding LDUs blocked Tororo/ Mbale Road, in Tororo town, and forced passengers out, undressed them and ordered the LDUs to beat them up. He took some of those people to Tororo police station. Some of these victims made affidavits substantially supporting Ekanya, although some of them subsequently denied being beaten by Fox Odoi. Mr. Fox Odoi has given his own version denying beating up people. But he admits being at the scene. I do not believe Mr. Fox Odoi that he was on floric of his own.

Mr. Odoi did not do all this on an election day to advance his own cause. As personal Legal Assistant to 2nd respondent, he must have been doing the respondent's work as Ekanya says.

In Para 23 of his affidavit accompanying his petition, the petition deponed that Mr. Fox Odoi, the Legal did to the President, 2nd respondent harassed, assaulted and intimidated his supporters in Tororo as deponed by Ekanya. As I pointed out earlier, a witness for the respondents called Epakasi Lawrence of Aukot village Tororo District claimed he voted on 23/2/2006. He deponed that on his way home about 2km on Tororo/Mbale Road, he and four other men were arrested by policemen at that place for no reason. He deponed that Mr. Odoi was at the scene with some policemen. He denies being assaulted by Fox Odoi. He swore that the following day the Monitor Newspaper published on the front page photographs of himself and the other people who were arrested. He denied reports in the news paper that he and the others had been assaulted by Fox Odoi. This man's evidence substantially corroborates the evidence of Ekanya and of the petitioner about harassment of voterssupporting the petitioner by Mr. Fox Odoi, on the day of voting. The other persons who were with Epakasi and also swore affidavits about the incident are Omalla Richard, Okware, and Kamu. The evidence of the two of them is almost

identical with that of Epakasi Lawrence. They deny what the petitioner states in para 23 of his affidavit about their assault and intimidation by Mr. Odoi and being FDC supporters. They claim to have seen Odoi for the first time on 23/2/2006, the voting day when Odoi was in the company of armed policemen. Omalla was arrested when he was going to vote and he and his compatriots were taken to Tororo Police Station where they were released in the evening. The following day he saw a photograph of himself and the other men on the front page of Monitor Newspaper (showing that he and others were being tortured). Subsequently he made a statement at CID Headquarters denying he was assaulted by Mr. Odoi. Okware's affidavit made similar statements as that of Omalla except that one amplified on reasons for his arrest. In para 7 thereof he states: -

"7 That I was arrested with Epakasi, Omalla, and others for allegedly being ferried to vote".

I note the following.

- *Whereas Epakasi claims he was arrested after he had voted and was on his way home, the others say, they had not voted yet.*

- *Second, if the incident happened in Tororo where there is an established police station and where they were detained initially, why did they make statements at CID Headquarters in Kampala, denying assault and harassment by Mr. Odoi after news papers reported the assault?*

- *Third, these deponents appear to be simple ordinary men. How is it that each of them, after being arrested and detained by the police in Tororo, were able to move about in Tororo town and fortuilously each saw their photographs on the front pages of the Monitor following which they were all ferried to CID Headquarters to make statements denying they were assaulted and harassed by none other than Mr. Fox Odoi?*

These deponents swear that they were in Tororo Town on the voting day. They were at the scene where Monitor news paper apparently captured their pictures as persons who were being tortured under the supervision of Mr. Fox Odoi, the legal Aide to the

2nd Respondent. They suddenly appear at CID Headquarters in Kampala to deny that Mr. Odoi tortured them. This tells a lot of what must have happened.

Mr. Fox Odoi Oywelowo made his own affidavit. In paragraphs 5 to 12, he swore as follows-

"5 On the day of the Presidential Elections, I went to Tororo Central Police Station to report alleged acts of bribery of voters by Forum for Democratic Change Members in Tororo.

6. That while I was at CPS, I received a report from Apollo Ofwono, the Movement District Chairperson that FDC Supporters were ferrying people who were ineligible to vote in different polling stations in Tororo.

7. That I received the report when I was with the officer-in-charge CPS, George Abaho. He decided that the police should go to verify the reports and that I **should accompany them.**

8. That the police intercepted one of the vehicles carrying the said people along Mbale Road. Some of the passengers ran away while others including Omalla, Epakas and Okware were arrested by the Police.

9. That a crowd of people from the area formed with the apparent intention of lynching the suspects and I assisted the police in dissuading the crowd from assaulting the suspects.

10. That at no time whatsoever, did I intimidate, torture or assault any supporter of the petitioner or any person at all.

11. That at all times I was in Tororo in my personal capacity and not on official duty.

12. That I am not and have never been an agent of the second respondent or the National Resistance Movement."

This affidavit reveals that-

- There is conflict between the other three deponents on the one hand and Mr. Fox Odoi on the other about why on 23/2/2006 these people were arrested. Were they just walking as Epakasi claims? Where were they going to vote? Were they ineligible voters as Mr. Odoi depones?

- Were they supporters or not supporters of FDC? An inference can be drawn from Mr. Odoi's own affidavit that either these people were FDC supporters or they had been bribed by FDC to go and vote. The former appears to be a logical inference which made him punish them as he did.

- Although Mr. Fox Odoi claims that he was in Tororo on his own, he does not state what is it that took him to Tororo on that important voting day, when his boss was campaigning for the presidency.

- If Mr Fox Odoi was not an agent, on what grounds did he get reports of bribery by FDC?

- If he was not an agent of the 2nd respondent, why should a whole District Movement Chairman report to him about FDC ferrying ineligible voters? Why should he have accompanied the police rather than leaving the chairman going with the police to arrest suspected ineligible voters?

Considering the whole situation, I draw the following inferences:
Neither Mr. Odoi nor the three men are telling the whole truth why the men were arrested. It is most probable that these men were arrested for being supporters of FDC and were detained so as to be denied the opportunity to vote. The fact that they were whisked away to make statements at Police Headquarters in Kampala instead of Tororo Police Station suggests that because their mistreatment attracted media

publicity, they were taken to Kampala to make statement at CID Headquarters exonorating Mr. Fox Odoi of beating them! They were probably forced to make these statements of half truths. This incident illustrates the subtle manner of harassing supporters of opponents of an incumbent and the urgent need to reform the law relating to conduct of trial of Presidential Election Petition.
Was Mr. Fox Odoi acting as a mere eccentric or a fanatic or as a legal aide to the president who is at one and the same time a candidate for the presidency?

The logical inference I can draw is that Mr. Fox Odoi Onywelewo was in Tororo on the voting day, 23rd February, 2006 to look after the voting interests of the 2nd respondent to whom he was a legal Aid. All his activities bring him within the armbit of an agent of the 2nd respondent and, therefore, the 2nd respondent can be held responsible for Mr. Odoi's conduct on the presidential election day.
Because of the reasons I have endeavoured to give I was among three Justices who answered issue 3 in the positive and the late Oder; JSC (RIP), and I answered the 4th issue in the positive.

Before I end I wish to make observations especially on the need for respect for Court and course of justice.
Mpiima Koloneria, Presiding Officer at Kobolwa Polling Station in Pallisa first swore an affidavit supporting the Petitioner. His affidavit was filed in Court. A few days later, the respondents prepared yet another affidavit which the same Mpiima swore in effect amending the first affidavit denying some activities which he had stated in the first affidavit.
Secondly, on 18th March 2006 the petitioner filed an affidavit supporting corruption sworn and signed by one David Magulu of Kaliro Town who was hired by police to take and did take police to Nawampiti. Four days later the respondents drew yet another affidavit in the name of "one David Maguru" also a driver and of same Kaliro Town. This David Maguru drove policemen to the same place called Nawampiti on the same mission apprarently. Although the "Maguru" offered by the respondents claimed he did not know how to write and he appears to have thump printed at the end of his affidavit, he was betrayed because whoever administered the oath to him

wrote (by the thump print) the name “D. Magulu” and not “D.Maguru” which was typed in the affidavit.

What counsel for the respondents should have done in the case of Mpiima and Magulu is to ask for both Mpiima and Magulu to be produced in court for cross-examination rather than to produce another affidavit sworn by the same witness denying part of what he stated earlier to the opposite party. This is tantamount to preverting the course of justice.

The same can be said about the four voters who were arrested in Tororo having been tortured under the supervision of Mr. Fox Odoi, detained there and subsequently surfaced at CID Hesdquarters, Kampala to deny what took place in Tororo.

I wish to say that participating in the hearing of this petition is in effect participating in the trial of the president of my beloved country. I hope that views and opinions my learned brothers and I have expressed will help to advance the virtues of constitutional democracy in our motherland; at least in reforming the relevant laws.

On the basis of the evidence before me and for the reasons, I have set forth herein, I was satisfied that the petitioner established his allegations. I held that the petitioner’s prayers (1) and (2) should be granted. I would annul the election and order a rerun.

I would order that because of the national importance of this petition, each party shall bear its own costs. I further order that if the petitioner deposited money as security for costs the same be returned to him.

Delivered at Mengo this 31st day of January 2007.

J.W.N.Tsekooko
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J., ODER (RIP), TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA, KATUREEBE, JJ.S.C.)

PRESIDENTIAL ELECTION PETITION NO. 1 OF 2006

BETWEEN

COL. (RTD) DR. BESIGYE KIIZA :::::::::::::::::::: PETITIONER

AND

1. THE ELECTORAL COMMISSION
2. YOWERI KAGUTA MUSEVENI :::::::: ::::::: RESPONDENTS

REASONS FOR THE FINDINGS AND DECISION OF KANYEIHAMBA, J.S.C

I will begin my findings on this petition with a reminder that the overriding constitutional dogma in this country is that constitutionalism and the 1995 Constitution of Uganda are the Alpha and Omega of everything that is orderly, legitimate, legal and descent. Anything else that pretends to be higher in this land must be shot down at once by this Court using the most powerful legal missiles at its disposal. The Constitution of Uganda is a binding contract between the people of Uganda and their successive governments. It was made by the people after some six years of protracted negotiations throughout the Country under the auspices of the Constitutional Commission and the Constituent Assembly. This Court is the last sanctuary for all people within Uganda who are challenging any violations of the Constitution or breach of any law. Consequently, this petition must be considered and resolved with the people's Constitution guiding this Court.

The Uganda Constitution which is the supreme law of the land provides in Article 103(1) that the election of the President shall be by universal adult suffrage through a secret ballot. It is also provided in clause 9 of that article that, subject to the provisions of the Constitution, Parliament shall by law prescribe the procedure for the

election and assumption of office by a President. Subsequently, Parliament enacted several Acts for this purpose which include the Presidential Elections Act, the Electoral Commission Act and the Parliamentary Elections Act under which Presidential and Parliamentary elections in Uganda are organized and conducted.

Article 104 which is headed, *challenging a Presidential election*, provides as follows:-

(1) Subject to the provisions of this article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected as President was not validly elected.

(2) A petition under Clause 1 of this article shall be lodged in the Supreme Court registry within ten days after the declaration of the election results.

(3) The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed.

(4) ----------

(5) After due inquiry under Clause (3) of this article, the Supreme Court may:

(a) dismiss the petition

(b) declare which candidate was validly elected; or

(c) null the election

(2) Where an election is annulled, a fresh election shall be held within twenty days from the date of the annulment.

(3) If after a fresh election held under Clause (6) of this article there is another petition which succeeds, then the Presidential election shall be postponed, and upon the expiry of the term of the incumbent President, the Speaker shall perform the functions of the office of the President until a new President is elected and assumes office.

(4) For the purposes of this article, the provisions of article 98(4) of the Constitution shall not apply.

(5) Parliament shall make such laws as may be necessary for the purposes of this article, including laws for grounds of annulment and rules of procedure.

From the way they are worded, it is clear that the only respective purposes of articles 103(9) and 104(9) are to empower Parliament to make laws and rules of procedure for the election and assumption of office of the President and the grounds for upholding or annulment of such an election. Parliament is not empowered to convert the said inquiry into a trial or limit the powers of the Supreme Court from considering and taking into account any evidence touching on the election of the President that may assist the Court in coming to the right decision. Thus, in the South African case of **Ferreira v. Levin No. 1996 (1)** S.A 984 (C.C), the court invited written submissions from professional bodies whose work could have been affected by the court's decision.

> It is my view therefore, that this court's duty is to conduct an inquiry into the allegations contained in the petition and, after due consideration, declare its findings, give reasons thereof and make appropriate orders, if any. There is no provision in the Constitution for a trial and judgment by this court. The inquiry meant in the Constitution is radically different from an ordinary trial whether of a criminal, civil or administrative nature.
>
> The implications of Article 104 are easily discernible. An inquiry into a Presidential election must be conducted, concluded and its findings and reasons given within the period prescribed by the Constitution. The idea that the Supreme Court can summarise its findings and give a decision and then give reasons outside the period fixed by the Constitution is indefensible. It could not have been the intention of the makers of the Uganda Constitution that if an election is annulled, a fresh one could follow immediately without regard to the reasons that may be given by all or any of the judges on the panel. To suggest that the Electoral Commission and the parties concerned could meaningfully carry out or participate in a fresh election, following the annulment of another by the Supreme Court and before the reasons for the decision of that Court are unknown is to

indulge in speculation. It is only logical to expect the Electoral Commission and other actors in the Presidential election to act correctly and legally after reasons for the annulment of the previous election are known and publicised. To do otherwise could be putting the cart before the horse. It is imperative that reasons why one election is upheld and another is nullified, should be clearly spelt out and known before a fresh and new election is held. Only this way can the mistakes made in the previous election be known and subsequently avoided.

The other reason why a Presidential election should be inquired into and not regarded as a trial is to avoid delay. In fact, the reading of the provisions of Article 104 shows that not only must the inquiry into a Presidential election be conducted and concluded expeditiously but should the proceedings suggest further delays, the Constitution provides the answer in Clause 7 of the same article which avoids further delays and complications in the ascertainment of a President, by providing that the Speaker shall perform the functions of the President.

It is thus very clear to me that the Constitution deliberately created a procedure for determining a Presidential election petition which is different from those designed to cater for trials. Nothing could be clearer than Article 104(3) which for, emphasis I repeat here, *"the Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed."* No trial or judgment are intended or implied. Under the Uganda laws and practices, a trial which is necessarily followed by a judgment is differently structured and conceived. A trial must be followed not only by the evaluation of facts and the applicable laws, but also by a judgment which must contain reasons for the decisions therein. In the majority of cases; whether of a civil or criminal nature, judgments are given on notice and may sometimes stretch to two months or more. Moreover, the pleadings, arguments and submissions tend to be confined to the evidence and facts presented by the parties or their counsel. The Oxford Standard Dictionary defines the word to inquire as **"to find out through information or to investigate."** H.W.R. Wade and C. F. Forsyth, the learned authors of the **8th edition of 'Administrative Law'** published by Oxford University Press describe an inquiry as intended **"to investigate into an objection by a citizen or a**

number of them and give that objection the fairest possible consideration." So, just as those authors speak of statutory inquiries in the context of administrative actions, one may speak of a constitutional inquiry into a Petition presented under Article 104 of the Uganda Constitution. Under Uganda laws, there is the Commissions of Inquiry Act, Cap. 166 in which the concept and purpose of an inquiry are clearly stated and where emphasis is placed upon the reasons leading to the findings and conclusion of such an inquiry. It follows that reasons for the decisions in an inquiry are integral parts of the findings and conclusions of the tribunal. One may not act on findings alone without knowing the reasons and rationale for such findings.

In my opinion, the delay to give reasons for the findings of the Supreme Court was never contemplated by the makers of the 1995 Uganda Constitution. Such delay is democratically and constitutionally unacceptable. In my view, it is imperative that the nation should be informed expeditiously why any disputed Presidential election was upheld or nullified by this court and this can only be discerned from the reasons given by the court. Trials of civil or criminal or other types are by nature subject to long and drawn out procedures. In many instances, such procedures and delays are determined or caused by the parties themselves or their counsel with possible indefinite adjournments. It is not unknown for cases to drag on for years, sometimes stretching to several or more years.

I investigated into the petition, compiled and assessed the evidence availed to the court, wrote my reasons, circulated the same to my colleagues of the Supreme Court in early May last year, that is 2006. I was guided and in some cases, compelled by the reasons I have so far advanced with regard to the necessity that Presidential election petitions be dealt with and concluded expeditiously. As a matter of fact, it is only in the second week of January of this year that my colleagues except one who did so earlier, released and circulated their own draft reasons. This is notwithstanding that had the court allowed the petition, a fresh Presidential election would have had to be held within twenty days from the date of the court's decision. It cannot have been the intention of the makers of the Constitution that a fresh election would be held by the Electoral Commission or allow others to participate in it without knowing the

reasons why the previous election had been cancelled. Nor can it be suggested that findings and reasons for a dismissed petition are different from those advanced for an allowed petition and that whereas the latter must be disclosed immediately, the former can be delayed for an indefinite period. In light of this anomaly, I respectively suggest that this court, sooner rather than later might wish to revisit its decision in the Presidential election petition of 2001 under Article 132(4) of the Constitution which provides that:-

> ***"The Supreme court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so."***

If this court feels inclined not to do so, Parliament should be moved to do the necessary in clarifying this law.

The facts and circumstances leading to this petition were summarised in our majority decision which was read on the 6th, April, 2006. I will nevertheless summarise them for the purposes of my own findings. Dr.Kizza Besigye, the petitioner, was one of the Presidential candidates in the election that was held on 23rd, February, 2006, the results of which were declared by the 1st Respondent on 25th February, 2006 to the effect that the 2nd Respondent had emerged as the winner of the election. In that declaration, the 1st Respondent announced that the 2nd Respondent had obtained 59.28% of the total valid votes cast while the Petitioner was the runner-up with 37.36% of the votes cast, and as the 2nd Respondent had obtained more than 50% of the votes, he was declared by the 1st Respondent to have been duly elected President of the Republic of Uganda.

The Presidential election was held and conducted under a multiparty system unlike previous ones that had been held since 1996 under the monolithic National Resistance Movement Political System. The Petitioner ran for election as the candidate of one of the participating political organizations which is registered as Forum For Democratic Change (F.D.C), while the 2nd Respondent stood for election as the candidate of the National Resistance Movement (N.R.M). There were two other Presidential candidates representing political parties, namely, Miria Kalule Obote for the Uganda People's Congress (UPC) and John Kizito Sebaana representing the

Democratic Party (DP). There was a fifth candidate, Bwanika Abed who stood as an independent Presidential candidate.

In his petition, Dr. Kiiza Besigye complains that the 1st Respondent failed to comply with several provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act and actually infringed some of the provisions of the Constitution and these Acts of Parliament. He also complains that section 59 (6) (a) of the Presidential Elections Act is contrary to the provisions of article 104 (1) of the Constitution. The Petitioner further complains that the entire election process in 2006 Presidential election was characterized by acts of intimidation, lack of freedom and transparency, unfairness and violence and the commission of numerous offences and illegal practices. The petition makes further allegations of breaches of the law by the 1st Respondent in the disenfranchisement of voters by way of deleting them from the voters' register and failing to cancel results from polling stations where gross electoral multipractices had occurred. The petition complains of further malpractices allowed in the election by the 1st Respondent such as multiple voting, vote stuffing, failure to declare results in accordance with the law and the absence of freedom and fairness in the whole electoral process.

The Petitioner's allegations against the 2nd Respondent are listed to include the illegal practices and offences committed by him personally. The petitioner alleges that the 2nd Respondent used words or made statements which were malicious or which contained sectarian words or innuendos against the Petitioner and his party and, made abusive, insulting and derogatory statements against the Petitioner, FDC or other candidates. Additionally, the petition alleges that the 2nd Respondent made defamatory and derisive, mudslinging, insulting and false statements against the same parties. The Petitioner further alleges that the 2nd Respondent committed acts of bribery of the electorate personally or by his agents with his knowledge and consent or approval, before and during the elections designed to interfere or which interfered with the free exercise of the franchise of voters.

In support of the petition, counsel for the Petitioner, presented a number of affidavits with annextures, made submissions and cited authorities. In response, the

Respondents, through their counsel denied all the allegations against them and their counsel presented affidavits together with various annextures, authorities and made submissions in support of their responses.

At the commencement of the proceedings of the inquiry, this Court framed five issues for the determination of the petition. These were:

Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and the Electoral Commission Act in the conduct of the 2006 Presidential Elections.

Whether the said elections were not conducted in accordance with the principles laid down in the Constitution, Presidential Election Act and the Electoral Commission Act.

Whether if either issue 1 or 2 or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner.

Whether the alleged illegal practices or any electoral offences in the petition were committed by the 2nd Respondent personally or with his knowledge and consent or approval.

Whether the petitioner is entitled to the reliefs sought.

The inquiry into the allegations of the petition proceeded partly under the Constitution and partly under the Presidential Elections Act and the Electoral Commission Act. Both the inquiry and the consideration and findings of the court must be constitutionally completed and the decision of the court pronounced publicly within a period of thirty days which reinforces my firm opinion that the framers of the Uganda Constitution intended petitions in Presidential elections to be expeditiously disposed of by way of inquiries.

At times during the hearing of the petition, a number of counsel for the parties tended to spend too much time on definitions, explaining and arguing about the meaning and implications of certain terms and expressions in the law even when they were submitting before Justices of the Supreme Court with all that it implies. In my opinion, the thrust and impact of an inquiry of this nature are best presented by

maximum concentration upon what actually occurred before and during the election. Detailed facts and events and the actual circumstances implied by each allegation of such malpractices as bribery, intimidation and disenfranchisement need to be given with particulars and actual occurrences by credible witnesses, if possible, giving testimony produced or deponed to the satisfaction of the court because this is an essential and important inquiry that could have grave consequences for both the parties and the nation as a whole.

Be that as it may, the parties and their counsel managed to present evidence and submissions to enable court to deliberate on the petition. Within a few days of completing the hearing of the inquiry, the court rose to consider its findings and decision which as already noted, it delivered on the 6th of April, 2006.

On issue No.1, the court found unanimously that there was non-compliance with the provisions of the Constitution, the Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 Presidential Elections by the 1st Respondent in the following instances:

(a) ***In disenfranchisement of voters by deleting their names from the voters' register or denying them the right to vote.***

(b) ***In the counting and tallying of the results.***

On issue No.2, the court found, again unanimously, that there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act and the Electoral Commission Act in the following areas:

The principle of free and fair elections was compromised by bribery, intimidation and violence in some areas of the country.

The principles of equal suffrage, transparency and secrecy were infringed by multiple voting, vote stuffing and incorrect methods of ascertaining the results.

On issue No.3, by a majority of four to three, the court found that it was not proved to the satisfaction of the court that failure to comply with the provisions and

principles as found on the first and second issues, affected the results of the Presidential election in a substantial manner. I was one of the three dissenting Justices.

On issue No.4, by a majority decision of five to two, the court found that no illegal practices or other offences were proved to the satisfaction of the court to have been committed in connection with the said election, by the 2nd Respondent personally or by his agents with his knowledge and consent or approval. I was one of the majority Justices who made this finding.

I will be giving reasons for all the courts' decisions on all the issues. I will start with issue No.3. After perusing the affidavits, their annextures and heard counsel for the parties on the authorities and their application, the court was almost evenly divided as to whether to answer this issue in the affirmative or the negative. I dissented from the four members of the courts' panel who eventually decided to resolve the issue in the negative and dismissed the petition.

At the commencement of the inquiry's proceedings, counsel for the Petitioner made an application to stay the proceedings of the inquiry so that the Petitioner can first petition in the Constitutional Court for a declaration that section 59(6)(a) of the Presidential Elections Act is inconsistent with Article 104(1) of the Constitution. At the time and in our summary findings, I concurred in the courts' decision that it was inappropriate to have had that application while we were hearing the petition but in my opinion, the observation by the Court that there is no inconsistency between the section in question and Article 104(1) of the Constitution which we made hastily deserves further review. After Counsel made submissions on the provision, this Court rose and deliberated briefly and then gave its decisions immediately.

It is my opinion that by enacting section 59(b)(a) into the Presidential Elections Act, 2005, Parliament created a clog on Article 104 (1) of the Constitution. I am fully aware and I was acutely mindful of the fact that to hold that a Presidential election is in some way flawed, is not an easy thing to contemplate, for to do so may

lead to serious consequences for both the winning candidate and the nation. For this reason, every judge and every court will not make such a decision lightly or without compelling evidence. Such a decision must be reached after careful consideration of substantial evidence that amply justifies the decision. In my opinion, there was sufficient evidence presented in this petition to enable the court to decide that the results of the Presidential election of 2006 had been so fatally affected by irregularities, malpractices and illegalities substantially as to affect the final results in a substantial manner and therefore those results ought not to be upheld by this court.

I now turn to the issues framed by the Court. In my opinion, having answered in the affirmative both the first and second issues framed by the court, it became imperative for me to answer issue No.3 in the affirmative also. To decide otherwise would, in my opinion, manifestly conflict with the unanimous findings of the court on issues No.1 and 2. Once a court finds that the Constitution, the supreme law of the land and other country's laws have been flouted, that court must do its bounden duty and grant the remedy sought. In my view therefore, I could not see any rational or defensible alternative to answering issue No.3 other than in the affirmative. I am fortified in my resolve by a decision of the Supreme Court of South Africa in the case of **Speaker of the National Assembly v. De Like,** 1999 (4) S.A. 863 (SCA) which emphatically declared that:

> **"The Constitution is the ultimate source of all lawful authority in the country. No Parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the court".**

The provisions of Article 1 of the Constitution on the sanctity and binding effect of the Constitution must be unconditionally applied and respected. Clause 1 of the Article provides that all power in Uganda belongs to the people who shall exercise their sovereignty in accordance with this Constitution. In the 2006 Presidential

election, the people of Uganda were endeavouring to exercise their sovereign power which they had to do in accordance with the provisions of the Constitution. It should be emphasized here that both the principle of people exercising their power through elections and the obligation for the same people to do so while complying with the Constitution are co-equal. Neither is subordinate nor superior to the other.

In my opinion, to find otherwise would be tantamount to holding that whenever any person or body is exercising powers derived from or delegated by the Constitution, such exercise can result in measures or acts which override the provisions of that same Constitution. A result of that kind cannot have been contemplated by the makers of the Uganda Constitution for this would be the effect if it were to be held that the purpose and effect of section 59(6)(a) of the Presidential Elections Act, 2005 is to direct the Supreme Court to ignore the consequences of what this court found unanimously in issues No.1 and 2 including violations and breaches of the Constitution and laws of the country provided that they did not affect the result in a substantial manner which holding would, in my opinion, be based purely on conjecture and personal inclinations of judges. In this particular petition, such an opinion would be grossly unfair to Ugandans because the 1st Respondent refused adamantly to produce the only evidence which could have assisted the Petitioner, Respondents and this Court to prove and be satisfied that the allegations that there were irregularities, malpractices and illegalities were justified or unjustified.

Section 56(2) of the Presidential Elections Act which is mandatory provides that;

> ***(2) Upon completing the return under subsection (1), the returning officer shall transmit to the commission the following documents-***
>
> ***(a) the return form;***
>
> ***(b) a report of the elections within the returning officer's electoral district;***
>
> ***(c) the tally sheets; and***
>
> ***(d) the declaration of results forms from which the official addition of the votes was made.***

The 1st Respondent either adamantly refused or was unable to comply with the request of counsel for the petitioner and the directive of this Court to produce returning officers reports from electoral districts.

The Constitution provides in Article 103(1) that the election of the President shall be by universal adult suffrage through a secret ballot. This court found unanimously, that this provision was violated. In my opinion, it matters not whether there was no additional evidence that these violations which affected many areas of the country did not spread to many more others. I have found no provision in the Constitution nor was any cited before this Court other than a similarly decided Presidential Election Petition No.1 of 2001, that in any election where breaches of the Constitution and laws have blatantly occurred, they should be ignored or tolerated by the Supreme Court provided the Court is satisfied that those breaches did not affect the result of that election in a substantial manner. In my view, if there were such a law it would deserve to be struck down because it would be existing as a clawback provision from the provisions of the Constitution which is the supreme law of this country.

The Constitution further provides in Article 59 that every citizen of Uganda of eighteen years of age and above has a right to vote, that he or she has a duty to register as a voter for public elections and *referenda,* and that the State shall take all necessary steps to ensure that all citizens qualified to vote, register and exercise their right to vote. Voting is not compulsory in this country. This is a good reason why those who have taken the trouble to be registered as voters should be given every encouragement and assistance to vote. Instead, either by design, bribery or intimidation and violence, many of them were prevented to freely exercise this right. Many who chose to turn up in possession of either their registration certificates or polling cards were denied the right to vote or in some instances, were chased away from the polling centres or simply told that they could not vote because their names had been omitted or deliberately deleted from the register of voters without their knowledge. This meant that the State or its agents, instead of assisting and ensuring that all citizens qualified and registered to vote did so, actually prevented many of them from exercising their constitutional right to determine who governs them.

Volume 2(d) of the Petitioner's affidavit contains the testimonies of some forty deponents swearing to diverse acts and practices disenfranchising voters. Typical of such affidavits is one by Isaka Hire Saturday who depones as follows:

> ***"That I am a male adult citizen of sound mind. That I am a registered voter having been duly registered and issued with a certificate No.0269498 (Annexture "A"). That on the 23rd February, 2006, I proceeded to old park polling station, Busia Town Council, Samia Bugwe North to vote for my candidate Dr. Kizza Besigye. That after lining up and reaching the presiding officer's desk, he informed me that my name was not on the register. That he returned my certificate after checking it and advised me to leave."***

Much more damning of these illegal practices were reports of independent observers. Thus, Mr. Kiago Geoffrey of DEM Group swore and signed an affidavit in which he states:

> ***"I was an election monitor with DEM Group at Kampala T/C. I reported to the polling station at 6.00 am and presented my credentials to the presiding officer and assumed my seat at the station. That before the voting begun, some people came with a yellow numberless pick-up and directed all the voters to vote only NRM candidates. … saying that they would come back later to establish whether the voters had done so. I wrote a report to the country supervisor of DEM Group informing him what had happened. In the afternoon, the same group returned and ordered Kintu, the presiding officer to stop the elections, took over the polling station. A polling constable whose name I could not readily establish then ordered the presiding officer to hand over all the remaining ballot papers which the latter did. The group then began ticking the remaining ballot papers in favour of the NRM candidate and ordered polling officials to balance and sign the declaration forms, ---. Shortly afterwards, the police came and carried away the polling materials."***

This court found unanimously that the provisions of Article 59 of the Constitution were violated.

Article 61(a) of the Constitution provides that the Electoral Commission shall ensure that regular free and fair elections are held and that the Commission shall organize, conduct and supervise elections in accordance with the Constitution. This court found that the provisions of this Article were violated nationwide.

The unanimous findings of this court indicate quite clearly that Article 1(4) of the Constitution which provides that all the people of Uganda shall express their will and consent on who shall govern them through regular, free and fair elections of their representatives was infringed in many instances, deliberately. There were several other malpractices such as multiple voting, vote stuffing, bribery, intimidation, violence and partisanship on the part of officials and security forces all supposed to be neutral in an election which was conceived on the basis of multipartism. In **Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Council**, 1999(1) S.A.374 (c.c) the Constitutional Court of South Africa stated that:

> **"It is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law-to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that which is conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need to merely hold that fundamental to the interim Constitution is a principle of legality. There is of course no doubt that the common law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to 'administrative action', the principle of legality is enshrined in s.24 (a)(1c). In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution.**

Therefore, the question whether the various local governments acted *intra vires* in the case remains a constitutional question."

In my view, constitutionality and legality as provided for in our Constitution are matters on which compromise should never be permitted. Issue No. 3 which was framed by this court can be said on the face of it to be the most difficult to resolve because its determination depends on the consideration of matters beyond what is purely legal. The answer to this riddle is essentially governed by the words used in Section 59(6)(a) that the court must be satisfied that the result was not affected in a substantial manner. The provision transports the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment.

In my opinion, it is implicit in the provisions of Section 59(6) (a) that before coming to a decision which complies with those provisions, a judge must be guided by much more than rules and principles of law. The provision appears to have been inserted in the Act to militate against decisions which arguably may be correct and constitutional but might appear to be awkward and unacceptable because of their possible consequences. Ultimately, the decision on issue No.3 will depend on the valour to consider and choose between a number of possible alternatives, each of which perhaps may be perfectly justified by findings on the facts and acts but whose consequences the decider is not certain. In my view, Section 59(6)(a) appears to have no other purpose than to force judges to consider and reflect on possible political consequences of their decision before making it. It creates a subjective test for the manner in which judges may use their discretion and personal conscience in reaching decisions that may result in controversial consequences. It was for fear of the use of such subjective discretion that in my reasons for the Courts' decision in **Attorney General v. Paul Ssemwogerere & Hon. Zachary Olum,** Const. Appeal No.3 of 2004, I observed that:

"In my view, Constitutional principles and rules should always be interpreted objectively and impartially without regard to consequences except in very exceptional circumstances which do not exist in this appeal. It would be an error to construe constitutional provisions on the basis of what that construction might lead to. It is untenable in a case of this nature

to suggest that the Constitutional Court or any other court has or can exercise discretionary powers and decline or grant a remedy sought by a petitioner or litigant on the basis of some extraneous issues other than judicial and constitutional."

In these reasons, I have endeavoured to emphasise the supremacy of the 1995 Constitution of Uganda. Where Parliament is empowered to make a law to amplify a constitutional provision, it must do so, *intra vires*. It must not make bad law. In my considered opinion, section 59(6)(a) of the Presidential Elections Act which compels judges to operate in the near impossible circumstances and choices I have described, is bad law.

It is very important to bear in mind that in this Petition, this Court found that:

(1) There was non-compliance with the Constitution and Election laws.

(2) The principle of free and fair elections was compromised by bribery, intimidation and violence.

(3) The principles of equal suffrage, transparency and secrecy were infringed by multiple voting, vote stuffing and incorrect methods of ascertaining the results.

In my view, these findings were more than sufficient to compel a court to come to the conclusion that these substantial irregularities, malpractices and illegalities had the effect of affecting the results in a substantial manner without being subjected to the constraints of the provisions of Section 59(6)(a) of the Presidential Elections Act. Had the court found that the allegations were not well founded or were inadvertent or merely technical, it would equally dismiss the petition using its constitutional and legal powers. The unanimous findings of this court on framed issues Nos. 1 and 2 are compelling. The only final decision this Court can make is to order the holding of a fresh election. By such decision of this court, the political parties and candidates participating in the election as well as the Electoral Commission and its agents will have become more knowledgeable about what must and must not be done. This opportunity appears to have been lost to the nation of Uganda when by a majority of four to three, this court declined to nullify the Presidential Election of 2006.

Following the Presidential election in 2001, there was Petition No.1 of 2001, the first of its kind under the 1995 Constitution. The panel of this Court which heard and decided that petition also found that the provisions of the Constitution and the electoral laws of the country had been extensively violated. However, as in this petition, the court decided to dismiss that petition by a narrow margin of 3 to 2 because the majority felt as they have done in this petition that the offences they found to have occurred in that petition had not affected the results in a substantial manner. In my opinion, this Court in this petition and in petition No.1 of 2001, has raised the standard of proof required for an annulment of a Presidential election far beyond the capabilities of petitioners and the expectations of this nation to the extent that makes it impossible to predict what may happen in future.

It is my considered opinion however that for a result of a Presidential election to be flawed, the petitioner need only produce sufficient evidence to prove that the Constitution and laws of Uganda were violated in a substantial way and this finding alone should lead the court to hold that the results were affected in a substantial manner. There can be no mathematical formula to be used by Justices of the Supreme Court in reaching any decision on such petitions. There can be no justification for the view that since these illegalities, irregularities and malpractices were few and far in between, they did not constitute enough evidence. Such justification would, in my opinion, be fallacious. Judges cannot be expected to use speculative or doubtful mathematical calculations on the evidence presented and then turn round and say that their decision is an accurate and acceptable one. The only credible, constitutional and legitimate basis on which such a decision can be made is the extent to which, deliberately or otherwise, the Constitution and laws of Uganda were substantially violated. In my opinion, this should be the only concrete criterion upon which the court should safely act. The affidavits by Dr. Odwee and others, the experts in statistics were somehow helpful and assisted the court in understanding some of the issues. However, in my opinion, these reports were quite inconclusive and partial and did not convince this court to follow one or any of the routes suggested by those experts in order to come to any rational conclusion.

Incidentally, the Petitioner, his lawyers, the Respondents and their respective lawyers had little time in which to collect the evidence and materials in support or against the petition. It was especially more difficult for the Petitioner's team which was searching for relevant information much of which was in the possession of the 1st Respondent or its agents. Some of the affidavits and submissions indicated a reluctance and occasionally hostility towards the Petitioner's team as evidenced by the affidavits of Lucia Naggayi of Makindye West, Kamateneti, Ingrid Turinawe and her annexture "B" in Vol. 2 (c) of the Petitioner's affidavits and the replies by way of affidavits of George Maingo, James Were and Laban Muhwezi on behalf of the Respondents, to which I will refer later. The team was doing its work against partisanship exhibited by many public agents and institutions and supporters of the respondents. The Justices of the Supreme Court who shouldered the responsibility of pronouncing their findings on the petition had only thirty days from the date of its filing to consider and pronounce themselves on the matter. If the framers of the Constitution had intended the hearing of Presidential elections to be treated as ordinary civil or criminal trials and to use mathematical numbers in their verdict and decision, there would have been a provision for the necessity of collecting all the results in the whole country and giving more time to all concerned to analyse those materials. Certainly, there would have been need for all the reports of presiding officers at the election polling stations to be submitted and received by the parties and the Court before the hearing of the petition. This is one of the biggest handicaps that face parties and court in this kind of petition.

Despite this limitation, the Petitioner and his counsel managed to reveal many of the irregularities, malpractices and illegalities complained of in the petition which occurred in a number of areas they were able to investigate in the short period they had before filing the petition. In any event, the Petitioner's allegations were often supported by affidavits and reports of independent observers, some of which were recognized and fully accredited as observers in the election by the 1st Respondent. Significantly, as already noted, many of the allegations of illegal acts, malpractices and irregularities could have been proved or disproved by perusal of the reports of the election officials throughout the election exercise countrywide, but alas, as the court found, the 1st Respondent failed to produce them even though the law required it to do

so. These same reports which are supposed to contain detailed information of what occurred before and during voting at polling centres throughout the country would have greatly assisted the parties to strengthen their submissions on some aspects of the petition. They would certainly have helped this court to get at the truth of some of the accusations.

In the absence of the reports, the petitioner and his counsel were entitled to rely on some other evidence which was also availed to this Court. The numerous affidavits filed by the parties contained much of the information needed for decision. The petitioner and his counsel filed some five volumes of affidavits while the affidavits of the respondents were covered in six volumes with a large number of deponents for each side. Equally important, were the various reports compiled during the election and filed for the purpose of hearing the petition. Several of these reports were made by respected and independent observers to whom I will revert later in these findings. Thus, it is revealed in the affidavits that whereas in some areas agents of the petitioner caught ferrying or bribing voters were arrested and detained, those doing exactly the same for the 2nd Respondent were either assisted or ignored by his agents and members of the security forces.

The report of the Foundation for Human Rights Initiative (FHRI) dated 25th February, 2006 contains numerous examples of irregularities, malpractices and intimidation. At P.3, it noted the following incidents:

> ***"The EC split up some polling stations without notice to the voters. The FHRI, EOC noted that there were voters whose names appeared on registers in totally different parishes from those in which they thought they were registered and which were indicated on the voter's cards or on their voter registration slips. A number of voters shuffled between stations, in some cases for over 4 hours before they found their names or simply gave up. In Kikulu Zone in Kisasi College School polling station, in Kawempe North, one Kyakabale was arrested while giving out extra ballot papers to voters who are known NRM-O supporters at the polling station. In Kamukuzi M-Z polling station, Mbarara, one George Senzira, a polling assistant gave Pascal Nabasa, a voter, additional papers serial numbers***

00170956 and 00170954. The incident was noted by the polling agents and the matter was reported to the Police.

In many areas, the FHRI, EOC noted that in some polling stations voters arrived to find that their names had been ticked already. It was noted that in Rubaga, Kampala at the West Church N-Z polling station, some candidates' agents were denied access to the voters' register by the presiding officers while other candidates' agents were given access and allowed to share desks with the presiding officers. In Mbarara, presiding officers refused to let people who were on the register to vote whereas in Makindye Gombolola polling station, people who were neither on the register nor held voters' cards were allowed to vote after being identified by the area LC Chairman. In Makerere, Mukwaya's polling station, the area LC3 Chairman was openly campaigning for the NRM Presidential candidate and the polling constable failed to stop him."

In Bungatira, Acwa, Gulu District, in Makindye, in Soroti and Kampala, the observers' reports contain several incidents of violence, intimidation and harassment by agents and members of the security forces against voters. They contain incidents of vote buying and bribery of voters.

Action for Development Observer Group monitored some districts which included Masaka, Tororo, Rukungiri, Pallisa, Kiboga, Lira, Soroti and Mbarara. Among its findings were that: omissions of names on the register were common. People feared the rumours that if people did not vote President Yoweri Museveni back into power, there was a possibility of war erupting. This fear was detected in the districts of Masaka, Kiboga, Rukungiri and Tororo. People whose names were not on registers would vote if they insisted but women would be turned away. In Nyanza, Kamonkoli and in Pallisa District, there were not enough election materials. At one polling station there was only one Presidential candidate, Yoweri Museveni with his photograph displayed. Other reports show that in some areas voting continued long after the constitutional closing time whereas in others, voting started very late. Multiple voting was very common in Mbarara barracks. In some areas such as

Lubongi polling areas in Tororo District, persons under age had been registered and they were allowed to vote.

The report of the Democracy Monitoring Group which consisted of three civil society organizations namely: Uganda Joint Christian Council (UJCC), Action For Development (ACFODE) and Uganda Journalists Safety Committee (UJSC) noted that in Rwemiyaga, Rubaya, Kabale District,

> ***"the elections were fair. However, there was general singing of all people and rejoicing that the money from Mr. Museveni camp will make him win. The money came in two batches (sic.) as follows: the first round they received 50,000/= cash and the second round they received 40,000/=. This money in general was distributed amongst all villages in the sub-county. In my opinion, this money induced most voters to vote for Museveni. The second issue was rampant threats that if people did not vote for NRM, there would be civil war and this forced people to vote for Mr. Museveni lest they are not (sic.) killed. So for these reasons, it seems that people did not vote according to their will."***

The affidavit of the 2nd Respondent on the question of facilitation of NRM candidates and his agents, states, *inter alia*:

> ***"7. That the main strategy for the campaign was physical voter contact tasked to the NRM branch/village task forces throughout the country.***
>
> ***8. That the primary responsibility of each branch/village task force was to persuade each voter in its area to vote for me and all NRM candidates from village to national levels …***
>
> ***9. That a national budget for facilitating all NRM candidates' campaigns was prepared and approved by the Central Executive Committee …. A copy of a typical sample of the said payment voucher is attached hereto and marked as Annexture R2A1.***
>
> ***10. That the figures indicated in paragraphs 6 to 23, 25 and 27 of Musumba's affidavit are not true. There was no such regular pattern of distribution, and disbursements depended on amounts received at Central Executive Committee level and the facilitation needs at the various levels.***

11. That all funds raised by the NRM were exclusively spent on facilitation of the campaigns as stated in this affidavit and no money was ever disbursed for the purpose of bribing voters as falsely alleged by Proscovia Salaamu Musumba in paragraph 26 of her affidavit."

The payment voucher bearing the name of Mzee Muwumba Samuel who is the NRM District Chairman of Jinja District reveals that for that District alone Shs. 87,850,000 was dispatched by the NRM for facilitation.

Affidavits in support of the petitioner and evidence of independent observers show that much of the money disclosed in the affidavits of the 2nd Respondent and the accompanying vouchers was actually spent in bribing voters. The 2nd Respondent and his supporters strongly deny the charge and depone that the money was used to facilitate agents and voters. In the case of Jinja District, the sum of Shs. 87,850,000 was released for the District on the 17th of February, 2006, several days before the election day. It is not disclosed when that money reached the constituencies in Jinja district and when it was actually distributed to recipients. Whatever the position, this is a colossal sum of money to effectively facilitate anyone within just a few days from voting. Under the circumstances, it is not easy to distinguish between the meaning of facilitation and that of bribery. However, what is crucially clear from all the evidence is that democracy and elections in Uganda have been truly monetized. It is no longer voting for the best candidate but the candidate who is the most able to facilitate or bribe voters. It is now the position that democracy in Uganda today depends on the wealth or financial capacity of candidates. In this kind of situation, it becomes a mockery to speak of freedom and fairness in the elections and voting system of Uganda. In my view, democracy and political power have almost been increasingly transformed into the exclusive property of the highest bidder in money terms and he or she who owns or controls the national purse is bound to be that highest bidder as aptly noted in the Commonwealth observers' Report *(supra)*.

Jack Sabiiti, M.P for Rukiga County in Kabale District, and an FDC Parliamentary candidate, deponed that:

7. Most of the appointment letters were confiscated and as a result the petitioner did not have agents at most of the polling stations in time.

9. That on the eve of polling day there was widespread bribery of voters by the 2nd Respondent's agents who were escorted and protected by the police throughout Rwamucucu and Bukinda in Rukiga.

14. That at polling stations in Kamwezi and Bukinda sub-county, Kabale District, Charles Mayombo and Julius Ndihohabwe, agents of the 2nd Respondent openly distributed sugar and salt to voters while telling them to vote for the 2nd Respondent.

30. That the Chairman of LC3 Butanda Sub-county together with the GISO, Matiya, beat up FDC polling agents who ran away from the polling stations.

Hon. Sabiiti lists more than 20 other malpractices and illegalities allegedly committed by agents of the 2nd Respondent. In his supplementary affidavit, General Muntu Mugisha of the FDC, lists a number of irregularities in the tally sheets and methods of verifying the results nationwide and called for a recount of all votes.

Mr. James Birungi of Kibaale County, Kamwenge District deponed that on the polling day, he was monitoring the voting process on behalf of the FDC when he met a pick-up carrying 15 LDUs/SPCs and moving in the area. The LDUs and SPCs would disembark from the pick-up from place to place and intimidate people shouting to people that if there were any supporters of the FDC amongst them, such people would be identified and punished and that he found FDC voters to be indeed very scared. He claimed that there were other malpractices such as allowing people to vote without verification, returning officers folding multiple voting cards and giving them to people to cast for the 2nd Respondent. He cites cases of serious vote buying and attempts by the agents of the 2nd Respondents in buying the agents of the petitioner and possible voters with sums of money ranging from Shs. 500,000 to 20,000. He cited the case of one Mr. Musise Rogers who operated a boda boda between Kamwenge and Kabarole who was rejoicing that he had just received about Shs. 15,000 in bribery and he had then decided to vote for President Museveni because FDC had no money to offer.

Patrick Kitimbo deponed on events that occurred in Iganga District which he monitored for the FDC on the polling day. He stated that the 2nd Respondents' agents and supporters wearing yellow NRM T-shirts and holding guns, beat FDC supporters and blocked many of them from voting or moving anywhere near polling stations, that FDC agents were kidnapped and detained by the 2nd Respondents' agents who are also local council officials. He further deponed that the FDC agents were prevented from the voting table and were therefore unable to see what the presiding officers were doing. Hon. Augustine Ruzindana, M.P deponed on events in Ntungamo District on election day. He stated, *inter alia,* that soldiers and intelligence operatives were involved in effecting arrests and harassment of the Petitioner's supporters and agents. He further stated that there was widespread distribution of money and commodities such as blankets, *bitambi,* iron sheets, sugar and salt as inducements to voters to vote for the 2nd Respondent.

Abdu Katuntu who was Chairman for FDC in Bugweri county also made a report on the 2006 Presidential elections. He deponed that, amongst other occurrences, a group of armed men wearing NRM party colours camped at Busese Mixed Primary School and traversed Bugweri County campaigning for the 2nd Respondent and Mr. Kirunda Kivejinja, who was the NRM Parliamentary candidate. The said group was led by one Lt. Mulindwa also known as Surambaya, that these men moved from village to village threatening and intimidating people who did not support the 2nd Respondent and Mr. Kivejinja. He further stated that these armed men assaulted a number of FDC supporters and several cases were reported to Idudi Police post vide the following references SD/17/22/01/06, SD/18/22/01, SD/19/22/01/06, SD/31/01/06, SD/13/19/08, etc, that on 21st January, 2006, the same men attacked Idudi trading centre and shot in the air and thereafter occupied the town for 2 hours, shooting with Ak47 assault rifles, pistols and using sticks while some of them were defacing the election posters of the petitioner and those of the deponent.

The deponent claims that he reported these incidents to the Minister of Internal Affairs, Dr. Ruhakana Rugunda and pointed out the terror that was being perpetuated by this group. Apparently, the Minister promised to have these men

disarmed and forced to leave Bugweri County. This was temporarily done. However, they returned to the District and on the eve of the election, they arrested two of the FDC campaign managers from Bukoteka village and detained them at their camp at Busese Mixed Primary School. The deponent also alleges that these same group of men invaded Busembatya Town Council on the eve of the elections and arrested a number of FDC supporters whom they tortured and maimed. The deponent attaches two photographs showing men in yellow shirts, some of whom are carrying guns and sticks. These events were not denied or fully explained to the court by the Respondents or their counsel beyond the general denials that any of these irregularities, malpractices or illegalities took place. The denials are supported by the Respondents' own affidavits and those of many officials of the 1sr Respondent, army and police officers and supporters of the 2nd Respondent. For nearly every petition alleging these offences against them, the Respondents filed a counterpart or more deponed to confirm the denials. Typical of these affidavits are the following;

> ***"That I was the Ag. Sub-County Chief of Rukoni sub-county and my role was to receive results after polling: That the allegations contained in the said affidavit are false, malicious and unfounded. That during the entire campaign and election period, I did not witness any extraordinary presence of the Presidential Protection Unit in Rukoni Sub-county apart from an occasional presence of a small contingent of escorts that were protecting the Parliamentary candidate for Ruhama County, Mrs. Janet Museveni"***

Paul Bakole Bwire from Busia District deponed that in the recently concluded Presidential, Parliamentary and Local Council elections, he was part of the NRM District team charged with the responsibility of overseeing and monitoring the conduct of the electoral process. He states that on the 22nd and 23rd February, 2006, he moved to various areas of the District to monitor the situation and to pay out to the NRM officials' money meant for polling agents for their transport and facilitation of the NRM and its candidates. There were 8 agents at each polling station and each agent was entitled to Ug. Shs. 5000 (Five thousand only) for the day's work. He further stated that later he, together with others in his group, were met by the police who arrested them (for bribery related offences). They were detained but later released on police bond. On search, the police found on his person a sum of Shs.

260,000 which was taken by the police as exhibit. This is one of the rare occasions deponed on when security forces acted properly upon allegations that supporters of the 2nd Respondent were breaking the law.

Mr. Masiko Joram deponed on events which Hon. Jack Sabiiti had claimed occurred at Bubaare sub-county, Kabale District, and said that the contents of paragraph 7 of Sabiitis' affidavit were untrue and that the elections were conducted in a peaceful atmosphere and he did not receive any complaints of any malpractice. Mr. Obong Geoffrey of Mbarara Police Station deponed that he and a colleague by the name of Rwigyema, a Prison Warder No. 8741 were deployed at Kamukuzi M-Z polling station and polling commenced at 8:00 a.m in the morning and was closed at 5:00 p.m in the presence of all but one agent (UPC agent) and observers, and that he did not witness any form of chasing away of agents nor the distribution of pre-ticked ballot papers in favour of any candidate.

Kakaire Ahmed who was Chairman of the Idudi Parish tribunal, in Iganga, deponed that the allegations made by one Kaboode Abudu and Nafula Christine in their respective affidavits in favour of the petitioner are false. Masodo B.Abbey of Bulungule Parish, Buyanga sub-county, Iganga District was the presiding officer at Nakawala N-Z polling station during the Presidential elections, 2006, and he deponed that, contrary to the contents of the affidavits deponed by one Muwaza Sulaimani whom he knows personally and that of Nabaja Sarah, the complaints they contain are not true. Robert Mugabi was the presiding officer at Kirungu outside Quarter Guard, M-Z polling station – Code 41 and having read the affidavit of Ssebowa Ibrahim, he himself deponed that there was no such polling station as "Omumahe Polling Station", and that it is not true as alleged that the FDC agents were chased away from the polling station over which he presided near the barracks in Kichwamba sub-county in Kabarole District.

A Mr. Fox Odoi, a Legal Assistant in the office of the President deponed that on election day of 23rd February, he went to Tororo Central Police Station to report alleged acts of bribery of voters by the FDC members in Tororo and that at no time whatsoever did he intimidate, torture or assault any supporters of the Petition or any

other person at all. Mr. Francis Museveni of Kibale Village, Bufundi sub-county, Kabale District deponed that the allegations contained in the affidavits of Twinomukago Vanice and of Hon. Jack Sabiiti in support of the petition are false and malicious and that no NRM government officials and or LCs forced any voter to vote from the table as alleged and there was no intimidation, bribery, alcohol and open/forced voting as alleged at all. Mr. Onen David Michael deponed as Assistant District Registrar of Nebbi District with responsibility of updating and maintaining the District voter's Register. In his affidavit, he maintained that the allegations made by Samuel and Roseline Angom that they were prevented from voting are untrue. Many other deponents in support of the Respondents' denials swore that the election was free and fair and was not characterized by acts of bribery, disfranchisement, intimidation, harassment or violence as claimed by the petitioner and in the affidavits supporting him.

There is also evidence that acts of intimidation, bribery and breaches of the law were committed by agents or persons working for the election of the Petitioner. I am not persuaded by the arguments of one of the Petitioner's Counsel, Mr. Matovu, that a Petitioner is entitled to break the laws and violate the Constitution of Uganda provided that if at the end of the day, he or she is the loser, they cannot be affected by the provisions of the Constitution and laws of this country. In my opinion, this is a very cynical and unacceptable view of what true democracy and constitutionalism is all about. This kind of argument ignores the fact that one of the orders this court is empowered to give is that a petitioner may be declared as having won the election in which event he or she is expected to assume office as new President. If Mr. Matovu's ingenuous argument were to be accepted, the country would end up with a President who is equally or more tainted with illegalities which in my opinion would be a manifest absurdity. In consequence, Mr. Matovu's contention must be rejected as void of merit.

In my view however, it is not so much that any party or all of them who stood in the Presidential elections of 23rd February were guilty or innocent of the offences complained of as much as the fact that this court found them to be generally proved. What tainted this election is not the guilt of the parties but of the offences that were

committed before and during its conduct. The violation of the Constitution and the laws of Uganda committed by diverse persons throughout the country is what is of crucial importance. For instance, section 23 of the Presidential Elections Act (Act 16 of 2005) provides that:

(1) ***During the campaign period, every public authority and public institution shall give equal treatment to all candidates and their agents."***

Section 24(1) of the same Act obliges State owned media to give equal treatment to candidates to present their programmes to the people.

It is clear that these provisions were blatantly violated, with the 2nd Respondent getting the lion's share of both the public authorities support including that of the 1st Respondent and of the State media.

The report of the Independent Democracy Section of the Commonwealth Secretariat whose representatives monitored the Presidential election noted that:

"The NRM-O, taking maximum advantage of the existing and operational Movement structures, used government resources, vehicles and personnel and received overwhelming coverage on state television and radio. It was noted that the NRM-O and the Movement with its organs, share many of their senior personnel. This office-sharing arrangement has been note in Bundibugyo, Kamwenge and Kabarole in the Western Region."

Incidentally, the Commonwealth observer team appears to have been misinformed about the NRM-O. There was no such political party called the NRM-O participating in the 2006 elections. Following the NRM "conversion" to multipartism, its leaders decided that they too would participate in the forthcoming elections as a party called the National Resistance Movement Organisation (NRM-O). However, when it came to registration, the leaders of the party registered the National Resistance Movement (NRM) as the party participating in the 2006 elections. They also registered the NRM symbol of a bus and its colour of yellow as those of the same NRM party to participate in the 2006 elections. It is this party which participated in the 2006 elections. It is at this stage that other prospective participating political parties and others should have challenged this apparent deception. They did not, and have only themselves to blame.

Be that as it may, the Commonwealth observers Report states that:

> **"Notwithstanding those provisions of the Presidential and Parliamentary Elections Act that restrict the use of state resources for election campaigns, it was not uncommon to find that the NRM-O Presidential candidate and many NRM Parliamentary candidates availed themselves liberally of the facilities and resources which only government could provide."**

On bribery and other inducements, the Commonwealth observers' report continues:

> **"During the campaigns, government pronouncements were routinely made at NRM-O platforms and in manifestos with government affairs in a way that was indistinguishable from bribery. Bribery is incompatible with free and fair elections. Our team in Mbale specifically observed the distribution of cash to voters on the eve of polling day. The NRM-O Presidential candidate spoke out against the practice of inducing voters with gifts of soap, sugar and salt. This practice was not restricted to anyone political party, although the most resourced party, was the most frequent offender."**

DEMGROUP noted that cases of bribery were 'rampant' during the campaign and on polling day, although many cases were not reported to the police. On polling day, the incumbent MP in Arua district was arrested on allegations of vote buying as was the incumbent woman MP for Yumbe District.

The Commonwealth observer team report on violence, intimidation and harassment is equally damning. With all these grave reports, it would surely have been a little short of a miracle for anyone to expect the 2006 Presidential elections to be free and fair. In my view, had the Presidential elections of 2006 been organized and conducted in accordance with the Constitution and laws of Uganda, the 2nd Respondent would have obtained less votes and the petitioner would have got more than they received. There is no formula by which anyone can tell how much the difference would have been. The only sure way is to have a fresh election which complies with the Constitution and laws of the country. Only in that way, can Ugandans be certain about the results as to who won fairly and lost equally.

In my view, the illegalities, malpractices and irregularities reported and proved to the unanimous satisfaction of this court dug too deep in the foundations and legitimacy of the Presidential elections of 2006 and leave no shadow of doubt that that election was fatally flawed and a fresh one ought to be ordered and held. For these reasons my response to issue No.3 can only be in the affirmative. I find that the Presidential election results of 2006 were affected in a substantial manner.

I now turn to framed issue No.4. This issue concerns illegal practices and electoral offences allegedly committed by the 2nd Respondent personally or by his agents with his knowledge and consent or approval. The petitioner lists these malpractices and offences in paragraphs 11 and 12 of his affidavit as follows:

11. Your petitioner avers that the 2nd Respondent personally committed the following illegal practices and or offences, while campaigning.

(a) Used words or made statements that were malicious, contrary to S.24 of the Presidential Elections Act.

(b) Made statements containing sectarian words or innuendos against your petitioner and or his party and other candidates, contrary to S.24(5)(c) of the Presidential Elections Act.

(c) Made abusive insulting and or derogatory statements against the petitioner, F.D.C and other candidates, contrary to S.24(5)(c) of the Presidential Elections Act.

(d) Made exaggerations of the Petitioner's period of service in government and the reason why he moved from the several portfolios your Petitioner held in government and he also variously ridiculed the petitioner, contrary to S.24(5)(e) of the Presidential Elections Act.

(e) Used derisive or mudslinging words against the petitioner.

(f) Used defamatory and or insulting words contrary to S.23(3)(b) of the Presidential Elections Act.

(g) The 2nd Respondent made statements which were false either knowingly or recklessly at a rally namely,

(i) That the FDC frustrated the efforts to build another dam.

(ii) That I was working in alliance with Kony PRA and other Terrorists.

(iii) That I was an opportunist and a deserter.

12. The petitioner further contends that the 2nd Respondent committed acts of bribery of the electorate by his agents with either his consent and or approval.

(a) Bribery of voters just before and during the elections, contrary to S.64 of the Presidential Election Act.

(b) Attempting and interfering with the free exercise of the franchise of voters contrary to S.26 (c) of the Presidential Elections Act.

(c) By agents procuring the votes of individuals by giving out tarpaulins, saucepans, water containers, salt, sugar and other beverages and making promises of giving such beverages.

The 2nd Respondent denies each and every one of the above allegations. He deponed a lengthy affidavit containing many excerpts of what he said he stated on diverse places and times and giving explanations and reasons for his assertions. These detailed statements are contained in the affidavit of Yoweri Kaguta Museveni deponed at Kisozi on the 12.03.2006. He categorically denied a number of the allegations made in paragraphs 11 and 12 of the petition. On offences allegedly committed by persons who could be regarded as his agents, he deponed as follows:

27. That in reply to paragraph 21 of the Petitioner's affidavit, I did not authorize any interference with the free exercise of voters' franchise nor was what is alleged to have been done, done with my knowledge, consent or approval.

28. That the conduct of the person referred to in paragraph 22 of the Petitioners' affidavit in connection with the killing at Bulange was not with my knowledge and consent or approval. I am aware that the person has been charged before a court of law and due process of the law is taking its course.

29. That the alleged conduct by Fox Odoi in paragraph 23 of the Petitioner's affidavit was not authorized by me and was done without my knowledge and

consent or approval and it is the subject of police investigations. Fox Odoi was not my agent and I was very displeased when I was informed about the incident.

In my view, SS.23 and 24 of the Presidential Elections Act which deal with the rights of a candidate and the possible offences he or she may commit during election campaigns are contradictory and therefore unhelpful to this court because the two sections first mix up a number of issues and then proceed to contradict each other.

Section 23(1) provides that;

"During the campaign period, every public officer, public authority and public institution shall, give equal treatment to all candidates and their agents."

Section 23(2) provides that;

"Subject to the Constitution and any other law, every candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of the right to campaign under this Act."

The next set of rights and freedoms of candidates are to be found in Section 24 which provides that:

(1) ***All Presidential candidates shall be given equal treatment on the state media to present their programmes to the people.***

(2) ***Subject to any other law, during the campaign period, any candidate may, either alone or in common with others, publish campaign materials in the form of books, booklets, pamphlets, leaflets, magazines, newspapers or posters intended to solicit votes from voters but shall, in such publication, specify particulars to identify the candidate or candidates concerned.***

Subsequently, the two sections provide what may be described as clawback provisions. Section 23(3) provides that a person shall not, while campaigning use any language-

which constitutes incitement to public disorder, insurrection or violence or which threatens war, or

which is defamatory or insulting or which constitutes incitement to hatred.

Thus, sub-section 3(b) annihilates the unhindered rights and freedoms the Act appears to create for candidates in its other provisions. Similarly, section 24(5) derogates from the freedoms and rights already given by creating the seven so-called offences in the campaigns which it enumerates in its paragraphs (a) to (g).

It appears to me that the draftsmen of this Act failed to appreciate the serious nature of the contradictions they allowed to slip into the statute. Be that as it may, a court faced with these contradictions must utilise other sources of law including its own concept of what is fair and just in the particular case to resolve disputes.

In law, the allegations made by the Petitioner as having been committed by the 2nd Respondent have to be proved strictly as any other criminal charges under the Uganda Criminal Code and criminal proceedings. The reason for this high standard of proof is that a candidate found guilty of them may face serious consequences including criminal charges under section 59(9) of the Presidential Elections Act, 16 of 2005. Counsel for the Petitioner contended that with regard to the offences he enumerated and described as having been committed by the 2nd Respondent would, if proved, make the 2nd Respondent personally and strictly liable. If that be the case, in my opinion therefore, it is imperative then for the petitioner to prove those allegations beyond reasonable doubt. The burden on the petitioner becomes greater than the preponderance of proof on a balance of probabilities.

The authors of "The Election Laws of India" published by the Law Publishers (India) PVT.Ltd, 1998, observe that:

"The Supreme Court (of India) has indicated a note of caution that in election speeches, appeals are made by candidates of opposing political parties often in an atmosphere surcharged with partisan feelings and emotions. Use of hyperboles or exaggerated language or adoption of metaphors and extravagance of expression in attacking one party or a

candidate are very common and court should consider the real thrust of the speech without labouring to dissect one or two sentences of the speech, to decide whether the speech was really intended to generate in proper passions on the score of religion, caste, community, etc. In deciding whether a party or his collaborators had indulged in corrupt practices regard must be had to the substance of the matter rather than mere form or phraseology."

I am persuaded that the above passage represents the proper balance when considering the effect of the wrongs complained of in this petition. In order to constitute an election crime or corrupt offence, the facts and circumstances of it must be such as are tainted with malice sufficient to constitute *mens rea* of the crime. The particular candidate who is accused of the offence and the person against whom it was committed must be so closely identifiable that a direct *nexus* is proved beyond reasonable doubt between the maker and the alleged victim or victims. A number of the allegations in this petition have been freely admitted by the Respondent who at the same time has given reasons and explanations in his defence which in my opinion are feasible and acceptable. Yet, these accusations have to be proved beyond reasonable doubt.

The statements complained of in this petition are nothing more than boasts, exaggerations and vulgarities typical of political insults intended to enhance the speaker's chances of success in an election and dampen those of his or her opponents in turn. For a political rival to call another a failure or an opportunist or a weakling does not, in my opinion amount to anything capable of being interpreted as an offence against the law, sections 23 and 24 of the Presidential Elections Act, notwithstanding. In consequence, my answer to issue No.4 would definitely be in the negative. I would absolve the 2nd Respondent of the charges and allegations made against him personally.

Finally, I come to issue No.5. In my opinion, the Constitution strictly prohibits any violation of any of its provisions or those of any legitimate law of Uganda. In my view, it is the solemn and bounden duty of Uganda courts to ensure that the sanctity

and sovereignty of the Uganda Constitution and the legitimacy of its laws are respected and complied with, unconditionally. Once the Constitution is violated and Uganda laws flouted, there can be no other law or cause for which the appropriate remedy may be denied a party. That remedy must be granted. None of the candidates in the 2006 Presidential election has convinced me that they did not break the constitution and electoral laws of Uganda and therefore none deserves to be declared the winner of that election. I would therefore allow this petition.

It was because of the reasons I have given while discussing the framed issues that I agreed that a fresh election be held in accordance with the provisions of the Constitution. I would make no order as to the costs of this petition. I would annul the Presidential election held on 23rd February, 2006 and order that a fresh election be held in accordance with the constitution.

Before concluding these reasons however, I am constrained to observe that the non-compliance with and violations of the principles of the Constitution, the Presidential Elections Act and the Electoral Commission Act, which this court has unanimously found to have occurred, were caused principally by the continued existence and sustenance of electoral structures created and personnel appointed originally to serve one political organization, being called upon and entrusted with, in 2006, to organize and conduct elections in which more than one political party including that one organization, were seriously and acrimoniously competing for power.

The partisan nature and behaviour of the national electoral agents, the security forces including the police, the UPDF and the government Press and other media to the extent of showing bias and, in some instances, open animosity while actively working for and favouring one set of candidates as was clearly shown in many affidavits, annextures and observers' reports during the hearing of this petition, can only be of the greatest national concern.

There can be no justification for the view that the irregularities, malpractices and illegal acts were few and far in between. Judges have the responsibility to pronounce themselves on a disputed matter guided only by the Constitution and laws of Uganda. In my view, to prove that the results of a Presidential election were affected in a substantial manner, all that a petitioner needs to show is that both the Constitution and the laws of the land were substantially violated. It is also my view that thereafter the court must come out bravely and vigorously protect the Constitution and legitimate laws of Uganda.

Failure to protect and defend the Constitution and Laws of the Country would tantamount to the abdication of the judicial function just as to travel outside them in search of an answer to a petition would be embarking on a voyage of discovery beyond the realm of constitutional and legal boundaries.

Dated at Mengo this 31st day of January 2007.

Dr. G.W. Kanyeihamba
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME OF UGANDA

AT MENGO

(CORAM: ODOKI, C.J., ODER, TSEKOOKO, KAROKORA, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.S.C).

PRESIDENTIAL PETITION NO. 01 OF 2006

RETIRED. COL. DR. KIZZA BESIGYE :::::::::: PETITIONER

VERSUS

1. ELECTORL GOMMISSION]
2. YOWERI KAGUTA MUSEVENI] :::::::::::: RESPONDENT

REASONS OF KATUREEBE, JSC., FOR THE JUDGMENT OF THE COURT.

The Petitioner, Retired Col. Dr. Kizza Besigye was one of the candidates in the Presidential Election organised by the 1st Respondent and held on 23rd Feb, 2006. He was unsuccessful, but felt aggrieved by the declaration, by the 1st Respondent, of the

2nd Respondent as the candidate validly elected President. Accordingly he petitioned the Supreme Court seeking orders that the 2nd Respondent was not validly elected President, that the election be nullified and fresh election be held, or that a recount be conducted.

The petition was lodged in the Registry of this court on 7th March 2006, and Respondents filed replies thereto, and the hearing of the petition commenced on 22nd March 2006 and ended on 30th March 2006. Five issues were framed by the court and agreed to by the parties. In accordance with Article 104 of the constitution, and section 59 of the Presidential Election Act, 2006, the court delivered its decision dismissing the petition on 6th April , 2006, i.e within 30 days of the filing of the petition.

The petitioner and the respondent filed many affidavits to which there were annextures of various documents. Because of the constraints of time, it was not possible for us to write and deliver individual judgments detailing reasons for the decision within that period. Having carefully studied all the affidavits and documents filed by all the parties, and having listened to submissions of counsel for the parties, I now hereby give reasons for my decision in dismissing the petition.

For ease of reference I reproduce here below the issues that were framed by the court as well as the decision of the count on each of those issues.

These issues were framed as follows:-

"1. Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and electoral Commission Act, in the Conduct of the 2006 Presidential election.

Whether the said election was not conducted in accordance with principles laid down in the Constitution, Presidential Elections Act and the Electoral Commission Act.

Whether if either issue 1 or 2 or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner.

Whether any illegal practices or electoral offences alleged in the petition, were committed by the 2nd respondent personally, or by his agents with his knowledge and consent or approval.

Whether the petitioner is entitled to the reliefs sought".

The decision of the court on the issues framed was as follows:

"1. On issue No. 1, we find that there was non-compliance with the provisions of the Constitution, Presidential Elections Act and the electoral Commission Act, in the conduct of the 2006 Presidential Elections, by the 1st respondent in the following instances:(emphasis added).

in disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote,

in the counting and tallying of results.

On issue No. 2, we find that there was non-compliance with the principles laid down in the Constitution, the Presidential Elections Act, and the Electoral Commission Act in the following areas:

(a) the principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country. (emphasis added).

(b) the principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting, and vote stuffing in some areas. (emphasis added)

On issue No. 3, by a majority decision of four to three, we find that it was not proved to the satisfaction of the court, that the failure to comply with the provisions and principles, as found on the first and second issues, affected the results of the presidential election in a substantial manner.

On issue No. 4, by a majority decision of five to two, we find that no illegal practice or any other offence, was proved to the satisfaction of the court, to have been committed in connection with said election, by the 2nd respondent, personally or by his agents with his knowledge and consent or approval.

In the result, by majority decision, it is ordered that the petition be, and it is hereby dismissed. We make no order as to costs".

Background to the Petition

The Presidential Elections held on 23rd February 2006 were the first election Uganda has held under a multi-party system since 1980. Between 1986 and 1995 the

Country was governed under the National Resistance Movement as proclaimed by Legal Notice No. 1 of 1986. The 1995 Constitution established the Movement Political system under which the elections of 1996 and 2001 were held. In 2005, a national referendum was held which decided that the country should hence forth by governed under the multiparty system. Consequential amendments to the Constitution and the necessary electoral laws had to be enacted to give effect to this decision of the national referendum.

The Legal Frame work:

The Constitution of 1995, as amended, provides the constitutional basis for elections in Uganda. Article 1 of the Constitution provides:

1(1) ***"All power belongs to the people who shall exercise their sovereignty in accordance with this constitution.***

1(4) ***The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda."***

Article 17(h) imposes on a citizen the duty ***"to register for electoral and other lawful purposes."***

Article 59 further elaborates on the importance of the rights of the people to choose their leaders and guarantees the right to vote;

59 (1) ***"Every citizen of Uganda of eighteen years of age or above has a right to vote.***

It is the duty of every citizen of Uganda of eighteen years of age or above to register as a voter for public elections and referenda.

The state shall take all necessary steps to ensure that all citizens qualified to vote register and exercise their right to vote.

Parliament shall make laws to provide for the facilitation of citizens with disabilities to register and vote."

One has to note the duty imposed on both the State and Parliament to give effect to the right of the citizen to vote. Article 60 establishes the Electoral Commission, some of whose functions are set out in article 61 as follows:-

61(1) ***"The Electoral Commission shall have the following functions:-***

(a) ***to ensure that regular, free and fair elections are held;***

(b) ***to organise, conduct and supervise elections and referenda in accordance with this Constitution;***

(c) **……**

(d) ***to ascertain, publish and declare in writing under its seal the results of the elections and referenda;***

(e) ***to compile maintain, revise and update the voters register;***

(f) ***to hear and determine election complaints arising before and during polling;***

(g) ***to formulate and implement voter educational programmes relating to elections; and***

(h) ***to perform such other functions as may be prescribed by parliament by law."***

Parliament has prescribed further functions for the Electoral Commission by enacting the Presidential Elections Act. No 16 of 2005 and The Electoral Commission Act, Cap. 140 Laws of Uganda. Part II of the latter Act deals with ***"Particular functions of the Commission****." Section 12 thereof stipulates the "**additional powers of the commission and regulation of ballot papers."***

Since this forms a central part of this petition, I deem it necessary to set out some of the relevant provisions in full:

Section 12(1) **"The Commission shall, subject to and for the purpose of carrying out its functions under chapter five of the constitution and this Act, have the following powers:-**

a) ***to appoint a polling day for any election subject to any law;***

b) ***to design, print distribute and control the use of ballot papers;***

c) ***to provide, distribute and collect ballot boxes;***

e) ***to establish and operate polling stations;***

d) ***to take measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness;***

e) ***to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with this Act or any other law;***

f) ***to promote and regulate through appropriate means civic education of the citizens of Uganda on the purpose and voting procedure of any election, including, where practicable the use of sign language;***

g) ***to promote and regulate through appropriate means civic education of the citizen of Uganda on the purpose and voting procedures of any elections, including, where practicable, the use of sign language;***

h) ***to ensure that the candidates campaign in an orderly and organised manner;***

i) ***to accredit any non partisan individual, group of individuals or an institution or association to carry out voter education subject to guidelines determined by the commission and published in the Gazette;***

j) ***to ensure compliance by all election officers and candidates with the provisions of this act or any other law;"***

As indicated above, the Presidential Elections Act 2005 contains more specific powers of the Commission relating to presidential elections.

With regard to the filing of petitions challenging a presidential election, the constitutional basis is Article 104 of the constitution whose provisions are as follows:-

104(1)" Subject to the provisions of this Article, any aggrieved candidate may petition the Supreme Court for an order that a candidate declared by the Electoral Commission elected as President was not validly elected.

(2) ***A petition under clause (1) of this Article shall be lodged in the Supreme Court Registry within 10 days after the declaration of the election results.***

(3) ***The Supreme Court shall inquire into and determine the petition expeditiously and shall declare its findings not later than thirty days from the date the petition is filed.***

(4) ***After due inquiry under clause 3 of this Article, The Supreme Court may***

a) ***dismiss the petition***

b) ***declare which candidate was validly elected or***

c) ***annul the election.***

(5) ***Where an election is annulled, a fresh election shall be held within twenty days from the date of the annulment.***

(6) ***Parliament shall make such laws as may be necessary for the purpose of this Article, including laws for grounds of annulment and rules of procedure."***

The Presidential Elections Act, 2005, in Part VIII thereof, has provisions regulating the challenging of Presidential Elections. In particular, section 59(6) provides the grounds upon which a presidential election may be annulled. Since it is of crucial importance in this petition, I also deem it necessary to reproduce it in full:

"59(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the count

a) ***non compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non compliance affected the result of the election in a substantial manner;***

b) ***that the candidate was at the time of his or her election not qualified or was disqualified for election as president; or***

c) ***that an offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.***

(10) ***Where an election is annulled, a fresh election shall be held within twenty days from the date of the annulment.***

(11) ***The Chief Justice shall, in consultation with the Attorney General, make rules providing for the conduct of petitions under this act."***

Accordingly, the Presidential Elections (Election Petitions) Rules, 2001 were made which provide for the procedure regulating the conduct of a petition seeking annulment of a presidential election. Of particular importance is Rule 14 regarding evidence at trial. Again 1 deem it necessary to set out this rule in full:

14(1): ***"Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.***

(2) ***With leave of the court, any person swearing an affidavit which is before the court, may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.***

(3) ***The court may, of its own motion examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence of the witness is likely to assist the court to arrive at a just decision."***

The Presidential Elections Act also contains the dos and donts of the elections. It contains the rights and duties of the candidates, the conduct of campaigns, the duties of the Electoral Commission and Election Officials, and it also creates offences. It is the non-observance of this Act and the principles thereunder that may lead to the annulment of the election, if such non observance substantially affects the results.

Basically, then, this is the legal framework within which this petition was filed and had to be considered and determined.

The Petition:

The petition alleged that the 1st respondent had not validly declared the Presidential election results contrary to Article 103(4) of the Constitution and Section 57 of the Presidential Elections Act, 2005, thereby rendering the declaration of the 2nd respondent as duly elected President invalid. The petitioner further contended that the entire election had been conducted in contravention of and contrary to the provisions of the constitution, the Electoral Commission Act and the Presidential Elections Act 2005. In the alternative, he contended that the election of the 2nd respondent was invalid on the ground that the election "***was not conducted in accordance with the principles laid down in the provisions of the Presidential Elections Act and that such non-compliance affected the results in a substantial manner."***

Paragraph 8 of the petition particularized the alleged non-compliance with the provisions of the law to show that the entire electoral process ***"beginning with the campaign period up to the polling day was characterized by acts of intimidation, lack of freedom and transparency, unfairness and violence and commission of***

numerous electoral offences and illegal practices." It is important to set out these particulars in full:

8 (a) "Contrary to Section 19(3) and Section 50 of the Electoral Commission Act, the 1st respondent disenfranchised voters by deleting their names from the voter's roll / register.

Contrary to Section 32 of the Presidential Elections Act, the 1st respondent allowed multiple voting and vote stuffing in many electoral districts in Uganda.

Contrary to Section 57 the 1st respondent failed to cancel results of polling stations where gross malpractices and irregularities took place in particular the districts of Kiruhura, Manafwa and Pallisa.

Failing to declare the results of the election in accordance with Section 56 and Section 57(4) of the Presidential Elections Act 16 of 2005 and Electoral Commission Act.

Contrary to Section 12 and (f) of the Electoral Commission Act, failing to take measures to ensure that the entire electoral process is conducted under conditions of freedom and fairness.

Contrary to Section 9 of the Presidential Elections Act, the 2nd respondent was neither sponsored as a candidate by a registered Political Organization or party or as an independent candidate.

Misleading the voters by printing and using ballot papers, which indicated that the 2nd respondent's party was the NRM, which is not a registered party participating in the elections.

Misleading the voters by allowing the use of a symbol of the "Bus" which was used by the Movement's Political System during the referenda."

Paragraph 9 averred that the 2nd respondent had directly benefited from all the above non-compliance with the law

Paragraph 10 was stated in the alternative and without prejudice, to the effect that the result of the election had not been declared in accordance with Article 103(4) of the Constitution.

Paragraph 11 contended that the 2nd respondent had personally committed illegal practices and or offences while campaigning. These are particularized as follows:-

11 (a) "Used words or made statements that were malicious contrary to Section 24(5)(b) of the Presidential Elections Act.

Made statements containing sectarian words or innuendoes against your petitioner and or his party and other candidates contrary to section 24(5) (c) of the Presidential Elections Act.

Made abusive, insulting and or derogatory statements against the petitioner, F.D.C and other candidates contrary to section 24(5)(d) of the Presidential Elections Act.

(d) Made exaggerations of the petitioner's period of service in government and the reason why he was moved from the several portfolios your petitioner held in government and he also variously ridiculed the petitioner contrary to section 24(5)(e) of the Presidential Elections Act.

(e) ***Used derisive or mudslinging words against the petitioner.***

(f) ***Used defamatory and or insulting words contrary to Section 23(3)(b) of the Presidential Elections Act.***

(g) The 2nd respondent made statements which were false either knowingly at a rally or recklessly namely:

That the F.D.C frustrated efforts to build another dam
(ii) ***That I was working in alliance with Kony PRA and other terrorists;***
(iii) ***That I was an opportunist and a deserter"***

This paragraph(g) was an addition after counsel for the petitioner made a successful application to amend the petition.

The last paragraph of the petition i.e. para.12 contained allegations of bribery against the 2nd respondent for clarity I also set it out in full:

"12.The petitioner further contends that the 2nd respondent committed acts of bribery of the electorate by his agents with either his consent and or approval;

a) ***Bribery of voters just before and during the elections contrary to Section 64 of the Presidential Elections Act.***

b) ***Attempting and interfering with the free exercise of the franchise of voters contrary to Section 26(c) of the Presidential Elections Act.***

c) ***By agent procuring the votes of individuals by giving out tamplins saucepans, water containers, salt, sugar and other beverages and making promises of giving such beverages."***

The Petitioner prayed court to:-

Determine that Yoweri Kaguta Museveni was not validly elected.

Order that a re-run be held

Order for a recount

Order for costs of this petition

Such other remedy available under the electoral laws, as the court considers just and appropriate in the circumstances.

It is to be noted that the petitioner did not specifically pray for the annulment of the election, although it may be said that this would follow as a matter of law if the first prayer was granted.

As required by the rules, the petition was accompanied by the affidavit of the petitioner in support of the allegations made in the petition.

The Replies:

The 1st respondent filed its reply to the petition on 13th March 2006 and it was supported by the affidavit of its chairman Dr. Badru Kiggundu. The reply denied that the petitioner had any *"real grievance within the meaning of Article 104(1) of the constitution or section 59(1) of the Presidential Elections Act."* It asserted that the 1st respondent had validly declared the 2nd respondent duly elected President, and that the elections had been *"conducted in accordance with the provisions of the constitution and the Electoral Commission Act."* The 1st respondent further stated that if there had been any non-compliance with the provisions of the law, then such non-compliance did not affect the result in a substantial manner. It denied disenfranchising voters or allowing multiple voting and vote stuffing *"in any electoral districts in Uganda."* It specifically denied any gross malpractice or irregularities in Kiruhura, Manafa and Pallisa or anywhere else. The 1st respondent further stated that it had taken *"measurers to ensure that the entire electoral process was conducted under conditions of freedom and fairness."* Adding that the 2nd respondent had been; "properly sponsored as a candidate by the National Resistance Movement (NRM)" which, it asserted was a registered political organisation with a **"Bus"** as its registered symbol.

The 1st respondent further denied any Knowledge of any illegal practices, offences or acts of bribery on the part of the 2nd respondent or his agents.

The 1st respondent prayed that the petition be dismissed with costs.

Dr. Kiggundu annexed to his affidavit, the National Results of the Presidential Elections as annexture **"R 1"** , which shows that the petitioner had received 2,570,603 votes or 37.36 % of votes cast, while the 2nd respondent had received 4,075,911 votes or 59.28 % of votes cast. This document also gives the following figures:

Total number of registered voters	-	10,450,788
Total number of Polling stations	-	19,786
Total number of polling stations received	-	19,585 or 98.98 % of total number of polling stations.

Also attached to the affidavit is the declaration of results when there is a winning candidate, issued under Article 103(7) of the constitution and section 58 of the Presidential Elections Act. This also gives the votes cast for each candidate. But it also gives the following data:

Total number of valid votes cast for candidates	-	6,880,484
Total number of invalid votes	-	292,757 or 4.08 % of votes cast.
Total number of votes cast	-	7,173,241 amounting to 68.64% of the total number of registered voters.

Also annexed is the declaration of final results signed by the Chairperson, the Deputy Chairperson and five Commissioners of the 1st respondent Also annexed to the affidavit as R2 is the statement of Preliminary Conclusions And Findings of the European Union issued at Kampala on 24th February 2006, as well as the Interim Statement of the Commonwealth Observer Group as R3.

The 2nd respondent also filed a reply to which was attached an affidavit sworn by himself. The 2nd respondent denied having committed any electoral offences as alleged in the petition or at all, and he asserted that he had been validly elected in a free and fair election and that the declaration by the 1st respondent of his election was valid and in accordance with the constitution. His lengthy affidavit detailed a number of statements he says he made in answer to allegations made by the petitioner at various places in the country. The petitioner filed an affidavit in reply to the above affidavit of the 2nd respondent. The 2nd respondent also later filed a supplementary affidavit.

When the hearing started, lead counsel for the petitioner, Mr. Wandera Ogalo raised a preliminary issue. He contended that the petitioner was not happy with issue No.3 and wished to be allowed to argue the point raised in paragraph 6 of the petition, namely that:

> ***"The provisions of section 59(6)(a) of the Presidential Election Act are contrary to the provisions of Article 104(1) of the constitution and that this should therefore be referred to the constitutional court for interpretation under Article 137(5) (b) of the constitution."***

The Court allowed counsel for the petitioner to argue the point and counsel for the respondent also made their responses. The court rejected the application for reasons given in the decision. I only wish to elaborate my own views on the matter.

The petitioner's quarrel appears to have been with the requirement in Section 59(6)(a) of the Presidential Elections Act that to annul the election of a candidate as president it must be proved, inter alia, to the satisfaction of the court that the noncompliance with the law and principles thereof affected the result in a substantial manner. I have already reproduced the relevant section in full.

If one removed the need to prove that the noncompliance had affected the results in a substantial manner, it would mean that mere proof of any non-compliance with the provisions of the Act and principles therein, however slight this may be, would be sufficient to annul a presidential election. It would mean that if there was non-compliance in a single constituency or electoral district, but full compliance with the

law and principles in all other districts, the Presidential election would still be annulled.

In my view, the legislature must have addressed its mind to the great importance to the life of the country of the election of a president and decided that there must be grave reason to annul the election. Indeed the framers of the Constitution had themselves left it to Parliament (Article 104 (9)) to determine the grounds upon which a Presidential Election may be nullified. This comes after the court has duly inquired into the petition and decided that the election should be annulled. I do not believe that the framers of the Constitution or Parliament expected that at all times there would be 100% compliance with the provisions of the law and principles therein. I believe it was reasonably envisaged that failures to comply with the law might inevitably occur, but it is the extent to which these failures might impact on the result of the election that was to be of concern if the country was to have to undergo another period of campaigns, expense, etc to have another election. It is a sort of proportionality test that if an important exercise like a Presidential election had to be nullified, the level of non-compliance had to be to a high threshold.

The question was asked by counsel for the petitioner as to what is "affecting the result of the election in a substantial manner." To begin with this is the language of the statute, and one has to follow the normal rules of statutory interpretation to discover the meaning. The first rule of statutory interpretation is to give the words their natural meaning. The word ***"substantial"*** is known in ordinary English language. The Oxford Advanced Learner's Dictionary 5th Edition, defines the word ***"substantial" as "large in amount or value: considerable ……concerning the most important part of essential."***

The word also has a legal meaning:
Black's Law Dictionary, 6th Edition, defines the word ***"substantial"*** to mean;

> ***"Of real worth and importance: of considerable value. Belonging to substance; actually existing: real: not seeming or imaginary; not illusive; solid; true; veritable. Something worthwhile as distinguished from something without value or merely nominal."***

The same dictionary goes on to define the meaning of "substantial compliance rule as ***"compliance with the essential requirements, whether of a contract or of a***

statute." The word ***"substantially"*** is then defined as: ***"Essentially; without material qualification; in the main; in substance; materially: in a substantial manner. About, actually, competently, and essentially."***

From the above dictionary definitions, one may deduce that to affect the result of an election in a "substantial manner" means to affect the result in a big way such that the result would have been different but for the non-compliance. The essence of section 59(6)(a) therefore seems to be that the court must not only be satisfied that there was non-compliance with the provisions of the Act and principles therein, but it must also be satisfied that the non-compliance affected the result in such a big way as to necessitate nullifying the election and taking the country through another election. I am of the opinion that the legislature was right to provide as it did. Similar provisions do exist in other countries such as Nigeria, Zambia and Tanzania. I will refer to these later In this Judgment. I concurred in the decision that this provision is not inconsistent with the constitution. To do away with it could lead to dire consequences for the country as proof of any non-compliance, even if it did not affect the result, would lead to nullification of elections and ordering of fresh elections. I am convinced this would not be in the overall interests of justice for the people of Uganda as a whole. The Legislature must have been mindful of this when it enacted the law as directed by the constitution to set the grounds for nullification of a presidential election.

Furthermore, Article 104 (1) does not itself set out the grounds that the Petitioner needs to prove to the court in order for the court to order that a candidate declared by the Electoral Commission as elected president was not validly elected. It is noteworthy that this clause is ***"subject to the provisions of this Article"***. Therefore one has to read the whole article together including 104 (9) which states:

> ***"(a) Parliament shall make such laws as may be necessary for the purpose of this article, including laws for grounds of annulment and rules of procedure."***

Parliament has made the law, and the Rules of Procedure have been made which provide for how a petition will be proved. I see no inconsistency whatsoever with provisions of Article 104(1).

Having disposed of the preliminary point of law, the hearing of the petition proceeded in earnest. Counsel John Matovu presented the petitioner's arguments, and submissions in respect of issue No 4, and Counsel Wandera Ogalo, presented arguments and submissions in respect of the rest of the issues. I intend to deal with the grounds of the petition as set out in the petition and deal with the issues in the order in which they were framed. But in discussing issues No.1 and No.2, elements of answers to issue No.3 will also be touched upon before disposing of issue No.3 on its own.

Burden of Proof:

All counsel agreed that the burden of proof is that set out in the section 59(6) of the Presidential Elections Act i.e. that proof must be to the satisfaction of the court. One has to determine as to what amounts to ***"satisfaction of the court"*** and what sort of evidence would indeed satisfy the court.

In the ***Kizza Besigye -Vs- Yoweri Museveni and Electoral Commission Petition No I of 2001***, this court considered this issue and reviewed many judicial decisions on the matter. Odoki, C,J in his Judgment cited with approval the following observation of Lord Denning in the English case of ***Blyth -Vs- Blyth [1966] AC 643***:

> ***"My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt……..."***

Having quoted the above, Odoki, C.J. goes on to state:

> ***"I entirely agree with those observations by Lord Denning. The standard of proof required in this petition is proof to the satisfaction of the court. It is true court may not be satisfied if it entertains a reasonable doubt but the***

> ***decision will depend on the gravity of the matter to be proved….since the legislature chose to use the words*** *"proved to the satisfaction of the court",* ***it is my view that that is the standard of proof required in an election petition of this kind. It is a standard of proof that is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance."***

I agree entirely with the above position. The election of a president is a matter that affects the life of the country as a whole. If it is a fraudulent election, it is not only the petitioner who has been aggrieved, but the whole country is aggrieved in that a person they have not freely chosen by their **"will and consent"** is to govern them. On the other hand, court must take care that flimsy or exaggerated evidence is not allowed to nullify a decision made by the people as a whole. Therefore, in my view, the evidence must be strong and cogent and must satisfy the court without leaving any reasonable doubt that the result declared by the 1st respondent is unsustainable given the level of non-compliance with the Act in the country as a whole. One has to consider the nature of the alleged non-compliance, the extent of occurrence in the country, and determine whether it was so grave and so widespread that it must have affected the majority of the voters.

Affidavit Evidence:

As already indicated above, in this petition all evidence is required to be adduced by affidavit. I must observe from the beginning that this method may be unsatisfactory. First the parties, both the petitioner and the respondents have very little time within which to traverse the country gathering evidence and identifying witnesses to swear affidavits. Secondly, the people who swear affidavits are not ever likely to be summoned to court for cross-examination on their evidence, again because of the time factor. Consequently there is always the danger that a party will get enthusiastic supporters to swear affidavits on matters they would otherwise not do if it weren't for the confidence that they will not be cross-examined. The court must be alive to the danger of exaggerated or biased or even false statements in some of the affidavits filed by all the parties. This is particularly so where one party alleges facts and the other merely denies. There is a lot of this in the affidavits filed in this petition.

The petitioner filed a total of 191 affidavits. Of these 95 specifically alleged disenfranchisement of voters by not being allowed to vote because their names were

not on the Register. There were some other affidavits among the rest which also raised similar concerns, among other allegations. The other affidavits were in support of evidence to show other forms of non-compliance with the law, malpractices and irregularities in a number of districts. This affidavit evidence is in respect of a total of about 186 polling stations in various districts, notably the districts of Kampala, Jinja, Mbale, Manafa**,** Sironko, Pallisa, Nebbi, Yumbe, Mbarara, Bushenyi, Ntungamo, Kanungu, Kamwenge, Kabale, Rukungiri, Ntungamo, Soroti. The extent and gravity of the malpractice varies from place to place, with some areas having graver and more widespread allegations than others. In some districts, only isolated incidents of malpractice are identified.

The respondents, who chose to argue their cases jointly, filed a total of about 280 affidavits in reply to those filed in support of the petition. Many affidavits are mere denials of the allegations contained in the affidavits filed in support of the petition. But there are some that do give explanations.

Mr. Nkurunziza, one of the counsel for the 2nd respondent raised a number of objections to some of the affidavits, which I think I should deal with before going into the merits of the affidavit evidence. His objections were basically framed on the provisions of certain statutes and the rules of civil procedure.

Counsel cited a number of affidavits which he contended were not drafted in accordance with the law and therefore ought to be disregarded, such as the 11 affidavits allegedly filed by Mwene - Kahima & Co. Advocates. Counsel submitted that under the Advocates Act, a document must give the name and address of the person that draws it or else it would not be accepted by court or any authority. The sole partner in that firm had sworn an affidavit to the effect that his firm had not drawn the affidavits. In the course of argument, counsel for the petitioner contended from the bar that the affidavits had been drawn at the Kabale branch of the firm by a lawyer who was manning that branch.

Counsel for the 2nd respondent also cited those affidavits that do not disclose the means of knowledge or source of information as being incurably defective.

Although I agree with the view that arising out of article 126 of the constitution substantive justice must be done without undue regard to technicalities, I am of the opinion that in a case of this importance and in which evidence is required to be by way of affidavit, it is important that the affidavits conform to the law particularly as to substance. In this type of case, it is conceivable that partisan supporters may swear and file false or exaggerated affidavits based on rumours or conjecture. These affidavits must be examined critically and those found wanting in substance or based on hearsay or containing apparent falsehoods should not be relied on by the court. I will illustrate this point with some of the affidavits. There is the affidavit of one Damali Nagawa sworn in support of the petition at Mbarara on 15th March 2006 in which she makes a number of allegations regarding her arrest and detention at Mbarara Police Station on 23rd February 2006. She then states in paragraph 9.

> ***"That we were about 300 people in the cells up to around 3 p.m. when Mr. Charles Atamba, Mr. Stephen Katembeya and Ms. Edith Byanyima came and pleaded with the police officers and we were released without formal police bond."***

On the other hand Ms. Edith Byanyima in her own affidavit in support of the petition, states that she was in charge of supervising elections on behalf of FDC in Kiruhura District and on that day at 3 p.m. she was at Kiruhura polling station - stated in another affidavit to be more than 100 km away. Clearly what Negawa stated that Edith Byanyima pleaded for her release cannot be true. I would therefore treat with caution the other matters contained in her affidavit. I believe the affidavit sworn in answer to her by the district police commander, Mbarara, which I found more logical and candid, to the effect that she had been arrested on suspicion that she was giving money to voters and on the basis of the suspicious behavior by running away, of the person she was moving with. After further inquiry she was released the same day without charge by the police and without the alleged intervention of Ms. Byanyima or anybody else. She was able to go back to her polling station in time to vote. The DPC also that there were 300 people detained in police cells at Mbarara that day.

Then there is the affidavit of one David Magulu sworn at Kampala on 18th March 2006. He states that he was the driver of motor vehicle pick-up Reg. No. UBE 320 L

and he was hired by the Police for purposes of supervising the elections in Kaliro district. He states that he took the Police to a number of places and he witnessed money being given to voters and witnessed the Police arrest some four people whom he then transported to the sub-county Police Post. He states that Shs. 800,000/= Notes was recovered from the arrested persons and the incident was recorded at the police "as Police Case Reg. 8 of 23rd February, 2006".

Here one wonders whether a hired driver would also have accompanied suspects into the police station so as to even witness the amount of money recovered and even note the case number. But then there is the affidavit in reply by another David Magulu of Lumonye Parish in Kaliro Town Council who stated in his affidavit that he is the driver of a Pick-up No. UAG 324L and he is the one that was hired by the police. That he had since checked in the Motor Vehicle Registry in Kampala and found that the vehicle given as UBE 320L did not exist. A letter from the motor vehicle Registry in Kampala was also produced in evidence. This evidence is corroborated by the evidence of Mr. Mbasa, District Police Commander Kaliro District. I would find it difficult to rely on the affidavit of the first Magulu which contains a material falsehood with regard to the vehicle he claimed to be driving and indeed appears to be fictitious altogether.

Then there is the affidavit of Henry Lukwaya of Lungujja, Kitunzi, Rubaga Division Kampala who states that he was one of the youths mobilized by one Esther Najjemba to go to meet the 2nd respondent at State House on 27th December, 2005. He then states in paragraph 12 of his affidavit:

> ***"I know for a fact that on 24th December 2005, a group of youths who included Chief Mbowa, Bashir Kakooza, Lumu Fred, Isma Lubega and Katende had visited State House prior to our visit and had received Ug. Shs.100,000= each, as a Christmas gift, while in State House"***

Then in paragraph 14 he states:

> ***"I swear that whatever is stated herein above is true to the best of my knowledge and belief."***

This deponent has sworn to matters that clearly had taken place in his absence. The people he alleges to have received the money have not given evidence and one does

not know whether in fact they exist. He has not stated the means of his knowledge, although he states individuals received 100,000/= as Christmas gift. He states that this had taken place before his own visit to State House. He simply was not there for him to be able to state that he knows "for a fact" that anybody received 100,000/=. This must be based on hearsay. I would therefore reject this type of affidavit as evidence upon which I can say I am satisfied.

These affidavits illustrate, in my view, the difficulty court may be confronted with in this type of cases. If an affidavit does not conform to the law, court must treat it with care and seek corroboration. If an affidavit contains apparent falsehoods or exaggerations, it should not be relied on. A decision like annulling a presidential election must be based on hard concrete evidence. The court must be satisfied, and as already observed, one cannot be satisfied if one still entertains doubt.

As to the 11 affidavits denied by Mr. Mwene - Kahima, I believe this is a matter of evidence as to which of the two lawyers is telling the truth. But since the affidavits were properly sworn, I would allow them and consider the substance of the allegations contained therein. One observation, however, is that these affidavits are indicated to be "drawn and Filed" by Mwene Kahima and Co. Advocates, yet neither this firm nor any lawyer from there was listed as representing either party in this petition. How could they file documents? But this is a technicality that should not prevent the court from considering the substance of the affidavit. However this should not be taken to be a condonation of sloppy affidavits filed by learned counsel. Exceptions may be made in particular cases as the justice of the case may demand, but the law and rules must be adhered to.

DISENFRANCHISEMENT OF VOTERS:

The petition stated in paragraph 8(a) that the 1st respondent had disenfranchised voters contrary to section 19(3) and Section 50 of the Electoral Commission Act.

This court, in its findings, and in answer to issue No. 1 did **"find that there was non-compliance with the provisions of the constitution, Presidential Elections Act and the Electoral Commission Act, in the conduct of the 2006 presidential election, by the 1st respondent in the following instances**:

in disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote.

In the counting and tallying of results."

I must note that the court's finding of no-compliance was in respect of the above two specifically stated areas. The court did not find that there had been no compliance at all with the provisions of the Constitution and the law. In my view, the court then has a duty to examine the evidence and determine the extent of these particular instances of non-compliance and determine further whether the non-compliance affected the result of the election in a substantial manner, when it comes to answer issue No. 3 as framed.

Since this matter of affecting the result in a substantial manner will also run through the evidence in respect of issue No. 2, I deem it necessary to consider it at this stage in some detail.

In my view, it should be a material consideration whether 10 voters, or 200,000 voters or 5 million voters were disenfranchised. Even if one voter was unlawfully removed it would amount to disenfranchising that voter and would be non-compliant with the Constitution and the law. But could it be said to have the same effect as if 5 million voters were unlawfully removed from the register?

I am certain in my mind and as earlier observed that the framers of the Constitution, could not have intended that even the slightest non-compliance should result in the nullification of a presidential election. It is for that reason that they provided in Article 104(9) that Parliament shall give the grounds upon which a presidential election shall be annulled and Parliament had done so in section 59(6)(a) which I have already commented upon.

The court has a bounden duty to inquire into the nature of the non-compliance, the extent of it, and its impact on the result of the election. The court cannot run away from this duty. Had it been the intention of the framers of the Constitution that the slightest infringement nullifies the election, then the constitution would have said so. Likewise if Parliament had wanted non-compliance per se to be a ground for nullification of a presidential election it should have said so. It did not. In my view,

the reason it did not do so is because such a situation would lead to absurd and dire consequences. Any aggrieved candidate would find any particular instance where there had been non compliance and obtain a nullification of a presidential election. I am fortified in this view by the fact that similar provisions exist in other countries and they have been judicially considered.

In the Tanzanian case of ***BURA -Vs- SARWATT, [1967] EA 234,*** the High Court of Tanzania considered a similar provision in the National Assembly (Elections) Act 1964 where it was also a requirement that the non-compliance with the Act be proved to have affected the result of the election. The court did find evidence of non-compliance with the Act but went on to find that the particular act of non-compliance had not affected the result.

Court stated at P.238:

> ***"We are of the opinion that in this respect there was non-compliance with the provisions of the Act and that the election was not conducted in accordance with the provisions of the Act. We do not think, however, that such non-compliance affected the result of the election."***

Another Tanzanian case of ***MBOWE Vs - ELIUFOO [1967] E.A 240***, which was also considered and followed by this court in the 2001 Kiiza Besigye Petition No.1 of 2001 also established that non-compliance with the provisions of the Act may not be substantial and may not affect the result of the election. In that case the provision of the law in Tanzania was very close to our section 59(6)(a): of the Presidential Elections Act. It stated:

> ***"Non-compliance with the provisions of this Act relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such no-compliance affected the result of the election."***

In the English case of the ***KENSINGTON NORTH PARLIAMENTARY ELECTIONS PETITION [1960] 2 ALLER 150*** the court considered a similar provision i.e section 16(3)of the Representation of the People Act where a parliamentary election could only be declared invalid if it was proved to the satisfaction of the tribunal :-

> ***"That the election was so conducted as to be substantially in accordance with the law as to elections, and that the act of omission did not affect its result."***

Streatfeild, J, made the following observations:

> ***"……it is for the court to make up its mind on the evidence as a whole whether there was a substantial compliance with the law as to elections or whether the act or omission affected the result…….***
> ***Here, out of a total voting electorate of 34,912 persons who recorded their votes, three or possibly four, are shown by the evidence to have voted without having a mark placed against their names in the register, and each of them voted only once. Even if one was to assume in favour of the Petitioner that some proportion of the remainder of 111 persons,…..were in somewhat similar case, there does not seem to be a shred of evidence that there was any substantial non-compliance with the provision requiring a mark to be placed against voters' names in the register; and when the only evidence before the court is that, of the only three, or possibly four people who are affected……one cannot possibly come to the conclusion that, although there was a breach of the statutory rules, the breach can have had any effect whatever on the result of the election. Even if all the 111 were similarly affected, it could not possibly have affected the result of this election. (page 153).***

One has to note however that the English statute has one element not provided for in our own Act, i.e. the element of substantial compliance with the law. What is common is that the non-compliance must affect the result. But I do believe that even though that requirement is not provided for in our law, to have a situation where non-compliance does not substantially affect the result, there must have been substantial compliance with the law. We therefore have to determine whether in this case there was substantial compliance with the law bearing in mind that this was not a Parliamentary but a Presidential Election dealing with one national constituency of more than ten million registered voters.

In the Nigerian case of ***ALHAJ, MOHAMED DIKKO YUSUF*** and ***MOVEMENT FOR DEMOCRACY & JUSTICE -Vs- OBASANJO*** and ***53 OTHERS,*** CA/A/EP/2003 the Court of Appeal of Nigeria considered section 135 of the Electoral Act of Nigeria which provided for not only substantial compliance with the Act but also that such non-compliance must affect the result substantially. It states:-

> ***"An election shall not be liable to be invalidated by reason of non-compliance with the provision of this Act if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election"***

After reviewing several authorities on this subject, the court had this to say:

> ***"Further on this ground, an election shall not be invalidated merely for the reason that it was not conducted substantially in accordance with the provisions of the Electoral Act. It must be shown that the non-compliance had affected the result of the election. The petitioner* must *not only show non-compliance but must also demonstrate that the votes attracted or scored through the non-compliance affected the result of the election or had the effect of disenfranchising majority of the electorates in the constituency,."*** (emphasis added).

The court went on at page 78:-

> ***"A non-compliance is deemed to be substantial if the victory of the first respondent would be reversed when the scores or votes credited to him through non-compliance are deducted from his final score. But in the instant petition, the petitioners neither pleaded nor adduced evidence in support of figures scored from non-compliance. To drive home the point it must be shown that the outcome of the election would have been otherwise without the votes arising from non-compliance or corrupt practices."*** (emphasis mine).

The above quoted foreign provisions and judgments illustrate the point that the section 59(6)(a) of the Presidential Elections Act is not far fetched, and is certainly, in my view a reasonable and programmatic provision.

I now go back to the non-compliance with respect to deletion of voters from the Register. What was the constitutional duty of the 1st respondent?. As earlier pointed out, the 1st respondent is mandated to prepare voters register and keep it up-dated from time to time. The matter of the preparation of the register has been of concern in previous elections. In fact, this court did find that the register in the 2001 elections was in shambles with inflated numbers of voters, many unregistered voters, ghost polling stations etc. There appears to be common ground this time around that the 1st respondent greatly improved in the aspect of preparing the voters register, despite

adverse findings of deletions of voters. Thus, the Commonwealth Observers group for example, despite criticizing the electoral commission for the deletion of an estimated 200,000 people from the register, nonetheless commends it for preparing a register that this time managed to capture 90 % of people eligible to vote. In my view, capturing 90% of eligible voters on the register is not full compliance, but is definitely substantial compliance with the law.

There is no doubt that people were deleted from the register. The Commonwealth Observers estimated the number to be about 200,000. The Demi Group estimated 150,000. The Electoral Commission actually admitted deletion of 153,000 people countrywide. In my view, it is the manner of deletion of voters that constitutes a non-compliance in this respect. The law in section 25 of the Electoral Commission Act does provide for deletion from the register of people who have moved from one polling station to another, those who have died, or those found not to be eligible to vote. So deletion of a name by itself does not amount to non-compliance with the law. It is when the deletion does not follow the procedure provided in the law that non-compliance arises. In this respect the law provides in section 25(5) for the establishment of tribunal which are charged with the duty of recommending to the Electoral Commission the deletion of persons found to be eligible for deletion. The Tribunal must have sat with the necessary coram (section 25(6)) and must have received a complaint from another person that a named voter or voters should be removed from the register. The tribunal must deliberate on that complaint and make a decision which is then sent to the Electoral Commission for review. It is the Electoral commission which then carries out the deletion. Section 25(7) sets out the methodology how the tribunal makes its decisions, i.e. by consensus or by majority vote. Therefore if a tribunal is found not to have been properly constituted, or to have made decisions outside the law, this would be non-compliance.

From the evidence I have seen, it is clear that in many instances the Tribunals were not properly constituted, and recommendation for deletion of many voters was being made by one or two individuals to a tribunal consisting of only two members. This was particularly true in several centres in Kampala. The Electoral Commission appears to have gone ahead to delete the names without satisfying itself that the

tribunals had followed the laid down procedure in making their recommendations. Yet section 25(8) states that "any decision of a tribunal shall be subject to review by the commission." As a result 153,000 people were denied the right to vote. This was non-compliance with the law.

However, there appears to be a lacuna in the law. A person in respect of whom a recommendation for deletion has been made ought to be notified so that he may explain himself. Currently this is not provided for in the law. But as managers, the Electoral Commission ought to have inquired into those cases where the CLN forms clearly indicated that the Tribunals had not been properly constituted, and the deletions were made at the instance of one or two individuals. The commission had a duty to satisfy itself that there was no foul play since the result was to deny a citizen his right to vote.

I now must address the issue of the effect on the result of the election by this non-compliance. To start with, there was no evidence to show that all the people deleted belonged to one party or the other. There was evidence by affidavit of 95 people stating that they were supporters of the petitioner and were removed from the register and denied the right to vote for him. Counsel for the petitioner did suggest from the bar that in his estimation 80% of those deleted were supporters of the petitioner. There was no evidence to back this up. I believe all the parties were affected by this non-compliance with the law by agents of the Electoral Commission.

Be that as it may, there were a total number of 10,450,788 voters. A total of 7,173,241 voted in the presidential election, representing 68.64 % of the total number of registered voters. According to official results, the difference in votes for the 2nd respondent and the petitioner was about 1.5 million. In my view, 153,000 people, whose deletion is indeed reprehensible, is too small a number to affect the result of the election in a substantial manner, even if they had all belonged to one candidate, which was not proved. I am satisfied that this non-compliance did not affect the result in a substantial manner.

TALLYING OF RESULTS:

I now turn to the issue of non-compliance in respect of tallying of results. Article 103(7) of the constitution states:

> ***"The electoral commission shall ascertain, publish and declare in writing under its seal, the results of the presidential election within forty-eight hours from the close of polling."***

This provision does not indicate the manner or method by which the Electoral Commission shall "ascertain" the results. But Article 103(9) states:

> ***"Subject to the provisions of this constitution, Parliament shall by law prescribe the procedure for the election and assumption of office by a President."***

In my view then, one has to look at the provisions of the Presidential Elections Act. Section 56(1) thereof repeats the above quoted provision of the constitution. Again the point to note here is that the results must be ascertained, published and declared within forty-eight hours from the close of polling station. The provision which spells out anything about the tallying of results is section 55 which states:

> ***"55 (1) Each returning officer shall, immediately after the addition of the votes under section (53)(1), declare the number of votes obtained by each candidate and also complete a return in the prescribed form, indicating the number of votes obtained by each candidate.***
>
> **(2)** ***Upon completing the return, every returning officer shall transmit to the commission the following documents:-***
>
> ***the return form***
>
> ***a report of the elections within the returning officer's electoral district,***
>
> ***the tally sheets; and***
>
> ***the declaration of results forms from which the official addition of the votes were made."***

One must assume that the Electoral Commission can only ascertain the results of the election after receiving the above documents. However, one must also note that the above quoted provision of the Act does not specify a time frame within which the returning officers must submit the documents to the commission. Yet the

Commission must declare the results within 48 hours. From the evidence we received, both by way of affidavits from both sides as well as minutes of meetings of the Inter Party Electoral Liason Committee, and from submissions of counsel for the parties, receipt and tallying of results appears to have caused considerable difficulty.

It was clear many districts were not sending results forms quickly enough and the Electoral Commission decided that results could be sent in by fax or phone. This was put to the meeting of the committee and it appears to have been agreed that results could be sent in by fax or by phone in case of districts without fax lines, but that agents of the candidates should be able to listen in and be present in the tally room as the results came in. It must also be observed that right from the beginning the agents of the petitioner were unhappy about this arrangement.

Be that as it may, the Electoral Commission went ahead and received results by way of faxes, returns and phone. In the result, some results could not tally. The petitioner was able to prove in evidence that a number of results at some 9 polling stations were clearly wrong. What was contained in the tally sheet was inconsistent with what was on the return form. For its part, the Electoral Commission admitted that some errors had indeed occurred in the tallying of results at those polling stations resulting in the loss by the petitioner of 962 votes.

According to the affidavit of Wamala Joshua, the Head of Election Management at the Electoral Commission, he states in paragraph 30:

> **30)** ***"That there were in fact some errors in data entry at the time of tallying the sum total of which amounted to a loss of 962 votes of the petitioner's which is 0.013% of the total valid vote cast.***

This was not challenged, nor indeed did the petitioner prove that he lost any more votes than the 962 as a result of errors in tallying results. In fact these votes relate to polling stations pointed out by the petitioner's evidence, i.e. West Mengo Ground in Kawempe Division, Kisaasi College school (N - Z) also in Kawempe Division, Kasasira Polling Station in Kibuku County, Pallisa District, Ajepete G.C.S Ltd in

Pallisa County, Kihaani 4 in Ibanda County South, Ibanda and Musoola Polling Station in Busiki County, Iganga District.

I am of the view that the loss of votes of 962 by the petitioner as a result of non-compliance in respect of tallying results did not affect the result in a substantial manner given that the difference in votes between 4,078,911 for the 2nd respondent and 2,570,603 for the petitioner was 1,508,308 votes.

Counsel for the Petitioner, Mr. Ogalo, dealt at length with the failure of returning officers to submit reports of the elections to the Electoral Commission as required by section 55(2) (b). It was conceded by the 1st respondent that indeed at the time of declaration of results most reports from districts had not been received, but that this had no bearing on the results.

Clearly failure to submit election reports would be a non-compliance with the law. It may well be that the returning officers exploited the lacuna in the law in that no time limit had been prescribed within which to submit the reports. But did this affect the results?. There was no evidence that it did. According to Halsbury's Laws of England, 4th Edition, vol.15, paragraph 581 on validity of and irregularities at elections, it would appear that a failure to forward documents at the close of the poll may by itself not be sufficient to avoid an election. It states at page 457:

> ***"Failure to count or record the number of ballot papers in each box or mix the whole of the ballot papers before counting, or failure to comply strictly with the provisions as to forwarding documents after the poll, is not sufficient to avoid an election.".*** (emphasis added).

I am of the view that the failure by returning officers to send election reports did not affect the results, so long as they sent the return forms, the tally sheets and the declaration of results forms, i.e. documents which were essential for the tallying of results.

MULTIPLE VOTING AND VOTE STUFFING

Under paragraph 8 (b) of the petition, the petitioner alleged that contrary to Section 32 of the Presidential Elections Act, the 1st respondent allowed multiple voting and vote stuffing in many electoral districts in Uganda. This Court in answer to issue No. 2 did find that **"the principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting, and vote stuffing in some areas"** (emphasis added). This begged the question as to what areas and how much of the country was affected so as to establish whether on not this malpractice affected the result in a substantial manner. A number of affidavits were filed as evidence in support of this allegation. The affidavits show that the alleged malpractices were stated to have occurred at some polling stations in the following districts: Kanungu, Mbarara, Pallisa, Kabale, Ntungamo, Bugiri, Rukungiri, Mbale. The respondents filed many affidavits in answer to disprove the allegations. I will highlight some of the affidavits dwelt on by counsel in proof of the Petition.

As already indicated, court has to be careful when dealing with affidavits sworn by partisan supporters of the parties. A lot of allegations appear to be exaggerations or out rightly untrue. Likewise a lot of the denials themselves appear to be untrue, made by people trying to hide their own misdeeds. Such affidavits could in fact hide the truth of what took place. In my view, if it is found that such malpractices occurred at only a few polling stations, such malpractices may not necessarily affect the result of the election.

Counsel for the petitioner , in his submissions, dwelt on the affidavit evidence of one private Allan Barigye who gave in his affidavits, a detailed account of alleged vote stuffing and multiple voting at Lubiri polling station outside Mbarara Army Barracks. This, apparently, was a very important witness. Counsel for the 1st respondent wanted to cross examine him. Court granted the request and counsel for the petitioner promised court to produce him. The witness was never produced before the court. As a result this witness was not cross-examined. I am certain that both counsel and the Court would have benefited had this witness been brought to court. Be that as it may, the affidavit evidence of this witness, is, in my view, an example of exaggerations and untruths by a deponent for whatever reasons. In so doing, a witness discredits his entire evidence.

Barigye swore two affidavits. The first affidavit was sworn at Mbarara on 15th March 2006. In that affidavit he deponed that on 23rd February 2006 he together with his colleagues in the barracks were briefed and ordered by a Captain Chris Ndyabagye to vote for the 2nd respondent. He, together with many of his colleagues were given 10 voters cards each belonging to absent soldiers, and were asked to use them to vote. He further states that he was ordered together with others, to carry those cards ***"under our shirt sleeves in order to keep voting again and again, using one card at a time."*** That at the end of the voting he was to hand over, the cards ***" to Brigadier Hardison Mukasa in order for it to be distributed to some one else."*** In this affidavit Barigye claims to have voted several times, but to have retained 5 cards he serializes in the affidavit.

He then states that in addition to the cards, each one of them was ***"given 17 ballot papers with 16 of them already pre-ticked in favour of the 2nd respondent."*** He then claims that he refused to put them in the ballot box and, instead, pocketed them. He states that the presiding officer then saw him and 4 colleagues and reported them to the Division Commander and they were arrested. He managed to escape. But while still in prison he had ***"managed to secretly send the ballot papers to my mother but she was too scared to keep them and destroyed them instead"***. He ends stating that ***"whatever I have stated herein above is true and correct to the best of my knowledge."***

On 16th March 2006, a day later, Barigye swore another affidavit in Kampala. In the second affidavit, he now states that three days before voting day, a Captain Ahimbisibwe from the office of the Chief Political Commissar had come to Mbarara and that soldiers had been summoned to parade and the said captain had addressed them and told them that they would be required to vote for the 2nd respondent using other soldiers registration cards. On 23rd February the said captain returned to the barracks with five men in civilian clothes. On 23rd February, at 8 a.m., 500 soldiers were put on parade and addressed by the said Captain Ahimbisibwe. The Captain told them that each of them would be given 17 ballot papers, 16 of them pre-ticked in favour of the 2nd respondent and the 17th would be ticked at the voting table.. These 17 ballot papers were distributed to each soldier by Captains Ahimbisibwe and Chris

Ndyabagye. He claims that together with 10 colleagues they decided they would proceed to the polling station but "would not be part of the fraud",. They reached the polling station and then returned to barracks without casting any vote. He then stated that on their way back to barracks, a Lt. Balamu instructed them to go to the water Tanks where someone was waiting for them. There he states they found Captain Ahimbisibwe, Captain Ndyabagye and another civilian who was introduced as an officer from the Electoral Commission. They were asked to pick voter's cards from a heap and he picked 5. Now he then states:

> ***"That Captain Ahimbisibwe instructed us to go to the presiding officers at the polling stations but not hand over the cards but simply to tell the presiding officer the name on the card and the presiding officer would tick any name on the register and give the ballot papers."*** They were to tick the ballot papers in favour of 2nd respondent. He states that he ***"voted three times at Lubiri Cell I, polling station and the two times at Kasari outside quarter guard polling station and on all occasions the ballot paper handed to me was already ticked in favour of the 2nd respondent."***

He states he was disgusted with the manipulation and did not return the voters cards. After the counting of the votes at 6.30 p.m, Captain Ahimbisibwe came and arrested him together with other 4 soldiers, for disobeying orders. Later he escaped, went back to his house and retrieved the 17 ballot papers, changed into civilian clothes and escaped from barracks. He went to his home at 9.30 a.m and explained to his mother what had happened and showed her the ballot papers. His mother subsequently burned the ballot papers.

The inconsistencies in the two affidavits are quite obvious and render the whole evidence unreliable. To compound matters of its credibility, in the affidavit sworn by Major Rubaramira Ruranga, he states that Private Barigye surrendered to him 30 voters cards. Nowhere in his affidavits does Barigye claim to have been given or obtained 30 voters cards. In the first affidavit he states he was given 10 voters cards. In the second affidavit he states he picked 5 cards from a heap. In the first affidavit , he was given 17 ballot papers to hide in his short sleeves, 16 of them being pre-ticked. In the second affidavit he was to go to a presiding officer, say the name of the person on a card and would be given a ballot paper.

For whatever reason Barigye chose to swear the two affidavits, the end result in my view was to make his evidence too coloured to be relied upon. By itself, it would not have been proof of multiple voting and vote stuffing at that polling station. Although counsel for the petitioner had themselves filed the two affidavits, curiously Mr. Ogalo invited us to disregard the first affidavit and accept the second one because, as he put it, it contained more facts. This was like in an open trial with an untruthful witness, counsel inviting court to believe the witness's evidence on the second day and in ignoring the earlier evidence given by the same witness. It is noteworthy that the second affidavit was not sworn as a supplementary affidavit. In fact it made no reference to the first affidavit. I therefore found this evidence of Barigye totally unreliable.

I however, believe the evidence of one Komuhangi and an election monitor who did say there were some malpractices at the Lubiri I Polling Station. Another polling station in Mbarara where vote stuffing was alleged were at Kamukunzi 2 Kakyeka polling centre (M - Z) where the presiding officer was arrested attempting to issue pre-ticked ballot papers to some people, according to the affidavit of James Muhwezi. But these affidavits do not state the extent of the problem. Indeed in the case of Kamukuzi Kakyeka polling station, the presiding officer was arrested, somebody else was appointed and voting proceeded.

From the evidence there were other polling stations where there was evidence of ballot stuffing and multiple voting in a number of polling stations in the Districts aforesaid. In some cases the Electoral Officials and police did intervene. Seven polling stations in Pallisa District in fact had their election results cancelled as a result of these malpractices.
No doubt, these practices did compromise the principles of equal suffrage, transparency and secrecy of the vote at the places where they occurred.

The question as to the impact of these malpractices on the result of the election would, in my view depend on the extent, i.e. the number of polling stations, the number of voters involved, whether any interventions were made by the electoral officials and police. Although these incidents were found to have occurred, evidence

shows they were in a few polling stations, compared to the total number of polling stations in the districts concerned, and some were arrested in time.

In paragraph 8 (c) the petitioner contended that the 1st respondent failed to cancel results of polling stations where gross malpractices and irregularities took place in particular the districts of Kiruhura, Manafa and Pallisa.

The evidence we received on record indicates that the Electoral Commission did cancel the results of a total of 29 polling stations countrywide, including 7 in Pallisa District, where gross irregularities and malpractices occurred. So the line of contention in this paragraph is not borne out by the evidence. With regard to the district of Kiruhura, counsel for the petitioner appears to have abandoned that as he made no submissions in respect thereof. Nonetheless one affidavit was filed to support the allegation of gross malpractices and irregularities in Kiruhura district.

This is the affidavit of Edith Byanyima who states in her affidavit that she was ***"appointed by the petitioner to supervise and monitor the voting process on polling day in Kiruhura District.***" In that affidavit she makes the following averments in respect of the polling stations she visited:

"2. That I traveled through the district and observed many irregularities

3. That at Sanga and Kanyaryeru polling stations there was no secret ballot as voters were required to openly tick the ballot papers at the first table.

4. That at those two polling stations I saw Captain Bashaije who is also a Councilor Local Council V leading a group of soldiers and local defence units and over seeing what was happening at the polling stations.

5. That I met several people who informed me they had not voted as, they were threatened by Captain Basheija and his men.

6. That at Rushere polling station the petitioner's agents had been chased away and ballot boxes were not sealed. When I protested to the presiding officer he informed me the boxes had come without seals.

7. That at Omukatongole polling station I found the 2nd respondent's agents seated on the same table with the presiding officer John Mwesige and when I protested

to him, he informed me the agents were very important persons in the area. I also observed that the ballot boxes were not sealed.

8. That at Rushonge polling station the presiding officer Justine Ingeine allowed underage persons to vote as well as people not in the roll nor holders of voters cards and that when I threatened to report him to police he stopped and said he would not repeat the same mistake

9. That I reached Nyakasharira polling station at 2.00 p.m only to find the petitioner's agents chased away and so I appointed Mapozi and Kagezi and left. That when I reached the trading centre about 100 meters from the polling station, Mapozi and Kagezi came running after me and informed me they had been chased as well.

10. That I went back at the polling station and pleaded with Matsiko Hope the Councilor of the area to prevail on the presiding officer to be fair. When I went back in the evening to collect the declaration of results forms Kagezi and Mapozi both in formed me that though they had been allowed to stand around, the presiding officer had refused to give them the declaration forms.

11. That I reached Kiruhura polling station at 3 p.m and found that the petitioner's polling agents had been chased away allegedly because they were not registered voters. That I appointed Mbabazi Allen and Matsiko Edward.

12. That I arrived at Rugonji I polling station and found the petitioner's agent Zabandure Edward petrified. He pleaded to leave with me because he had questioned ballot stuffing by chairman LC II Kabagembe Justus and had been threatened.

13. That I appointed Bakunde David and left with Zabandure. I later met Bakunde who informed me the presiding officer had refused to give him declaration forms.

14. That at Malina polling station, the petitioners' agents refused to sign the declaration forms because of ballot stuffing.

15. That what I have stated herein is true to the best of my knowledge."

This affidavit constitutes the main evidence to prove “gross malpractices and irregularities” in Kiruhura District. Even if believed, it is in respect of 8 polling stations she claims to have visited out of 229 polling stations for the District. Even the petitioner's agents who apparently told the deponent about the ballot stuffing did not swear affidavits about it. The deponent does not claim to have witnessed the vote stuffing herself. The deponent depends in most part on what she was told by other people.

This affidavit was replied to by several affidavits which I now consider.

First to answer is Musindi Rogers who states that he was the presiding officer at Rushere Trading Centre polling station. His evidence is that there were no FDC agents at Rushere polling station at all, and that the ballot boxes were sealed. He states further that the only agent of the petitioner who came to his polling station at 2.30 p.m was one FRED KAGUMIRE "who identified himself as FDC monitor/supervisor No. BK/06 for Kiruhura". This Kagumire is stated to have inquired whether there had been any agents of FDC, and having taken down the particulars of the presiding officer and his assistants, he left. According to this deponent, the statements of Edith Byanyima in respect of that polling station are false.

Then there is the affidavit of Matsiko Hope Eric who stated that he is the LC.III Chairman, Kenshunga sub-county. He states that whereas Byanyima gave the name of John Mwesigye as the presiding officer for Omukatongole polling station, the presiding officer actually was Esau Tumwesigye. He further states there was no polling station called Rushonge as stated by Byanyima, and he does not know a person called Justine Ingeine. He states further that Byanyima found him at Nyakasharia polling station where the petitioner's agents Mapozi and Kagezi were present, and that she never pleaded with him, as claimed, to prevail over the presiding officer to be fair. He admits having had discussion with Byanyima, whom he says was his relative, after which she left. In his affidavit in answer, Captain Bashaija denies having moved around with a group of soldiers or local defence units at all that day. He says he voted at Kibega polling station at 11 a.m, went home and only returned for the counting of votes at 5 p.m, and never traveled to Sanga or Kanyaryeru that day. This is confirmed by Rwakashaija Samuel in his affidavit. Then there is the affidavit of Allan Kagabe Rukira who says he was the presiding officer at Nombe III polling station within Sanga Trading Centre, and he knows Byanyima. According to him, he never saw her at his polling station, and there was no ticking of ballots at the presiding officer's table. The same denials are also made by Mugume Arthur who was presiding officer at Kanyaryeru polling station. He states that at his station there was a poll watcher from DEMGROUP for the whole day. The agents of the petitioner Kirikiri Wilber and Muhanguzi Eliah stayed at the

station the whole day and even signed the declaration of results forms contrary to what was stated by Byanyima. He also states that there were never any soldiers or local defence units. The presiding officer at Rushere I (A-L) polling station, Geofrey Byabakama states that there were no FDC agents at his station which also had three foreign observers present. The boxes were properly sealed.

With this type of evidence, and in absence of any other strong and compelling corroborative evidence in support of the allegation of gross malpractices and irregularities in Kiruhura district, I cannot say that the allegations were proved to the satisfaction of the court. Given that there were poll watchers and even some international observers at some of these polling stations, it is unlikely that there would have been gross malpractices throughout the district as alleged.

On the other hand I was satisfied by the well corroborated affidavits in respect of Pallisa District where malpractices occurred and, as earlier observed, seven polling station had results cancelled. Of course the occurrence of these malpractices was a violation of the principles aforestated. The offending polling stations were cancelled and there was no evidence that all the other polling stations in the district were also affected. All the affidavits filed for Pallisa District are in respect of those polling stations where action was taken.

With regard to Manafa District, I have seen no affidavit from Manafa district, and therefore find no evidence to support the allegations in respect of that district. But there are a number of affidavits in respect of Mbale District. There are 15 affidavits sworn by various people in respect of Musola Trading Centre polling station, stated to be in Bunkhoko county. All these affidavits state that some military vehicles moved around the village at night and people felt intimidated, particularly by the activities of one Lt. Daba who appears to have been a parliamentary candidate. These affidavits also state that one Mayatsa, a District NRM Chairman, bribed voters by giving them shs.500/=. Each of the deponents stated they each received that money. I found these affidavits credible and corroborated, notwithstanding the denials of Mayatsa. I am therefore satisfied that there were malpractices at Musoola Trading Centre polling station.

But in the absence of evidence covering the whole district, I am unable to say that the occurrence of gross malpractices and irregularities in the whole district has been proved to my satisfaction. The evidence I saw was too limited to apply to the whole district.

This court made a finding that ***"the principle of free and fair elections was compromised by bribery and intimidation or violence <u>in some areas of the country</u>"*** (emphasis added).

Once again it is important to identify which areas of the country were affected, the extent of the malpractices, how many voters were involved, to be able to assess the effect on the results of the election. I have already identified Musoola Trading Centre polling station as one such area where the malpractices of bribery and intimidation occurred.

From the evidence on record the above illegal practices were also found at some places in the districts of Kabale, Rukungiri, Ntungamo, Bugiri, Mbale, Pallisa, Kampala, Tororo, Sironko.

Regarding violence, the cases dwelt on by the counsel for the petitioner in his submissions were the killing of 3 FDC supporters at Bulange, the activities of security men at Najjanakumbi where one Col. Bugingo slapped an FDC official, Rubaramira Ruranga and the activities of one Fox Odoi in Tororo. To prove that the entire electoral process was not conducted with fairness and that it was characterized by violence, intimidation and bribery, counsel for the petitioner relied on the affidavit of Ingrid Kamateneiti, Augustine Ruzindana, Taaka Kevinah, Geoffrey Ekanya, Abdu Katuntu and Salaam Musumba. There are other affidavits in that regard. To be able to assess the probative value of these affidavits, it is necessary to consider some of them and the replies thereto.

Ingrid Kamateneti in her affidavit states that she is the National Secretary for Women FDC and contested the Rukungiri Women Representative Seat. She states that FDC

District Elections Task force put in place a team of election monitors and provided them with a video camera to cover what was happening in Rukungiri Town Council, Nyarushanje and Nyakishenyi sub-countries. She states that she sat in the FDC office on election day to receive reports from FDC monitors. She received reports that the FDC monitors for Bugangari sub-county, Rwaambara sub-county and Kagunga sub-county had been arrested by ISO. She also received reports that the FDC agents at Rwentodo polling station had been forced by the presiding officer to sign declaration of results forms before the commencement of voting. It was further reported to her that one Byabakama, the RDC of Rukungiri was moving around Kebisoni sub-county deploying UPDF soldiers. FDC monitors from Ruhinda sub-county reported "that NRMO agents were stationed at all roads and paths leading to all polling stations distributing money to voters." She alleged further that at Marashaniro Primary School polling station, the presiding officer and his polling officials ticked ballot papers in favour of Yoweri Kaguta Museveni and other NRM-O candidates which they were handing over to voters to cast. Upon receipt of the above information, the deponent states that she together with the petitioner went and complained to the returning officer who dispatched his assistant to the station and the assistant together with the District Registrar made changes at the polling station. She further states that at Kiyaga polling station and Nyamayenje market polling stations, the presiding officers refused to give FDC polling agents copies of the declaration of results forms. She states that the ballot boxes supplied to many polling centres in the District bore no seals, although she mentions only one polling station in that regard. She further states that at Bikurungu Trading Centre and Kikarara Primary School polling stations FDC agents were made to sit metres away from the table. At Nyakishenyi sub-county , presiding officers did not ask voters to produce voters cards but only called out names. That at some polling stations the positioning of the ballot boxes and the basin was very close. That at Nyarushanje sub-county, an FDC agent one Mwesigwa Edward was tied up and beaten on the orders of the GISO in full view of voters. ***"That on 20th February 2006 the District NRM - O Task Force distributed money to all sub-county chairpersons to use to buy items like soap, salt or actual cash to bribe voters on the eve of elections."***

She concludes by stating that **"all the irregularities and election malpractices throughout the voting process as mentioned herein above were reported by our District FDC Office to the returning officer, one by one as they came in on the voting day."** She attaches two documents: one is an acknowledgment by one Ruraka George of shs. 4,100,000/= from the District Taskforce; the second is a copy of the complaint sent to the District Returning officer. But it is to be noted that this complaint is dated 24th February 2006, the day after the elections.

This affidavit is replied to by several affidavits. First is the affidavit by Nkurunziza Francis, the district registrar, Rukungiri District; He depones that a number of allegations in Kamateneti's affidavit are false. He did not receive any report of bribery as alleged by Kamateneti, and that it was not true that the deponent and the petitioner had complained to the returning officer that the presiding officer at Marashaniro Primary School polling station and his officials ticked ballot papers which they handed to voters. That in fact the deponent and the petitioner had come to the office of the district returning officer ***"where I happened to be at the material time. The said persons reported the unsealed ballot boxes at Rukungiri stadium polling station and Kakonkoma Primary School polling station."*** He was then instructed by the returning officer to go and check which he did. He found that the ballot box at Rukungiri station had already been sealed, and he directed and supervised the sealing of the box at Kakonkoma Primary School and reported back to the returning officer. This sealing of the boxes was done in the presence of the agents for the petitioner and 2nd respondent to their satisfaction. He adds: ***"The said persons expressed satisfaction that the boxes had been in their full view and that no one had tampered with them."*** Whereas Kamateneti had stated that the assistant returning officer was Dan Muhumuza, the deponent says the assistant returning officer was Tibugyenda Wilson, and Muhumuza was the Rubabo county elections supervisor. The deponent further states that apart from the ballot boxes he has mentioned which were not sealed, it is not true that ballot boxes supplied to many polling centres in Rukungiri bore no seals. The deponent then states that of 21 polling stations in Nyakishenyi sub-county, the alleged malpractice was received in respect of only one polling station at Nyamabaare Primary school where the county

supervisor and the assistant registrar were instructed by the returning officer to investigate.

Further reply to Kamateneti is made in affidavit of Ntaho Frank, the District returning officer. He denies ever receiving a report of malpractices in respect of Marashaniro polling station, but states he received a complaint in respect of Nyamabare Polling station where it was alleged that the presiding officer was allowing voters to tick the candidates' names at his desk. He confirms sending the county supervisor Dan Muhumuza who found and reported that the presiding officer was not managing the voting exercise well, and the officials at that station were reshuffled as per instructions of the returning officer. He confirms that the petitioner and Kamateneti reported to him about the unsealed ballot boxes at Rukungiri stadium and Kakonkoma polling stations, and he directed the necessary remedial action to be taken. He states further that he received the letter of complaint two days after the elections.

The allegations of Kamateneti are further stated to be false by the affidavit of Dan Muhumuza. With respect to her statements of receipt of money to buy materials and to bribe voters, there is the reply of Mr. Karokora who explains that the money given out was to facilitate NRM agents at various levels, and gives a breakdown of how the money was to be divided. He denies that the money was for buying votes.

Having carefully considered the above evidence, I am of the opinion that some of the statements in the affidavit of Kamateneti are based on reports by party officials which appear to have been false in some instance or exaggeration, in others. She states that she received reports of bribery but no person is named who received or gave a bribe. She states that FDC agents did not sign declaration of results forms, yet evidence shown in court including copies of the forms show that in fact they did sign. I am satisfied with affidavits in reply of the district returning officer and district registrar. In my view they portray a more realistic picture. Although in her affidavit Kamateneti states that a video camera was given to their agents to cover what was happening, no video tape or such evidence was produced to support the reports she deponed to.

With regard to the allegation of bribery, I must observe that this seems to be solely based on the fact that someone called Ruraka received she 4,100,000/= from the district NRM chairman. The law allows Political Parties to hold funds and to facilitate their campaign agents. Possession of money by itself, in my view, is not evidence of bribery. The affidavit of Charles Byarugaba, filed in support of the petitioner is illustrative of this point. He states that he was the District Chairman of FDC Task Force for the petitioner for Kanugu District. He was arrested on the eve of the election by police on allegations that he was bribing voters. Shs.687,000/= was found on him. He stated that this money ***"was transport allowance or lunch for agents and monitors at polling stations the following day."*** I find this explanation reasonable. This person should never have been arrested in absence of other evidence of bribery. Candidates did have various agents at various levels who had to be provided for in terms of transport, food, allowances etc. Therefore being found with money by itself cannot be evidence of bribery of voters. This person should never been arrested in absence of other evidence of bribery.

In cases of bribery, I think it is not enough for a deponent to say ***"people were being bribed at road junctions."*** This must be stated with precision as to who gave the money, who received it and the purpose must be to influence their vote. Merely being seen giving money to a person or receiving money from a person cannot per se be evidence of bribery upon which a court can rely. In the book "ELECTION LAWS, BEING commentaries on ***THE REPRESENTATION OF THE PEOPLE ACT*** *by* ***S.K. GHOSH***, which deals with election laws in India but which law are similar to ours, the learned authors at page 151, have the following to say about allegations of bribery to voters.

> ***"A plain reading of the petition would reveal the essential materials and particulars are conspicuous by their absence. With regard to the allegation that the petitioner paid Rs. 25,000/= to two sapals to purchase votes from the Harjan Colony, the omission of material significance is provided by the absence of any averment to the effect that the offence of bribery was made to two persons who actually received money, were voters. What stands out, in this behalf is the further fact that not one of the recipients of any such alleged bribe has been named in the petition. In this situation, there can be no escape from the conclusion that this allegation constitutes no cause of action for the respondent to answer. Election petition is liable to be dismissed."*** (emphasis added).

I have already found that in the case of Musoola Trading Centre, there was evidence of who paid money, how much was paid, and the voters who received it. I accepted that evidence. If this court were to accept every allegation of bribery made by politicians against each other in an election in this country without insisting on strict proof thereof, every single election would be annulled and it would encourage losers to simply go out there and swear affidavits that people were bribed at road junctions. Moreover, section 64 of the Presidential Elections Act, requires that the bribe is given to a person to influence his vote. The bribe must be to a voter. If money were given to people who are not voters, this would not amount to bribery within the meaning of the Act.. Therefore more particulars must be given in allegations of this nature, and must be proved. In my view, merely stating that agents of the given candidate were bribing voters without any further specifies would be difficult to bring under section 64.

In the circumstances I find the affidavit of Kamateneti by itself unreliable as evidence upon which to make a specific finding of bribery. Indeed, she never stated herself that she witnessed the bribery, she relied on reports from agents which in turn appear to be reports of reports.

On the other hand, I find the affidavit evidence of Abdu Katuntu well corroborated and believable and I do believe that there were malpractices in those areas of Bugweri county in Bugiri district that he has given evidence on. The photographs he attaches to his affidavit do illustrate the point that armed people wearing NRM shirts intervened in the electoral process, and he is further corroborated by independent observers.

The affidavit of Jack Sabiiti raises a number of issues. He states that he is a Member of Parliament for Rukiga county and that he was the coordinator for FDC in-charge of presidential campaigns in Kabale and Kisoro District, and overall supervisor of all agents in Rukiga county Kabale district. His entire evidence, however, concentrates on some sub-counties in Rukiga county, and nothing at all about Kisoro district.

He states that police and military personnel intercepted a vehicle that was carrying letters to the petitioner's polling agents as well as his own and those of the FDC woman parliamentary candidate, and that most of those letters were confiscated as a result of which the petitioner "did not have agents at most of the polling stations in time, for example at Bushura Polling station, in Bubare sub-county and at Kigongo C polling station." He states further that he hastily contacted some agents who arrived late at polling stations. He makes the general statement. ***"That on the eve of polling day there were widespread bribery of voters by the 2nd respondent's agents who were escorted and protected by the police throughout Rwamucucu and Bukinda in Rukiga."***

He states that the petitioner's agents at Rutengye III polling station were chased away by the presiding officer, but allowed back after intervention of the returning officer. At Kacerere I, II, III and IV polling stations voters ticked ballots at the first table. Security personnel coerced voters and there was distribution of sugar, salt and money to various women groups in Bukinda and Kamwezi sub-counties and he specifically mentions Charles Mayombo and Julius Ndihohabwe as the agents who did the distribution. He further states that Captain Matsiko and Major General Owoyesigire's vehicles were used to deliver soap, salt and sugar for bribing voters . He also mentions a Mrs. Kabarisa, Apollo Nyeganehe and Moses Kakuru as the people who gave these items to women and burial groups. He also mentions a Rev. Kafashangwa in bribing voters at Kagoma polling station. He alleges multiple voting and lack of secret voting at Kigume, Bubare polling stations. He mentions a "one Kabatabazi working with state House" as having terrorized voters to vote for the 2nd respondent. He further accuses Captain Matsiko of going around showing war films and telling people not to vote for FDC. He alleges that FDC agents were chased away from Kagamba polling station and people were forced to vote for the 2nd respondent with pre-ticked ballots, and that the LC.III Chairman of Butanda sub-county together with the GISO beat up FDC agents who ran away from the polling stations.

Most of these averments have been denied by the various presiding officers and other election officials as untrue and malicious. In particular several Presiding officers have stated that FDC agents said by sabiiti to have been chased away from polling

stations actually remained at their stations and signed the declaration of results forms without any complaint, copies of such declaration forms were annexed to several affidavits and they appear to be signed by persons indicated to be FDC agents.

Major Henry Matsiko, apparently referred to as Captain in Sabiiti's affidavit, has replied to the allegations relating to him. He denies that any vehicle belonging to him was used in the delivery of soap or sugar or salt in Rukiga County or "at any other place in the Republic of Uganda" He denied being involved in any campaign for any of the candidates during the last elections, and denies ever showing any war films anywhere in Uganda. Major General Owoyesigire also totally denies. When a person denies even being in a place, it should require corroboration to pin him down. In absence of such corroboration I would give such person benefit of the doubt.

It is apparent that Hon. Sabiiti"s affidavit is based on reports given to him by various agents, although it is sworn to his knowledge. I believe some of the rebuttals that have been made particularly where he claims that FDC polling agents were chased away from various polling stations, when it turns out that not only were they present but they signed the declaration of results forms. Hon. Sabiiti mentions specific names of individuals who are stated to have been involved in the distribution of various items to various women groups. The groups are not mentioned nor whether their members were voters and the items meant to influence their votes. Nonetheless if a candidate gives out gifts and donations to groups of adult persons on the eve of an election, it can be reasonably assumed that it was meant to influence them. But there were three elections that the same day. It should be necessary to relate the alleged acts to a specific candidate. What may be done on behalf of a Parliamentary candidate may not necessarily linked to a presidential candidate. Indeed, there are other affidavits which also name individuals like one Banyenzaki who was himself a Parliamentary candidate and his alleged to have been involves in malpractices in Rubanda County in Kabale district. The consistency of these allegations plus the fact that specific names are mentioned, lead me believe that there was bribery in some polling stations in Bukinda and Rubanda counties, Kabale district. What is not clear is whether people like Banyenzaki who themselves were election candidates would

have done what they are alleged to have done on behalf of the 2nd respondent or on behalf of themselves for their own interest.

Hon. Salaam Musumba in her affidavit details funds that the NRM distributed to its various branches, and concludes that this must be money that was meant for bribing voters. This affidavit is replied to by the affidavit of the 2nd respondent to show that the money given to the various levels of the NRM Task Forces was for purposes of facilitating their own agents. I have already stated that the mere giving of money to one's party's agents is not by itself evidence of bribery of voters. Parties are expected to run their campaigns and to pay their campaign workers or agents and to pay for campaign materials. I have stated that when it comes to allegations of bribery, it is necessary to be more specific by detailing the names of persons bribing and who received the bribe. Perhaps, for clarity, it is necessary to reproduce the relevant provision of the law defining bribery. Section 64 of the Presidential Elections Act states as follows:

64. Bribery:

(1) ***"A person who, either before or during an election with intent either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.***

(2) ***A person who receives any money, gift or other consideration under subsection(1) also commits the offence under that sub-section.***

(3) ***Sub-section (1) does not apply in respect of the provision of refreshments or food.***

Offered by a candidate or candidate's agent who provides refreshments or food as an election expense at a candidates' campaign planning and organisation meeting; or

Offered by any person other than a candidate or a candidate's agent, who, at his or her own expense provides the refreshments or food at a candidates' campaign planning and organisation meeting."

This section, in my view, spells out the need to be particular when allegations of bribery are being made. It is an offence to give or cause to be given a bribe, and it is equally an offence to receive one. Apart from being an illegal practice under the Presidential Election Act, if proved it can lead to prosecution of the offenders. Although this court may not convict a person, nonetheless a prosecution can ensue. It is therefore not enough for a petitioner or any person to merely allege that agents gave money to voters. A high degree of specificity is required. The agent must be named, the receiver of the money must be named and he/she must be a voter. The purpose of the money must be to influence his vote.

What I have stated above also applies to the allegations contained in Hon. Ekanya's, affidavit that of Major Rubaramira Ruranga and other similar affidavits which make allegations of bribery but do not go to specifics. It appears that the petitioner had intended to capture evidence of malpractices including bribery on video tapes. A number of video cameras appear to have been bought and distributed for the purpose. This is borne out from the affidavit of Ingrid Kamateneti and several others. Several affidavits purport to annex video tapes to show bribery and other malpractices. In the case of the affidavit of Major Rubaramira Ruranga who was in charge of elections for the FDC, he makes serious allegations of bribery based on reports he received from agents in Jinja, Kamuli and other places. He then states that he was annexing a video tape as evidence of those malpractices. In court, counsel for the petitioner, Mr. Matovu, insisted that the tape had been filed in court even when all the Judges and the Registrar pointed out that it had not been seen. The next day, Mr. Ogalo, the lead counsel for the petitioner informed court that he was abandoning the matter of the tape. When court insisted that counsel clarify whether the tape had been filed in court as alleged, Mr. Matovu then admitted to court that the tape had never been filed in court in the first place. No other evidence by way of affidavit from the person or persons who had done the video recording and therefore had witnessed what was recorded, was filed in court. Major Rubaramira Ruranga who purported to attach the tape to his affidavit does not say that he himself saw the bribery or that he was even present.

In my view those allegations remained unsubstantiated hearsay, and the court cannot base a decision on them. Not a single tape recording showing the practices was produced in court, and not even a single affidavit from the video cameramen was filed. It may well be that the video tapes did not exist or none had even been recorded. It may also be that learned counsel for the petitioner, after reviewing the tapes themselves found them useless as evidence and therefore decided not to file them in court. The bottom line is that tapes stated to be annexed to affidavits in proof of alleged bribery were in fact never seen by the court. The evidence purported to be on those tapes cannot just be inferred from the allegations of the deponents of those affidavits.

There were allegations of intimidation and threats of war on the part of some ministers and other agents of the 2nd respondent. Several affidavits state that these people went around several places in Bushenyi and Kanungu Districts and some other places showing films about past wars in Uganda and saying that the country could return to war if the 2nd respondent was not elected.

I have great difficulty in appreciating the argument that showing a film about Uganda's past constitutes intimidation or threat of war within the meaning of the law. Section 23(3)(a) states as follows:-

"A person shall not, while campaigning, use any language-

(a) which constitutes incitement to public disorder, insurrection or violence or which threatens war;"

In any country, elections are fought on issues and the strengths of candidates to tackle those issues. If the issue of security for the country arises, and one candidate in promoting himself holds himself out as being in a better position to provide security than other candidates, would, in my view be legitimate. If he goes further and makes reference to past history where a failure in leadership of the country has led to war, again I would not regard this as intimidation or threatening war. On the other hand if he states that he will fight or cause chaos, if he should lose the election then this would offend the above quoted provision of the law. Reminding people of the past turbulent history, in my view, is legitimate. The Preamble to the Constitution states:

"We The People of Uganda:

RECALLING our history which has been characterized by political and constitutional instability;
RECOGNISING our struggle against the forces of tyranny, oppression and exploitation; …….”

Clearly, the fathers of the Constitution did not shy away from reminding themselves and all the people of Uganda about the turbulent history of Uganda. I do not see how being reminded about it when an important event like choosing the leadership of the country is about to take place can constitute intimidation or threat of war. None of the affidavits alleged that the 2nd respondent or his agents had stated that if he is not elected he would fight. This type of campaigning, showing films about country's past wars and a candidate claiming to be the only one who can prevent a relapse into chaos, may be negative or indeed distasteful, but in my view, by itself it does not amount to violation of the law.

I now turn to the question of how the malpractices that were proved affected the result of the election, bearing in mind the provision of the law that the court must be satisfied that the non-compliance with the Presidential Elections Acts affected the result in a substantial manner

Counsel for the petitioner argued strenuously that the affection of the results of the election should not be a question of numbers; that it would be impossible to mathematically ascertain how much practices had affected the election results. With respect, I do not agree. The result is itself expressed in numbers. It is based on the total number of votes cast in all the constituencies and polling stations in the whole country. The Constitution itself provides for a mathematical formula as to how one wins the presidential election. I do not see how one can run away from the question of numbers. If parliament wants to do away with that, then it should amend the law to say that proof of any malpractice, however limited, shall vitiate a presidential election. Indeed, parliament provided under section 59(6)(c) that proof of a single election offence on the part of a presidential candidate is sufficient to cause nullification of the result. I believe the rationale for this is that a Presidential Candidate who has committed the offence of bribery is a person who is not fit to be

president. This provision is consistent with the following provisions of the Constitution: Article 102 gives the qualifications a person must have to qualify for election as a president. One is that the person be qualified to be elected as a member of Parliament. Under Article 80(2) (g) and (f) " A person is not qualified for election as member of parliament if that person:-

has, within the seven years immediately preceding the election, been convicted by a competent court of a crime involving dishonesty or moral turpitude; or

(g) has, within the seven years immediately preceding the election, been convicted by a competent court of an offence under any law relating to elections conducted by the Electoral Commission."

Clearly the Constitution envisages a clean and morally upright person to be President of Uganda. Therefore proof that a Presidential Candidate has personally committed the offence of bribery or any other electoral offence would annul the election of such candidate.

The law, as it now stands, treats the above differently from where the non-compliance with the law or principles thereof may have been committed by persons other than the Presidential Candidate himself, like the Electoral Commission or any other person. I believe that is why the law has introduced a proportionality test, i.e. that the court must be satisfied that the non-compliance affects the result of the election substantially.

The magnitude of the malpractices, how much of the country is affected, how many voters are affected, must be taken into account, even though this may not be done with mathematical precision. It is indeed possible to have a malpractice but which does not affect the result. For example, there are several affidavits where individuals claim that attempts were made to influence them but they still stuck to their candidate. One Lukwaya, already referred to, alleged he had been promised money at State House. He reacted by reporting those alleged promises to his party headquarters. This person would still vote for his candidate, the illegal attempt to influence him notwithstanding. There were incidents of violence, e.g. the shooting of the petitioner's supporters at Bulange which counsel for the petitioner dwelt on. Such

incident, totally reprehensible as it was, may not necessarily have stopped the petitioner's voters from voting for him or his party. There was no evidence to show that it was part of a systematic attempt to intimidate voters countrywide. It appears to have been an isolated incident which was treated as such with the alleged culprits being arraigned before a court of law. In fact evidence on record shows that the Petitioner's party won in that very constituency where the incident occurred. In absence of evidence to the contrary, I do not see how court can deduce that such incident by itself substantially affected the result of the Presidential election. Indeed counsel for the petitioner urged court to find that this incident must have affected the results because it received wide coverage on radios and in the press. I am unable to agree in absence of evidence that anybody voted differently because of this incident.

In my view, if malpractices occur in a given district, it is important to establish, at least by estimation, how many voters were affected. Some polling stations may have as few as 400 voters while others may have 1,000 voters. If the malpractice was proved to have affected only 50 persons out of 1000, would that be said to have affected the result at that polling station in a substantial manner. I think not. If a district had 200 polling stations and malpractices were proved to have occurred at only 10 polling stations and the results thereafter are cancelled, can one reasonably say the results of the entire district should be annulled? On the basis of authorities already cited. I would not think so.

According to evidence on record, there are 69 districts in Uganda and a total of 19,786 polling stations in the whole country. Malpractices were alleged in a number of districts and spread over a total of less than 200 polling stations in all. Actual proof of malpractice was in less than that number. But even if all were proved, 200 polling stations out of 19,786 would, in my view, be a factor to consider when ascertaining whether those malpractices had affected the results substantially. Even if one assumed each polling station to have the high number of 1,000 voters, one would be contending with a total of less than 200,000 voters in areas affected by malpractices. This, in my view, is a factor to be considered as against the total number of registered voters and as against the number of the people who actually voted.

In the Nigerian case of ***Dikko Yusuf and others -Vs- Chief Olusegm Obasanjo*** **and Others** (supra) the Court of Appeal considered this question, i.e whether practices found in a minority number of polling stations can vitiate the entire presidential election. The court followed an earlier Supreme Court decision in the case of ***OJUKWU -Vs- ONWUNDIWE*** which had reversed a lower court decision which had nullified an election when malpractices had been found at 52 polling stations out of 138 polling stations. The Supreme Court per Uwais, JSC, held as follows (at page 74)

> ***"In all therefore the learned trial judge found that the election which took place at 52 out of the 138 polling booths was discredited. By inference it follows that the election at the remaining 86 polling booths was flawless. Thus the discredited polling booths were not half as many as those validly used. Nevertheless the learned trial judge disallowed the votes in all the 138 polling booths. I think this is a serious misdirection."*** (emphasis added).

Then the Court of Appeal went on further at page 75 after reviewing other authorities:

> ***"In the present case the fact that the election as conducted in 86 of the 138 polling booths of the constituency in question was not found wanting, prima facie shows that there was substantial compliance with the provisions Part II of the Election Act in the majority of the polling booths where the election took place in the constituency. The burden was therefore on the appellant to show that the non compliance which applied to the 52 polling booths, as found by the learned trial judge, actually vitiated the election in the constituency as a whole. This he failed to do. Furthermore, the appellant is required under section 123(1) to show that the non-compliance affected the result of the election. He sought to do this by the averments under paragraph 13 of the petition as amended. However, the averments impugned the votes cast in the whole of the 140 polling booths in the constituency instead of 52. Obviously this cannot be right. Hence I am satisfied that the appellant did not succeed in showing the non-compliance in the 52 polling booths affected the result of the election in the Onitsha North - East State Constituency."*** (emphasis added).

The Court of Appeal, after further review of other decisions, stated at page 79:

> ***"On the principles which I have just adumbrated above the presidential election which has the whole country as a constituency cannot because of defilement of only three polling stations be vitiated."***

In the Zambian case of ***ANDERSON KAMBELA MAZOKA & ANOTHER -VS- LEVY MWANAWASA*** and 2 others **(SCZ/EP/01/02/03/2002)** the Zambian Supreme

Court also considered the question of the proportionality of the number of areas where there is non-compliance to the country as a whole. In that case, there were 150 constituencies in the whole country, but election malpractices were found in a few. The Supreme Court reiterated its earlier decision in the ***CHILUBA CASE*** and stated:

"This is what we said in the Chiluba case:

> ***"The bottom line, however was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that the proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters. We are satisfied on the evidence before us, that the election while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs elections; the few examples of isolated attempts at rigging only served to confirm that there were only a few superficial and desultory efforts rather than any large scale comprehensive and deep rooted " rigging" as suggested by the witness who spoke of aborted democracy".*** (emphasis added).

Of course the above cited authorities do not bind this court, but I find them persuasive in the consideration of this case and the evidence that has been brought before us. Given that the affidavit evidence covered a limited number of polling station in a given number of districts, the court cannot assume that the rest of the polling stations, well over 19500, and the rest of the districts were equally affected. There has to be concrete evidence. It is true there were malpractices and non-compliance with the Act in some areas of the country. But they appear to have been scattered and in many instances quite isolated. There were cases where apparently biased polling officials were involved in malpractices. There is also evidence that where these were reported, returning officers or police intervened and took remedial action as happened in Rukungiri and Ntungamo Districts. There were incidents of violence which appear to have been orchestrated by a few individuals like the case at Bulange where three supporters of the petitioner were shot dead and the Fox Odoi case in Tororo where Fox Odoi was said to have arrested, harassed and tortured supporters of the petitioner. There was affidavit evidence that in both these incidents, the individuals had acted without authority and that those incidents were a subject of Judicial proceedings. There was deployment of soldiers in many areas of the country, but that by itself does not appear to have stopped or interfered with the electoral process. Indeed in one

affidavit sworn in support of the petitioner's case to which was annexed a photograph showing armed soldiers at or near a polling station, it can be discerned from the photograph that the people standing in quite a long line seemed unbothered by the presence of the soldiers. There are no apparent signs of chaos, and voting appears to be proceeding smoothly. The presence of the soldiers at the polling station is non-compliance with the law. But how did it affect the results?

The European Union Observer Mission in their report annexed to the affidavit of Dr. Badru Kiggundu made the following observation in that regard.

> ***"More generally, the campaign was conducted in a generally open environment, in which freedom of expression, assembly and association were largely respected. Candidates and parties campaigned intensively, and were able to move freely throughout the country without restriction or interference. Many rallies took place, and in a positive development careful co-ordination between the Electoral Commission and political parties helped to ensure candidates and parties were not campaigning in same areas on the same day, thereby reducing the potential for violence. However some statements by President Yoweri Museveni and Dr. Kizza Besigye cast some doubt in the public mind as to whether they would accept results of the elections, recalling public memories of the years of civil war. This was not conducive to a campaign climate in which political contestants are viewed as legitimate political opponents. A number of violent incidents occurred most notably two incidents in which security personnel were observed to have been involved in partisan politics in contravention of the code of conduct for security personnel which required neutrality during the election period. The first was in Bugiri constituency in the Iganga district on 31st January and 1st February where men wearing yellow NRM T-shirts were photographed carrying AK 47s in a clash between National Resistance Movement Organization and FDC supporters. Three of the men were arrested and included a senior movement secretariat organizer and members of the local defence unit. The second incident occurred on 15th February, when three FDC supporters were shot and killed by a security officer in Kampala. Subsequently there was a heightened level of tension in the closing days of the campaign, with two incidents of FDC supporters clashing with the police. Up until these incidents, the campaign had largely been free of violence and intimidation, despite predictions of a repeat of 2001. Generally, the majority of the Uganda Peoples' Defence Forces (UPDF) and police appear to have respected their code of conduct."*** (emphasis added).

The same observer mission goes on to state thus in respect of observations on polling day itself:

> ***"Voters turned out in large numbers in a calm and disciplined manner despite inclement weather conditions in parts of the country and expressed confidence in making their own choice between continuity or change. In a positive development which contributed to the transparency of the process, party and candidate agents were present in virtually all polling stations visited and domestic observers were present in over 85 percent of polling stations visited. Security was adequately and discreetly maintained. Incidents of intimidation and disruption of the process were observed in a very small number of polling stations."*** (emphasis added).

This report seems to suggest that although there were these incidents, the election exercise as a whole seems to have fairly succeeded.

Many affidavits filed on behalf of the petitioner alleged that their polling agents were chased away from many polling stations. Evidence in reply has already shown that this claim was exaggerated. The above report would also tend to negate these claims.

In its overall assessment of the Presidential Election, the DEMGROUP, which issued a very critical and analytical report, had this to say:

> ***"The elections of 23rd February, 2006 presented the people of Uganda with the opportunity to exercise their democratic right to vote for candidate of their choice. DEMGROUP notes that voting was generally peaceful in most parts of the country. Nevertheless, there were some incidents of intimidation and violence in certain parts of the country including Pallisa and Tororo districts."*** (emphasis added)

Again this tends to support the view that the incidents of intimidation and violence were not characteristic of the whole country but only scattered in some parts of the country. One has to note that the DEMGROUP deployed 40 national supervisors, 69 district monitors, 215 constituency monitors and 19,786 poll watchers on polling day. In other words they were present at every polling station in the country. Their report also states: **"98.6%** of presiding officers and **94.1%** of polling assistants reported for duty**.** ***Majority of polling officials were conversant with their roles and consistently followed voting procedures. 95% of polling stations were covered by party agents."*** Again this tends to confirm the exaggerated nature of the petitioner's witness affidavits that their agents were chased away from polling stations and that polling procedures were not followed.

The ***DEMOGROUP*** did conclude that ***"the election of 23rd February, 2006 though important in the evolution of the democratic process in Uganda, had several shortcomings which rendered the exercise short of expectation of a free and fair election contest."*** This apt conclusion is based on other shortcomings mentioned in the report such as the short period for campaigns brought about by the late enactment of the electoral laws by Parliament, the failure of the state owned media to provide equal media coverage to candidates, use of state facilities by the incumbents, failure by government to provide funds to the 1st respondent in time to carry out civic education, and the arrest, detention and trial of the petitioner on treason charges in the High Court and in the Court Martial.

EU Election Observer Mission also pointed out these shortcomings and concluded that the ground for elections had not been leveled. Indeed, the heading of EU observer mentioned report is: **"POSITIVE PROCESS ON ELECTION DAY, BUT LACK OF LEVEL PLAYING FIELD FOR POLITICAL CONTESTANTS."** I agree that these would have been serious shortcomings but the petitioner never pleaded them in the petition or his affidavit in support. It would appear that the petitioner never intended for this Court to inquire into them or else he would have stated them in the petition and the respondent would have had opportunity to respond. One has to remember that the Constitution, Article 104 (3) mandates the Supreme Court **to *"inquire into and determine the petition expeditiously".*** The Court cannot inquire into and determine matters not presented in the petition, and to which the other parties have had the opportunity to respond.

In the Indian case of ***CHRANLAL SAHU -Vs- GIANI ZAIL SINGH AND ANOTHER [1985] LRC***, 31, the Supreme Court of India decided that in an election petition, the petition must contain all the grounds that the petitioner wants the court to inquire into. Chandrachud, C.J. states at page 42;

> ***"It is not open to a petitioner in an election petition to plead in terms and synonyms. In these petitions pleadings have to be precise, specific and unambiguous as to put the respondent on notice. The rule of pleadings that facts constituting the cause of action must be specifically pleaded is as fundamental as it is elementary."***

In the case of ***INTERFRIEGHT FORWARDERS (U) LIMITED -Vs- EAST AFRICAN DEVELOPMENT BANK***, Civil Appeal No. 33 of 1992, this court, per Oder, J.S.C has held as follows (at page 11 of his judgment):

> ***"Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of his pleadings."***

In my view therefore, the petitioner could not expect this court to determine on facts or alleged facts that he had not pleaded in his petition.

Taking all the above evidence into account, there can be no doubt that there were many instances of non-compliance with the law and principles thereof in the conduct of these elections. But on the whole, I am not satisfied by the evidence on record that this non-compliance affected the result of the election substantially. The conclusion of the Commonwealth Observer Group in the report annexed to the affidavit of Major Rubaramira Ruranga of 19.3.2006 in my view, summed up the situation correctly thus;

> ***"We believe that the poll, count and results process provided for conditions which enabled the will of the people to be expressed and that the results of the elections reflected the wishes of those who were able to vote.***
> ***There were some serious irregularities and significant shortcomings and there is scope for substantial improvement. Nevertheless, we commend the effort made by the Electoral Commission and the determination of the people of Uganda to exercise their democratic rights."*** (emphasis added).

As already noted, those who were able to vote were 7,173,241 voters or 68.64% of the total number of registered voters. Despite the irregularities and shortcomings, these people turned up and expressed their will as to who they want to govern them. The evidence on record does not satisfy me that I should nullify this decision of the people made in exercise of their democratic rights.

The petitioner sought to rely on the affidavits of an expert, a statistician, one Dr. Odwe, to show that because of the **"gross irregularities and malpractices"** the 2nd respondent actually did not get 51% of the vote and therefore called for a re-run.

Dr. Odwe's affidavit was seriously contradicted by the affidavit of another expert Dr. Tumwesigye, by Andrew Mukulu and by Wamala Joshua, the head of election management at the Electoral Commission.

I very carefully perused all the above affidavits and, carefully listened to the arguments and submissions of counsel for both parties. I have a number of difficulties with Dr. Odwe's affidavit evidence which was, as indicated, meant to prove a major point of contention.

In paragraph 4 of the affidavit Dr. Odwe states that he received instructions from the petitioner ***"to make an analytical study of the voter's register, tally sheets, returning officers' reports and declarations results forms in respect of all the constituency in the recent presidential and parliamentary election of 23rd February, 2006 and to draw scientific deductions from them."***

One would expect that after making analytical study, Dr. Odwe as an expert would produce a report containing his findings and his scientific deductions. As it turned out Dr. Odwe made no such report and definitely none was exhibited in court. All that court has is his affidavit.

In paragraph 6 of his affidavit Dr. Odwe states:-

6- ***"That, from my preliminary study of the tally sheets, declaration of results forms given to me by the petitioner as well as the voters registers, I discovered that there were several discrepancies , anomalies, fabrications and gaps in the tally sheets which have no explanation offered by the 1st respondent."*** He does not give the basis for his conclusion about fabrications, nor does he say whether he himself sought explanation from the 1st respondent and it was not given. He continues in paragraph 7 to state:

7- ***" That the rest of the declaration of results forms were not availed to me because according to the petitioner his polling agents did not hand them over for various reasons ranging from intimidation, arrest at polling***

stations, outright refusal by presiding officers to hand them over or bribery exercised on them by agents and supporters of the 2nd respondent."

All the matters mentioned in this paragraph are matters in issue in the petition. Yet the expert was now being asked by the petitioner to base his study on those allegations. The expert then goes on to use words such as "manipulation, ghost polling stations, predetermined percentage levels," e.t.c without giving a basis for such conclusions. He then uses population census figures to draw conclusions as to voting patterns in various districts. For example paragraph 18 he states:

> ***"That, I examined the tally sheets of both Isingiro and Kiruhura districts and I found it odd that the voter turn-up was about 100% in both districts a pattern which is not shared by the other districts and I also noted that almost all the votes cast were for the 2nd respondent."***

One will recall that in the petition, the petitioner alleged gross irregularities and malpractices in Kiruhura district, and I have already stated that there was scant evidence of this proved in court. But this seems to have influenced this expert. Evidence on record from the official results of the elections shows that voter turn-up in Kiruhura district was in fact 87.68% and Isingiro was 79.39%. According to the affidavit of Mr. Wamala Joshua, this ***"pattern was shared by other districts including those where the petitioner won such as Amolatar with a turn-up of 77.2% and Kaberamaido with a turn-up of 76.88%."***

Dr. Odwe states further in paragraph 25 of his affidavit:

> ***"That from the examination of the tally sheets availed we have observed that in some instances the votes cast for the petitioner were reduced as in the case of Ajepetete G.C.S.Ltd in Pallisa district where the petitioner's votes were reduced from 446 to 4. this also happened at Kisasi, Kawempe division Kampala district where the petitioner's 317 votes were entirely wiped out. The losses and gains in the percentage points cumulatively total 1 million votes."***

The errors he states to be gross in the tally sheets are actually shown to be minor, resulting in loss of only 963 votes, including the votes at Ajepetete G.C.S Ltd in Pallisa district and Kisasi in Kawempe division Kampala.

In paragraph 20, he had already stated his conclusion with regard to the percentages of votes gained by both the petitioner and the respondent. He states: ***"the population growth and distribution in Uganda and after taking into account the votes cast in 38.8% of the valid votes cast whose declaration of results forms were availed to me, I have come to the conclusion that the 2nd respondent did not secure the percentage assigned to him by the 1st respondent but his percentage was 48.8% while that of the petitioner was 47.8%."***

In reply to these statements and conclusions, Dr. Tumwesigye totally disagrees with Dr. Odwe's methods and conclusions. He accuses Dr. Odwe's of using ***" poor sampling methods and lack of evidence of proper analytical techniques,"*** and of coming up with misleading conclusions. He attacks the size of the sample used by Odwe as not being representative, it having not been scientifically selected as a random sample from the whole. In his ***"considered opinion the report is biased, unreliable and severely lacking in material aspects."***

In my consideration of the affidavits of the experts, i.e. Dr. Odwe and the reply by Dr. Tumwesigye, I have borne in mind the caution given in **PHIPSON ON THE LAW OF EVIDENCE, 9TH Edition** at page 4 with regard to the value of expert evidence: It states:

> ***"The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will."***

SARKAR ON EVIDENCE has this to say on the issue of whether experts should express their opinions on facts in issue or whether they should state the results of their opinion.

> ***"Clearly it is not the province of the expert to act as judge and jury. Hence all questions calling for his opinions should be so framed as not to call upon him to determine controvert questions of fact, or to pass upon the preponderance of testimony. Thus it would be obviously improper to ask the witness to state his opinion upon all the testimony in the case as to any given question, if the truth of part***

> ***of such evidence were in dispute. When the question is so framed as to call upon the expert to determine or to reconcile conflicting statements, he is in effect asked to decide the merits of the case which is a duty wholly beyond his province …….it is not the duty of an expert to reconcile conflicting evidence. Expert should put before court all materials which induce him to come to the conclusion, so that court, although not an expert, may form its own judgment on those materials ……..depositions of expert witnesses as to the result of their opinions, and as to the effect on them, do not come within the domain of expert evidence at all."***

Bearing the above statements of the law in mind, I am unable to rely on Dr. Odwe's affidavit which appears to rely on what he was told by the petitioner and appears to make conclusions on matters in issue before this Court.

On the other hand, the DEMGROUP made its own analysis **"utilizing a methodology commonly known as the parallel vote tabulation *(PVT)"*** based on a nationwide weighted sample of 383 polling stations. It is to be recalled that this group deployed poll watchers at every polling station. Each poll watcher had to fill a form which gave information as to what had been observed at the polling station including such matters as violence, intimidation e.t.c. The group states in its report:

> ***"We have used this methodology so that we can comment on the election process as a whole, to allow citizens to understand the time scope and scale of irregularities."***

The Group in its statistical analysis, came to the conclusion that the respondent obtained 36.9% of the vote, the 2nd respondent obtained 58.8%, allowing for an error margin at 95%.

In my view, the above statistical analysis by an independent observer group appears to be reliable. It is to be noted that the given outcome is not too distant from the official results declared by the 1st respondent. In the absence of any other evidence I am unable to put any reliance on Dr. Odwe's assertion that no candidate obtained more than 50% of the vote.

Having considered all the evidence, the various reports of observer groups and the submissions of counsel, I am of the view that malpractices such as intimidation, bribery and violence did occur in some areas of the country, and this amounted to

non-compliance with the law. But those areas were limited in relation to the whole country. In most areas of the country and in absence of evidence to the contrary the election appears to have been conducted smoothly and substantially in accordance with the law. I therefore answer issue No. 3 in the negative, that is to say the non-compliance did not affect the result of the election in a substantial manner.

The Registration of NRM

The petitioner had in paragraph 8(f)(g) and (h) alleged that the 2nd respondent had neither been sponsored as a candidate by a registered political organisation or an independent candidate, that the NRM was not a registered party and therefore voters were misled, and that the use of the "bus" symbol was misleading as this had been used by the movement political system during the referenda.

At the hearing, counsel for the petitioner abandoned these grounds. I will therefore not say anything on them.

Issue No. 4: Alleged illegal practices and offences

In paragraph 11 of the petition the petitioner avers that the 2nd respondent, while campaigning, personally committed illegal practices and offences contrary to sections 24(5)(b), 24(5)(c) , 24(5)(d), 24(5)(e), 23(3)(b) of the Presidential Election Act. In the main these alleged offences relate to words spoken by the 2nd respondent at various places and fora. The petitioner alleges that the 2nd respondent made statements to the effect that the FDC had frustrated efforts to build another dam, that the petitioner was working in alliance with Kony, PRA and other terrorists, and that the petitioner was an opportunist and a deserter. The affidavit of the petitioner gave details of the statements said to have been made by the respondent which he averred were malicious, derogatory, mudslinging and defamatory of the petitioner. The petitioner says he based his knowledge of these statements on reports received from his agents. The agents did not themselves give evidence as to what they had heard the respondent say. The court therefore has no way of ascertaining the veracity of the petitioner's complaints with regard to what he was told.

In reply, the 2nd respondent detailed the various statements he had made which, he claimed were in response to statements made in various places by the petitioner and or his agents. Also submitted for the 2nd respondent is the affidavit of Mukasa John an employee of Media Plus Ltd, a Production Company that records film footage and supplies video coverage to various clients. In that capacity, Mr. Mukasa says he was detailed to record the rallies of the petitioner and did so at various places in the country. He reproduces certain excepts of what he says he heard the petitioner say.

In his reply, the respondent has stated that he was reacting to statements made by the petitioner or his agents. One has to carefully study both records to be able to say whether the statements made by the respondent amounted to offences under the Presidential Elections Act. In fact, counsel for the petitioner, Mr. Matovu, strenuously urged court to treat the offences under the Act as being of strict liability, and submitted that in so far as the respondent admitted to making them then the offences were committed. There could be no excuse or justification

With respect, I do not agree with learned counsel. Offences under section 24(5) seem to require some degree of conscious intentional or reckless behaviour in making the statements.

For ease of reference and clarity, the section states:

"24(5) A candidate shall not while campaigning, do any of the following

making statements which are false
(i) knowing them to be false; or
(ii) in respect of which the maker is reckless whether they are true or false;

making malicious statements;
making statements containing sectarian words or innuendoes';
making abusive, insulting or derogatory statements;
making exaggerations or using caricatures of the candidate or using words of ridicule;
using derisive or mudslinging words against a candidate."

I do not see how an offence can be said to be of strict liability which has the ingredient of knowledge, recklessness or malice. These require *mens rea*. I think

statements have to be put in their proper context in which they are made. If they are made to answer a previous statement made by the complainant, the statements made by the complainant must be looked at. Whether there was malice or recklessness not is very important to determine whether an offence was committed.

RUSSELL ON CRIME, Vol.2, cites the case of **R-Vs- CUNNINGHAM [1957] 2QB** where the court of Criminal Appeal stated"

> ***"In any statutory definition of a crime, "malice" must be taken not in the old vague sense of 'wickedness' in general but as requiring (i) an actual intention to do the particular kind of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured."***

In the case of **HIBBS -Vs- WILKINSON ERLE, C.J.**, summed up the law thus to the Jury:

> ***"This is an action which is not maintainable without malice; which means, in law, any wrong motive. Nothing is more important than to draw the line duly between fair discussion for the promotion of the truth, and publications for the aspersion of personal character. The case of a servant is only an instance illustrating the legal principle upon which defamatory words may be justified by the occasion. Where the plaintiff and the defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff first had recourse to the press, and made the matter public, it is, in such a case important to see if malice is made out against the party sued, or if he has published only what he believed to be required for the interests of truth. If you are of opinion, upon the whole of this inquiry, that the defendant wrote what he did for the purpose of maintaining the truth, sincerely having that object in view, without any corrupt motive, and that the language he used, even although it may be exaggerated, was prompted by the desire to maintain the truth and that the exaggerated language was provoked by the similar language on the other side and which might well have accounted for the use of strong expressions, then you are at liberty to find the defendant not guilty. This doctrine was laid down long ago by LORD ELLENBOROUGH,*** in a case reported by ***LORD COMPBELL*** in these terms:
> ***"Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication I shall never consider as a libel which has for its object, not to injure the reputation of any one, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature or to censure what is hostile to morality."*** (emphasis added).

Our own Constitution, in Article 29(1)(a) guarantees freedom of speech and expression. Section 23(2) of the Presidential Elections Act also provides for freedom of expression for candidates.

It states:

> **"23(2)*Subject to the constitution and any other law, every candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of the right to campaign under this Act."***

In my view therefore statements made by candidates during campaigns must be viewed in the context of the constitution and the Act to allow candidates the freedom of expression. This should include the right and freedom to answer statements and accusations made against them by other people. It should include giving explanations on issues raised by other people, and correcting any wrong impressions created about them. Every candidate should be allowed to enjoy that right.

The 2nd respondent states that he had personally read from the media and received reports from his supporters about the various statements attributed to the petitioner and his supporters. He regarded these statements as falsehoods and states: ***"and I had to counter all these falsehoods and misleading statements during my campaign."***

A few examples will suffice to show the applicability of the above principles to this case. According to Mr. Mukasa's affidavit, the petitioner while campaigning at Koboko on 28th January, 2006 had said words to the following effect;

> ***"It is a pity that some of the good leaders of this area are now no longer there. Our good friend Francis Ayume who was working with Museveni gave his advice, he told him you are wrong to change the constitution to continue leading this country at this time. The problem is that President Museveni does not want anybody to tell him the truth. The leaders of NRM who have told him the truth, he has got rid of them. Even some of his close friends who they grew up together from Primary School. They told him, but he removed them. James Wapakahabulo told him you are wrong to seek to continue in government, he removed him. It is therefore sad that the leader in Koboko who could tell President Museveni the truth that you should not change the constitution, that this is wrong has also left in a similar way."***

I will take judicial notice of the fact that Francis Ayume was the Attorney General of Uganda and MP for Koboko when he died in a motor accident. James Wapakahabulo was Minister of Foreign Affairs when he died of natural causes. Neither of them had been removed from the respective positions as Cabinet Ministers at the time of their death.

With this background, the 2nd respondent says he made the following statement in Koboko:

> ***"There are liars who come here and tell you lies. They tell you that Museveni is the one who caused the death of Wapakahabulo, Ayume. He is the one who caused the death of Gad Toko. How can I cause these deaths? These were driving in cars, their own cars not even cars under my control. How could I cause their death……Like Francis Ayume was a very close supporter of mine. Why kill Ayume and not kill the bad ones. So that shows you that these people are sick. They are sick literally and metaphorically….These are liars…."***

In his submission, counsel for the petitioner contended that these statements were malicious and defamatory of the petitioner, calling him a liar and sick. With great respect to learned counsel. I do not agree. In their proper context, the 2nd respondent was answering allegations made by what he called "liars" but without even mentioning the petitioner by name. Obviously allegations made before the people of Koboko that their member of Parliament had been gotten rid of by the 2nd respondent needed to be answered. To me the answer was made in the context of maintaining the truth and I see nothing malicious or defamatory about it. It may appear strong language to refer to the "liars" as sick. But in its proper contexts this cannot be construed as being malicious or defamatory of the petitioner.

The petitioner, in his affidavit averred .that the 2nd respondent had referred to him as a false prophet and to the opposition as night dancers, calling UPC and DP as failures and FDC as non-starters and scattered millet. He further stated that the 2nd respondent had stated that the FDC controlled Parliament had frustrated his efforts to build two new hydropower dams. According to the Petitioner, these statements were false and derogatory of the petitioner and his party.

On the other hand, the affidavit of Mukasa states that the petitioner had uttered words to the following effect at Karugutu:

> ***"This government as I have told you forgot the ordinary person a long time ago. It is working for a few people who are in centre. The ones who are around the president and his people. People of Karugutu and Bundibugyo the government does not remember that he has a problem. That is what is causing poverty to increase more than it used to be. There are two countries in Uganda. The country of those that are really wealthy and the other of the very poor….."***

At Kasese, the petitioner is reported in Mukasa's affidavit, to have uttered statements to this effect:

> ***"What President Museveni does not know is that why people support us but refused to support him, is because he has forgotten about the welfare of ordinary people of Bundibugyo, Kasese, the ordinary people. Musevei abandoned them, stopped thinking about them and working for them. He started working for a few people, small groups that surround him and abandoned the rest of the people of Uganda."***

The 2nd respondent states that he had to answer these accusations, and he did so in the following statements:

> ***"The Movement has governed Uganda basing itself on three pillars. The first one is good governance, the second is proper economic management and the third is effective management of the army. UPC had failed to do this and DP had not even started. Now about FDC, when you are threshing millet, you first make a heap, and then you thresh the heap. Then there is some millet that scatters. So you cannot leave the heap and follow the millet that has scattered. You have to remain with the heap until it is softened and then go with the broom and collect the millet that has scattered. Time will come when we shall look for them and bring them back."***

To me, the language of all these statements is what I may call political banter. These are the sort of things one would expect a politician to say to woo people to his side. Using a metaphor or figurative speech to refer to former supporters as scattered millet who will be brought back to the main heap later, or referring to a party as having failed in government, and another for never having started, cannot in my view, amount to offences under section 24(5) of the Presidential Elections Act. Nor can it be an offence for the Petitioner to accuse the 2nd Respondent and his party of failing to serve the people of Uganda. As for what the 2nd respondent stated in respect of the building of the two dams, evidence was produced in court by way of affidavit by

Hon. Daudi Migereko to which was attached correspondence from the World Bank, indicating that a group of members of parliament had written to the Bank urging it to withdraw support from the hydro power project at Bujagali. Several of them were pointed out to be now leaders in the FDC. There were others who were not now in FDC. Pointing out such matters, in my view, cannot amount to an offence under the act.

In the book ***ELECTION LAWS BEING*** commentaries on ***THE REPRESENTATION OF THE PEOPLE ACT*** (of India) (supra), the learned authors have made the following commentary about election speeches at page 149.

> ***"Speeches delivered in the election meeting by leaders of political parties should be appreciated dispassionately by keeping in mind the context in which such speeches were made. The Supreme Court has indicated a note of caution that in election speeches appeals are made by candidates of opposing political parties often in an atmosphere charged with partisan feelings and emotions. Use of hyperboles or exaggerated language or adoption of metaphors and extravagance of expression in attacking one party or a candidate are very common and court should consider the real thrust of the speech without labouring to dissect one or two sentences of the speech, to decide whether the speech was really intended to generate improper passions on the score of religion, caste, community, etc. In deciding whether a party or his collaborators had indulged in corrupt practice regard must be had to the substance of the matter rather than mere form or phraseology."***

I think the above view offers a useful guide while looking at the statements attributed to the petitioner and the respondent in this case. I am of the considered view that in their proper context, none of these statements amounted to offences under the Act. Some of the language may have been inordinately strong or even colourful, but it did not amount to an offence. I therefore do not find that the 2nd respondent by his quoted statements committed any offences under section 24 of the Act.

Allegations of bribery

By paragraph 12 of the petition, the petitioner **"further contends that the 2nd respondent committed acts of bribery of the electorate by his agents with either his consent and or approval:**

a) **Bribery of voters just before and during the elections contrary to Section 64 of the Presidential Elections Act.**

b) **Attempting and interfering with the free exercise of the franchise of voters contrary to Section 26(c) of the Presidential Elections Act.**

c) **By agent procuring the voters of individuals by giving out tauplins, saucepans, water containers, salt , sugar and other beverages and making promises of giving such beverages."**

The court did find that there were incidents of bribery of voters in some areas of the country which had the effect of compromising the principle of a free and fair election. I have already dealt with that in this judgment. What had to be proved under this statement of claim is that the 2nd respondent personally or by agent with his consent or knowledge had committed the offence of bribery or attempted bribery as provided by Section 64 of the Presidential Elections Act.

Section 59(6) (c) of the Presidential Elections Act states as follows:-

"59(6) The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court-

……..

……..

That an offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval." (emphasis added).

So it was necessary for the petitioner to prove to the satisfaction of the court that:

a) the 2nd respondent had personally committed an offence, or

b) an offence had been committed with his knowledge coupled with his consent or approval.

It would appear that if a candidate was not proved to have personally committed an offence, the election would not be annulled. Likewise if it was not proved that the candidate had knowledge of the commission of the offense and had consented to or

approved of it, the election would not be annulled. This, in my view, is a heavy burden which must be discharged with strong evidence. The court cannot presume or infer the evidence.

The question may then be asked: who did the bribing? To answer that question, I think, one has to look at the nature of the elections. This was a multiparty election. Supporters of various parties went out campaigning for their parties or candidates even when they may not have been specifically appointed as agents. It is conceivable that overzealous party supporters could engage in such malpractices. There were three simultaneous elections: Presidential, Parliamentary and District Women Representatives. Some supporters of any of these Parliamentary Candidates did engage themselves in such malpractices, and there was evidence of this in some areas. There was specific mention of names of persons that were themselves candidates for various offices who were alleged to be involved in bribing voters.

But, to succeed in respect of the Presidential Candidate, the proof must be specific to the Presidential candidate or his agents with his consent or knowledge. This is crucially important because proof of even one such offence on the part of a presidential candidate is enough to nullify the election. In some other jurisdictions, such candidate may even be disqualified from contesting any future elections. Section 64(4) states that an offence of bribery shall be an illegal practice, and under section 68 a person who commits such illegal practice is liable to a fine not exceeding forty eight currency points or imprisonment not exceeding two years or both. So it is a serious matter that requires strict proof.

In the commentaries on the India Representation of the People Act (supra) which has provisions similar to our section 64, it is stated at page 153:

> ***"The act amounting to a corrupt practice must be done by a candidate or his election agent or by any other person with the consent of a candidate or his election agent. A leader of a political party is not necessarily an agent of every candidate of that party. An agent is ordinarily a person authorised by a candidate to act on his behalf on a general authority conferred on him by the candidate. Ordinarily, the agent is the understudy of the candidate and has to act under the instructions given to him, being under his control. The position of a leader is different and he does not act under instructions of a***

candidate or under his control. The candidate is held to be bound by act of his agent because of the authority given by the candidate to perform the act on his behalf. There is no such relationship between the candidate and the leader, in the abstract merely because he is a leader of that party. For this reason, consent of the candidate or his election agent is necessary when the act is done by any other person."

In order to constitute corrupt practice, which entails not only dismissal of the election petition but also other serious consequences like disbarring the candidate concerned from contesting a further election for a period of six years, the allegations must be very strongly and narrowly construed to the very spirit and letter of the law. A person may, due to sympathy or on his own, support the candidature of particular candidate but unless a close and direct nexus is proved between the act of the person and the consent given him by the candidate or his election agent, the same would not amount to a pleading of corrupt practice contemplated by law. It cannot be left to time, chance or conjecture for the court to draw an inference by adopting an involved process of reasoning. The allegation must be so clear and specific that the inference of corrupt practice will irresistibly admit of no doubt or qualm…….

Charge of corrupt practice will have to be proved by clear and cogent evidence as a charge for criminal offence and it is not open to the court to hold the charge of corrupt practice as proved merely on the preponderance of probabilities but it must be satisfied that evidence is sufficient to prove the charge beyond reasonable doubt."
(emphasis added).

The above are comments on the law in India. But because of the similarity with our own, it is useful to bear to them in mind as I examine the evidence that was put before us. The one case that learned counsel dwelt on in proof of bribery the 2nd Respondent was the affidavit of Umar Bashir who stated that he, together with about 40 other persons, had met the 2nd respondent at State House, and that the respondent had enticed him to vote for him and ordered that he be given a bribe of shs.100,000/=. He claimed to have got that money. This was vehemently denied by the 2nd respondent and one Ester Najjemba who had arranged for the meeting. I will examine these affidavits closely. Mr. Umar Bashir states that on 24th December, 2005 one Esther Najjemba came for him and one Lumu Fred, Iga Rashid and others he did not know and took them to Sam Sam Hotel in Bakuli. They found other people he did not know at the hotel. He states that Najjemba then addressed them, "particularly asking us why we didn't support the Movement and Presidential Candidate Museveni." He

states further that they gave their reasons of being poor and unemployed, whereupon Najjemba told them that the 2nd respondent was ready to meet them and address their concerns. Thereafter they set out for State House at 10.00 p.m.

Thus far, Mr. Umar Bashir does not say why and how the said Najjemba picked on him and these others to go to State House at such rather short notice. He does not even state whether he knew this Najjemba before. He merely states, "That on 24th December, 2005 at around 7.30 p.m, a one Esther Najjemba came for me…." On the other hand, Esther Najjemba states in her affidavit that she was a mobilizer for the NRM in 1996 and 2001 for Najanankumbi and Kabowa area and was the woman NRM representative in Rubaga Division. She states that in that capacity of NRM mobilizer she knew the deponent as a movement supporter. She also knew the others as movement supporters in 2001. She states that she invited these people with a view to mobilising them to support the NRM in 2006. She says that during their discussion they raised issues of Youth unemployment, high tuition fees, very high taxes for businessmen and poverty as issues that affected the youth. Thereafter she sought appointment from the Principal Private Secretary for them to meet the 2nd respondent so that they could explain these matters. The appointment was granted and they then proceeded to State House at 10.00 p.m. What happened at State House seems to be a matter of divergence. Mr. Bashir states that the respondent met them at about midnight and that he "took us through his manifesto and went on to ask why we didn't support him." He states that they reiterated the same reasons they had given to Najjemba whereupon the 2nd respondent advised them to form groups through which "he would channel financial assistance." He then claims:

> ***"That this financial assistance was given on the condition that we crossed over and started campaigning for him, which we agreed to do. He then asked one of his Aides to give some money of which I personally got Shs.100,000/= (One Hundred thousand)".*** Bashir further states that the 2nd respondent promised to give them more money if he proved that they had crossed to his camp when they met him again on 27th December. He states that from then on he deserted the FDC party since they were warned they would be trailed. He then contradicts this by stating further that he ***"brought this matter to the attention of Hon. Betty Kamya MP Rubaga North who advised me to stay there, saying I could still be useful to the party while there, and I did as advised."*** Clearly then, he did not cross to the opposite camp, but remained a loyal supporter of FDC albeit working from within the other camp.

He then further contradicts this by stating that he is deponing the affidavit in his capacity "as someone who was induced to support Presidential Candidate Yoweri Kaguta Museveni on account of financial assistance." Bashir does not state whether he subsequently went back to State House or met the 2nd respondent again or indeed whether he voted for the 2nd respondent.

On the other hand, the 2nd respondent states that he had been told that the youths he was to meet were NRM supporters but who wanted to discuss matters that were of concern to the youths generally. He states he did not meet them until 1.00 a.m when he was tired and preparing to leave for Rwakitura for Christmas. He states that he listened to their leaders and then agreed that he would meet them again on the 27th December for discussion. He did not take them through his manifesto, did not ask them to vote for him as he thought they were already his supporters, and did not give them money or promise to give them money. He states that he advised them to form groups which would then access funds from the various poverty eradication programmes. He instructed his aides to make transport arrangements for the groups to reach their homes.

This appears to be corroborated by the affidavit of Najjemba who states that when the group met the respondent at about 1.00 a.m, ***"four of us stated the problems we had come to discuss with the President, but they were not discussed because it was late and he was leaving for Rwakitura for Christmas."*** She denies that he took them through his manifesto, and denies that he ever promised that he himself would channel financial assistance to the groups. She states that before he left, he instructed the Principal Private Secretary to get the State House Legal Officer to assist them register an association, and also instructed her to **"make transport arrangements for us to reach our homes."** They were given another appointment after Christmas at which they would have full discussion of the problems.

I have gone to great length to detail these affidavits because counsel for the petitioner dwelt on Bashir's affidavit as evidence of bribery by the 2nd respondent. I have already stated that the burden of proof in allegations of bribery is a heavy one,

requiring proof beyond a reasonable doubt. Merely throwing accusations is not enough. Not a single person of those alleged to have received the 100,000/= corroborated Bashir's evidence. Even Mr. Lukwaya who claimed in his affidavit that he knew for a fact that named individuals had received 100,000/= had himself not been present and those individuals have not testified to these alleged facts. I have already stated that I regard Lukwaya's affidavit as useless evidence. That leaves the affidavit of Bashir as the sole evidence upon which this particular allegation is based. No other corroboration evidence was adduced in this matter at all.

HALBURY, LAWS OF ENGLAND, 4th Edition Vol. 15 on Elections, also gives an insight as to the nature of evidence required to prove bribery. Under paragraph 695 on ***PROOF OF BRIBERY***, it is stated:

> ***"Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances maybe, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive.***
> ***A corrupt motive must in all cases be strictly proved. For this purpose a corrupt motive in the mind of the person bribed alone is not enough; the question is as to the intention of the person who bribes him.***
>
> ***Where the evidence as to bribery consists merely of offer or proposals to bribe, stronger evidence will be required than in the case of a successful bribe because of the greater likelihood of there having been some misunderstanding."*** (emphasis added).

After due consideration of the above evidence and the law, I am satisfied that Umar Bashir's affidavit by itself cannot be regarded as reliable evidence to find the allegation of bribery on the part of the 2nd respondent proved. It falls far short of the strict proof required in this sort of case. It is possible that Bashir may have misunderstood the purpose of the meeting. But it would appear that the group was assumed by the respondent to be his supporters who would be campaigning for him. A promise to assist them if they formed youth groups, in my view, is not bribery as one cannot bribe people who are already supporters. Nor is it bribery to make

transport arrangements for them to go home. It is also to noted that the meeting took place on 24th December, 2005, two months before the elections. This seems to be consistent with the 2nd respondent's understanding that these were people who were supporters and were going out to campaign for him. In my view, it is no offence for candidates to meet with groups of people and discuss campaign issues. To advise such groups to organise themselves so as to be able to access State funding for their activities cannot be bribery.

Counsel for the petitioner invited us to make the inference that where NRM Party officials were found to have committed malpractices, this should be attributed to the 2nd respondent as their candidate.

I do have some sympathy for this view. However, as already indicated above, the law requires more than mere proof that an agent had committed an offence. Individual party officials, fighting their own campaigns, may commit election malpractices which the presidential candidate knows nothing about. It would be wrong to impute those as having been committed with his knowledge and consent or approval. It must be proved to the satisfaction of the court that the candidate personally committed an act of bribery or it was committed by his agent with his knowledge and or consent. The essential ingredients must be proved, i.e. knowledge and or consent. The framers of the law must have used those words deliberately and it would not be safe to ignore the need to prove them and base decisions on assumptions. A party official who is himself a candidate may bribe voters for his own election. In the absence of proof, I do not see how this should tied to the Presidential candidate who may have no knowledge of it, let alone consenting to it. I think it will require amendment of the law to attribute liability to the candidate for electoral offences committed by agents even without his knowledge or consent or approval.

It was not proved to my satisfaction that the 2nd respondent committed any acts of bribery personally or that his agents committed any such acts with his knowledge and consent or approval. Accordingly I find that the allegations of bribery were not proved against him.

In the result I answer issue No. 4 in the negative. I would therefore dismiss the petition, with no order as to costs.

However, this some Election Observers reports did raise very important matters that must be addressed. This court did express grave concern over certain matters, I only wish to add a few thoughts.

There are those matters I have already referred to which were not raised in the petition but were highlighted by the various observers as having impacted negatively on the election. In my view, every organ of the state must play their part in the organisation of elections. It is wrong to conceive of elections as being solely the responsibility of the Electoral Commission. Article 66(1) of the Constitution for example states "Parliament shall ensure that adequate resources and facilities are provided to the Commission to enable it perform its functions effectively." Article 66(2) makes the commission one of the self accounting institutions that deals with Ministry of Finance directly on matters of its finances. The Constitution provides for Presidential Elections every five years. So it was a well known obligations that there had to be elections. Yet all the observers point out that money to organize election was given to the Commission very late In my view, Parliament must pass the budget in time and government must provide funds necessary to organize elections that are truly free and fair.

Reports indicate that an important aspect of the election, i.e. civic voter education, was not carried out due to lack of funds. The relevant organs of the State must address this matter and ensure that it does not happen again at subsequent elections. There is evidence that some of the problems and malpractices that had occurred at some polling stations were due to a lack of voter education. In some instances returning officers had to suspend the exercise while they gave voter education to the voters and election officials before the exercise reportedly proceeded smoothly. There was evidence of this in Ntungamo District.

The Government must address the question of the involvement of the military or any armed groups in elections. No one denies the responsibility of government to provide security for the country where the situation warrants it, even during the election period. In my view the Police Force should be adequately trained and equipped to

handle elections. It may only be supplemented by other security forces where the situation clearly warrants it. But where there is no clear cause for it, the army should be kept away from election counters.

Another aspect pointed out by the observers is the late passing of the necessary electoral legislation in time. Again this is matter that the government and Parliament must address. All the necessary legislation must be put in place in good time to enable the Electoral Commission to organize a truly free and fair election. When the electoral laws are passed late and with little or no time to correct anomalies and contradictions in them, the Electoral Commission is left with no time to attend to all the issues and problems that arise since it is trying to beat the constitutional deadline of holding the elections. State organs must, in my view, perceive of elections as an event that must be preceded by deliberate processes carefully thought through and put in place to ensure that the event does produce free and fair centers.

The other aspect commented on is that of the use of the Public media. Article 67(3) of the Constitution provides as follows: ***"All Presidential Candidates shall be given equal time and space on the* state-*owned media to present their programmes to the people."***

In my view, this is a constitutional command to the state organ concerned. It is not a matter for the Electoral Commission to negotiate on. The people in charge of the state-owned media have the duty to ensure compliance. Perhaps in future petitions, the law should provide for the Government (Attorney General) to be made a party to the petition so that such complaints if pleaded by a petitioner can be answered and be fully inquired into by the court.

Finally, I am of the view that Parliament must take a fresh look at the Constitutional provisions regarding the challenging of election results. There appears to be constraints of time in respect of filing and hearing the Petition. Reasonable time is need to enable the parties file their pleadings and for the court to have reasonable time to inquire into all the matters alleged. Also, the provision that where the Presidential Election is nullified by Court, a fresh election must be held within twenty

days should be examined. It may well be that at the time the framers of the constitution made this provision, there was an assumption that all the fundamental processes would have been put in place, e.g the relevant laws were in place in time, funds were provided in time, voter education was done, the electoral register had been properly prepared and was not open to challenge, etc. Where all these were inadequate and a subject of challenge, it may be too much optimism to expect that the Electoral Commission would then organize a truly fair and free election within 20 days of the nullification of an election. A situation where a subsequent election ends up being the same or worse than the one challenged should be avoided. Parliament should therefore consider a longer period, realistic enough for the Electoral Commission to address what had gone wrong and make adequate preparations for a free and fair election superior to the one nullified. Perhaps an expansion on the principle contained in article 104(7) should be studied.

Dated at Mengo this 31st day of January 2007.

Bart M. Katureebe
Justice of the Supreme Court