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

(CORAM: ODOKI, CJ., TSEKOOKO, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.S.C.)

ELECTION PETITION APPEAL No.18 OF 2007

BETWEEN

MUKASA ANTHONY HARRIS ::::::::::::::::::::::::::::::
APPELLANT

AND

DR. BAYIGA MICHAEL PHILIP LULUME ::::::::

RESPONDENT

[Appeal from the decision of the Court of Appeal at Kampala (Okello, Mpagi-Bahigeine and Byamugisha, JJ.A) dated 13th October, 2006 in Election Petition Appeal No. 14 of 2006]

JUDGMENT OF TSEKOOKO JSC.

This is an appeal from the decision of the Court of Appeal which upheld the judgment of the High Court (Musoke-Kibuuka, J.,) allowing a petition filed by the

respondent. The judge set aside the election of the appellant and declared the parliamentary seat vacant.

On 23rd February, 2006, there were both presidential and general parliamentary elections throughout this country. Mukasa Anthony Harris, the appellant, Dr. Bayiga Michael Philip Lulume, the respondent, together with one Luwaga Livingstone contested for the parliamentary seat of Buikwe County South Constituency. The appellant obtained 13,690 votes; the respondent obtained 13,026 votes while Luwaga Livingston got 3,994 votes. Consequently the Electoral Commission declared the appellant the winner and therefore the Member of Parliament for that constituency. The respondent was dissatisfied with the result of the election. He petitioned the High Court at Jinja and raised many complaints against both the Electoral Commission and the appellant. In respect of the appellant, the respondent alleged, among other things, that the appellant had committed various electoral offences, including bribery, personally or through his agents.

Affidavits in support of the petition and against it were filed in the High Court from the parties and their witnesses. During the hearing of the petition, the learned trial Judge permitted counsel for each party to cross-examine a number of witnesses from both sides on their respective affidavits. Those witnesses were re-examined. In a rather long and carefully reasoned judgment, the learned trial Judge held that the allegations against the Electoral Commission had not been proved. Consequently he dismissed the petition against the Electoral Commission. Further he held that most of the allegations against the appellant had not been proved. So he disallowed the claims of the respondent. However, the learned trial Judge concluded that the respondent had proved allegations of bribery by the appellant at two places in the constituency, that is to say, that on 24th January, 2006, the appellant gave shs. 250,000/= to be distributed to the voters in an area called Lubbongi. The second allegation which the judge held to be proven is the allegation of bribing voters with shs. 500,000/= at a campaign rally at a place called Kikuusa on 25th January, 2006. As a result and in conformity with the law, the judge allowed the petition,

set aside the election of the appellant as the Member of Parliament for Buikwe County South Constituency and ordered for fresh election to be held. The appellant unsuccessfully appealed to the Court of Appeal based on six grounds. Hence this appeal which is based on seven grounds.

The appellant was represented by Messrs Makeera and Co., Advocates, while the respondent was represented by Messrs Balikuddembe and Co., Advocates. The former filed a written statement of arguments but Mr. Balikuddembe who was assisted in Court by Mr. Katabalwa, made oral reply.

Counsel for the appellant argued grounds 1, 2, 3, 4, 5 and 6 together and ground 7 separately. I think this was a proper course because in my view the six grounds in reality revolve around the same thing namely evaluation of evidence.

Although Mr. Makeera counsel for the appellant argued the last ground of appeal (7) last, I find it convenient to dispose of this ground first. This is because counsel's

contention is that the petition was in effect defective from inception primarily because no notice of presentation of the petition in court was served on the appellant, as required by Section 62 of the **Parliamentary Elections Act, 2005** (PEA, 2005) and Rule 6(1) of the **Parliamentary Election (Election Petitions) Rules** (the Rules).

Ground 7 reads as follows:

The learned Justices of Appeal erred in law and fact in failing to
find that petition was a nullity as there was non-service of the
notice and the petition.

Counsel for the appellant contended that as the petition was improperly before court on account of non-service of the notice, it should have been dismissed by the trial Judge and subsequently by the Court of Appeal. He criticised the Court of Appeal for its view that failure to serve the notice was a mere irregularity which does not vitiate the proceedings. On his part, Mr. Balikuddembe

contended that this point should have been raised, but was not raised, as a preliminary point of objection during the scheduling conference.
Instead it was raised belatedly during submission stage by appellant's counsel who represented him at the trial. He supported the decisions of the two courts below.

In my view it is not true that the appellant raised the issue of lack of service of notice belatedly at the submissions stage during the trial. It should be noted that in paragraph 19 of his affidavit sworn on 11th May, 2006, which accompanied his answer to the petition, the appellant averred that–

"I am informed by my said advocate that the petition is defective in as far as I was never served with a copy of the petition or other document in this matter".

Here the appellant raised the issue of the non- service of a copy of the petition. It can be stated though that the appellant or his counsel did not appear to take this matter seriously. This is because normally if the

appellant had considered the failure of service of a copy of the notice and or the petition as going to the root of the petition itself, he or his counsel should have raised non-service as a preliminary substantial point of objection before the petition was heard. Instead his lawyer fully took part in the hearing of the petition. He cross-examined the present respondent and his witnesses and re-examined those of the present appellant. The record does not show that counsel asked the respondent about non-service of either the notice or the petition or both. It was not until he was making his final submissions that counsel half-heartedly alluded to non-service. Indeed, in his affidavit, the appellant does not say explicitly that he was not served with the notice of presentation of the petition. Nor does he give any inkling of how and when he or his counsel came across the petition which made him to instruct his lawyer to draw up the answer to the petition and the accompanying affidavit both of which were filed in the High Court on the 11th May, 2006. Indeed I have seen on my record of appeal a copy of the notice of presentation attached to the copy of the petition. The former purports to have been signed on (26/4/2006) the day of

presentation and was signed on the same date by a Registrar of the Court implying that that notice was filed in court along with the petition.

Section 62 of the *P. E. A,* 2005, reads as follows:

"Notice in writing of a presentation of petition accompanied by a copy of the petition shall, within 7 days after the filing of the petition, be served by the petitioner on the respondent or respondents, as the case may be".

Similarly *Rule 6(1)* of the *Rules,* reads as follows:

"Within 7 days after filing the petition with the Registrar, the petitioner or his or her advocate shall serve on each respondent notice in writing of the presentation of the petition, accompanied by the copy of the petition".

Both the High Court and the Court of Appeal held that the requirement of the service of notice as prescribed in both the Act and the Rules is mandatory but concluded

that because the objection was raised late and no prejudice was caused to the appellant, the failure to serve the notice did not vitiate the proceedings.

With respect to both the learned trial Judge and the Court of Appeal, I do not accede to the view that the provisions of Section 62 and of Rule 6(1) are mandatory. In my opinion the use of the word "shall" in both provisions is directory and not mandatory. The provisions direct what ought to be done. I say so first because the two provisions do not state what would happen if the notice and or the copy of the petition are not served within the 7 days or indeed after the 7 days. Normally either Section 62 itself or Rule 6(1) would have stipulated that omission to serve the notice of presentation would lead to a specified sanction. This is missing in both provisions. Further, I have not been able to find any provision, either in the Act itself or in the Rules, indicating what would be the effect because of non-service. I think that the curative provisions where there is default in complying with any of the Rules after the petition is presented and or during trial of the petition, is found in Rule 19 which read thus:

The court may on its own motion or on application by any party to the proceedings and upon such terms as the justice of the case may require enlarge or abridge the time appointed by the Rules for doing any act if, in the opinion of the court, there exists such special circumstances as make it expedient to do so.

Since the act of service is prescribed by Rule 6(1), the provisions of Rule 19(1) can be invoked to extend time for service. I go to these lengths to illustrate that prior to and during the trial of a petition it is possible to seek leave of court to take necessary steps to rectify any error. It is unnecessary for me in this case to speculate on what would constitute "special circumstances" because that point was not argued before us.

As stated already, the learned Justices of the Court of Appeal considered that the omission to serve the notice is an irregularity which does not vitiate the proceedings. The appellant has not pointed out any prejudice or injustice which he suffered because of the alleged

omission by the respondent to serve the notice. Other than the half hearted averment in the aforementioned paragraph 19 of his affidavit, the appellant did not in the written statement of arguments to this Court or when he testified orally at the trial, explain how and when he or his lawyer got hold of the petition which was apparently lodged together with the notice in court so as to be able to file his answer to the petition on the 11th May, 2006.

The silence may well mean that the appellant helped himself to the copy of the petition probably within the prescribed time in which case he pre-empted the service and did, in effect, enter appearance unconditionally. Clearly there is no material upon which court can say conclusively that the appellant did not get the petition within the prescribed period of 7 days. In my opinion the two courts were right in declining to dismiss the petition on account of non-service of the petition. I also believe that this is a case where paragraph (e) of clause (2) of Article 126 of the Constitution is applicable.

Therefore, ground 7 of the appeal ought to fail.

Grounds 1, 2, 3, 4, 5 and 6 read as follows:

1. **The learned Justices of Appeal failed to properly evaluate the record (sic) and therefore came to a wrong decision.**

2. **The learned Justices of Appeal erred in law and fact in finding that the appellant bribed voters.**

3. **The learned Justices of Appeal erred in law and fact by relying on contradictory and hearsay evidence of the respondent and his witnesses.**

4. **The learned Justices of Appeal erred in law and fact when they failed to reevaluate the evidence as a Court hearing the first appeal.**

5. **The learned Justices of Appeal misdirected themselves in law and fact when they failed to find that the appellant won the election genuinely and validly in accordance with the law.**

6. **The learned Justices of Appeal grossly erred in law in disregarding the defendant and his**

witnesses overwhelming evidence on record and instead acted upon speculation and conjecture against the weight of the evidence.

As counsel for the appellant correctly observed in the written arguments, the crux of these grounds is that the learned Justices of Appeal failed in their duty as a first appellate court to properly re-evaluate the evidence on the record.

Learned counsel then submits, again correctly, that the conclusion of the Court of Appeal is that the appellant bribed voters. After making reference to Subsection (1) of Section 68 of the **PEA,** 2005, learned counsel contended that in order to establish bribery, the respondent had to prove:

(a) that the appellant gave out money or gifts;

(b) that the giving was to a person who was a registered voter;

(c) that the giving was with intent to influence the voter to vote or refrain from voting;

(d) That the appellant committed the bribery personally or through his agent with his knowledge and consent or approval.

Learned counsel relied on the reasoning of my learned brother Katurebe, JSC., in our decision in **Kiiza Besigye Vs. Y. K. Museveni & Electoral Commission** (Presidential Election Commission No. 1 of 2006) (unreported), for the view that the charge of bribery had to be proved beyond reasonable doubt and not on the basis of the balance of probabilities. Counsel concluded that the evidence adduced by the respondent did not establish the allegations or the charge of bribery beyond reasonable doubt.

Essentially the evidence relating to the two instances of bribery was that of witnesses Mubiru Livingstone (Pw2), Saabwe Ben (Pw3), Wamala Renald (Pw4) and Yusuf Mbowa (Pw7) whose evidence learned counsel contended was inconsistent and insufficient.

Mr. Joseph Balikuddembe who represented the respondent submitted in reply that both the trial judge

and the Court of Appeal properly evaluated the evidence fairly and adequately. He contended that the trial judge was so fair in his consideration of the evidence that except for the two instances of bribery he disallowed the many other allegations against the appellant.

Regarding the Court of Appeal, Mr. Balikuddembe asserted that in the lead judgment with which the other members of the panel concurred, Byamugisha, JA. properly directed herself to the duty of a first appellate court and that she properly re-evaluated the evidence before she upheld the findings of the learned trial judge.

I am not persuaded by the arguments of learned counsel for the appellant. First of all the learned trial judge properly directed himself when, after referring to Section 61(1) of the **PEA**, 2005, he stated, at page 6 of his typed judgment, that:

"It is settled law that the burden of proof in an election petition lies upon the petitioner who is required to prove every allegation contained in the petition to the satisfaction of the court. The

standard of proof is a matter of statutory regulation by Subsection 3 of Section 61 of the PEA, 2005. The Subsection provides that the standard of proof required to prove an allegation in an election petition is proof upon the balance of probabilities".

On this point, I am surprised by the assertions of learned counsel for the appellant who unfairly criticised the two courts that they misdirected themselves on the standard of proof by applying the standard of proof sanctioned by the statute which is proof on the balance of probabilities. Learned counsel is certainly aware of the existence of **Section 61(3) of the PEA,** 2005, for he alludes to it towards the end of his written arguments. Throughout his submissions, appellant's counsel relied on the opinion of my learned brother, Katureebe, JSC., in **Kiiza Besigy**e Election Petition (supra) notwithstanding the fact that the *Presidential Election Act, 2005* does not itself have a provision similar to Section 61(3) of the PEA, 2005, which very clearly prescribes the standard of proof required in a parliamentary election petition. The record of appeal indicates that the respondent, as petitioner,

and nine of his key witnesses were cross-examined by the appellant's counsel. These witnesses include the five I have earlier mentioned in this judgment. In their affidavits each on of them gave his or her voter's registration number. They each witnessed the appellant release money for distribution to voters. They were cross-examined on their affidavits in support of the petition. Similarly the appellant, as the first respondent at the trial, was cross-examined at length on his affidavit along with some of his witnesses. These include: Fenekasi Wasswa (Rw2), Kumani Ssekitoleko Charles (Rw3), Mrs. Nakasi Kumani (Rw4), Kajumba Joseph Zavuga (Rw8), **Katiisa Ronald** (Rw10). The last had been the master of ceremonies at the two rallies held at Lubbongi Parish and Kikuusa. According to the appellant that witness campaigned for him.

The learned trial judge observed those witnesses who were cross-examined. Indeed he took note of the demeanour of the appellant and of some of his witnesses: Rw3, Rw4 and Rw8. In his judgment, the learned trial judge examined the evidence with care before he rejected most of the allegations of the respondent (as

petitioner). It was after the evaluation of the evidence that the learned trial judge found such witnesses as Pw2, Pw3, Pw4 and Pw7 to be truthful.

He found the appellant a liar. He found witnesses of the appellant, like Kumani Ssekitoleko (Rw3), Mrs. Nakasi Kumani (Rw4) and Kajumba Joseph Zavuga (Rw8) and Katiisa Ronald (Rw10) unreliable. Rw10 had been a master of ceremony at the two rallies at Lubongi and at Kikuusa and an agent of the appellant. At the end, the learned judge found that the respondent had discharged the burden of proof in respect of the allegations of bribery of shs. 250,000/= and shs. 500,000/= at Lubongi and Kikuusa, respectively.

Similarly Byamugisha, JA., in the Court of Appeal, carefully re- evaluated the evidence on record before she upheld the conclusions of the trial judge that the appellant was a liar and that:

(a) at Lubongi the only one witness Mbowa Yusuf told the truth about the bribery of shs. 250,000/=.

(b) at Kikuusa, the witnesses Wamala Ronald, Mubiru Livingstone and Ssaabwe told the truth as opposed to Katiisa who was the appellant's witness at the trial.

When he was cross-examined this is how Mbowa Yusuf testified in respect of shs. 250, 000/= given by the appellant at Lubongi–

"The rally was attended by very many people. They were more that 250 persons. I saw Hon. Mukasa handover shs. 250,000/= to Mr. Kimani. It was in 50,000= thousand notes (new ones). I counted the money. ..... The 1st respondent did not wish the money to be distributed in his presence. Even when giving it to Kimani we had to provide a human screen when he was passing it over to Kimani. Kimani gave the money to the L.C.II Chairman. I got shs. 20,000/= for Lubongi village. We used the money to purchase a saucepan for the village residents. We purchased it shs. 25,000/=. It is for our L.C.I. The money was given to voters. Other villages shared the money out among individual residents".

During re-examination by appellant's counsel, the witness stated–

"Hon. Mukasa when giving us the shs. 250,000/= told us if we voted him in power, he would give us more money. He promised 500,000/=. The people were highly excited".

The witness asserted that he did not campaign for anybody. He impressed the trial judge who believed him in preference to the appellant, and his witnesses such as Kimali and Katiisa.

Eminently, the conclusions of the trial judge were based on the credibility of witnesses for both sides. Fortunately all the material witnesses who gave evidence about the two incidents of bribery were cross-examined on their respective affidavits. The learned trial judge who heard and observed the demeanour of the appellant, the respondent and the witnesses was in a better position to assess their credibility. The learned Justices of Appeal who re-evaluated the evidence on record

concurred with the findings of the trial judge. For this Court to interfere with the two concurrent findings on credibility of witnesses, we must be satisfied that either the trial judge or the Court of Appeal or both of them took an erroneous view of the evidence and, that therefore, each arrived at a wrong decision or that their conclusions cannot be supported in law: See **Kifamunte Henry Vs. Uganda** (Supreme Court Criminal Appeal No. 10 of 1997) reported in Supreme Court Certified Criminal Judgments (1996/2000) at page 280. I have not been persuaded that either of the two courts erred.

From the evidence of witnesses such as Mbowa Yusuf there can be no doubt that participants at the two rallies were voters or at least some of them. Mbowa's oral evidence confirms this. It also points to the intention of the appellant when giving out the money. He knew they were voters and he wanted their votes. Katiisa who was appellant's master of ceremonies was himself a voter. In any case it is hardly reasonable to imagine that a parliamentary candidate could give out money to people who were not voters in a particular locality. Nor is it reasonable to imagine, as argued by learned counsel for

the appellant, that money could have been given out for anything else other that to persuade the voters to vote for the appellant. There is ample evidence showing that money was released by the appellant for bribing.

For these reasons, I think that all the six grounds have no substance and each ought to fail. I would uphold the conclusions of the two courts below.

This appeal has no merit and I would dismiss it with costs here and in the two courts below.

Delivered at Mengo this 6th day of March 2008.

J. W. N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.

JUDGMENT OF ODOKI, CJ

I have had the benefit of reading in draft the judgment of my learned brother, Tsekooko JSC, and I agree with it and the orders he has proposed.

As the other members of the Court also agree, this appeal is dismissed with costs for one counsel here in the courts below.

Dated at Mengo this 6th day of March 2008.

B J Odoki
CHIEF JUSTICE

JUDGMENT OF MULENGA, JSC

I had the benefit of reading in draft, the judgment prepared by my learned brother Tsekooko, JSC. I agree that for the reasons he has elaborated, this appeal ought to be dismissed with costs to the respondent in this Court and in the courts below.

DATED at Mengo this 6th day of March 2008.

J. N. Mulenga
JUSTICE OF SUPREME COURT.

JUDGMENT OF KANYEIHAMBA, JSC.

I have read in draft the judgment of my learned brother, Tsekooko, J.S.C and I agree with him that this appeal has no merit and ought to fail. I also agree with the orders he has proposed.

Dated at Mengo, this 6th day of March 2008.

G.W. KANYEIHAMBA

JUSTICE OF SUPREME COURT

JUDGMENT OF KATUREEBE, JSC.

I had the benefit of reading in draft the judgment of my learned brother Tsekooko, JSC, and I agree with him that this appeal ought to fail for lack of merit.

I also agree with the orders he has proposed.

Delivered at Mengo this 6th day of March 2008.

Bart M. Katureebe
Justice of The Supreme Court