

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

**(CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE,  
5 KISAAKYE, JJ. S.C.)**

**ELECTION PETITION APPEAL NO. 6 OF 2009**

**BETWEEN**

10 **HON. SITENDA SEBALU :::::::::::::::::::: APPELLANT**

**AND**

1. **HON. SAM K. NJUBA**

2. **ELECTORAL COMMISSION :::::::::::::::::::: RESPONDENTS**

15 ***[Appeal from the Judgment of the Court of Appeal at Kampala (S. G. ENGWAU, C.N.B. KITUMBA and C. K. BYAMUGISHA, JJ.A) dated 1<sup>st</sup> June 2009 in Election Petition Appeal No. 1 of 2008.]***

20 *Constitutional law – election petition – whether elections were conducted in line with the law – whether several voters were de-franchised – whether some voters’ names were struck out of the voter’s register – whether there was bribery of voters and if so by who- whether prohibited persons were procured to vote – whether there was intimidation of voters – whether there was multiple voting- Declaration of results Forms – whether failure to*

*Appellate court – duty of second appellate court-*

25 *The appellant was one of the contestants in a parliamentary election in 2006. He lost to the first respondent with a margin of 23 votes. He unsuccessfully petitioned the High Court for nullification of the elections among other things. Before petitioning the high court, however, he had petitioned the chief Magistrate for a vote recount. The Supreme Court while upholding the decisions of the lower courts, dismissed the appeal with*  
30 *costs.*

## JUDGMENT OF KISAAKYE, JSC.

This is a second Election Petition Appeal that was filed by Sitenda Sebalu, the appellant, against Hon. Sam Njuba, the first respondent and the Electoral Commission, the second respondent, (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively). The appellant appealed from the judgment of the Court of Appeal which dismissed his first Election Appeal on 1<sup>st</sup> June, 2009, with costs to the respondents.

The background to this Appeal is that on 23<sup>rd</sup> February 2006, Parliamentary general elections were held nationwide on the same day as the Presidential Elections and the elections for the District Women Members of Parliament. The appellant contested with the 1<sup>st</sup> respondent and one Charles Kiwanuka for the Member of Parliament seat for Kyadondo East Constituency, Wakiso District. The 2<sup>nd</sup> respondent organized these elections and declared the 1<sup>st</sup> respondent the winner. According to the results, the 1<sup>st</sup> respondent polled 17,743 votes, while the appellant and Charles Kiwanuka polled 17,720 votes and 16,114 votes, respectively.

Being dissatisfied with the outcome of these elections, the appellant petitioned the High Court seeking nullification of the election on the following grounds:-

- (i) *The elections were carried out in a way that did not comply with the law leading to substantial negative effect on the results.*
- (ii) *Several voters were de-franchised.*
- (iii) *Striking out of voters from the voter's Register.*
- (iv) *Bribery of voters to vote the wrong way.*
- (v) *Procuring prohibited persons to vote.*
- (vi) *Intimidation of the voters*
- (vii) *Voting more than once.*

On November 24<sup>th</sup> 2006, the appellant filed a second supporting affidavit in support of his Petition. In this Affidavit, the appellant alleged additional election malpractices at the Kireku 2 A.M. Namanve Railway polling station and at the Kireka 'B' St. Stephen polling station. The appellant subsequently dropped his claims with respect to the Kireku 2 A.M. Namanve Railway polling station.

The specific allegations of election malpractices in respect of the Kireka ‘B’ St. Stephen polling station were that the presiding officer, Kirwana Ibrahim, had failed to declare the results of the voting for the Parliamentary seat on the prescribed Declaration of Results Form for a Directly Elected Member of Parliament and had instead declared the results on a Declaration of Results Form for a District Woman Member of Parliament (hereinafter referred to as the non-prescribed DR Form) which had been provided for training purposes only.

The appellant also alleged that the results that the 2<sup>nd</sup> respondent declared at the Kireka ‘B’ St. Stephen polling station to the effect that the appellant had obtained 150 votes, while the 1<sup>st</sup> respondent and Charles Kiwanuka had polled 178 votes and 143 votes, respectively were the wrong results. He further averred that the correct results for this polling station were actually declared on the prescribed Declaration of Results Form No. 18168 by the presiding officer, Kirwana Ibrahim on Election Day, in the presence of his agent, Moses Wasswa Muwonge, and were as follows:

Sam Njuba (1 <sup>st</sup> respondent):	143 votes
Charles Kiwanuka:	178 votes
Sitenda Sebalu:	150 votes.

The respondents contended that although a non-prescribed DR Form was used to declare the results at Kireka ‘B’ St. Stephen polling station, the results that were declared on the Election Day were indeed the results of the voting that had been held at that polling station.

The Election Petition was heard by Justice Anna Magezi, who dismissed the Petition, and ordered each party to meet their respective costs. Being dissatisfied with this decision, the appellant appealed to the Court of Appeal relying on six grounds of appeal. Only one main issue was framed for the Court’s determination, that is:

*“Whether the non-compliance with the Parliamentary Elections Act (17/2005) in the declarations of Results at Kireka ‘B’ St. Stephen Polling Station substantially affected the results in Kyadondo East Constituency.”*

The Court of Appeal dismissed the Appeal with costs to the respondents. The appellant then lodged this second Election Petition Appeal before this Court, relying on five grounds which are reproduced later in this judgment.

The appellant sought for several orders from this Court. First, he prayed to this court to set aside the judgment and orders of the Court of Appeal which upheld the decision of Magezi A, J. Secondly, he prayed that this Court declare him the validly elected Member of Parliament for Kyadondo East Constituency, and for a declaration that the 1<sup>st</sup> respondent was not validly  
5 elected as a Member of Parliament for Kyadondo East Constituency. Lastly, in the alternative, he sought for an order that the election in Kyadondo East Constituency be set aside.

The appellant was represented by Mr. Bakiza and Mr. Semuyaba, while the 1<sup>st</sup> respondent was represented by Mr. Nsibambi. The 2<sup>nd</sup> respondent was represented by Ms. Christine Kaahwa, a Principal State Attorney from the Attorney General's Chambers.

10 Counsel for the parties filed written submissions in support of and against the appeal. The first and second respondents filed joint written submissions. While the appellant argued each ground separately, the respondents argued Grounds 1, 2 and 3 together and Grounds 4 and 5 separately. I propose to consider grounds 1, 2, and 3 separately and ground 4 and 5 together.

Ground 1 of the appeal was framed thus:

15           ***“That the learned Justices of Appeal erred in law and fact when they failed to properly re-appraise and re-evaluate the evidence before them and found that the Election at Kireka B St. Stephen Polling Station did contravene Section 50 of Parliamentary Elections Act but as there were no properly declared and dully transmitted results in accordance with that section they failed to annul the results at the polling station which would have  
20           substantially affected the entire election in Kyadondo East Constituency.”***

Counsel for the appellant made several arguments in support of Ground 1. First they contended that the Court of Appeal erred in law and fact in failing to annul the results of Kireka B St. Stephen after it found that the declaration of the results of the elections at Kireka `B' St. Stephen polling station did not comply with section 50 of the Parliamentary Elections Act.  
25 They contended further that this affected the election results substantially and that this should have formed a good basis for the Court of Appeal to set aside the entire election results.

Counsel for the appellant also submitted that since the non-prescribed DR Form was neither signed by the Candidate's polling agents nor properly transmitted, the declaration and

transmission of results was not done in accordance with section 50 of the Parliamentary Elections Act and that both the declaration and transmission were flawed.

Counsel for the appellant further submitted that paragraph 10 of George Ntulume, the Returning Officer's Affidavit which was to the effect that the non- specified DR form was not brought to  
5 his attention was tantamount to an admission by the Electoral Commission that the presiding officer at Kireka B. St. Stephen polling station, Ibrahim Kirwana had failed to transmit the results in accordance with sections 47-59 of the Parliamentary Elections Act.

Counsel for the appellant further contended that the presiding officer of Kireka B. St. Stephen polling station failed to comply with the legal requirement to make 5 copies of the Declaration  
10 of Results Form and to transmit them in accordance with section 50(1) of the Parliamentary Elections Act

Furthermore, the appellant's counsels also submitted in support of Ground 1 that the presiding officer of Kireka B. St. Stephen polling station had also failed to comply with the requirement of sealing the ballot box with one duly signed Declaration of Results Form.

15 Lastly, appellant's counsel contended that the Court of Appeal erred in fact and law when they held that the carbon copy DR Form Serial No. 18168 exhibited by the Appellant was not an authentic DR Form.

Based on all these various submissions, Counsel for the appellant argued that the only logical conclusion the Court of Appeal should have reached was to find that no results were properly  
20 declared at Kireka St. Stephen B. Polling Station. Counsel cited and relied on several cases including *Col. (Rtd.) Dr. Besigye Kizza v. Museveni Yoweri Kaguta & Electoral Commission, Presidential Election Petition No. 1 of 2001 (Supreme Court)*, *Rtd. Col. Dr. Kizza Besigye v. Electoral Commission & Yoweri Museveni, Presidential Election Petition No. 1 of 2006 (Supreme Court)*, *Kakooza J. B. v. Electoral Commission & Yiga Anthony, Election Petition Appeal 11 of*  
25 *2007 (Supreme Court)*, and *Kayongo Abasi v. Wandyaka, E/P 27 of 2006 (High Court)* in support of their claims.

Counsel for the respondents opposed the appeal and supported the findings and decisions of the Court of Appeal. They submitted that the learned Justices of Appeal properly re-appraised the evidence on record. They argued that the appellant's case as borne out in the Petition and the

accompanying Affidavit of 18<sup>th</sup> May 2006 did not raise the complaint of the declaration of the results of Kireka `B` St. Stephen polling station on a non-prescribed form, which was now the basis of this appeal. They further contended, as they had similarly done in the Court of Appeal, that the complaint about the results of the Parliamentary elections of Kireka `B` St. Stephen was an afterthought, which was introduced by the appellant almost 6 months after the Petition was filed. They further argued that the appellant's supplementary Affidavit filed on 28<sup>th</sup> November 2006 did not validly introduce the complaint about the results of Kireka `B` St. Stephen, as this was a new issue and not evidence in support of the grounds which were raised in the appellant's Petition.

10 In the alternative, the respondents argued that the appeal should fail because the appellant failed to discharge his burden of satisfying the Court that such non-compliance had affected the result of the entire election of Kyadondo East Constituency in a substantial manner as required by section 61 of the Parliamentary Elections Act (Act 17 of 2005 as amended).

I will now turn to the law governing this Appeal. This Petition is governed by the Parliamentary Elections Act. The appellant based his arguments under Ground 1 on the 2<sup>nd</sup> Respondent's failure to comply with section 50 of this Act. The section provides as follows:

**50. Declaration of results forms.**

(1) *Each presiding officer shall fill the necessary number of copies of the prescribed form for the declaration of results as follows:-*

- 20 (a) *One copy of the completed form shall remain attached to the report book referred to in paragraph (c) of subsection (1) of section 6;*
- (b) *one copy shall be retained by the presiding officer for display at the polling station;*
- 25 (c) *one copy shall be enclosed in an envelope supplied by the Commission for the purpose, sealed by the presiding officer and delivered to the nearest result collection centre prescribed by the returning officer, together with the report book, for transmission to the returning officer;*
- (d) *one copy shall be delivered to each of the candidates' agents or, in the absence of those agents, to any voters present claiming to represent the candidates; and*
- 30 (e) *one copy shall be deposited and sealed in the ballot box.*

(2) *The presiding officer shall, in the presence of the candidates and the candidates' agents as may wish to be present, seal the ballot box with a seal provided for the purpose by the Commission.*

(3) *The sealed ballot box referred to in subsection (2) shall contain the following items:-*

- 5 (a) *One duly signed declaration of results form;*
- (b) *The ballot papers received by each candidate, tied in separate bundles;*
- (c) *The invalid ballot papers, tied in one bundle;*
- (d) *The spoilt ballot papers, tied in one bundle;*
- (e) *The unused ballot papers; and*
- 10 (f) *The voters roll used at the polling station.*

(4) *The declaration of results form referred to in subsection (1) shall be signed by the presiding officer and the candidates, or their agents as are present and wish to do so, and the presiding officer shall there and then, announce the results of the voting at that polling station before communicating them to the returning officer.”*

15 The above section elaborately spells out the role of a presiding officer not only in respect of filling the results declaration form, but also in respect to sealing the ballot box. The section also details out what the contents of the ballot box should contain and requires the presiding officer to announce the results of the voting at that particular polling station immediately after he/she has signed the form together with either the candidates, or their agents who wish to do so.

20 Section 61 of this Act, on the other hand, sets out the grounds on which the election of a candidate as a Member of Parliament can be set aside. It provides thus:

(1) *The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court-*

- 25 a) *Non-compliance with the provisions of this act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the non-compliance and the failure affected the results of the election in a substantial manner;*
- b) *that a person other than the one elected won the election; or*

- c) *that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or*
- d) *that the candidate was at the time of his or her election not qualified or was disqualified for election as a Member of Parliament.*

5

(2) .....

(3) *Any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities.*

Learned counsel for the appellant did not refer to this fundamental section in their written submissions. I agree with the submissions of counsel for the respondents that section 61 of the Parliamentary Elections Act is the applicable law in determining whether the elections of Member of Parliament for Kyadondo East Constituency should be set aside.

The appellant satisfied the trial judge that there was non-compliance with section 50 of the Parliamentary Elections Act to the extent that a non-prescribed DR form was used to record the results of the voting held at the Kireka ‘B’ St. Stephen polling station. He however failed to discharge his burden of proving that such non-compliance at this one polling station, (i.e. Kireka ‘B’ St. Stephen Polling Station) had affected the entire result of the elections held for Member of Parliament for Kyadondo East Constituency in a substantial manner, to warrant the results of these elections to be set aside. This was borne out in the judgment of the learned trial judge, where she clearly held that:

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*“The declaration on the Women DRF did not substantially affect the results because the Petitioner’s number of ballots would not have changed since he did not win and that there had been no substantial effect occasioned by the faulty declaration of results merely through the use of a non-prescribed form. The majority of the electorate in the Constituency was not disenfranchised”*

25

In ***Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Museveni, Presidential Election Petition No. 1 of 2006***, this Court considered section 59 of the Presidential Elections Act (16 of 2005), which provides for the conditions that a petitioner must satisfy before the results of a Presidential election can be set aside. As Odoki, C.J. rightly held:

30



**“... Section 59(6) of the Presidential Elections Act anticipates that some non-compliances or irregularities of the law or principles may occur during an election, but an election should not be annulled unless they have affected it in a substantial manner”.**

5 He went on to further note that:

**“Courts are therefore enjoined to disregard irregularities or errors unless they have caused substantial failure of justice. ... The fundamental or primary consideration in an election contest should be whether the will of the people has been affected.”**

As the section under interpretation is similar in wording to section 61 of the Parliament  
10 Elections Act, this Court is bound to follow the same principles when considering whether it should uphold or dismiss an election petition challenging results of Parliamentary elections.

Turning to this case, the burden of proof lay on the Appellant to satisfy the court that the non-compliance with the Parliamentary Elections Act (17 of 2005) had affected the results of the election of the Kyadondo East Constituency in a substantial manner. (see **Rtd. Col. Dr. Kizza**  
15 **Besigye v Electoral Commission & Yoweri Museveni, Presidential Election Petition No. 1 of 2001(supra).**

Similarly, in **Kakooza John Baptist v. Electoral Commission & Yiga Anthony Election**  
**Petition Appeal No. 11 of 2007**, this Court upheld the results of elections after the Appellants  
failed to satisfy this court that the irregularities and the violations of the law that they had  
20 proven had affected the election results in a substantial manner which is the required standard for setting aside results of Parliamentary elections.

The appellant’s evidence challenging the results of the voting which took place at the Kireka ‘B’ St. Stephen polling station was rejected by both the trial judge and the Court of Appeal. The net result of the rejection of the appellant’s evidence was that the results of the voting which had taken place at  
25 the Kireka ‘B’ St. Stephen polling station and which were declared by the presiding officer on the non-prescribed DR Form were left to stand.

Thirdly, the appellant claimed that the results reflected on the carbon copy of DR Form No. 18168 were indeed the ones that were announced by the presiding officer and that his polling agent got his copy there and then and passed it on to him within a few days after the elections. If this was indeed

true, then it becomes difficult to explain why the appellant did not include this ground in his Petition and waited until six months later to raise it.

It is important to note that there were 127 polling stations in the entire Kyadondo East Constituency. Out of these, the appellant complained of results in only one polling station (Kireka 'B' St. Stephen) and abandoned all his other complaints as outlined in his Petition. The evidence adduced by the appellant in support of his Petition were two Affidavits in support of his Petition sworn on 18<sup>th</sup> May 2006 and 24<sup>th</sup> November 2006, with its annexures and the one which was sworn by his polling agent, Moses Wasswa Muwonge.

The presiding officer, Kirwana Ibrahim deponed an affidavit on 11<sup>th</sup> March 2008. In paragraph 15 thereof, he stated that he sealed the envelope containing the results in the presence of Wasswa Muwonge and took them to the Parish Supervisor. The appellant, on the other hand, led no evidence to show how the results of Kireka 'B' St Stephen were transmitted by the presiding officer to the nearest collection centre as required by section 50 of the Parliamentary Elections Act. This being the case, I find no basis for the appellant's claim that the Court of Appeal ever found that there were no duly transmitted results.

Furthermore, the other claims of non-compliance which the appellant raised under this Ground were neither pleaded in his Petition and his supporting affidavits. The appellant never raised or argued these issues during the hearing of the petition to show any other non-compliance with the rest of the provisions of section 50 of the Parliamentary Elections Act. He cannot therefore raise them now during this second appeal as this court cannot entertain matters that were not argued and decided upon by the Court of Appeal. This Court is a second Appellate Court and its duty is to determine whether the first Appellate Court re-evaluated the evidence on record and properly considered the evidence from which the Appeal arose. This is the law as was stated by this Court in *Kifamunte Henry v. Uganda S.C. Criminal Appeal No. 10 of 1997 [1999] KALR 50 at p.57.*

Secondly, the last five arguments that the appellant raised in support of this ground were actually not related to the essence of this ground of appeal, which focused on the Court of Appeal's failure to annul the results of Kireka 'B' St. Stephen elections. I have therefore found no merit in the appellant's claims and arguments made in this respect.

I find that the Court of Appeal properly re-evaluated the evidence on the record and correctly upheld the decision of the trial judge. Ground 1 therefore has no merit and should fail.

Ground 2 of the Appeal is framed as follows:

5                   ***“The learned Justices of Appeal erred in law and fact when they relied on a non-prescribed form of Uganda Martyrs Kyaliwajjala Polling Station which was not in issue at the trial at all and none of the parties to this Appeal had opportunity to adduce evidence on it by way of affidavits.”***

10                   The appellant argued that the Court of Appeal erred in law and fact when it relied on the fact that a similar non-prescribed form had been used to declare the results of Uganda Martyrs Kyaliwajjala polling station. They argued that the results of this polling station were never in issue at all during the trial of the petition and that none of the parties ever raised a counter or cross-petition or adduced evidence on this issue. Counsel for the respondents supported the decision of the Court of Appeal.

15                   I do not agree with the submissions of counsel for the appellant. A review of the record of appeal shows that the appellant was actually cross-examined on this issue. The relevant part of the record reads as follows:

20                   ***“Polling station Uganda Martyrs Kyaliwajjala used a Woman Representative form to give results. I never complained on the use of the form. .... Kyaliwajjala used District Women Representative ...”***

Hence, although the appellant chose not to raise the use of a non-prescribed DR Form for the Uganda Martyrs Kyaliwajjala polling station, the respondents brought this issue out during their cross-examination of the appellant. The appellant’s response became part of the court record.

25                   Secondly, Uganda Martyrs Kyaliwajjala was one of the polling stations in Kyadondo East Constituency for which the appellant was seeking a court order to set aside the results for the entire constituency on grounds of non-compliance with the laws regarding declaration of results. Therefore, all evidence alleging or proving any mal-practice or non-compliance which was brought to the attention of the court was relevant. This being the case, I find that the Court of Appeal did not err in considering the use of a similar form to that one used at Kireka ‘B’ St.  
30                   Stephen, at Uganda Martyrs Kyaliwajjala polling station. Similarly, I do not agree with the

appellant's contention that the Court of Appeal relied on the use of this form in reaching the decision that it did. I have found no merit in this ground and it ought to fail.

I now turn to Ground 3 of the Appeal which is framed as follows:

5                   ***“The learned Justices of Appeal erred in law and fact by relying on the evidence of Salongo Bwabye, the Chairman of the Council of Kireka B Zone L.C. 1 as a voter who had no official capacity to verify results at Kireka B St. Stephen Polling Station.”***

10 Counsel for the appellant attempted to point out what he considered inconsistencies and the untruthfulness in the evidence of the 1<sup>st</sup> respondent. Counsel contended that the evidence of Salongo Bwabye and the DEMGROUP Report had no probative value, first because Ssalongo Bwabye was neither a duly appointed Polling Agent of DP nor its official spokesperson and secondly, that he was a partisan witness.

15 Appellant's counsel also argued that the DEMGROUP report had no probative value because it was not adduced by its authors and there was no evidence to show that it had been filed with the Electoral Commission in order for it to become a public document. The appellant made further submissions on the credibility of the DEMGROUP's report and invited this court to take note of the lies therein.

With due respect to the appellant's counsel, Ground 3 did not mention the DEMGROUP's Report as the basis of this ground. It was therefore not correct for the appellant's counsel to submit to this Court on a matter that was not a subject of the Appeal.

20 Be that as it may, this ground raises the issue of courts' reliance on reports of election observers in election petitions. The position of this Court on this issue was clearly stated by B. J. Odoki, C.J. in *Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006 (supra)*, where he rightly noted thus:

25                   ***“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”.***

I find no merit in the appellant's submissions on this ground of appeal for the following reasons.

First, it is not true that the Court of Appeal relied on the evidence of Salongo Mukasa Bwabye. The lead Judgment of Justice Byamugisha, J.A., in the course of re-evaluating the evidence of the respondent made reference to the evidence of Salongo Mukasa Bwabye. A review of her judgment however reveals that she not only relied on this witness's evidence but also on the following

5 additional evidence on record:

- the handwriting on the carbon photocopy of the Declaration of Results Form which was tendered in evidence by the appellant was not similar to that of the presiding officer;
- the pen that was used to write on the carbon copy of Form No. 18168 form was different from the pen that the presiding officer used to fill out the results on the non-prescribed form for  
10 Kireka 'B' St. Stephen and all the other Declaration of Results Forms filed at the same polling station;
- the fact that the appellant did not cross-examine Salongo Mukasa Bwabye on his evidence that he was present at the Kireka 'B' St. Stephen polling station;
- the fact that Bwabye was an independent witness and that he had witnessed the counting of the  
15 votes and the announcement of the results by the presiding officer;
- the fact that there were other Declaration of Results Forms for other polling stations in the same elections which had not been signed by the agents of the candidates and which the appellant had not complained about; and lastly,
- the fact that the appellant did not complain about the use of a similar non-prescribed form to  
20 declare the results at Uganda Martyrs Kyaliwajjala Polling Station, where he polled the highest number of votes as compared to the votes received by the 1<sup>st</sup> respondent.

Secondly, according to paragraph 4 of his Affidavit, Salongo Mukasa Bwabye swore his Affidavit as a registered voter and not as an accredited election observer as was contended by appellant's counsel.

25 Thirdly, the learned Justices of Appeal rightly noted that the appellant did not object to Salongo Mukasa Bwabye's affidavit which was part of the evidence on record and never cross-examined him during the hearing of the petition. If the appellant wanted to object to the evidence of Salongo Bwabye and the tendering in evidence of the DEMGROUP's Report, he should have

challenged this evidence at the hearing of the petition in the High Court or better still by cross-examining the respondents' witnesses. The appellant did not do so and cannot therefore raise these matters in this Court.

I hold that the Court of Appeal properly considered this evidence and correctly found that the evidence of Salongo Mukasa Bwabye supported the evidence of the respondents with respect to the correct results of the voting held at Kireka 'B' St. Stephen Polling station. I have found no merit in ground 3 and it ought to fail.

Ground 4 and 5 are related and I will therefore consider them together. They are framed thus:

- 10           **4. “That the Learned Justices of Appeal erred in law and fact when they failed to re-evaluate and re-appraise the evidence of the Appellant and Moses Muwonge, his duly appointed polling agent and was present at the polling station until the results were declared and upheld the learned trial judge’s finding that she was not impressed by their demeanour and held that they were evasive, refractory and anxious and rejected their evidence as untruthful, incredible and contradictory.”**
- 15           **5. “ That the Learned Justices of Appeal erred in law and fact when they failed to re-evaluate and re-appraise the evidence of the Appellant and held that there was a casting doubt on the credibility of the testimony of the Appellant and Moses Muwonge his agent because the evidence of falsification of results of Kireka B. St. Stephen polling station in Kyadondo East Constituency was adduced six months later after the Petition was filed in**
- 20           **court.”**

The appellant contends that the Court of Appeal failed to re-evaluate the evidence resulting in upholding the findings of the trial judge with respect to the demeanour of both the appellant and his agent. A review of the lead judgment of Justice Byamugisha, JA. clearly shows that she re-evaluated the evidence of the Appellant and his witness before she upheld the trial judge’s findings regarding their demeanour and credibility. This is evident at pages 11 and 12 of her judgment where she eventually concluded as follows:

***“I have found the evidence of falsification hard to accept. ....The evidence that he (i.e. the appellant) produced was that of his agent who was partisan. ... When the appellant filed his petition in the High Court in May 2006, he did not raise any complaints about the***

*falsification of the results at this particular polling station and yet he knew about the anomaly on 28<sup>th</sup> February or thereabouts. This damning evidence could not have been withheld by the appellant until six months later when it was eventually filed in court. This has the effect of casting doubt on the credibility of his testimony and that of his agent.”*

5

I have found no merit in both these grounds and they ought to fail as well.

In conclusion, I find no merit in this appeal. I would dismiss it with costs to the respondents in this Court and in the courts below.

10 **Dated at Kampala this 14<sup>th</sup> day of May 2010.**

.....

**DR. E. M. KISAAYE**  
**JUSTICE OF THE SUPREME COURT**

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**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA AT KAMPALA**

**CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE,  
5 KISA AKYE, JJSC.**

**ELECTION PETITION APPEAL NO. 6 OF 2009**

**BETWEEN**

**SITENDA SEBALU :::::::::::::::::::: APPELLANT**

**AND**

10 3. **HON. SAM K. NJUBA**

4. **ELECTORAL COMMISSION :::::::::::::::::::: RESPONDENTS**

15 *[Appeal from the Judgment of the Court of Appeal at Kampala ( Engwau, Kitumba  
and Byamugisha, JJ.A) dated 1<sup>st</sup> June 2009 in Election Petition Appeal No. 1 of  
2008.]*

**JUDGMENT OF J.W.N TSEKOOKO, JSC.**

I have had the benefit of reading in draft the judgment of the Hon. Lady Justice Kisaakye, JSC and agree that the appeal ought to fail.

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I would like to make some observations. The grounds of appeal appear in the Judgment of Lady Justice Kisaakye, JSC. This appeal has some interesting features which say a lot not only about the parties but also about appellant's advocated especially in regard to formulating pleadings and the subsequent presentation of arguments.

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The national parliamentary general elections took place on 23<sup>rd</sup> February 2006. Results were announced a few days later and were gazetted on 19<sup>th</sup> April, 2006. The appellant who lost the



election in Mukono North Constituency, by a margin of 23 votes, first sought through Chief Magistrates Court, a recount of the votes. On 18/5/2006, he lodged his petition in the High Court. Both the petition and its accompanying affidavit sworn on that day provided the barest of information in an imprecise manner. It was no surprise that the appellant decided on 5 24/11/2006, six months late<sup>3r</sup>, after the institution of the petition, to file yet another affidavit containing some details of his complaints. Of course it is appreciated that immediately after a general election a candidate may not have all necessary information (within a week or two) to enable him or her to include all material information in a petition or the accompanying affidavit. But this cannot take months where the dispute is about a few polling stations in a 10 particular constituency as this case. I think that counsel for the respondents were justified in their criticism (in their written arguments) of the stance taken by appellant's advocates.

The appellant, or his counsel, did not serve the petition together with the notice of its presentation on the respondents within the seven days prescribed by Rule No. 6 of the 15 Parliamentary Elections (Election Petitions) Rules. His application for leave to serve out of time was denied both by the High Court and the Court of Appeal. It was eventually granted by this court in 2008. Thus the electoral dispute could not be determined by courts as expeditiously as required by law. Perusal of the record shows that this delay is due to the appellant and or his advocates. This must be discouraged.

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The record in these proceedings shows that after the respondents filed replies to the petition, the appellant filed yet another affidavit in response. This affidavit appears to have been intended to enhance the credibility of the appellant's complaints. I have said before, and i would repeat it here that the trial of election petitions on affidavits does not appear to promote justice nor the 25 expected speedy disposal of election petitions. In this petition, the affidavits of the appellant and his key witness were not up to the mark. Pages 305 and 306 of the record of appeal show that while the appellant was under cross-examination of his affidavits, the learned trial judge noted that the appellant's conduct showed he was not truthful. From what the judge observed and some of the answers the appellant gave during cross-examination, the judge found as a fact 30 the appellant was untruthful. In the same way, during the cross-examination of Moses Wasswa Muwonge, a key witness for the appellant, the learned trial judge noted that his demeanour was unsatisfactory and so she justifiably concluded that his key witness was also untruthful.

On the basis particularly of the testimonies of the appellant and his key witness, Waswa Muwonge, the learned trial judge disbelieved the appellant, believed the first respondent and so he dismissed the petition.

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In the Court of Appeal, the Hon. Lady Justice Byamugisha, JA, wrote the lead judgment with which the other two members of the court concurred. In her reasoned judgment, the learned Justice of Appeal reevaluated the evidence before she upheld the decision of the trial judge both on credibility of the appellant and his key witness.

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She further observed that s.50 of the Parliamentary Elections Act which prescribes the procedure in regard to the Declaration of Results Forms does not prescribe what would be the effect or consequences of its non-compliance. It appears to me that the section is directory in the sense that it directs how elections results and paper work connected therewith should be done. Mere non-compliance with a stage in the procedures would not affect the results. I respectfully agree with the opinion of the court of Appeal.

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I think that the decisions of both the trial judge and the Court of Appeal are correct and therefore I would dismiss this appeal with costs here and in the two courts below.

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As the other members of the court agree the appeal is dismissed with costs to the respondents here and in the two courts below.

Delivered at Kampala this 14<sup>th</sup> day of May 2010.

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**J.W.N Tsekooko.**  
**Justice of the Supreme Court**

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

5 (CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE,  
KISAAKYE, JJ. S.C.)

ELECTION PETITION APPEAL NO. 6 OF 2009

BETWEEN

HON. SITENDA SEBALU :::::::::::::::::::::::::::: APPELLANT

10 AND

5. HON. SAM K. NJUBA

6. ELECTORAL COMMISSION :::::::::::::::::::::::::::: RESPONDENTS

15 [Appeal from the Judgment of the Court of Appeal at Kampala (S. G. ENGWAU,  
C.N.B. KITUMBA and C. K. BYAMUGISHA, JJ.A) dated 1<sup>st</sup> June 2009 in Election  
Petition Appeal No. 1 of 2008.]

JUDGMENT OF BART M. KATUREEBE, JSC.

I have had the benefit of reading, in draft, the Judgment of My learned Sister, Kisaakye, JSC  
and I concur in her decision and order she has made.

20 Dated at Kampala this 14<sup>th</sup> day of May 2010

Bart M. Katureebe

JUSTICE OF THE SUPREME COURT

**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT MENG0**

**(CORAM: Tsekooko, Katureebe, Okello, Tumwesigye,**

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**Kisaakye, JJ. S.C.)**

**ELECTION PETITION APPEAL NO. 6 OF 2009**

**BETWEEN**

**HON. SITENDA SEBALU :::::::::::::::::::::::::::::: APPELLANT**

**AND**

10 7. **HON. SAM K. NJUBA**

8. **ELECTORAL COMMISSION :::::::::::::::::::::: RESPONDENTS**

*[Appeal from the Judgment of the Court of Appeal at Kampala (S. G. Engwau, C.N.B. Kitumba and C. K. Byamugisha, JJ.A) dated 1<sup>st</sup> June 2009 in Election Petition Appeal No. 1 of 2008.]*

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**JUDGMENT OF OKELLO, JSC.**

I have had the chance to read in draft the judgment prepared by my learned Sister Kisaakye, JSC and I agree.

20 Dated at Mengo this 14<sup>th</sup> day of May 2010.

.....  
**G.M OKELLO, JSC**

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**  
**(CORAM: TSEKOOKO, KATUREEBE, OKELLO, TUMWESIGYE,**  
5 **KISAAKYE, JJ. S.C.)**

**ELECTION PETITION APPEAL NO. 6 OF 2009**

**BETWEEN**

**HON. SITENDA SEBALU :::::::::::::::::::::::::::::: APPELLANT**

**AND**

10 9. **HON. SAM K. NJUBA**

10. **ELECTORAL COMMISSION :::::::::::::::::::::: RESPONDENTS**

*[Appeal from the Judgment of the Court of Appeal at Kampala (S. G. ENGWAU, C.N.B. KITUMBA and C. K. BYAMUGISHA, JJ.A) dated 1<sup>st</sup> June 2009 in Election Petition Appeal No. 1 of 2008.]*

15 **JUDGMENT OF TUMWESIGYE, JSC.**

I have had the benefit of reading in draft the judgment of my learned sister, Kisaakye, JSC and I agree that the appeal should be dismissed.

I have nothing useful to add.

20 Dated At Kampala this **14<sup>th</sup>** day of **May** 2010

Jotham Tumwesigye  
**JUSTICE OF THE SUPREMEM COURT**