

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT SOROTI
ELECTION PETITION NO 11 OF 2022

ATTAN OKIA MOSES:.....PETITIONER

VERSUS

- 1. ARIKO HERBERT EDMUND OKWORO**
- 2. ELECTORAL COMMISSION:.....RESPONDENTS**
- 3. THE RETURNING OFFICER, SOROTI CITY DISTRICT**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

This is an election petition arising out of the Parliamentary election for the directly elected Member of Parliament for Soroti City East Constituency in Soroti district. In that election, the petitioner was a nominated candidate for the position as an NRM candidate alongside the 1st respondent as an FDC candidate and a one Amuriat Pascal as a UPC candidate who contested in the said elections wherein the 1st respondent was declared winner by the 2nd & 3rd respondent on the 29th July 2022 with 9,407 votes while the Petitioner was pronounced the 1st runner with 8,771 votes and Amuriat Pascal with 115 votes and duly gazetted on 1st August, 2022.

The petitioner contested the election results and filed this petition alleging and contending that the bye-election was not conducted in accordance with the Constitution, electoral laws and the principles laid down therein for the conduct of transparent, free and fair elections. The petitioner contended that at various polling stations, several election offences and irregularities were committed on polling day by various partisan National Resistance Movement officials with direct and passive assistance of several partisan elements among the security personnel

drawn from the armed forces and Uganda Police as well as the 2nd & 3rd respondent.

The petitioner alleges that on the polling day, the 28th day of July, 2022, the whole voting process was at a number of polling stations marred by multiple voting and ballot stuffing and this substantially affected the election results to the benefit of the 1st respondent and to the disadvantage of the petitioner.

The respondents pleaded that the election was conducted in strict compliance with the electoral laws and principles laid down therein. The election was free and fair and the results declared by the Returning Officer reflect the free will of the people of Soroti East Constituency and should be respected.

The respondents denied any involvement of National Resistance Movement officials in commission of any alleged electoral offence or irregularity at any polling stations. The respondents contended that there were no acts of alleged multiple voting and ballot stuffing as alleged by the petitioner and that there is no evidence of such alleged acts.

The deployment of Uganda Police was to keep law and order as mandated by law. The actions of Uganda Police Force were lawful and constitutional given the nature of election process and it was intended to respond to any abnormal situations that were likely to arise with negative impact on electoral process and this enabled all the registered voters who turned up to vote without any interference.

The results from all the polling stations were strictly and perfectly counted, recorded in the Declaration of Results Forms, announced and tallied in presence of all the candidates or their appointed agents and in full view of all other stakeholders who wished to be present and they confirmed and dully endorsed by the presiding officers and candidates agents.

The parties made a joint scheduling conference and agreed on the following facts and issue for courts determination.

Agreed Facts

1. The 2nd and 3rd respondent organized and conducted a bye-election for the directly elected Member of Parliament for Soroti City East Constituency I in Soroti District on the 28th day of July, 2022.
2. The petitioner together with the 1st respondent and a one Amuriat Pascal participated as the lawfully nominated candidates in the said bye-election.
3. Upon conclusion of the polling exercise, the 3rd respondent announced the 1st respondent as the winner of the election with 9,407 votes against the petitioner's 8,771 votes.
4. The 2nd respondent returned and gazette the 1st respondent as the duly elected Member of Parliament for Soroti City East Constituency.

Agreed Issues

The following issues were agreed upon for determination by this court:

1. *Whether the court should consider any affidavits whose propriety is challenged by the parties?*
2. *Whether there was noncompliance with the electoral laws and principles laid down in them during the conduct of the bye-election for Member of Parliament, Soroti City East Constituency?*
3. *If so, whether the noncompliance affected the results of the bye-election in a substantial manner?*
4. *Whether the parties are entitled to the remedies sought?*

At the trial, *Counsel Jude Byamukama* represented the petitioner. *Counsel Kirunda Robert, Isingoma Esau, Bazira Anthony and Waiswa Simon Peter* were for the 1st respondent whereas the 2nd & 3rd respondent was represented by *Counsel Patrick Wetaaka and Jude Mwase*.

The affidavits of all the parties were deemed read and admitted as evidence and some of witnesses were cross-examined on their affidavits. The parties were directed by court to file written submissions which have been considered by the court in determination of this matter.

Whether the court should consider any affidavits whose propriety is challenged by the parties?

RECANING AFFIDAVITS

The Petitioner's counsel objects to the competence of 12 affidavits in support of the 1st Respondent's Answer purportedly deponed by **Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen** and **Ariokot Demita**. These 12 witnesses had already deponed affidavits in support of the Petition and were lured by the 1st Respondent and his legal team to swear another set of affidavits.

The said 12 witnesses had already deponed affidavits in support of the Petition. The affidavits of **Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Ariokot Demita** and **Akello Grace** the other affidavits are from **Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, and Ongodia Stephen**.

Additionally, 4 of the 12 witnesses (**Ogwang Emmanuel, Ocen Nicholas, Emacu Rodrick Denis and Emesu Francis**) have provided affidavit evidence in rejoinder in which they testify that they were induced, bribed and coerced into signing affidavits in support of the 1st Respondent from the chambers of counsel for the 1st Respondent.

Counsel contended that the actions of the 1st Respondent and his legal team in approaching the witnesses of the petitioner, tricking them and obtaining further affidavits from them violates **Rule 19 of the Advocates Professional Conduct Regulations SI 267/2**. It provides that *an advocate shall not, in order to benefit his or her client's case in any way, intimidate or otherwise induce a witness who he or*

*she knows has been or is likely to be called by the opposite party or cause such a witness to be so intimidated or induced from departing from the truth or abstaining from giving evidence. Notably, the **Black's law Dictionary 8th Edition** defines the word **inducement** as; "The act or process of enticing or persuading another person to take a certain course of action."*

The Court of Appeal has ruled that Counsel for Respondents who approach witnesses that have already deponed affidavits in support of a petition in order to induce them to file a different set of affidavits for a Respondent are in breach of Rule 19 of the Advocates Professional Conduct Regulations and the tenets of a fair trial. The Court of Appeal has definitively held that such affidavits deponed in violation of Rule 19 must be rejected whereas the original affidavit and any rejoinder must be accepted. See EPA No. 64 of 2016 *Kintu Alex Brandon v Electoral Commission and Anor* at page 11, EPA No. 72 of 2016; *Nabukeera Hussein Hanifah v Kusasira Peace K. Mubiru* and EPA No. 0046 of 2021; *Mbaju Jackson v Thembo Gideon Mujungu & Anor*

The 1st respondent's counsel invited this Court to strike out all recanting affidavits. The affidavits sworn by **Emacu Rodrick Denis, Acibo Phoiso Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen** and **Ariokot Demita** for the Petitioner (in support of the petition and in Rejoinder) and the 1st Respondent's (in support of the Answer to the Petition) should be completely struck off record and disregarded.

While dealing with affidavit evidence of deponents that recant their earlier affidavits, the Court of Appeal in ***Mbaju Jackson v Thembo Gideon Mujungu & Anor, EPA No. 0046 of 2021***, guided that there are two possible ways of dealing with such affidavits.

- a) To challenge this evidence through cross-examination of such witnesses to test the veracity of their evidence and to pray to the court that such affidavit is thrown out for infringing the right to a fair trial.

- b) To view such evidence of a witness who switched sides with zero credibility that is that the deponent has no credibility or integrity and cannot be relied upon to be truthful as a witness.

The court while relying on **Qurum Okiror Sam v EC and Ochwa David Election Petition 008 of 2008** further held that if a deponent comes forth after offering an affidavit, having an oath administered, and then having had it commissioned turns around and confesses to having made a false averment therein, that deponent has no credibility or integrity and cannot be relied upon to be truthful as a witness whatsoever in any further affidavit.

The Court cautioned that in election petitions such as in the instant case, the practice of witnesses switching sides is becoming too common. That the fact that the witnesses can state one thing on oath one day and state a contradictory thing on oath the next day is bad for the state of law and order in this country.

The 1st Respondent's counsel submits that this court should not rely on any of the evidence of Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita. The 1st Respondent further submits that the credibility of the above witnesses who have sworn affidavits for both the Petitioner and the 1st Respondent stating contradictory statements is considerably compromised and should not be relied upon.

The 1st Respondent counsel contended that this court completely disregards and rejects the evidence of Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita.

The Petitioner's allegations that the 1st Respondent and his Legal team tricked them into signing second affidavits on behalf of the 1st Respondent. These allegations were not supported by any evidence. The said witnesses are not credible and this court should not believe their evidence. The 1st Respondent and his legal team contend that they were not involved any actions in violation of Rule

19 of the Advocates Professional Conduct Regulations SI 267/2 as alleged, or at all.

Counsel submitted that these witnesses are unreliable, and their evidence cannot be relied upon by any court of justice. The recanting witnesses have proved to this court that they are liars, lack credibility, and are no honest members of society. This court should reject their evidence.

Analysis

This court is bound by the position of the law as set out in the various cases from the Court of Appeal on recanting affidavits. *Kintu Alex Brandon v Electoral Commission and Anor EPA No. 64 of 2016*, *Nabukeera Hussein Hanifah v Kusasira Peace K. Mubiru EPA No. 72 of 2016* and *Mbaju Jackson v Thembo Gideon Mujungu & Anor EPA No. 0046 of 2021*. This court is supposed to determine what it should do with such affidavits in the circumstances of this present case.

The witnesses who have deposed the said affidavits are not innocent as they wish to portray themselves in affidavits in rejoinder. The affidavits in rejoinder are crafted in such a manner as to satisfy the standards set in the court of appeal decisions contending coercion or duress. The same witnesses never reported any of these incidents to police afterwards.

Where a witness or deponent comes forth after offering an affidavit and turns around or confesses to having made a false averment therein, that deponent has no credibility or integrity and cannot be relied upon to be truthful as a witness whatsoever in any further affidavit.

Litigation turns on credibility of a witness, therefore a witness's credibility is of utmost importance. If the court believes your witness's version of events, you may win; if the court does not find your witness credible, you are likely to lose.

Credibility is defined in ***Black's Law Dictionary*** as "The quality that makes something (as a witness or some evidence) worthy of belief. Justice Robertson of Ontario n Superior Court of Justice describes credibility as "a function of

truthfulness, reliability and accuracy” See ***Family & Children Services of Lennox & Addington v W(s) 2002 Carswell Ont 4917***

Therefore, where a witness provides inconsistent evidence, it becomes necessary to make a determination as to credibility. Conflicting affidavit requires assessment of the credibility of the witnesses in light of the principles applicable to the assessment of credibility and in light of the burden of proof in adducing evidence.

This court shall not rely on any of the affidavits deposed by the persons who switched sides or made contradictory affidavits since such evidence is not credible in the circumstances of this matter. Therefore the affidavits of the following persons *Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita* are accordingly rejected.

The Courts have always cautioned that in election petitions such as in the instant case, the practice of witnesses switching sides is becoming too common. That the fact that the witnesses can state one thing on oath one day and state a contradictory thing on oath the next day is bad for the state of law and order in this country.

The Office of Directorate of Public Prosecutions is directed take keen interest in this matter with a view of prosecuting the following persons; **Emacu Rodrick Denis, Acibo Phois Mary, Egaru Moses, Akello Mary Goretti, Igimu Immaculate, Emesu Francis, Akello Grace, Ogwang Emmanuel, Ocen Nicholas, Okurut Nathan, Ongodia Stephen and Ariokot Demita** in order to stem out this vice in election litigation.

Falsehoods in Affidavits & Inconsistencies, Contradictions in affidavits and legal consequences. Reliance on Uncertified Public Documents and its effect on the attendant Affidavits.

The 1st respondent's counsel submitted that the Petitioner in paragraph 6 of his affidavit in support of the petition alleges that he appointed agents. In cross-examination, the Petitioner informed this Honourable Court that he did not sign any appointment letter appointing agents. The Petitioner deliberately lied to this honorable court with respect to appointing agents. The Petitioner was at all material times aware that he never appointed any agents but deliberately, with impunity and intent to lie to this Court, claimed to have appointed agents. This falsehood should not be treated lightly.

The evidence of Okori Emmanuel further contradicts that of Oyoyo Samuel, the two individuals agree that they were both at the same polling station at the same time on that day. They were arrested at the same polling station and placed in the same vehicle.

Analysis

The 1st respondent raised the above issues as objections to the affidavits of the petition. The determination of the above goes to the determination of the merits and the court must evaluate the affidavit evidence on record in order to arrive at a decision.

The alleged falsehoods or contradictions and inconsistencies are questions of evaluation of the entire evidence on record. The court should not in a preliminary manner strike out affidavits without weighing what was said by other witnesses in the matter. An election court should guard the political rights of the citizens and the constituency. The conduct of the trial of an election petition cannot be left to the caprice of the party.

The election court has the power to examine the evidence presented in accordance with the circumstances surrounding the case. No document can be held to be inadmissible on ground that it is not duly stamped or registered. The general principles governing election enquiry as a general rule is well settled that the statutory requirements of election law must be strictly observed and an election contest is not an action at law or a suit in equity but is purely statutory proceeding guided by such electoral laws.

In cases where the election law does not prescribe the consequences or does not lay down the penalty for non-compliance with certain procedural requirements of that law, the jurisdiction of the Court entrusted with the trial of the case is not affected. Election matters are *sui generis* with a special character of their own, quite different from civil or criminal proceedings. They are governed by their own statutory provisions which regulate their practice and procedure.

Therefore, witnesses not deposing to some facts truthfully, *falsus in uno falsus in omnibus* could be no ground to reject the whole body of evidence or testimony. The principle *falsus in uno falsus in omnibus* is not applicable. It is not a rule of law that the testimony of a particular witness has to be rejected in entirety since a part of it has been rejected. It is simply a rule of caution. See **Ch. Razik Ram v Ch Jaswant Singh Chouhan [1975] 4 SCC 769**

The court cannot strike out or reject an affidavit simply because it contains falsehoods, inconsistencies or contradictions. This court would overrule this objection to the affidavits and the same will be evaluated with the rest of the evidence in the entire petition.

BURDEN AND STANDARD OF PROOF

S.61 (1) of the Parliamentary Elections Act provides that:

The Election of a Member of Parliament can only be set aside on any of the following grounds if proved to the satisfaction of the Court

Odoki CJ(as he then was) in his elaborate reasons for the Supreme Court Judgment in the **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2001** Supreme Court has the following to say on this important point;

“In my view, the burden of proof in an Election Petition as in other Civil Cases is settled. It lies on the Petitioner to prove to the satisfaction of Court” at Pg 16 of the Reasons.

The same principles have been reiterated in the case of ***Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2006*** citing ***Election Petition No.1 of 2001***

Odoki, CJ(as he then was) 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."

In this petition, therefore like in all Election Petitions, it is the petitioner who bears the burden of proving his allegations to the satisfaction of Court. It is only after the Court is duly satisfied that the grounds raised have been proved to its satisfaction that it will invoke its powers under Subsection (1) of Section 61, read together with Subsection 4 (c) of S. 63 of the Parliamentary Election Act of 2005

S.62 (3) of the Parliamentary Elections Act *provides that any ground specified in Subsection (1) should be proved on the basis of a balance of probabilities.*

The only crucial aspect of this issue which this Court must emphasize and bear in mind throughout the trial of an Election Petition, is the degree of a probability which must be attained before the Court can regard itself as satisfied that the ground or allegation is proved under S. 61 (1) and S. 61 (3) of the Parliamentary Election Act of 2005.

In the Case of ***Karokora Katono Zedekia v Electoral Commission Kagonyera Mondo HC-05-CV-EP 002 – 2001*** Justice V.F. Musoke-Kibuuka (RIP) noted at Pg 6;

“It is quite critical to emphasize and bear in mind the crucial fact that, setting aside an election of a Member of Parliament is, indeed, a very grave subject matter. The decision carries with it much weight and serious implications. It is a matter of both individual and national importance. The removal of the elected Member of Parliament renders the affected Constituency to remain without a voice in Parliament for some time.

Parliament will continue to carry out its legislative function on matters of public national importance without any representation of the Constituency affected. When the election is set aside, the Member of Parliament affected suffers both serious personal remorse as well as adverse financial effects..... Thus, the crucial need for Courts to act in matters of this nature only in instances where the grounds of the Petition are proved at a very high degree of probability”.[Emphasis mine]

In order to merit an order setting aside the election of a Member of Parliament the evidence produced by the Petitioner must be such as would, in the circumstances, compel the Court to act upon it.

Although the standard of proof is on the balance of probability, it must be slightly higher than in ordinary cases. The authority for this observation is ***Election Petition No. 9 of 2002 Masiko Winfred Komuhangi v Babihuga J. Winnie***. This is because an election is of a great importance both to the individuals concerned and the nation at large.

Similarly in the case of ***Sarah Bireete and Another v Bernadette Bigirwa and Electoral Commission. Election Petition Appeal No. 13 of 2002*** (unreported) it was noted by the court of Appeal “A Petitioner has a duty to adduce credible

evidence or cogent evidence to prove his/her allegation at the required standard of proof”

The respondent carries no burden to discharge as long as the petitioner has not produced sufficient evidence required to show the truth of the allegations is highly probable. In other words the burden of proof on the petitioner is high and it does not shift. See ***Akurut Violet Adome v Emurut Simon Peter EPA No. 40 of 2016***

This court has a duty to look at the affidavits in support of the Petition and evaluate the same against the respondents answer and supporting affidavits in order to satisfy itself of the allegations made in the petition.

With regard to numerical strength, the general rule is that no number of witnesses shall be required for proof of any act. Evidence is to be weighed but not counted. The direct evidence of one witness if believed by the Court is sufficient proof of a fact but a line of hearsay evidence cannot be sufficient to prove any fact.

Sarkars’ Law of Evidence 14th Edition 1993 Reprint 1997 at pg. 87. States according to Wigmore, the common law in repudiating the numerical system lays down 4 general principles;

1. *Credibility, does not depend on number of witnesses.*
2. *In general, the testimony of a single witness, no matter what the issue or who the person may legally suffice as evidence upon which the Jury may find a verdict.*
3. *The mere assertion of any witness does not of itself need not be believed even though he is unimpeached in any manner, because to require such belief would be to give qualitative and impersonal measure to testimony.*
4. *All rules requiring two witnesses or combination of one witness are exceptions to the general rule.*

It is trite law that the decision of Court should be based on the cogency of evidence adduced by a party who seeks judgment in his/her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince reasonable tribunal to give judgment in a party’s favour. ***Paul Mwiru v Hon Igeme Nathan Samson Nabeta & 2 others EPA No. 6 of 2011***

In addition, it is incumbent upon the petitioner to prove or to produce cogent evidence to prove the allegations and not to rely on the weakness of the respondent's case. Therefore, an election petition cannot be permitted to derive strength from the weakness, if any, of the other side. See ***Odo Tayebwa v Bassajabalaba Nasser & Electoral Commission Election Petition Appeal No.013 of 2021; Jeet Mohinder Singh v Harminder Singh Jassi, AIR [2000]AIR SC 256***

The sum effect of the above analysis is that the success of a candidate who has won at the election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of law. However, equally well established is the proposition that though election of a successful candidate is not to be lightly interfered with one of the essential requirements of the election law is to safeguard the purity of the election process and also see that people do not get elected by flagrant breach of electoral laws or the Constitution.

Purity of election must be maintained at all costs. Any attempt to procure success by unfair and foul means should be ruthlessly suppressed. Crooked and illegal methods employed by a candidate, his workers or agents, must be suitably dealt with and sternly put down by enforcing the law of elections. But at the same time, allegations must be proved to the satisfaction of the court.

Determination of Issues

Whether there was noncompliance with the electoral laws and principles laid down in them during the conduct of the bye-election for Member of Parliament, Soroti City East Constituency?

Akisim PAG Church Compound polling station.

The petitioner alleges under paragraph 7(a) of the Petition that there was ballot stuffing, arbitrary arrests of agents, shooting of live bullets, and alteration of the declaration of results forms at Akisim PAG Church Compound Polling Station. To further this allegation, the Petitioner relies on the affidavit evidence as stated in paragraph 23 of his submissions.

The Petitioner alleges that his agents at this polling station were arbitrarily arrested and relies on the evidence of Oyoyo Samuel and Okori Emmanuel. The two stated in their affidavits that they had been arrested after they had protested

to taking of ballot papers from the polling station by unknown people. The Petitioner also relies on an alleged video recorded by the said Okori Emmanuel.

The petitioner's counsel submitted that there was ballot stuffing at this polling station with pre ticked ballot papers in favour of the 1st Respondent, arbitrary arrests of his agents, shooting of live bullets at the station, dispersing of voters and finally, alteration of the Declaration of Results Form to conceal the fact that the total number of ballots cast exceeded the number of registered voters.

The DR Form obtained by the Petitioner from **Aguti Babra Agnes** the agent of the other candidate in the race, Amuriat Pascal, indicates that the 1st Respondent obtained 567 votes, the Petitioner 175 votes and Amuriat Pascal 1 vote. There were 17 invalid votes cast at the polling station. The results on this DR Form indicate a total of 760 votes cast yet the certified Voters' Register (annexture E to Petitioner's affidavit) for Akisim PAG Church Compound indicates a total of 758 registered voters.

The respondent's counsel submitted that that since the Petitioner did not have any appointed agent as he admitted in cross examination and as we submitted in issue one above; the petitioner has no evidence to support his allegations. We submit that the Petitioner's allegations of arbitrary arrests of Okori Emmanuel and Oyoyo Samuel are false. The allegations of the arbitrary arrests were controverted by the affidavit evidence of Eroku Stanley, and the agents of the 1st Respondent, Alung Patrick and Akiso Lucy. In his evidence, Eroku Stanley mentioned that he does not know the said Oyoyo Samuel and Okori Emmanuel and never saw them on the day of polling.

The 2nd & 3rd respondents' counsel submitted that Aguti Babra Agnes lied when she stated that there was 100% voting, it was contended that this a lie since it was not 100% voting as per Tally Sheet & DR Form annexed to petition. There was accountability of 100 unused ballot papers as per DR Form. She dully signed DR Form without indicating any objection as indicated in her paragraphs 13 & 14 and annexure B to her Affidavit. She does not contest the results obtained by each candidate as indicated in DR Forms. The only contention is on 17 votes first indicated as invalid and later as spoilt, but both belong to no candidate/non benefited.

Analysis

This court notes that there was a scuffle that happened outside the confines of the demarcated voting area, the same had no effect on the process of polling and it was quickly handled by the relevant authorities and the police constables who restored peace. The arrest of the two agents if at all was related to the election chaos or confusion at the polling station had to be dealt with in order to facilitate the election process (voting).

None of the witnesses stated that the election exercise or voting ended during the chaos or scuffle. The election continued without the two persons who had been arrested. The Petitioner stated these were his agents at the polling station, but this court is not sure of this fact since the petitioner stated in his evidence in cross examination that he never personally appointed the said agents since he was admitted at hospital on the election eve.

Justice Yorokamu Bamwine (as he then was) in the case of ***Bantalib Issa Taligola vs Electoral Commission & Wasugirya Bob Fred*** equally noted that:

“Court is cutely aware that in election contests of this nature, witnesses, most of them motivated by the desire to score victory against their opponents, deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain.”

Therefore, the evidence of polling agents and persons working for a candidate should not be ordinarily relied upon and if it is to be relied upon the court should be extremely cautious on its credibility. Testimony of political witnesses is to be accepted with care. The evidence of the election petitioner and his/her election agent is partisan. This has to be assessed with great caution. Interest or partisanship is a strong element that weans one away unconsciously from the truth.

The Petitioner wants to take advantage of the chaos in order to deny the inclusion of the results at this polling station. The petitioner’s evidence at this polling station is that elections continued after the scuffle and indeed results were returned on the Declaration of results forms. The contention is on the invalid votes at the polling station and why all the voters turned up on the voting day.

The petitioner has lined several persons or voters who claim that they did not vote on that day at the said polling station. It is always hard to believe that a

person did not without strong collaborative evidence on court record. The petitioner should have produced the voting register used at the polling station on that day instead of merely attaching a fresh voter's register which did not assist this court in establishing whether they voted or not. This court has a duty to examine the evidence having regard to fact that where the electorate has chosen their candidate at an election, their choice ought not to be lightly upset.

The declaration of results forms clearly show that the votes obtained by the candidates are the same and there is no ballot stuffing of excessive votes cast. The petitioner's witness (Aguti) clearly signed the same Declaration of Results Forms and never stated any problem which would have stopped her from signing as an agent of one of the contestants. (Amuriat Pascal obtained 01 votes, while Ariko Herbert Obtained 567 votes and Attan Moses got 175 votes. The only identifiable difference is on the 17 votes indicated as invalid votes on Aguti's DR form while on the certified copy of Electoral Commission indicates that the 17 were spoilt ballot papers and ballots issued at the polling station.

This would mean that the 17 ballot papers would not affect the number of voters since the spoilt ballot papers are never indicated as votes cast since they never get into the ballot box. It could be an acceptable error to record the same as invalid votes instead of spoilt ballot papers. In an election contest it is the public interest, not the parties claims, which is the paramount concern. The voters expressed their will at this polling station and cast their votes which are not in dispute, the claims of the petitioner on spoilt and invalid votes will not be entertained to lead to a cancellation of the results of the entire polling station in order to obtain victory for the petitioner.

Otatai Primary School polling station.

The petitioner's counsel submitted that the non-compliance at this polling station relates to the failure by the 2nd and 3rd Respondents to conduct the election in a free and fair manner which created room for the arbitrary arrests of the Petitioner's polling agents, unauthorised voting, multiple voting, ballot stuffing which the 1st Respondent benefitted from. There is further noncompliance on account of false entries on the certified copy of the DR Form, evidence of forged signatures of the Petitioner's agents and material lies on the face of the DR Form like attributing a ghost agent (Wansukina Michael) to the Petitioner that he never appointed. The petitioner contends that the signatures on the Declaration of

Results Form are a forgery. He further stated that several voters did not exercise their right to vote.

The 1st respondent's counsel submitted that the 1st Respondent led evidence through the affidavit of Eyatu Wilson who testified that he was present at the polling station with all purported agents of the Petitioner up until the point the polling closed. Isabu Josphine also testified that she was present at the polling station till close of polls and witnessed the agents of the Petitioner sign. This was also not rebutted. The witnesses of the 1st Respondent state that the voting went on peacefully throughout the day. The Petitioner has not adduced cogent evidence to prove his allegations. We submit that the allegations of forgery and arbitrary arrests are a ploy by the Petitioner to mislead Court without any cogent evidence to prove so.

The 2nd and 3rd respondent counsel submitted that the allegations of ballot staffing and forgery of the petitioner's agents signatures are baseless and not supported by an evidence.

Analysis

The person who claims to have been an agent has not set out any proof appointment as an agent and it is only persons duly appointed that can sign on the DR forms at the end of the election process. There are glaring contradictions in the evidence and or falsehoods that are being peddled by the witnesses. Omara who was one of the agents states that the RDC arrived in the morning with over 10 policemen and asked them to sign DR Forms and when they refused he ordered for their arrest while Ayebo does not mention of the RDC being present and she stated that the 10 police officers came only after their refusal to sign DR Forms. These are grave and deliberate falsehoods and contradictions in affidavits made on oath.

In addition, the persons produced as witnesses to prove this fact are not known agents or supervisors don't have any proof of appointment as lawful agents in absence of any appointment letters. Furthermore, the custodian of appointment letters of the polling agents is the Electoral Commission under section 32(2) of the Parliamentary Elections Act. The 2nd Respondent's duty was to ensure that the agents of the Candidates that were allowed at the polling station and allowed to sign are the agents that had been submitted to them. To this end, the Petitioner

forwarded a one Wansukina Michael and Omara John and these are the agents that signed the DR Form.

First and foremost, according to annexure A₂ to the affidavit of Omer Paul and also annexure A to Nandala's affidavit dated and filed in this honourable court on the 26/9/2022 being the list of accredited observers for Soroti East Division by-election on page 3 Jack Sabiiti the source of the phone used for forensic examination was never at the Tally Centre and not accredited to be anywhere in East Division during the by-election. He was not among the 10 FDC accredited observers and therefore the source of information on his telephone submitted for examination is unknown and alien and of no evidential value to this petition.

Paragraph 8 of his affidavit does not state the serial number and model of the alleged Alcatel V4G3Q phone from where the alleged information was extracted. The details of the phones from which the information is got is clearly stated in paragraph 7 of his affidavit, however, pages 1 & 2 of his report give a description of a different device as Samsung Galaxy All SM-A115FIDS without serial number than the one he examined according to his affidavit. Samsung galaxy All SM-A115FIDS SN: R9JN50IGF and ALCATEL:SN: V4G3Q. The report relates to a different device not the one alluded to in the affidavit.

Senior Government Analyst (Namuwoya) at Directorate of Government Analytical Laboratory who examines documents. She states in paragraphs 4 and 5 that she relied on certified copies of the DR Forms to compare with original uncertified DR Forms. Certified copies of the DR Forms by their nature are photocopies from the original which could not give a clear analysis for comparison purposes as they fade during photocopying, the strokes and strength/ pressure exerted on a document during writing cannot be ascertained from photocopies even if certified copies. That would only be done if the documents being compared are both in original form. The comparison must or should be between original documents in original ink both purporting to have been signed or written by the same person.

A court is entitled to accept the evidence of an expert if it is credible, particularly if it is uncontroverted or challenged and the expert has demonstrated skills. However, the evidence of an expert is generally an aspect of the entire evidence evaluated by a court because a trial court must be fully in control of all the evidence before it and must not abdicate its primary duty of assessing the

evidence and forming its clear opinion in relation thereto, including any expert evidence.

It bears emphasis that the handwriting or expert's Reports or findings are merely a formation of an opinion which in itself is not conclusive evidence. In other words, a court is not bound by the evidence of an expert witness, it has an opinion in the matter, that it must exercise judicially and judiciously. It can be rejected if found to be contradictory, unreliable and unhelpful.

The persons who claim not to have voted on that day cannot be verified with certainty in absence of the voters register used at the same polling station which is usually locked in the voters box after the election exercise.

AMURIAT PASCAL UPC Candidate throughout his affidavit does not state anywhere that that his agents ever informed him of any rigging, intimidation, ballot stuffing and unlawful arrests as per his paragraph 9. Since he was not physically present at all the polling stations he could only rely on appointed agents for information.

The allegations of rigging, intimidation and ballot stuffing, unauthorized voting, multiple voting have not been proved to the satisfaction of court on balance of probabilities.

Owolo C.O.U Compund Polling Station; Aloet Akum Catholic Church Polling Station;Opuyo Primary School Polling Station; Aminit Primary School Polling Station and Omalera Mango Trees Polling Station.

The petitioner alleged that at above polling stations there was heavy deployment of security personnel who aided ballot stuffing, forgery of signatures of petitioner's polling agents or refusal to sign on the DR forms.

The noncompliance at this polling station relates to the failure by the 2nd and 3rd Respondent to conduct the polling exercise in a free and fair manner that led to stuffing of ballots and fraudulent entries on the certified DR Form. The results at this polling station also indicate a 100% voter turn up even though several voters, who have provided affidavit evidence, did not vote.

The petitioner further contended that there was arbitrary arrest of polling agents who were later allegedly coerced to sign declaration of results forms. There was arrest of the petitioner's agents to facilitate pre-ticking of ballot papers and ballot stuffing.

The petitioner further challenges the election because the certified DR form indicates that the number of males and females who voted at several polling stations does not tally. His conclusion is that there was ballot stuffing, multiple voting and disenfranchisement of voters.

Analysis

The allegations set out at all these polling stations are not supported by any cogent evidence and they appear to be challenged in a 'choreographed' manner in order to tilt or overturn the victory of the 1st respondent. The petitioner makes general statements about what happened without any specifics at each of the polling stations on the alleged ballot stuffing, multiple voting, pre-ticking of ballot papers, disenfranchisement of voters and alteration of results on the Declaration of Results Forms.

The petitioner does not state in all his evidence how many votes were ballot stuffed or how many people voted more than once. He only analyses the number of male voters and female voters and then concludes that there was ballot stuffing. The court must evaluate such evidence with specificities in order to avoid speculation and conjectures in an election. The petitioner presupposes that at any polling station in an election, there should never be 100% turnout.

There was an attempt to prove this by getting some of the voters at the said polling station to deny ever voting during the election. Such a blanket statement of denial of voting should be taken with caution and the court ought to look at the other pieces of evidence. In this case, the petitioner does not produce in this court any of the registers used at the said polling stations. This would mean that this court would be engaging in surmises and conjectures that it is not possible to vote 100% at a polling station. It may have been quite believable if some persons in the register had died with proof of death certificates then the 100% voter turnout would have been satisfactorily disproved.

The allegation of disenfranchisement has not been proved and none of the voters was at the polling station and denied their right to vote whatever is stated by persons who claim not to have voted is highly suspicious. To prove disenfranchisement of voters, the voters affected by the disenfranchisement must testify their registration at the polling station provable by a voter's card and presence of their names in the voters register. They should then lead evidence to prove that they actually presented themselves to vote at the polling station but were denied a right to vote.

The allegation of pre-ticking or ballot stuffing or multiple voting is premised on number of males and females who voted. The discrepancy in the number of male or female voters does not in any way affect the integrity of an election. The law requires the presiding officer to register on the DR form the valid votes cast for each candidate and the name of the polling station and to this extent there was total compliance with the law. The assertions that the number of males and females differ are simple arithmetic errors that do not point to non-compliance with the law.

An election is not to be set aside for informality or for a triviality. The objection must be substantial, something calculated to really affect the result of the elections. See *Sitenda Sebalu v. Sam .K Njuba and The Electoral Commission Election Petition No. 01 of 2008*. Furthermore, the court has guided in *Babirye Jane Zaninka v Bukenya Michael Iga and The Electoral Commission Election Petition No. 0002 of 2021* that such anomalies are minor and can be explained by human error and fatigue that are associated with the exigencies of Election Day. Inadvertent errors could also be explained by lapses in training but not deliberate tampering.

The petitioner generally contends that since there was deployment of policemen and military men then the election was compromised and therefore should be nullified at specific polling stations. This was a bye-election and in my view it was highly charged between Forum for Democratic Change and National Resistance Movement. Extra security precaution was taken to ensure that the election exercise ends smoothly without any hiccups. The evidence on record clearly shows that all parties deployed their top party leadership to oversee the election process. It could be indeed be anticipated that there would be likelihood of chaos at some places with the electoral area.

Deployment of security personnel at a polling station does not lead to nullification of an election. In **Amama Mbabazi v. Y. K. Museveni and Another Presidential Election Petition No. 1 of 2016**: *the Supreme Court held that the mere presence of police or army is lawful, where called upon by lawful authority.*

The Petitioner has not adduced any iota of evidence to show that the security personnel at Owolo C.O.U Compound Polling station were illegally at the polling station. There is no evidence to show that the security personnel engaged in any illegal act or election malpractice. Their presence had no bearing on the election. Besides, this polling station registered 100% voter turn up which could be attributed to the security deployment which enabled the voters to feel secure to vote.

The petitioner did not adduce any evidence to prove that any security personnel intimidated any person. No person claimed to have been intimidated and no security personnel were accused of intimidation. No single witness reported a matter of intimidation to either the 2nd Respondent or to police. It would be wrong for court to take evidence of intimidation of voters when the alleged voters who were intimidated at the different polling stations never reported to police or electoral commission. All the Petitioner's witnesses state that they abandoned voting and this would mean that it was at their own volition and should not be attributed to deployment of security personnel.

The petitioner contended that at Aminit Primary School polling station, there was a fracas and chaos which compromised the entire election at the said polling station. The evidence on record indeed confirms that there was the Petitioner's agents started a fracas and disrupted voting only temporarily resulting in the police response to contain the fracas. However, the voting continued peacefully and that the Petitioner's agents left the polling station only after vote counting.

The voting occurred peacefully and that there was a minor disruption that called for temporary police intervention where after voting resumed normally. The version of events above does not reveal any non-compliance as alleged by the Petitioner. It simply shows that voting went on as expected and that the only disruption that occurred was from a minor response by the police to maintain law and order at the polling station and to protect the sanctity of the polling process.

The police intervention was justifiable and proportionate given the rowdiness that developed at the polling station due to the Petitioner's supporters and that the

same was within the police's mandate. The Supreme Court in ***Col (Rtd.) Dr. Besigye Kizza v Museveni Yoweri Kaguta and Electoral Commission Election Petition No. 1 of 2001*** has set out the role of the police in election matters. The court set out that the police in exercise of its duty/obligation of ensuring orderly management of the affairs of civil society – is in respect of election matters obligated to ensure that elections, such as the bye election, are conducted under conditions of freedom and fairness.

The court should not disregard election process and results simply because one group has turned rowdy in order to defeat the entire exercise. This would encourage any party to cause disruption or chaos in an area where they have least support in order to cause a cancellation or nullification of the results. The court should not fall in the trap of chaotic candidates and agents who want to win an election at whatever cost. The evidence on record shows the election exercise continued and there is no justification for cancelling the results at this polling station. The law envisages such situations and the same would be addressed by resuming the election exercise after the fracas.

Any form of breach of the law by any person must be brought to the attention of Electoral Commission or other authorities like the police. The concerned offices must be informed of the acts that do constitute breach of the law. The agents are in the most vantage points to give evidence of wrongdoings at a polling station.

The petitioner and his witnesses who have deposed affidavits seem to make these complaints to court without ever reporting to the Electoral commission. This makes their evidence suspicious and an afterthought. The agents of the petitioner in the entire election exercise did not complain to the Electoral commission and they did not lodge any complaint, it becomes quite unbelievable that the same agents turn around to allege that there was non-compliance unless they are confessing that they did not know what they were sent to do at the polling station.

Therefore, it would be unfair for the petitioner as a candidate who never made any formal or written complaint to Electoral Commission to turn up in Court later after the elections and claim that the Electoral Commission failed in its duty to prevent or stop something that was never brought to its attention. In the same vein to lay all sorts of allegations after the elections and yet these had not been raised before the election or during polling. This would only mean that these

allegations are an afterthought by the petitioner after he had lost an election and are not corroborated at all by independent bodies like Electoral Commission which would investigate such complaints or allegations.

Sections 46(1) Parliamentary Elections Act allows Candidate's Agent who is dissatisfied with the polling process to raise an objection in writing.

S.47(4), (5) and (7) of the same Act provides for the vote counting and recording procedure and process where the votes cast each candidate should be recorded both in figures and words and thereafter agents countersign the DR Forms in confirmation.

S.48 (1) provides for complaints in writing by Candidate's Agent during counting of votes. The results garnered by each candidate are deduced from the DR Forms. It is clear that the Petitioner's agents counter-signed the declaration of results forms and no complaints of irregularities were recorded with the presiding officer, the Returning Officer or with police. By signing the forms, they confirmed the results therein. Courts have established that irregularities at the polling station or on results which a candidate obtained can only be deduced from the declaration of results forms. What is important is that the record is transmitted to the Electoral Commission. In the case of ***Hon. Gagawala Nelson Wambuzi v Electoral Commission and Kenneth Lubogo HCT-03-CV-EP-0008/2011*** where Hon. Lady Justice Flavia Senoga Anglin held that; *"when an agent signs a declaration of results form, he is confirming the truth of what is contained therein. He is confirming to the principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore stopped from challenging the contents of the form because he is the appointing authority of the agent".* Further that *"even an agent who refuses to sign a declaration form but does not state the reasons for not signing as prescribed on the form is also estopped from claiming that there were irregularities at the polling station when he had an opportunity to complain but did not".*

The petitioner's agents duly signed on the DR forms and confirmed the results and those who claim not to have signed failed in their duty as agents and they ought to have given the reasons for their refusal to sign on the DR forms.

There must be evidence, direct or circumstantial, from which to infer the other fact that the election was not conducted in accordance with the election laws.

There can be no inferences unless there are objective facts, direct or circumstantial, from which to infer the facts which it is sought to establish. Therefore, the court must only make inference from the evidence and circumstances in order to avoid getting in conjectures and speculation. If there is no positive proved facts, oral, documentary or circumstantial from which the inferences can be made then court cannot make findings based on mere speculation and conjecture that the election was marred by election irregularities as the petitioner would wish this court to believe.

The petitioner further contended that there was falsification of results or alteration of results on Declaration of Results forms. This led the petitioner to go a step further to examine the signatures on the DR forms. It is not enough merely to allege falsification of results or forgery of results. The petitioner must lead such cogent evidence to prove this serious allegation.

To prove falsification of results of an election, two sets of results—one genuine and the other false must be put in evidence by the party making the accusation. After putting in the evidence, the two sets of results, a witness or witnesses conversant with the entries made in the declaration of result form must be called by the party making the accusation of falsification or forgery of the results of the election to prove from the election how the results of the election were falsified or made up. Falsification of election results has to do with unjustified reduction of votes scored by the petitioner, and unjustified enlargement or jacking up of results or increment of the votes scored by the respondent.

The petitioner failed in his duty to prove the falsification of results with his own evidence. He tried at great length to rely on the weakness of the respondent's case and contending that certain pieces of evidence were not controverted. It is the duty of the petitioner to establish his claim of falsification of results on his evidence which is credible and cogent and reasonably believable. Therefore, the onus of proving falsification of results is on the petitioner and not the respondent.

If so, whether the noncompliance affected the results of the bye-election in a substantial manner?

The petitioner's counsel submitted that non-compliance with electoral laws per se is not enough to overturn an election. However, in a case like the instant case where the noncompliance is glaring, it is safe to conclude that the noncompliance

affected the result both qualitatively and quantitatively. Therefore, it is our case that the irregularities and election offences committed at *Akisim PAG Church Compound, Owolo C.O.U Compound, Aloet Akum Catholic Church, Otatai Primary School, Opuyo Primary School, and Aminit Primary School polling stations* affected the outcome of the election in a substantial manner.

Counsel further submitted that the Court of Appeal has adopted two correctional measures in dealing with petitions where the evidence on record proves that there was noncompliance with the effect of overturning the victory of a benefactor of illegalities. On one hand, where the evidence of noncompliance is specific to particular polling stations, the offensive results are excluded from the final results tally sheet and the court must determine whether the winning margin is affected or not. If the excluded results affect the winning margin, then the final result is deemed to have been substantially affected.

If the excluded results do not affect the winning margin, then the noncompliance will not have substantially affected the final outcome. The court is required to adopt the quantitative test which is arithmetical once the petition is challenging specific polling stations. The results of candidates obtained at the impugned polling stations must be excluded from the Tally Sheet. While on the other hand, if court is satisfied that there was noncompliance, it adopts the qualitative test and the results of the entire election are nullified and an order for conduct for a fresh election is made.

The 1st respondent's counsel submitted that that the Petitioner, has not adduced evidence to show that there was non-compliance with the Parliamentary Elections Act as amended and other prevailing electoral laws and as a result cannot show that the results of the by-election were affected in a substantial manner. Further, they contended that even if the Petitioner were to show non-compliance in the by-election such non-compliance cannot be said to have affected the election in a substantial manner.

It is now well established that in order to overturn an election on the basis of non-compliance under s.61 (1)(a) of the Parliamentary Elections Act as amended, it is not enough to merely show non-compliance in an election. Instead, it must be

demonstrably shown by the Petitioner that non-compliance affected the results of the election in a substantial manner and in appraising the question of substantiality both quantitative and qualitative approaches must be used to appraise the entire process of the election.

Counsel submitted that no evidence of non-compliance has been led by the Petitioner in the present petition. The Petitioner has specifically targeted six polling stations namely, Akisim PAG Church Compound, Aminit Primary School, Aloet Akum Catholic Church, Opuyo Primary School, Otatai Primary School and Owolo Church of Uganda Compound. At each of these polling stations, the Petitioner claims that electoral offences and malpractices occurred. Therefore, as shown by our analysis of the evidence under Issue 2, there is no basis upon which the Petitioner's broad allegation of non-compliance is supported.

The 2nd & 3rd respondent's counsel submitted that the substantial effect can only be drawn and arrived at when and after a comparison and adjustments have been made from the results scored between the loser of an election/ petitioner and winner so that after adjustments the winner's victory margin is reduced or completely closed. The Petitioner miserably failed to prove that there was any non-compliance that substantially affected the results in a substantial manner.

He had the burden to prove these specific illegalities and show in terms of specific number of votes, his election was affected, with near precision. See **Bura vs Sarwath [1967] EA 234** at 239 E-H. The failure by the Petitioner or his agents to make complaints during the polling exercise makes it quite unbelievable at such a later stage and Court cannot rely on mere suspicions and baseless allegations.

All the evidence on record clearly shows that the Petitioner or his agents never reported to the 2nd Respondent as required by law and the whole petition is an afterthought intended to appease and soothe the Petitioner's supporters. All the allegations have been found to be baseless since they were never reported to the Electoral Commission and there is no way an assumption can be made on matters that were never disclosed to create a substantial effect.

There is a serious gap in the evidence of the Petitioner as has been highlighted in the evaluation of evidence. In sum therefore, the non-compliance if any could not affect the results substantially since the Petitioner has failed to prove to the satisfaction of Court that if there was any non-compliance it substantially did

affect the results. In the case of Odetta vs Omeda Election Petition No,001 of 1996 Court noted:

“What must the Petitioner prove? He must prove that whatever non-compliance with the provisions of the statute must have affected the result of the election in a substantial manner. It is not sufficient therefore to allege and even prove that there was harassment, intimidation and house burning. The Petitioner must go further and show that the results of the election were thereby affected and not merely affected but in a substantial manner”

Analysis

The duty lies on the court to determine whether or not an election was conducted substantially in accordance with the Constitution and the Electoral laws. The court will look at the circumstances of the case including the state of pleadings, especially the credibility of the petitioner’s position and nature and substance of the complaints of the petitioner, the attitude of the functionaries charged with the conduct of the elections and whether the omissions complained of by the petitioner, even if proved, affected the conduct of the elections.

There are certain non-compliances that go to the root of an election in that they are absolute in the sense that once established the purported election is invalid and as such there will be no result to be substantially affected by the non-compliance.

The onus is on the person who denies the genuineness and authenticity of an election to rebut the presumption by showing that there was a substantial effect that renders the election questionable and a nullity. Acts which may be regarded sufficient to substantially affect the result of an election need not be widespread non-compliance. It may be acts which occur only in one or few places, yet their effect are so significant to the overall result of the election between the candidates.

When a petitioner alleges non-compliance, he must satisfy the court that such non-compliance was substantial enough to affect the overall result of the election. It invariably means that cogent and compelling evidence must be

adduced to establish that the election was substantially affected by such non-compliance.

Irregularity in an election can only ground a petition if it has substantially affected the result of the election. When a petitioner questions the result of an election on ground of non-compliance with the provisions of the electoral laws, sufficient particulars must be given to show how the non-compliance affected the results substantially. Likewise where the petitioner questions an election result on the ground that the respondent was not elected by majority of lawful or valid votes cast at the election, the petitioner must go further to show the votes accredited to the respondent and the number of votes alleged to be invalid and the reason(s) for their invalidity and that if such allegedly invalid votes are subtracted from the respondents score the remaining valid votes will qualify the petitioner as a winner of the election against the respondent who has been returned. A mere allegation of electoral malpractice or invalidity of votes without showing how the result of election will thereby be affected substantially will not constitute a reasonable cause of action. See ***Abdulkarim & Others v Shinkafi & Others (2008) 2 LRECN 536 CA***

Irregularities at an election which is neither the act of a candidate nor linked to him cannot affect his election. The Petitioner through adducing evidence must prove two things which are that whether the irregularities particularly allotment of votes have been established, and whether the allotment of votes can be attributed to the respondent.

It is now well established that in order to overturn an election on the basis of non-compliance under s.61 (1)(a) of the Parliamentary Elections Act as amended, it is not enough to merely show non-compliance in an election. Instead, it must be demonstrably shown by the Petitioner that non-compliance affected the results of the election in a substantial manner and in appraising the question of substantiality both quantitative and qualitative approaches must be used to appraise the entire process of the election.

In support of this position, the Court of Appeal in ***Muhindo Rehema v Winifred Kiiza & the Electoral Commission Election Petition No.29 of 2016*** observed as follows: *“It is well settled that non-compliance with electoral law per se, however, is not enough to overturn an election. Rather the non-compliance must be so significant as to substantially affect the results of the election – Section 61(1) PEA. 2005. While the learned judge considered the effect of each category of non-*

compliance individually, with respect she should have assessed the effect of non-compliance as against the entire process of the election as was stated by Odoki, Chief Justice: "In order to assess the effect, the court has to evaluate the whole process of the election."— Besigye vs. Museveni (supra). In that case the Justices of the Supreme Court used both the qualitative and quantitative approaches. The quantitative approach takes a numerical approach to determining whether the non-compliance significantly affected the results. In this case, at least 13,426 votes (over 7%) have been rendered doubtful where the margin of victory was only 1,484 votes (less than 1%). Under the quantitative test, therefore the non-compliance appears to have affected the results substantially. On the other hand, the qualitative approach looks at the overall process of the election especially the transparency of registration, chaos at polling stations, voter information, the process of counting, tallying, and declaring the results; and the ability of each voter to cast their vote."

It should be noted that non-compliance with the electoral provisions or commissions of electoral offences occur in many instances. But the law is more concerned with the extent, which is how far and wide it occurs and also how substantially did it affect the election result. Not just any slight or inconsequential electoral malpractice or irregularity will secure invalidation of the result of a victorious respondent.

The petitioner attempted to come up with figures at different polling stations which would tilt or remove the 1st respondent's victory in his favour. The petitioner failed to show any non-compliance which would have led this court to nullify the results at the said polling station in order to show substantial effect. Like in every election there could be some irregularities in the election but the same would not be used to nullify or overturn the will of the people. Like discrepancies in figures of male and female voters which did not tally at the alleged polling stations. This cannot be used to cancel the results of the votes cast or nullify the election at those polling stations. The petitioner was only trying to make 'a mountain out of a mould'.

In ***Akugizibwe Lawrence v Muhumuza David & 2 Others Election Petition Appeal No.22 of 2016***, the Court of Appeal referred to the decision of the Supreme Court wherein the learned Chief Justice cited with approval, the case of Borough of Hackney Gill v Reed [1874] XXXI L.J. 69

“An election should not be upset for informality or for a triviality. It is not to be upset because the clocks at one of the polling booths was five minutes too late or because some of the voting papers were not delivered in a proper way. The objection must be something substantial, something calculated to affect the result of the election..... so far as it appears to me the rational and fair meaning of the section appears to be to prevent an election from becoming void by trifling objections on the ground of informality, but the judge is to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a rational mind to produce a substantial effect”

Nullification of an election is a very serious sanction which can be inflicted on an election already conducted. It should only be imposed in very rare situations and only after well-established reasons have been adduced in support of such a decision.

The success of a winning candidate at an election cannot be lightly interfered with or taken away without any justification rooted in law and cogent evidence.

In a democracy, purity and sanctity of elections, the sacrosanct and sacred nature of electoral process must be preserved and maintained. The valuable verdict of the people at the polls must be given respect and candor and should not be disregarded or set at naught on vague, indefinite, frivolous, or fanciful allegations or on evidence which is shaky or prevaricating character. In these circumstances, therefore, election results cannot be lightly brushed aside in election disputes.

In sum therefore, this petition fails and is dismissed with costs

I so order.

SSEKAANA MUSA

JUDGE

20th January, 2023