

UGANDA / JUDGMENT

Kyotasobora v Kabakumba Masiko and Another (Election Petition Appeal No. 54 of 2011) [2012] UGCA 63 (23 November 2012) [2012] UGCA 63

COURT

Court of Appeal of Uganda

BEFORE

Kasule, JA, Nshimye, JA, Arach-Amoko JA

CASE / FILE NUMBER

Election Petition Appeal No. 54 of 2011

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.54 OF 2011

(Arising from Election Petition No.003 of 2011 of ffe High court of ugancta
5 at Masindi)

;

KYOTASOBORA PHINEHAS PELLANT

VERSUS

KABAKUMBA LABWONI MASIKO

THE ELECTORAL COMMISSION RESPONDENTS

10 CORAM: HON. JUSTICE A. S. NSHIMYE, JA

HON. LADY JUSTICE M. S. ARACH AMOKO, JA

HON. JUSTICE REMMY KASULE, JA

JUDGEMENT OF THE COURT

15 This judgement is in respect of an appeal from the judgement of Hon. Justice Wilson Kwesiga dated 6th June 2011 in Election Petition No. OO3 of 2011 in the High court of Uganda at Masindi.

The appellant, first respondent and four others were candidates for the Parliamentary seat of Bujenje county constituency, Masindi District, in the countrywide parliamentary elections held on 18th February 2011. The second respondent by law conducted the said elections.

At the conclusion of the election, the second respondent declared and gazetted the first respondent as the winner with 10,165 votes while the appellant was runner-up with 9,413 votes.

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Dissatisfied with the result of the election, the appellant petitioned the High Court at Masindi against both respondents for orders, amongst others, that the first respondent's election as the Member of Parliament for Bujenje County Constituency be set aside and fresh elections be held.

The grounds for setting aside the election were that the first respondent had committed illegal practices and election offences directly and/or through her agents with her knowledge and consent. Further, that the election was conducted without complying with the provisions of the electoral laws as provided in the Constitution, the 20

Parliamentary Elections Act, The Electoral Commission Act and the principles set out thereunder which affected the results in a substantial manner.

5 The respondents to the petition denied the allegations stated in the petition

The learned trial judge conducted a full trial of the petition and on 6th June, 2011, delivered judgement. He found that the appellant, then petitioner, had not proved all the allegations in the petition to the satisfaction of the court, and as such he was not entitled to any of the remedies he had prayed for. The petition was dismissed with costs. 10

- The appellant then lodged this appeal to this court on two grounds, namely:- 15
- 7. The learned trial judge erred in law and fact in concluding that the appellant failed to prove that there was non-compliance with the provisions and principles laid down in the constitution of Uganda, the Parliamentary Elections Act and the Electoral

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Commission Act and came to the wrong conclusion that the election was conducted in accordance with the electoral laws.

2. the learned trial judge erred in law and fact when he failed to properly evaluate the evidence of the Appellant and that of the Respondents on record and came to the wrong conclusion that the Appellant failed to prove all the allegations in the petition to the satisfaction of the court

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At the hearing of the appeal, learned counsel Meclard Lubega Ssegona appeared for the appellant, while John Paul Baingana represented both respondents.

15 20 Counsel for the appellant argued both grounds of appeal together on two separate premises: first: whether or not bribery and/or other electoral offences had been proved to have been committed by the first respondent directly, and/or through other persons with her knowledge, consent or approval. Second: whether there was non-compliance with the provisions and principles of the electoral laws in the conduct of

this election, and if so, whether the non-compliance affected the results of the election in a substantial manner.

Counsel submitted that the learned trial judge erred when he found that the allegation of bribery had not been proved to the satisfaction of the court. The evidence of Baguma Ibrahim that the first respondent gave him money at Kitamba polling Station on the day of elections should have been believed. Asaba Lawrence's evidence to the effect that on his way to Bulima he witnessed money being distributed to voters at 10 Nyakoko's compound with instructions that they vote for the first respondent and that fuel was being given to boda boda riders to take voters to polling stations to vote for the first respondent, and that he saw the army personnel campaign for the first respondent also provided proof of bribery. Further, Souda Kiiza Amooti's evidence that on 17th February, ²⁰¹¹ agents of the first respondent gave her money to vote for the first respondent and that the said first respondent campaigned on voting day was cogent enough to have proved that the first respondent committed bribery and/or some other electoral offence.

The learned trial judge was therefore not justified in disbelieving those above witnesses who were illiterate, ordinary

' people staying in rural villages excited by someone giving them some little money, possibly to service for a day. Accordingly Baguma Ibrahim ought to have been excused for not being able to identify his signature on his affidavit filed in support of the petition. Likewise the evidence of Asaba Lawrence and Souda Kiiza Amooti should not have been rejected on the basis that it put the first respondent to be in different places at the same time of the day which the trial court found to be impossible. According to counsel, these were such type of witnesses who had no sophistication to tell the exact time. This explained why they placed the first respondent in different places at the same time. It was also for the same reasons that they gave contradictory evidence as to the registration number of the vehicle the first respondent was alleged to have been moving in when campaigning and on the day of the election.

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As to the second premise, counsel adopted the submissions of counsel for the 2nd respondent before the High court and contended that the trial judge ought to have found that the election was conducted without complying with the provisions and principles enshrined in the electoral laws.

He submitted that the trial court, in order to properly appreciate the evidence, had to apply both the qualitative and quantitative tests to the overall evidence adduced. Quantitatively, the winning majority vote was a paltry 690 votes. This narrow winning majority ought to have been considered against the qualitative test of instances of non-compliance with the electoral laws raised by the appellant. There was failure to account for ballot papers at Katugo, Kyabafoto, Kasongire and elsewhere throughout this election. The trial judge ought to have resolved the question as to where the missing ballots went and in whose candidate's favour was the excess of the ballot papers. The trial judge erred by not resolving these questions before concluding that the petitioner had not proved the petition.

The trial judge also ought to have considered the evidence establishing other forms of non-compliance with the electoral laws by the respondents. These included the first respondent campaigning on election day when she moved in a vehicle all covered with her campaign photographs, as well as the intimidation of the electorate by the army soldiers carried out for and on behalf of the first respondent. Counsel thus submitted that the trial judge grossly erred when he failed to

address the above stated issues and prayed for the appeal to be allowed.

Counsel for the respondents strongly opposed the appeal. He submitted that the trial judge properly evaluated the evidence that was before him and arrived at the correct conclusion that the petition had not been proved.

Baguma Ibrahim was not a truthful witness when he claimed that the three signatures on the affidavit he claims he deposed to were all his. Yet they were not, as only one belonged to him, and the others were of the Commissioner for Oaths and the translator respectively. This led to an inference that he was not the author of the contents of the affidavit and the trial judge was right to regard him as untruthful. 10

The trial judge properly analyzed the evidence, both affidavit and otherwise, of witnesses Rsaba Lawrence and Sacla Kiiza Amooti and came to the reasonable conclusion that the first respondent could not have been carrying out electoral offences and illegal practices in two different places of Kanga and Rubanda at the same time and on the same day.

It was also conceded on the part of the appellant that the registration number of the vehicle given as the one that the first appellant is alleged to have travelled in to campaign and to bribe voters with money during the election, was incorrect, yet the appellant gave no explanation how this mistake of the wrong registration number of this motor-vehicle could have been carried out in all the appellant's witness affidavits on this point. This led to an inference that this evidence had been manufactured to support the appellant's case. The learned trial judge was thus correct

not to believe this evidence.

As to the non compliance with the electoral laws, counsel submitted that as long as the Tally sheet figures were in conformity with the figures obtained from the Declaration forms of the results from the different Polling stations duly signed by the presiding officers and the candidates' agents as the correct results, then it cannot be said that the conduct of the election was done without complying with the electoral laws. This is because the presiding officers as well as the candidates' polling agents could not have signed as correct, results that had been obtained without complying with the law. 15 20

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counsel invited court to hold on the basis of court of Appeal Election Petition Appeal No. E8 of 2011 Hon. Oboth Marlsons Jacob vs Dr. Otiam Otaala Emmanuel, that irregularities that are not substantial do not necessarily result in setting aside the result of an election. In this case any irregularities that might have happened were not substantial and accordingly the election should not be set aside. Counsel prayed that the appeal be dismissed with costs.

Appellant's counsel in reply still maintained that the appellant had proved the allegations in the petition. Counsel submitted that it was not established as to what were the distances of the different places where the first respondent was supposed to have been at the same time and on the same day. Thus the trial judge had no basis to conclude that this could not be possible. 10

Further, as there was no explanation from the second respondent as to where the missing ballots were taken, then the election was conducted contrary to the electoral laws. As to the army soldiers, these were not supposed to be in the Constituency, so their being there was part of intimidation for which the first respondent, whose spouse was a high ranking army officer in UPDF, should bear the blame. Counsel referred court to court of Appeal election petition Appeal No. 2 of 2011: Muhindo Rehema V Winnie Ritza and Another and prayed that the appeal be allowed.

2011: Muhindo Rehema V Winnie Ritza and Another and prayed that the appeal be allowed.

5 We have carefully considered the submissions of respective counsel, the proceedings of the court below as well as the statutory law and court case authorities referred to us. We now proceed to state our findings and conclusions.

The learned trial judge considered the issue of burden of proof as stated in Mbowe Vs Eliofu 119671 EA (sup), a case from Tanzania, that the burden of proof in an election petition is on the petitioner rather than the respondent because it is the petitioner who seeks to have the election declared void. This principle had been applied in Uganda in Kiiza Besigye vs Yoweri Museveni Kaguta, supreme court presidential Election petition No.1 of 2001 where Odoki, C. J. held:- 15 I

> "In my view the burden of proof in election petitions as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the court".

The learned judge then had also addressed himself to the English case of *BATER V BATER* (1950) 2 ALLER 458 where Lord

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Denning, in resolving as to what amounts to "proof to the satisfaction of the court" in a divorce case, expounded that one cannot be satisfied where one is in doubt. Where ^a reasonable doubt exists then it is impossible to say that one is satisfied.

The trial judge related the above principles to sections 61(11 and (51 of the parliamentary Elections Act that provide that any ground to set aside an election specified in section 61(1) shall be proved on the basis of a balance of probabilities. The trial judge reverted to *Riiza Besigye v. Yoweri Museveni Kaguta* (scd (supra) where Chief Justice Odoki elaborated on the standard of proof in an election petition that:

".... since the legislature chose to use the words "proved to the satisfaction of the court", it is my view 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".

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After considering the above principle, the trial judge directed himself on the issue of burden and standard of proof thus:

"I do appreciate the tools of analysis or evaluation of evidence in an election petition to be not as high as proof beyond reasonable doubt as required in criminal cases and at the same time it is as applicable to ordinary civil suits. Therefore this court shall follow and apply the statutory provisions above stated and the principles of law settled in the above leading judgments in settling the issues raised in this case".

From the foregoing, we are satisfied that the learned trial judge properly and appropriately directed himself as to the burden and standard of proof at the commencement and throughout the trial of the election petition from which this appeal arises.

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The appellant's counsel has faulted the learned trial judge for not finding that the appellant had proved that the first respondent committed the electoral offence of bribery and/or some other electoral offence in the course of the election. Appellant's counsel submitted that the trial judge ought to have accepted the evidence of witnesses Baguma Ibrahim, Asaba Lawrence and Suda Kiiza Amooti as having proved the electoral offence of bribery against the first respondent.

The learned trial judge dealt with the evidence of Baguma Ibrahim. Under cross-examination of this witness he could not identify his signature on the affidavit he stated was his own and had been translated to him into Lunyoro, his native language, before he signed the same. The witness claimed the three signatures of the deponent, translator and of the

commissioner for oaths to be ail his. when asked to supply ^a signature in court, he supplied one and court found it was totally different from the three. The trial judge observed him as very shift and uncomfortable with what he was saying.

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As for Sauda Kiiza Rmooti, the learned trial judge observed that her evidence was that Dan Musunguzi had told her that money was being distributed to voters on the instructions of the first respondent. she asserted that she knew that some people were given money. The trial judge found her evidence to be hearsay as she did not disclose as to how she came to know how these people were given money. 15

The learned trial judge did not specifically deal with the evidence of Asaba Lawrence which was, as far as bribery was concerned, to the effect that on 18th February 2011 while going to Bulima, he met one Mahmood distributing money to voters 20

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in Ivyakojo's compound and telling them to go and vote the 1st respondent. The same witness also stated that he met Haji Nuru giving fuel to boda boda men asking them to take voters to vote for the first respondent.

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In our appreciation and appraisal of this evidence, we find that there is no number of voters disclosed by the witness. He did not claim that Mahmood and Haji Nuru were agents of the first respondent or that the first respondent knew, authorized and consented to what they were doing.

In connection with bribery, the learned trial judge considered the evidence of Odong Cosmas who claimed to have received Shs.500/- to vote for the bus. He was told that this was "chai" from the first respondent. The trial judge found this evidence to be of no value as the one who claimed that the first respondent was the one giving the money was never disclosed.

The learned judge also considered the affidavits of Patrick Kajura, Byarugaba Victor, Kamanyi Xavier and Wugisha William and found that all of them had made general allegations of bribery without giving particulars as who was paid, how much 20

was paid and for what purpose. The judge also found that Muhiru Steven and Olivia Atugonza denied being agents of the first respondent or paying money on her behalf.

5 We have also ourselves subjected the evidence that was before court as regards the bribery allegations and we find that the learned trial judge properly dealt with the same and came to the right conclusion that it did not prove on the balance of probabilities that the offence of bribery or some other electoral offence had been committed by the first respondent. 10

we have found that the learned trial judge properly applied the principles stated by I. D. Dua, J., in the Indian case of *GIANSHAND vs S.M. PRAKASH*, AIR 1955 PUNJAB 66 (V 46 C.21), ⁶⁶ applied with approval by the Uganda Supreme Court in the *Besigye Kiiza vs Museveni Yoweri Kaguta and Electoral Commission*, Election petition No. 1 of 2001, (supra at: 15

"It has often been stressed that it is in the interest of justice not to throw out an election petition on hyper-technical grounds and in the trial of election petitions, where the purity of election is questioned, and the

Tribunal trying the petitions should afford every possible facility, in its power, to ensure such inquiry.

"I am not unmindful of the undesirability of lightly setting aside elections on inadequate, flimsy or frivolous grounds, at the same time it is, in my opinion, of the utmost importance for the healthy growth of parliamentary system of Government and of true democracy that the purity of the election process should be jealously safeguarded, and people should not be allowed to get elected by flagrant breaches of the law of elections and by corrupt practices. Inquiry into allegations of corrupt practices, therefore, should not be thwarted by dismissing election petitions on unsubstantiated or highly technical grounds". 10 15

Like the learned trial judge, we too, come to the conclusion that the petitioner, now appellant, adduced no sufficient evidence in the court below to prove the electoral offence of bribery by payment of money to voters against the first respondent. 20

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The learned trial judge, apart from dealing with the allegations of bribery by payment of money to voters, also considered the evidence adduced in respect of other alleged electoral offences stated to have been committed by the first respondent of campaigning during voting time and employment of army soldiers and others to intimidate the electorate.

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As to the alleged electoral offence of campaigning during election time, the learned trial judge considered the meaning and effect of section 81 of the parliamentary Elections Act which prohibits campaigning on the eve of and during elections, and rightly in our considered opinion, held that the section does not prohibit the general public from talking about the election candidates while the said public is away from the polling station and members of the public are in their homes, coffee shops or bars. We note, in this regard, that the section only prohibits a person from canvassing votes, uttering slogans, distributing leaflets, singing, dancing and using a band on polling day within one hundred metres of the polling station. 20 The section also prevents anyone from influencing a voter in any way, or selling intoxicating liquor within two hundred metres of a polling station when the polling station is open on the polling day. Hardly any evidence was adduced at trial in our

view to prove that the provisions of this section had been contravened.

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5 The learned trial judge also considered the evidence relating to campaigning on the eve and during election. The evidence as to the registration number of the vehicle that the petitioner's witnesses stated was used by the first respondent was shown not to be unreliable as the number was proved to be not of the first respondent's vehicle, but of a tipper lorry belonging to SPENCON SERVICES LTD, and was not at all seen in the constituency on the eve or on polling day of the election. 10

The learned judge also considered the fact that the first appellant could not have been campaigning in different places, far apart of each other, at the same time and on the same day. He therefore rejected the evidence to this effect as unreliable. We find that the learned trial judge properly analyzed this evidence and further that the reasons he gave for rejecting the same were proper and sound. Accordingly, we too, agree that the allegations of campaigning on the eve and on the day of polling were not proved against the first respondent. 15 20

The evidence as to the allegation that the first respondent employed army soldiers of UPDF and other voters to intimidate the electorate was also considered by the trial judge. He found the evidence of Victor Byaruhanga who claimed to have seen two army jeeps on the night of 17th February 2011 at 8:00 p.m at Bulima Town, full of UPDF soldiers who explained to him that they had been sent to keep peace, law and order and one of the soldiers said they had been sent by the Minister, to be incapable of proving this allegation. This witness asserted that 10 people got scared without explaining what these soldiers did to scare the people. We agree with the trial judge that this evidence did not prove intimidation against the first respondent.

15 20 The allegation that the first respondent used Government resources to campaign stated in paragraph 6(b) of the petition was not in any way substantiated by the petitioner as there was no evidence at which incident and what Government resources were actually used. The learned trial judge was thus correct to find that this allegation was not proved.

All in all, on the first premise of submissions of counsel for the appellant, we agree with the trial judge that there was no such

strong and cogent evidence to prove, on the balance of probabilities, that the first respondent committed bribery or any other electoral offence(s), or illegal practice(s) in the course of the election, the subject of this appeal.

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The second premise of the appellant's counsel's submission was that the trial judge ought to have found, on the evidence that was before him, that the election in question had been conducted without compliance by both respondents with the provisions and principles of the electoral laws; and that this non-compliance affected the result of the election in ^a substantial manner.

The learned trial judge directed himself as to the law that in order to prove non compliance with the electoral laws, the Petitioner must prove, on a balance of probabilities, that there was contravention of the provisions and principles of the Parliamentary Elections Act, 17 of 2005, and that the contravention or non-compliance affected the result of the election in a substantial manner. We only hasten to add that the learned trial judge ought also to have directed himself that apart from the Parliamentary Elections Act 17 of 2005, the conduct of elections must also comply, as much as it is relevant, 15 20

with other election laws such as the Constitution and the Electoral Commission Act, cap.140, as well as the Rules made thereunder.

The learned trial judge, however, rightly in our view, further S directed himself that compliance, as a whole concept, requires that the election must be free and fair, be of universal adult suffrage and must be based on the majority of the valid votes cast. The trial judge reminded himself of **Article 1 (4) of the Constitution** that the people shall express their will and $\$10$ consent as to who is to govern and how they want to be governed through regular, free and fair election of their representatives or through referenda. He then directed himself to the holding of Chief Justice Odoki in *Besigye Kiiza Vs Museveni Yoweri Kaguta and Another*, (supra) to the effect 15 that:-

> "The entire election **process** should have $\$an$ atmosphere of free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election procedure should guarantee the secrecy of the ballot, the accuracy of counting and announcement of results in a timely manner.

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..... . Fairness and transparency must be adhered to in all stages of the electoral process,,.

It was alleged, inter alia, that there was non compliance with the electoral laws because a number of Declaration of Results forms for various polling stations were alleged to have been forged. 5

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The trial judge examined the evidence as regards these 10 documents and found that the forms had been signed by the candidates' agents and no agent denied his/her signature thereon. The respective presiding officers had also signed the same. Further, the particulars on these forms as to valid votes and each candidate's votes were identical, there was no other evidence of forgery or alteration of these forms. It is from these forms that data was obtained to complete the Tally Sheets. The trial judge concluded on the basis of this evidence that there was no proof of forged or altered documents. We are unable to fault the trial judge on the conclusion he reached on this point, after having re-appraised this evidence.

5 As to the complaint that computation of the Declaration of the Results forms showed excess ballot papers at some polling stations, the learned trial judge reviewed the evidence adduced on the point and found that it had not been proved on a balance of probabilities that any excess ballot papers had been ferried to any other polling stations and that if any excess votes were there, there was no evidence as to who of the candidates had benefited from such excess votes. The judge therefore held that the allegation of non compliance with the electoral laws in the conduct of this election had not been proved. We find that the learned trial judge properly considered the law and the evidence on this issue and he arrived at the correct conclusion on this matter. 10

In the final analysis, we too agree with the learned trial judge, that the appellant as petitioner did not prove the allegations in the petition to the satisfaction of court and as such he was not entitled to any of the remedies he prayed for. The learned trial judge was right to dismiss the petition with costs. 15

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> According to this appeal stands dismissed. W MASIKO remains the Elected Member of Parliament, Bujenje county constituency, Masindi District. 3

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The first and second respondents are awarded costs of this appeal as well as those in the court below as against the appellant on appeal and petitioner in the court below.

We so hold and order. $\$ \mathbf{S}$

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Dated at Kampala this

S. Nshimve

JUSTICE OF APPEAL**M. S. Arach Amoko****JUSTICE OF APPEAL**

Remmy. K. Kasu

JUSTICE OF APPEAL. The 1WQZ \$\Delta\$ hs \$\sim\$ runsel abose

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