

Nabukenya v Nakate and Anor
(Parliamentary Election Petition No. 26
of 2016) [2016] UGHCEP 16 (17 June 2016)
 [2016] UGHCEP 16

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1 / 12

1. Whether there was non – compliance with the provisions of the Parliamentary Elections Act, the Electoral Commission Act and the democratic principles governing the conduct of elections.
2. Whether the non – compliance, if any, affected the elections in a substantial manner.
3. Whether the alleged illegal practices or any of the electoral offences under the Parliamentary Electoral Act were committed by the 1st Respondent personally or her agents with her knowledge and consent or approval.
4. What are the remedies available to the parties?

The Respondents chose not to cross – examine any witnesses. The Petitioner chose to cross – examine 14 witnesses who had sworn affidavits in support of Nakate’s reply to the Petition.

The Law Grounds, Burden and Standard of Proof

The election of a candidate as a Member of Parliament shall only be set aside on any of the grounds set out in section 61 (1) of the Parliamentary Elections Act if proved to the satisfaction of court.

The said sub - section provides the grounds in (a) and (c) as follows:

1. Non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the Principles laid down in those provisions and that the non-compliance and the failure affected the results of the election in a Substantial Manner.
2.
3. That an illegal practice or any other offence under this Act was committed in connection with the election by the Candidate personally or with his or her knowledge and consent or approval.

By virtue of Sections 101 – 103 of the Evidence Act, Cap.6, the Party asserting the existence of certain facts on which judgment is sought bears the burden of proof to prove such facts.

In the instant Petition, Nabukenya bears the burden to prove her allegations of non-compliance with the Electoral laws. She also has the duty to prove that the non-compliance affected the results of the election in a Substantial Manner.

Most important of all she has to prove that illegal practices by Nakate’s agents and other people were committed by Nakate or her agents with her knowledge and consent or approval.

The above facts have to be proved to the satisfaction of the court and in absence of such proof the petition would fail.

The Standard of proof is set out in Section 61 (3) of the Parliamentary Elections Act. Any ground specified in Sub-Section (1) shall be proved on a balance of probabilities. Several authorities have interpreted **“Proof to the satisfaction of court.”*** In the Supreme Court Presidential Election Petition No.1 of 2001: ***Col (Rtd) Kizza Besigye Vs Museveni Yoweri Kaguta & Another*** court held that it implies that the matter has been proved without leaving room for the court to harbor any reasonable doubt about the occurrence of the matter or existence of the matter alleged. The balance of probabilities is but slightly higher than in ordinary cases.

AFFIDAVITS

Evidence in Petitions of this nature is by way of affidavits on oath. In the case of Col. (Rtd) Kizza Besigye Vs Museveni Yoweri Kaguta & Another (Supra) the court set a standard on the approach in handling the evidence based on affidavits. It must be a liberal and not strict view. In the instant petition there was no question as to whether the affidavits on record satisfied the essential requirements of section 6 of the Oaths Act except for one affidavit filed by Nakate in reply to the petition, dated the 9th day of May, 2016.

The affidavit is said to have been sworn by the said Nakate Lillian Segujja at Kampala before a one David S. Kaggwa, Advocate and Commissioner for Oaths.

However, in cross – examination the said Nakate told court that she swore her affidavit at Luwero and not Kampala. She repeated it not once but several times. At first I wanted to ignore the relevancy of the venue but because of her repetition it occurred to court that it was important for court to satisfy itself as to whether she actually took oath before a Commissioner for Oaths.

If she did she would at least recall the procedure she was taken through. She did not know or remember the Commissioner before whom she swore her affidavit. She does not know the Chambers she went to at Luwero. She said that the contents of the affidavit were read and interpreted to her by Counsel Tusingwire Robert assisted by Counsel Kiwanuka and a female legal assistant.

Thereafter she signed the affidavit. She was asked several times the people that were present at Luwero when and where she swore her affidavit and she named only her Counsel Kiryowa, Tusingwire and the female legal assistant. She never mentioned any Commissioner for Oaths. She does not mention any Commissioner for Oaths reading any part of the affidavit to her and or asking her to take oath or affirm attesting to the contents in the affidavit in question.

Whereas it is trite law that the deponent need not necessarily know or recall the Commissioner for Oaths, it is important that court is satisfied that Nakate actually appeared physically before the Commissioner for Oaths and swore to the contents in the affidavit.

Nakate was very firm and bold when being cross – examined on the contents except for how she swore the affidavit. She did not know or at least recall the expected procedure.

I waited to hear her say the Commissioner before whom she appeared gave her a Bible or required her to raise her right hand or otherwise administered the oath. She did not say so. All she said was that she signed the affidavit in the presence of her lawyers. To the contrary, all her witnesses told court that the said Nakate took them to Luwero and they swore their affidavits before a lame Male lawyer known as Mr. Katumba. They were many but none was referred to David Kaggwa at Luwero.

It is most probable that Nakate did not swear her affidavit before any Commissioner for Oaths at Luwero or at all. The oath was never recited to her before a Commissioner for Oaths otherwise she would not have forgotten such an incident when asked what happened or took place when it came to swearing her affidavit.

Considering Sections 5 and 6 of the Oaths Act, the deponent must take the oath to swear by saying or repeating after the person administering the oath the words prescribed by law or by practice of the court as the case may be.

The case of ***KAKOOZA JOHN BAPTIST Vs ELECTORAL COMMISSION & YIGA ANTHONY***, **Supreme Court Election Petition Appeal No. 11 of 2007** is similar, on all fours, with this petition. The deponent signed the affidavit without appearing before the Commissioner for Oaths. The statement was rejected because it failed to pass as a validly sworn affidavit.

I would borrow the words of Justice Kanyeihamba JSC as he then was and conclude that an affidavit signed but not sworn before a Commissioner for Oaths is a mere plain statement that cannot pass as an affidavit. To condone such a statement and take it as a valid affidavit in reply to the petition would undermine the importance of affidavit evidence which is rooted on the fact that it was made on oath. I therefore reject the statement of the 1st Respondent, Nakate, and any other evidence based on her so-called affidavit.

Once the statement is struck out with all its annexes (or annextures) the defence to all allegations leveled against her collapses to its knees.

The evidence of her agents or supporters would remain hanging independent of her evidence. Before I take leave of this fake affidavit let me comment on the argument that it was the duty of the Commissioner to name the place in the affidavit where the deponent appeared before him and that if he typed or wrote Kampala instead of Luwero such an error should not be visited upon the deponent, Nakate.

I would agree if there was no cross – examination of the deponent. In the case of ***MUGEMA PETER Vs MUDIIOLE ABED NASSER, Election Petition Appeal No.30 of 2011*** court held that on the basis of Section 58 of the Evidence Act the evidence given to court on oath viva voca, before a trial Judge, is proper and valid evidence that court must consider – together with the fact that the affidavit has been rejected. In the instant case the evidence given viva voca before me confirms the fact that the 1st Respondent never appeared before the Commissioner for Oaths be it in Kampala or Luwero. The 1st Respondent nailed herself to the cross.

Her reply to the Petition without an affidavit in Support is no defence at all to her case. Unlike the other affidavits by other witnesses that are a stand alone, her reply to the Petition must be supported by a valid and properly sworn affidavit. It is not a mere technicality.

Nevertheless, I shall proceed to analyse the evidence of other witnesses and her evidence viva voca on the issues framed and on each allegation so that I leave no stone unturned.

Issue No. 1: Non – Compliance

It was submitted that the Electoral Commission failed to hold free and fair elections. The affidavit of Semambo Robert was to the effect that he was a polling agent for Nabukenya at Kizito Polling Station. He saw Kasigwa Mohammed who is the Chairperson of Kyampologoma voting on behalf of many voters who were claimed not to be able to cast their vote. The Presiding Officer did nothing to restrain Kasigwa even when the polling agents complained.

This allegation was put to Mohammed Kasigwa in cross – examination. He admitted having voted more than once. Ssengagga was the Presiding Officer according to Kasigwa. That he asked Kasigwa to assist one elderly lady to vote. The fact that it was the Presiding Officer asking the Chairman of the village to **“assist”** the voters and not the voters asking for help is sufficient evidence on a balance of probabilities that the Chairman voted for the elderly voter(s) instead of helping the elderly to cast their vote.

It is not farfetched to believe the allegation that this particular Chairperson abused his position with the help and connivance of the Presiding Officer from the Electoral Commission.

No wonder the Presiding Officer ignored the complaints of the Polling agents. There was another allegation of counting invalid votes as valid votes for Nakate. This allegation was not substantiated with votes cast and figures. I would dismiss that allegation as incredible as far as Kizito Polling Station is concerned.

Counsel for the Petitioner also raised the issue of intimidation of Atango Salume, the Presiding Officer at GALIKWOLEKA Polling Station. In her affidavit Atango Salume alleged that the voting process started off very well at 7.00 a.m. and ended smoothly at 4.00 p.m. When she started counting votes the LCI Chairman of Galikwoleka a one Mugwanya Tophili started intimidating her forcing her to count invalid votes as valid votes. That she refused to yield to Mugwanya's directives and continued to count the votes. Upon further intimidation she stopped counting and the said Mugwanya and other people threatened to beat her up. She called the sub county Supervisor a one Nankabirwa Masitula and reported the intimidation. She got no immediate assistance. She was forced to abandon her polling station and went home to save her life.

The alleged non-compliance with the electoral law is again the subject matter in the affidavit of Julius Mayega who acted as Supervisor of Kamira Sub County for the Petitioner. He went to Kizito Polling Station and found Kasigwa Mohammed ferrying in people and voting for them.

That at Galikwoleka Polling Station he found when the Presiding Officer a one Atango Salume had left the Polling Station and a one Mugwanya Tofiri had taken over the role of the Presiding Officer and was seriously conducting the counting of the votes. It is only later that the sub county Supervisor Kamira a one Nankabirwa Masitula came and took over from Mugwanya Tofiri.

The 2nd Respondent, the Electoral Commission, did not do much to count this specific allegation. The affidavit of the Returning Officer of Luwero District one KOMUHANGI ALEX is a mere general denial. In Paragraph 7, she swore that she was not aware of any intimidation of voters. In Paragraph 9 she states that there are no recorded or reported incidences of abuse of electoral laws or illegal practice at all!

Unknown to the Electoral Commission Mugwanya Tofiri swore an affidavit in support of the 1st Respondent's answer to the Petition. Mugwanya admitted in Paragraph 8 – 13 of his affidavit that during the counting of votes of the District Women Member of Parliament by Atango Salume there was a disagreement in regard to some ballots which Atango declared invalid, yet they seemed to be valid.

He swore that other agents and himself voiced their concern. This confession is sugarcoated downplaying the confrontation he had with Atango. First of all Mugwanya was not a recognized agent of any of the Women candidates.

Putting himself at the level of agents to contest the decision of the counting Presiding Officer was beyond his powers at the Polling Station. I doubt whether he used civil and legal means. In fact he said he warned her against declaring invalid votes when it comes to the Presidential Candidates. This warning must have been so threatening that Atango either got annoyed or feared for her life or both. By the way, counting of votes began with the counting of votes for the Presidential race. So, it may not be true that Atango threatened that after counting the votes for Woman MP she would continue with invalidating the votes of Presidential Candidates.

The affidavit of Mugwanya Tofiri and others intimidated the Presiding Officer Atango. They hijacked the Polling Station and took control of the vote counting exercise unlawfully.

The submission that a Polling Assistant by the name of Etieno Efulansi took over the counting from the Presiding Officer is not credible. It is not so reported anywhere officially. The Returning Officer Komuhangi Alex is completely ignorant of this take over by Efulansi Atieno after the intimidation of the Presiding Officer, the fleeing of Atango and the violent citizens led by Mugwanya Tofiri hijacking the vote counting exercise at Galikwoleka . Even the DR Form filed by Atieno reported nothing! In Paragraph 12 of Mugwanya's affidavit, he stated that **“the situation was contained and we went ahead to count the votes cast in favour of each Candidate without any incident as alleged.”*** So what situation was contained? What had gone wrong if it was not the kicking out of the Electoral Presiding Officer and Tofiri hijacking the vote counting process? We are not left guessing at all. The Petitioner has proved to the satisfaction of court that there was non-compliance with the law, the Electoral Commission lost total control of Galikwoleka Polling Station to violent hooligans led by the LCI Chairman Mugwanya Tofiri. The results of that Polling Station should not be taken as valid. The implication is that the quality of election, credibility

organization, management of polling stations and polling output went to the lowest.

The election exercise at Galikwoleka went to the dogs or when put in worse terms “the cats came in to stay at the polling station”!! That was so terrible. No sober court can proudly uphold these election results of the election more so at this polling station of Galikwoleka marred by intimidation and chasing away of the Presiding Officer and hijacking of the vote counting exercise by unlawful means.

The Electoral Commission failed in its duty to organize and conduct a free and fair election in Galikwoleka and Kizito election areas. The irregularities point to non-compliance with the provisions of the Parliamentary Elections Act (P. E. A), the Electoral Commission Act and the democratic principles governing elections.

ALLEGATIONS OF BRIBERY

Four cases of bribery are alleged:

1. At Kamira Parish Head quarters on 8/1/2016.
2. Bribery at Malungu.
3. Bribery at Vumba LCI, Kakabala – Bubutumula, and;
4. Bribery at God’s will Nursery School.

The affidavit of Kazibwe Samuel brought the allegation that Nakate gave Uganda shillings, 70,000/= to Hellen Amoiti in support of a local singing group. The group was allegedly being encouraged to register with the local authorities.

I have perused the whole record but failed to find sufficient evidence to convince me that the 1st Respondent bribed Hellen Amoiti in person or on behalf of a yet to be formed group.

I cannot tell who the members of this un registered group were. Whether they were voters of that area or not remains un clear. I would dismiss the allegations of bribery at Kamira.

Bribery at Malungu was brought up in the affidavit of Sekiranda Matia. He alleged that after addressing a rally at Malungu Kasenke, the 1st Respondent (Nakate) pulled out Ug. Shs.300,000/= in 50,000/= denominations and told the deponent, as defence Secretary and other people that she was donating the money for the purchase of a solar panel to be used by the Residents. They chose to put it on the public toilet constructed by their MP J. C. Musingo.

The money was deposited with Kizito Sande S/O Nsubuga alias Kabenge. It was alleged by Semakula Charles in his affidavit that Kizito Sande actually purchased the said solar panel and placed it on top of the public toilet. The same words were repeated by another Kasozi Muggaga Kamya of Kileme Village. It appears it was a uniform cut and paste affidavit! The story of placing a solar panel on top of a public toilet does not appeal to me. A panel does not work on its own to automatically light a place. It is a solar system that is wired. I would have believed the story if the witnesses said Kizito Sande was given money to buy a Solar System and he actually installed it as

his place and extended the power supply to the public toilet. This allegation of bribery is concocted and incredible too. It is not proved to the satisfaction of court.

Bribery at Vumba Village, Kakabala comes out most prominently in the affidavit of Sevir Ibrahim. He was invited in his capacity as Omutongole Chief of the Kabaka of Buganda to Vumba Village, to an annual meeting of a village savings group called **“Tusitukirewamu.”*** The 1st Respondent also attended the function and was given chance to speak to the members of the group who are also registered voters in the area.

That she solicited for votes and promised to further assist the group if elected as a Member of Parliament. She openly contributed Shs.100,000/= to be invested in the saving group. This bribery was denied by the 1st Respondent although she does not deny attending the function. The 1st Respondent's invitation to the function was not official but because of personal connections with Naluyinda the Treasurer. She was a gate crusher according to the evidence of Apollo Kabali. Kabali was the cook of the day at the function. He did not see the 1st Respondent dishing out the cash.

I believe he was too busy in the kitchen to notice all details at the meeting. But their respectable Chief Guest, and a Kabaka's Mutongole at that, was at the High table and saw everything, heard for himself and noted the bribery. This was not a fund raising function in the ordinary sense. It was an end of year function where Members were receiving their accumulated savings.

They were reviewing the performance of their savings group and electing officials. For a campaigning Candidate Nakate, she would have performed no better ritual at the function than either contributing to the growth of the Savings Group or join the savings group or promise to link the group to other progressive groups. The most practical and likely thing she did was to contribute to the group savings, thank the group for being exemplary in fighting poverty and promise future support. Otherwise a reading of the denials in Naluyinda's affidavit does not show why she was so enthusiastic in inviting the 1st Respondent to this function. She concentrates on discrediting Mr. Sevir's evidence and showing that he was Nabukenya's Representative at the function without stating what her special guest the 1st Respondent said or did.

No amount of denials by Sempira John Muwanguzi the ex – Chairperson of the Savings Group can convince me that the Candidate on a last minute campaign did nothing to financially support an impressive Savings Group.

Muwanguzi said the Master of Ceremonies at the function one Lwanga John immediately gave Nakate a chance to greet the Members and she solicited for votes while kneeling down. I am convinced that Nakate greeted the voters with a handshake of Shs.100,000/=. Thereafter she immediately left. The Petitioner has discharged the burden of proof and made out a case of bribery at Vumba Village at the function of Tusitukirewamu Savings Group.

Bribery at God's Will Nursery School is the last allegation I want to end with. Eva Nalubega alleged that in February 2016 at Nakuto Village, Bamugolodde Parish, Butuntumula Sub – County, Luwero District one Iga Michael, Chairman of Kakuto – Bamugolodde gathered people at God's

Will Nursery School. The gathering was addressed by Meddie Ssebagala, a staunch Supporter and campaigner of the 1st Respondent and Ibrabim Muwonge Matovu, an LCV Councillor for Butuntumula Sub – County. That the two campaigned for the 1st Respondent and solicited for votes and handed over Shs.250,000/= to the gathering as a token from the 1st Respondent. That the money was handed to Iga Michael who distributed the same among the persons present. Eva Nalubega's allegations were believed by the Petitioner and taken as Bible truth.

At the trial these allegations were not proved to the satisfaction of court. Ssali Mohammed explained that it was Hon. Mutebi from the NRM Secretarial, Kampala who brought Shs.250,000/= sent to the village NRM Committee to facilitate party activities.

Ssali is supported by Lubowa Joseph Ddiba of Kakuuto Village. Yiga Michael, the Chairman of NRM Kakuuto LCI Village and also Chairman LCI Kakuuto Village was cross – examined in court. He firmly told court that he received the money talked of. He confirmed it was money from the NRM headquarters meant for facilitating the running of NRM party activities in his village. It was not money sent by the 1st Respondent as a token to bribe voters. I would believe this explanation. None of the people who delivered the money were proved to be campaign agents of the 1st Respondent. If they campaigned for her and gave out any money which I do not believe, they did not do it with her knowledge and consent or approval. The Petitioner has miserably failed to link the Shs.250,000/= delivered to Kakuuto village by Hon. Mutebi and Muwonge as a bribe from the 1st Respondent.

The other grounds in the Petition relating to voter intimidation and ballot stuffing at Mpakawero were not argued out by Counsel for the Petitioner save for summarizing the evidence of Sumaya Abdu and James Ntege. Sumaya was an agent at Mpakawero who complained that army men voted in big numbers. She complained of having been sent at a distance where she could not be allowed to verify the names of voters. That she signed the DR Forms before closure of the election and left fearing for her life. This is unbelievable. Her allegations are easy to fabricate but not so hard to refute. She could not sit through an exercise where she was useless as a polling agent then sign the declaration form.

She does not reveal who in particular caused her to stay. She does not tell court who forced her to sign the Declaration Form without indicating her grievance during the voting exercise or after counting the votes. If she left earlier, she does not name who intimidated her and made her fear for her life in her own village.

James Ntege alleged that by 10.00 p.m. in the night the ballot papers and voting materials were still at the village polling station. But he confirms they were being guarded by a constable. If the polling officers were safe with their materials waiting for transport, that was not non – compliance with the electoral law of an illegal practice.

Counsel for the Petitioner abandoned all the other allegations of ballot stuffing at various polling stations, allegations of polling stations which are gazette but have no results on the tally sheet, non – gazette polling stations with results on the tally sheet and allegations of pre – ticking of ballot papers at several polling stations. It is apparent this was a fishing expedition where the Petitioner had hoped to get evidence after filing.

It is commendable that Counsel for the Petitioner foresaw the futility of submitting on allegations that lack evidence. He saved court's time by conceding and abandoning the same.

***Issue No.2:* Whether the non – compliance affected the elections in a substantial manner.**

I have already ruled that the quality of organizing the election process, the Management of polling stations and the credibility of this election had gone to the lowest of expectations. The non – compliance affected the quality of not only the election exercise but the credibility of the results in terms of quality.

In terms of quantity Counsel for the 1st Respondent submitted that the Petitioner complained of only 4 polling stations out of 382 polling stations and this did not have a substantial effect on the results. Both Counsel for the 1st and 2nd Respondents were of the view that the malpractices of improper vote counting at Galikwoleka did not substantially affect the results. That even if we got 109 votes and added the invalid votes there would not be a substantial effect on Nakate's results who got 297 votes at Galikwoleka.

I do not agree with that logic. Once the Electoral Commission lost control of the polling station and the vote counting went into the hands of hooligans led by Mugwanya Tofiri, these ceased being credible election results worth talking about. With a winning Margin of 1,311 votes anything substantial could have happened for either Candidate.

The effect of bribery during elections cannot be underestimated. It is the duty of this court to condemn any single act of corruption and bribery because it has a substantial effect on the results not only in the ballot boxes but also in the mind and hearts of the voters.

It is against our national interest and against democratic principles that we hold un democratic elections. One soiled finger soils all the others. A single incident of bribery may have a far reaching effect on elections compared to validating a few invalid votes. The substantial effect depends on the type of non – compliance or illegal practice complained of.

In the instant case bribery and intimidation of Presiding Officers and unruly citizens voting more than once and hijacking the vote counting exercise are proven complaints that affected the elections in a substantial manner.

The Electoral Commission and the 1st Respondent are guilty of non – compliance with the electoral laws and principles of holding a free and fair election. To that extent this court is satisfied that there was no validly elected Woman Member of Parliament for Luwero District.

***Issue No.3:* Whether the alleged illegal practices or any of the electoral offences were committed by the first Respondent personally or her agents with her knowledge and consent or approval.**

This issue has already been answered in the affirmative. I have also pointed out several instances where I believe the Petitioner failed to prove allegations of bribery on the part of the 1st Respondent or her agents with her knowledge and consent or approval.

***Issue No.4:* Remedies available to the Parties**

This court has found that the 1st Respondent Nakate Lillian Seguja committed illegal practices during the campaign period. It is also our finding that the Electoral Commission failed to conduct a free and fair election and therefore the 1st Respondent Nakate Lillian Segujja was not validly elected as a District Woman Member of Parliament for Luwero District.

The said election is hereby annulled, set aside and it is hereby ordered that a new election be conducted in accordance with Section 61 (2) and Section 3 of the Parliamentary Elections Act.

It is ordered that the Respondents jointly and severally pay the costs of this Petition.

BATEMA N. D. A.

JUDGE

17/06/2016

17/06/2016:

Ronald Tusingwire, Counsel for Hon. Nakate Lillian Segujja

Nakate Not in court

Ms. Nassuna Victoria holding brief for C. Katumba, Counsel for the Petitioner

Petitioner in court

No Counsel for Electoral Commission

Court:

Judgment delivered in open court.

BATEMA N. D. A

JUDGE

Right of Appeal explained.

BATEMA N. D. A

JUDGE

17/06/2016

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