

UGANDA / JUDGMENT

Othieno Okoth Richard vs Ochai Maximus and Another (Election Petition No. 14 of 2021) [2022] UGHCEP 6 (1 December 2022)

[2022] UGHCEP 6

COURT

Election Petitions of Uganda

BEFORE

Kazibwe, J

CASE / FILE NUMBER

Election Petition No. 14 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBALE ELECTION PETITION NO.014 OF 2021

OTHIENO OKOTH RICHARD**PETITIONER****VERSUS****1. OCHAI MAXIMUS****2. ELECTORAL COMMISSION****RESPONDENTS****BEFORE HON. JUSTICE MOSES KAZIBWE KAWUMI JUDGMENT****Introduction.**

The Petitioner contested with eight other candidates for the position of Member of Parliament for West Budama County North in the elections organized by the 2nd Respondent on 14th January 2021. The 1st Respondent was declared the winner with 10,981 votes as against the 9,856 polled by the Petitioner.

The results were subsequently published in the gazette of 17th February 2021. The 1st Respondent was sworn in as the Member of Parliament. The Petition was heard and dismissed by Hon. Lady Justice Cornelia Kakooza Sabiiti on 28th October 2021. The Petitioner filed Court of Appeal Election Appeal No.70/2021 in which the High Court judgment was set aside and a re-trial was ordered.

This judgment therefore arises from the fresh hearing of the Petition as ordered by the Court of Appeal.

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Background:

The Petitioner contends that the election was conducted irregularly and in contravention of the provisions of the Constitution of the Republic of Uganda, The Electoral Commission Act (ECA) and the Parliamentary Elections Act(EPA). In particular the Petitioner states;-

- 1. That contrary to Section 61(1)(b) of the Parliamentary Elections Act the 1st Respondent was declared as the winner against the total number of the valid and verified votes scored by each of the candidates.
 - 2. That contrary to section 61(1)(c) of the PEA and section 12(1)(f) of the ECA the 2nd Respondent included in the tally sheets results which were not reflected in the Bio-data Voter Verification machines(BDVVM) hence wrongly declaring the 1st Respondent as the winner.
 - 3. The 2nd Respondent's designated officers allowed unauthorized persons to give ballot papers to the 1st Respondent's known supporters at Kakola P/S, Dida Church P/S, Pei Pei Primary School P/S, St. William Church P/S and MorkiswaPrimary School P/S.
 - 4. The Respondents' agents availed multiple and pre-ticked ballot papers in favor of the 1st Respondent to his known supporters at Kakola P/S, Dida Church P/S, Magoro P/S, Pei Pei Primary School P/S, St. William Church P/S, Morgwang Church P/S and Morkiswa Primary School P/S.
 - 5. The 2nd Respondent contrary to Section 12(b) and (C) of the Electoral Commission Act failed to control the distribution and use of ballot materials leading to;
 - Use of ballot papers by unauthorized persons in the elections. $\$i)$
 - Ballot stuffing and multiple voting in favor of the $\overline{\$1}$ 1st Respondent.
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- Contrary to Sections 29 and 30 of the PEA failed to position $\$iii)$ the polling station at Kakola in an open place which disenfranchised the Petitioner's supporters and further failed to ensure secret voting at all polling stations.

- 6. The 1st Respondent in connivance with the Police and the 2nd Respondent's officers was involved in electoral offences to wit;-
- Bribing voters in Mbula and Machar zones in Peta Sub \$i)\$ county.
- Through his known agents namely the Police Officer at Kisoko \$\overline{ii}\$ Police Post, Dr. Tanga Odoi, Okongo Patrick, Othieno Zedi and the "yellow boys" intimidated and harassed the Petitioners agents/supporters at Kakola, Pei Pei, Morkiswa, St. William and Makaur Polling stations before and on the polling day.
- Police Officers at Kisoko Police station declined to register iii) and investigate complaints lodged by the Petitioner's agents which disenfranchised the Petitioners supporters to the advantage of the 1st Respondent.

The Petitioner seeks a declaration that the 1st Respondent was not validly elected and that he is declared as the validly elected candidate with costs. In the alternative the Petitioner prays that the court should declare the election to have been a sham and order for a fresh one in which the 1st Respondent should not participate since he is not a fit and proper person to be a candidate in such contests.

1st Respondent's Answer to the Petition.

The 1st Respondent denied all allegations of electoral malpractices committed with his knowledge, consent or approval and contends that if any occurred, they did not affect the election results in a substantial manner. The 1st Respondent contends that BVVM's are used to verify

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details of voters at particular polling stations but not for tallying or announcing results.

It is further contended by the 1st Respondent that the election was lawfully and properly managed by the 2nd respondent devoid of the alleged ballot stuffing ,bribery, connivance with the Police and disenfranchisement of voters as alleged by the Petitioner.

2nd Respondent's Answer to the Petition.

It is contended by the 2nd Respondent that the entire electoral process was conducted under a free, fair and transparent atmosphere devoid of any complaint from stakeholders. The 2nd Respondent further contends that all voters were properly identified and issued with a single ballot for the respective electoral offices and the vote counting was witnessed by candidates' agents.

The 2nd Respondent denied any acts of bribery, intimidation, voter harassment, disenfranchisement and ballot stuffing alleged by the Petitioner. In the alternative, the 2nd Respondent contends that if at all any such acts happened, they did not affect the outcome of the election in a substantial manner.

Legal representation.

Mr. Bwesigye Enoch appeared for the Petitioner. The 1st Respondent was represented by Mr. Ssekandi Gonzaga Kironde and Mr. Sebastian Orach. The 2nd Respondent was represented by Mr. Wetaka Patrick and Ms. Hilda Katutu.

Counsel opted not to cross examine any of the deponents of the filed affidavits for the respective parties. Submissions were filed and have been taken into account in the determination of the Petition.

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Burden and standard of proof.

Section 61(1) and (3) of the Parliamentary Elections Act, Act 17 of 2005, provides for the grounds for setting aside an election. The burden of proof which does not shift to the Respondent is carried by the Petitioner. He must prove to the satisfaction of the court that the alleged irregularities or malpractices or non-compliance with the provisions and principles laid down were indeed committed, and that they affected the results of the elections in a substantial manner.

The standard of proof is stated to be on a balance of probabilities in Section 61(3) of the same Act. The Petitioner is required to adduce credible or cogent evidence which is free from contradictions, truthful and compelling as to convince a reasonable tribunal to give judgment in the Petitioner's favor.

**Chebrot Stephen Chemoiko v Soyekwo Kenneth & Another. EPA No.56/2016;
Ssematimba Peter Simon & Another V Sekigozi. EPA No.40/2016.**

Evidence in support of or in Answer to the Petition is furnished through Affidavits read in open Court the deponents of which may with leave of Court be subjected to cross examination. The Court of Appeal has further guided that oral evidence may be taken followed with cross examination as in the common civil suits.

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Courts have further established a principle that in evaluating evidence in Election Petitions, regard must be had to the fact that since the trial is majorly premised on affidavit evidence, such evidence ought to be considered with caution due to the fact that witnesses tend to be partisan and testimonies may contain deliberate falsehoods and/or exaggerations.

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Rtd. Col. Dr. Kizza Besigye V Yoweri Kaguta Museveni & Another. SC Presidential Election Petition No.1 of 2001; Kasta Hussein Bukenya V Bukenya Balibaseka Gilbert & Another. EP No.29 of 2011.

On 1st September 2021 Counsel filed a Joint Scheduling Memorandum in which the following issues were agreed on for resolution by the court;-

- 1. Whether the election for the position of directly elected Member of Parliament for West Budama County North Constituency in Tororo District was conducted in accordance with the law?
- 2. Whether the non-compliance if any, affected the results in a substantial manner?
- 3. Whether the 1st Respondent committed any illegal practices or electoral offences personally or through his agents with his knowledge, consent or approval.
- 4. Remedies available to the parties.

Objection to various Affidavits filed by the Petitioner.

Counsel for the 1st Respondent implored the court to view with a lot of scrutiny and circumspection the evidence contained in Affidavits sworn by thirteen deponents. The basis for the argument is that there are glaring differences in the signatures appended on the Affidavits and those attributed to the deponents on National Identity Cards attached to the Affidavits.

In some instances the deponents who were stated to be unable to append signatures on the National Identity Cards ably did so on the Affidavits filed in court. It is submitted that the evidence should therefore be treated with suspicion.

The impugned Affidavits were sworn by Adongo Monica (PW3), Anguma James (PW5), Awor Perepetwa (PW8), Mathew Oboth (PW9),

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Odhaw Julius(PW11), Odongo Simon(PW12), Okoth Fred(PW15), Olowo Augustine(PW 19), Opendi Alex(PW21), Opio Christopher(PW23), Osinde Boniface(PW 25), Owori Bernard (PW 27) and Wandera Samuel(PW 31).

In response to the submission, it is argued by Counsel for the Petitioner that this matter was settled by the Court of Appeal and could not be reopened in the de-novo hearing.

I find it pertinent to note that the impugned Affidavits were deemed to have no evidential value and expunged from the record by the trial court. This was on account of the doubt about who swore them given the variance in signatures. The deponents were not cross examined on the alleged variances in signatures. The Appellate court held that the authenticity of the Affidavits was a matter of fact and a decision about their veracity could not have been validly reached without hearing from the deponents.

In the proceedings leading to this judgment, counsel for all the parties adopted the Joint Scheduling Memorandum filed on 1st September 2021 and opted not to cross examine any of the deponents of the impugned Affidavits. The Court did not also find it necessary to cross examine any witness. It follows that no finding about the authenticity of the impugned Affidavits can be made but the contents shall be weighed for any probative value as against other evidence in the Affidavits filed by the parties.

The same finding holds for the two Affidavits filed by Anguma James(PW5) and for the Affidavit of Olowo Augustine (PW19) who claims to have been accredited as an Election Observer by the 2nd Respondent through the Center for Constitutional Governance.

Resolution of issues:

Whether the elections for the position of directly elected Member of Parliament for West Budama County North in Tororo District was conducted in accordance with the law.

The gist of the Petitioner's complaint under this issue as gleaned from Paragraph 6(b) of the Petition and the submissions filed appears to be that the 2nd Respondent breached section 61(C) of the Parliamentary Elections Act and Section 12(1)(f) of the Electoral Commission Act by including in the tally sheets results which were not reflected in the biodata verification machines and declared the 1st Respondent as the winner on the basis of results tally sheets.

In the second limb of the complaint, the Petitioner alleges that the 2nd Respondent failed to ascertain verified results before declaring the 1st respondent as the winner for the position contested for in the election. The Petitioner's computation as indicated in the filed submissions is that he won the election with 9,856 votes as opposed to 8,406 he attributes to the 1st Respondent. A margin of 1,450 votes thus separated the two contestants.

With all due respect to Counsel for the Petitioner, section 61(1)(c) of the Parliamentary Elections Act and Section 12(1)(f) of the Electoral Commission Act do not by any imagination relation relate to the complaints raised. Section 61(1)(c) relates to illegal practices or offences committed by the candidate personally or with his knowledge and section 12(1)(f) relates to the powers of the Electoral Commission to take steps to provide secure conditions for any election to be held.

Bio-data Voter Verification Machines.(BVVM)

The Petitioner submitted evidence of certified copies of BVVM print outs relating to 17 of the 68 polling stations in the constituency competed for

by him and the 1st Respondent. The printouts were generated by Anguma James(PW5) and attached to Affidavits filed in court.

PW5 claims to be the District Information Officer information Technology Officer for Tororo District in which capacity he swore the Affidavits. PW5 further claims" to work with the Electoral Commission as an Information Technology Officer whose role is to collect all data to the computer and doing IT works for the commission as well as obtaining data from the BVVM."

It is argued by Counsel for the Petitioner that the Respondents did not oppose the fact that PW5 supplied the certified print outs to the Petitioner which were thus validly placed on the court record. It is also argued that the fact that the 2nd Respondent did not provide alternative evidence as to which person worked on the BVVM data for Tororo District proves its authenticity.

This court allowed the Affidavits sworn by PW5 on record due to the fact that he was not cross examined on the impugned signatures which is a matter of fact that could only be determined on a preponderance of evidence, The weight the court can attach to the BVVM print outs is however a different matter based on different considerations.

Court admitted in evidence exhibit R2 which is a letter by the Secretary of the 2nd Respondent confirming that PW5 "is neither a permanent nor a temporary staff" of the Electoral Commission. The implication of this evidence is that PW5 could not have access to the data he claimed to have supplied to the Petitioner. Counsel for the Petitioner did not deem it necessary to cross examine the author of the letter about the allegation. An application for him to be summoned to give viva voce evidence on the allegation would not have been denied by the court.

It is also common knowledge and of judicial notice to the court that no person can hold two jobs and draw two salaries from the Consolidated Fund. PW5 could thus never have been an employee of both the District of Tororo and the Election Commission at the same time. This lends credence to the evidence in the letter admitted as "R2".

PW5 who generated the alleged print outs was not cross examined about his qualifications, how he went about the business of accessing the BVVMs used at the respective Polling stations and retrieving the data he claims to have supplied to the Petitioner. It was also not explained why PW5 could only access and supply to the Petitioner data from only 17 of the 68 polling stations.

The print outs were also certified by PW5 himself which provided the court no room for consideration of a third party's input as to the credibility of the process through which they were obtained and to support the authenticity of the output.

Section 8(2) of the Electronic transactions Act and Section 29(2) of The Computer **Misuse Act** which are in pari- material provide that;-

"A person seeking to introduce a data message or an electronic record in any legal proceedings has the burden of proving its authenticity by evidence capable of supporting a finding that the *electronic record is what the person claims it to be."*

Sections 8(4) of the Electronic Transactions Act and Section 29(4) of the **Computer Misuse Act** which are also in pari materia provide;-

"(4) When assessing the evidential weight of a data message or an electronic record, the court shall have regard to--

- (a) The reliability of the manner in which the data message was generated, stored or communicated;
- (b) The reliability of the manner in which the authenticity of the data message was maintained;
- (c) The manner in which the originator of the data message or electronic record was identified; and (d) Any other relevant factor.

It is however the legal position that BVVM were introduced into Uganda's electoral process by the Electoral Commission (Adoption and Manner of Use of Technology In the Management of Elections) Regulations. SI Number 2/2021. The purpose of the BVVM technology is to improve the integrity of the electoral process through authentication of the identity of voters to eliminate electoral fraud through multiple voting.

The primary document for purposes of identifying a registered voter however remains the Voters' Register from which is derived the respective Voters rolls for the polling stations within the respective constituencies under Section 18(1) and (3) of the Electoral Commission Act. The implication is that BVVM machines only help in improving the integrity of the process but are not a substitute for the Voters roll.

The Parliamentary Elections Act in sections 51 and 53 further lays out the documents required for the collection and tallying of results after the closure of polling. The tallying is from Declaration of Results Forms. Data from the BVVM is not one of the listed requirements for the tallying process.

The 2nd Respondent's officers were thus not required by the Law to use BVVM data in the tallying of results as the Petitioner incorrectly submits. Section 61(1) (C) of the Parliamentary Elections Act was therefore not breached in that respect as alleged by Counsel for the Petitioner.

Failure to ascertain verified results;

The Petitioner faults the 2nd Respondent for not attending to the complaints he raised in a letter dated 15th January 2021 before the 1st Respondent was declared as the winner. The letter was addressed to the Returning Officer and was received on the same date but not the time when it was received.

It is argued by Counsel for the 1st Respondent that the 2nd Respondent duly verified and tallied results from the respective polling stations based on which he declared the winner and was thus functus officio. Only a court of Law could alter the declaration he made. In view of lack of any indication as to the time when the Returning Officer allegedly received the complaint from the Petitioner, I find credibility in the reasoning of Counsel for the 1st Respondent.

I find this complaint rather hanging. The complaints the Petitioner raised in the letter dated 15th January 2021 are embedded in the Petition he filed and are to be addressed in the final assessment as to whether the declaration by the 2nd Respondent merits to be sustained or not.

In resolving the 1st issue, I find that the election for the position of directly elected Member of Parliament for West Budama County North in Tororo District was conducted in accordance with the law.

Issue No.2

Whether the non-compliance if any, affected the results of the election in a substantial manner.

Based on the decision of the court on the use of BVVMs and how they are not tailored for tallying results, I find this issue rather baseless since it is grounded on what the Petitioner claims to be votes cast on the basis of the machines. Evidence by the Petitioner's witnesses namely Abbo Elizabeth(PW1), Auma Margaret(PW6), Odong Simon(PW11) and

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Wandera Salim(PW 31) was to the effect that not all voters at the polling stations they voted at were verified by the machines.

This evidence diminishes the Petitioner's own arguments to the effect that all voters were captured by the BVVMs and hence what is deemed to appear in the print outs is the sum total of persons who voted.

Even then, supposing that the print outs could be used to arrive at the number of total voters and were a requirement in vote tallying, the absence in evidence of BVVM printouts from all the 68 polling stations would not enable this court to apply the substantiality test. It cannot be applied to partial results.

I further find it strange that the Petitioner submitted no Affidavit evidence on how non-use of BVVM data at any polling station affected the outcome of the elections and in a substantial manner. It is Counsel for the Petitioner who in submissions crafted a table with what he calls evidence to the effect.

It is settled law that a party is bound by the filed pleadings and that submissions do not amount to evidence. The attempt by counsel amounts to adducing evidence from the bar which cannot be sustained by the court.

In resolving the 2nd issue, i have failed to find evidence of any noncompliance that could have affected the results of the election in a substantial manner

Issue No.3

Whether the 1st Respondent committed any illegal practices or electoral offences personally or through his agents with his knowledge, consent or approval.

The Petitioner faults the Respondents for failing to locate polling stations in open places which disenfranchised his supporters, condoning the handling of ballot papers by unauthorized persons and ballot stuffing. I will consider the complaints relating to the respective polling stations in the order they are presented in the Petitioner's submissions.

Kakola Polling station.

Anyima Cecilia(PW6) swore an Affidavit stating that she is a registered voter at Kakola Polling station and was the Petitioner's coordinator in the zone. That she was chased away from the Polling station by Patrick Okongo and Owor Ogeni but later returned, was verified and voted. In the process, she witnessed two men being given a bundle of ballot papers which they ticked and slotted into the ballot box. That they finished all the ballot papers and nothing was left.

Opio Ambrose(PW 22) stated that he was registered to vote at Kakola Polling station but was chased away by Owor Ogen since he was known to support the Petitioner. That it rained and all polling materials were ferried to a small house in Owor Ogen's compound. A number of boys he supervised ticked ballot papers in favour of the 1st Respondent and slotted them into the ballot box. PW22 claims to have witnessed all that while at the door way.

Owori Benard(PW 27) claims to have been chased away by Mr. Owori Ogeni in whose compound the polling station was located and in which he saw the "yellow boys" led by Onyango Patrick. PW 27 later returned to the Polling station camouflaged in a yellow shirt and took shelter on the verandah of the house in which the polling officials, agents and some of the yellow boys were.

PW 27 states that he peeped through one of the windows and saw people inside the house who did not care about his presence busy ticking ballot papers. PW 27 was later shocked to learn that the 1st Respondent obtained 100% of the votes cast yet he had not voted.

The 1st Respondent denied the allegations through the evidence of his agents who were Owori Joseph Dede (RW4) and Owor Ogen (RW 17. Okongo Patrick (RW8) reported to have chased away PW6 from the Polling station stated that he was on that day deployed as an agent of the 1st Respondent at Pei Pei Primary School which is about two kilometers away from Kakola Polling station and did not step at Kakola.

Wawire Christopher (RW 18) the second agent of the 1st Respondent at Pei Pei Primary School corroborated the evidence of RW8 stating that they spent the polling day at the same station representing the 1st Respondent.

Oketch Kenneth (PW 12) a voter at Pei Pei Primary School witnessed Owori Dede, Okongo Patrick and Owor Ogen telling people to vote for the 1st Respondent at Pei Pei Primary School when he went to vote at 10.30 am. Wandera Samuel (PW 31) a voter at Pei Pei Primary School also claims to have seen Okongo Patrick at the same polling station from around 12.30 pm. PW12 and PW31 contradicted PW6, PW 22 and PW 27 about the presence of the 1st Respondent's agents at Kakola.

It is common knowledge that elections held on 14th January 2021 were for a number of electoral positions including the President, directly elected Members of Parliament, District Women Members of Parliament, Councilors and other positions. All candidates had agents at the respective polling stations which invariably made it difficult to exercise the kind of impunity alleged by the Petitioner's witnesses.

I further find it rather strange that all the Petitioner's witnesses regarding the polling exercise at Kakola were chased away but all returned to witness the stated illegalities. The contradictions in the

evidence of the Petitioner's witnesses as to the presence of Owor Ogen, Okongo Patrick and Owori Dede at both Kakola and Pei Pei Polling stations point to a lot of falsehoods.

The Petitioner further denied that Atanas and Azoliny who signed the Declaration of Results Forms for Kakola Polling station were not his agents but stated no action taken against them. Oketch Charles (RRW 19) who was the Presiding Officer swore an Affidavit to the effect that the exercise was smooth and witnessed to the end by the two agents.

It is important to note that a Certified DR Form for Kakola Polling station was exhibited as "RR7". The form was executed by the named agents of the Petitioner who despite the denial did not volunteer the names of the people he had appointed as his agents at Kakola a polling station he knew to be controversially located in the compound of a rival candidate's agent.

The DR form does not also indicate a 100% voter turnout as alleged but shows an unused 50 ballot papers contrary to the evidence of PW6 who together with other witnesses referred to men and boys they could not name as the ones they saw participating in the alleged ballot stuffing. The Form does in the opinion of the court reflect the true position in regard to the polling exercise at Kakola Polling station.

I find more credence in the evidence of the Respondents rebutting the allegations of the chasing away of the Petitioner's supporters and ballot stuffing at Kakola. The location of the polling station in a private compound could have amounted to non-compliance with the Parliamentary Elections Act but the Petitioner should have raised it to the 2nd Respondent prior to the polling day. The Petitioner did also not show how it substantially affected the results of the elections.

Morkiswa Polling station.

Abbo Elizabeth(PW2) claims to have been chased away from the Polling station by a one Noah Abur after she had witnessed Olowo Richard ticking and handing over the ballot papers to Noah for stuffing into the box. Adongo Monica(PW3) an agent of the Petitioner witnessed voter verification by BVVM but known supporters of the Petitioner would be chased away by Olowo Richard, Masasi Wanjala and Mujasi Gabriel.

PW3 saw Olowo tear five to ten ballot papers at a time which he would hand over to Noah for stuffing in the box. It happened for over fifty times before she was forced to leave. PW3 called the District Police Commander who came to the scene and ordered a Prisons Officer to stay behind. The illegalities continued and PW3 was advised not to sign the DR Form by the Chairman of their campaign task force.

Olowo(RW2) and Okongo Bruno(RW 21) denied the allegations and testified to a smooth polling exercise at Morkiswa. RW2 stated that PW3 just refused to sign the DR Form but all other candidates' agents present signed it. Wanjala(RW 16) denied being an agent of the 1st Respondent but stated that he was for one of the Presidential candidates.

For the 2nd Respondent Omolo John(RRW 10) and Ochola John(RRW 7) disputed the allegations and stated that no such illegalities occurred at the polling station. As I noted herein before any polling station had a number of agents for different candidates for the respective offices being competed for. The alleged impunity like tearing over five ballots for over fifty times and stuffing them in the box in open day light is incomprehensible.

The evidence is either fabricated or exaggerated which denies it credibility. Ballot stuffing is a grave offence which has to be proved through cogent evidence which standard has not been met.

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Dida Church.

Allegations of pre-ticking and ballot stuffing are raised by the Petitioner through Omalla Okunde (PW 20). A one Amuny the NRM Chairperson for Kisoko sub-county is stated to have arrived with soldiers at 12.00pm and ordered all polling agents away from the Polling station except those for the 1st Respondent. Verification of voters started, voters were handed pre-ticked votes in favor of the 1st Respondent and later results were announced without vote counting witnessed by all.

PW 20 claims to have been forced to sign DR Forms by the "yellow boys" or be arrested and he was not handed a copy of the Form. PW 20 did not attach any evidence of his appointment as an agent of the Petitioner at Dida Church. Dida Church was not pleaded as one of the stations where illegalities occurred and PW 20 was not named among the Petitioner's agents allegedly harassed on the 14th January 2021.

Oburu Osinde (RW15) and Oloka Dennis(RW 26) countered the evidence by PW 20 deposing that the elections were smooth and the said Amuny did not appear at the polling station as alleged. It is also denied that PW 20 was forced to sign the DR Form because there is no signature on the form he alleges to have been forced to sign.

The Respondents rely on a certified copy of the DR Form for Dida Church supplied to court on 24th September 2021 and I find no reason to disregard this evidence as credible.

The Petition and the Affidavit in support do not also specifically plead Dida Church as one of the problem polling stations. The name of 'Amuny' does not also feature in the Petition. I take it that the alleged interference by the NRM Chairperson with nine soldiers could not have easily been swept into generalities. PW 20 did not adduce evidence to show that he was an agent and his evidence was not corroborated at least by any other person.

I fail to find credibility in the allegations raised by PW 20 about the polling exercise at Dida Church.

Magoro Polling station.

Through the evidence of Opio Christopher (PW 23) the Petitioner alleges pre-ticking and ballot stuffing at Magoro Polling station. PW 23 claims to have been handed five pre-ticked ballot papers which he however dropped down and therefore missed the opportunity to vote for the Petitioner.

Ochieng Johny(RW 13) and Opendi Joseph (RW 25) rebutted the allegation stating that no such incident happened at the polling station. The 2nd Respondent's Presiding Officer Wasenda Peter Phillip(RRW 16) corroborated the 1st Respondent's evidence.

A perusal of the DR Form for Magoro Polling station however shows that the Petitioner's two agents Abbo Esther and Idi Hussein signed and total number of votes counted was 242 as against 246 voters. That cannot amount to the ballot stuffing alleged by PW 23. The certified DR Form was admitted in evidence as "RR4."

I find no merit in the allegations of pre-ticking and ballot stuffing at Magoro Polling station.

Makaur Polling station.

The Petitioner faults the 2nd Respondent for failing to secure the polling exercise at Makaur which led to harassment and intimidation of his voters at this station. Auma Margaret(PW7) claims to have been harassed together with her co-agents by Owere Ali who forced them to

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lie down and assaulted them. PW7 claims to have run to a classroom where she hid but returned, was verified and voted.

In the process, PW7 claims to have voters being issued with pre-ticked ballot papers in favor of the 1st Respondent and to have been forced to sign the DR Form. Owori Joseph(PW 28) and Salim Mwanja (PW 29) also claim to have been harassed and they escaped from the Polling station on motorcycles with the 1st Respondent's supporters riding after them.

PW28 and PW 29 state that they were not helped by the Officer in Charge of Kisoko Police Station and while there, army men came and roughed them up until people present threatened to boycott the election. PW 28 and PW 29 were thus not able to witness the polling exercise at Makaur.

Ofwono Gaetano(RW5) and Owino Innocent(RW 19) rebutted the allegations on behalf of the 1st Respondent. RW5 a grandson of PW7 stated that they were together with her all day and even shared lunch. Both witnesses deny that any acts of harassment took place at the polling station and that PW7 signed the DR Form without being coerced as she alleged in the Affidavit.

Ochwo William (RRW 14) corroborates the evidence and a certified DR Form for the station was admitted in evidence as "RR2".

PW7,PW 28 and PW 29 did not attach copies of their appointment letters to the Affidavits yet their evidence stems from their alleged appointment as such. PW 28 and PW 29 do not also make mention of PW7 as a co-agent at the Polling station. While PW7 mentions Owere Ali as the one who commanded the team that harassed them, PW 28 and PW 29 make an unidentified man and soldiers.

The inconsistencies in the Affidavits of PW7,PW28 and PW 29 waters down any credibility about the alleged harassment. I find the evidence of RW 5 and RW 19 to the effect that Owere Ali was a registered voter at

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Mor-Mile and that he did not appear at Makaur and which was not rebutted more believable.

County Chief's Residence.

The Petitioner led evidence of ballot stuffing and harassment through Opendi Alex(PW 21) and Opoya Badru (PW 24). It was the evidence of PW 21 that he arrived at the Polling station at 7.20 AM but the voting started at 11.00AM. That only the agents of the 1st Respondent were allowed to access the polling area and he observed the proceedings from a distance.

PW 21 saw the Presiding Officer allow some men to enter and block others from witnessing what was happening as the Election Constable dished out more than one ballot papers for Parliamentary candidates to known supporters of the 1st Respondent including a one Nyapalapa.

BVVM's were not used and the 1st Respondent came to the scene with Dr. Tanga Odoi at 10.00AM, 1.00PM and 4.00PM accompanied by soldiers and the exercise went on up to 8.00PM. PW 21 was advised to leave the station given the escalating threats to his life. PW 21 did not witness the counting of votes or the signing of any documents.

PW 24 claims to have been refused to vote for the Parliamentary candidate after verification on the BVVM and he relocated to his uncle's home in the neighborhood from where he witnessed the events. PW 24 saw about 100 people being denied the right to vote for the Petitioner and saw a man in army fatigue accompanied by another enter into a nearby house and when they left the Presiding Officer exited with ballot papers which he stuffed into the box.

At 8.30 PM Dr. Tanga Odoi arrived in a double cabin pick up with an "RM 00....." Registration plate and provided light for the tallying process to start and he carried the officials with the voting materials to Kisoko subcounty after the exercise.

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Olowo Malik Obbo(RW 12) and Olowo Taddeo(RW 23) rebutted the allegations stating that the exercise went on smoothly and there were no incidents of violence, intimidation and ballot stuffing as alleged by PW 21 and PW 24. Oketch Francis (RRW 13) who was the Presiding Officer also rebutted the allegations.

PW 21 and PW 24 gave contradicting evidence about the use of BVVMs at the Polling station. While one stated that all voters would be verified, it was not the evidence of the other. I further note that PW 24 did not mention the presence of Dr. Tanga Odoi with soldiers on the three occasions alleged by PW 21 but only saw him at 8.00PM. One wonders how PW 24 could have missed such evidence yet the same Tanga Odoi is alleged by PW 21 to have threatened to shoot supporters of the Petitioner.

While PW 21 stated that agents of all other candidates except the ones for the 1st Respondent were prevented from carrying out their duties on behalf of their principals, the submitted DR Form shows that agents for Alira David, Okello Jabweri and Owor John Paul duly executed the Form. Could they have been pushed away from the station but allowed to validate the exercise they never participated in at the tail end?

I find the evidence of PW 21 and PW 24 either exaggerated to favour the Petitioner or untruthful. It should have been corroborated to gain some credibility. As observed in *Kabuusu Moses Wagaba V Lwanga Timothy & EC*. EP No, 15/2011;

"Election petitions are highly partisan and supporters are likely to go to any length to seek to establish adverse claims and therefore it is important to look for cogent independent and credible evidence to corroborate the claims to satisfy court that the allegations made by the Petitioner are true."

Morkiswa Health Center.

Voter harassment and intimidation are alleged by the Petitioner through the evidence of Akong Mary Francis(PW4) and Oketcho Valentine Jude (PW 14). It was the evidence of PW4 that she arrived at the polling station at 7.30 am and was told that an agent of the Petitioner had been chased away. That a one Owere Ali and a group of men arrived and arrested a man whom they took to Kisoko Police station.

PW 4 was verified and voted but in the process saw a polling official tear, tick and give about 10 people she had seen moving with the 1st Respondent more than one ballot paper. On the other hand PW 14 claims to have been an agent of the Petitioner and he saw a Police Constable declaring that he will allow the 1st Respondent's agents to vote as they please. PW4 was latter harassed from the polling station and he was whisked away on a motor cycle. He was not helped at Kisoko Police station and he reported at Nagongera.

Ochai Raphael(RW3) and Achieng Rose(RW 20) rebutted the allegations and stated that no voter was harassed or intimidated. Omal Wycliff (RRW 8) corroborated the evidence of RW 3 and RW 20.

While PW4 was told of an agent of the Petitioner who had been chased away as she approached the polling venue at 7.30 AM, the name of the person who told her is not disclosed. PW 14 does not mention such an agent and he stayed at the station for a good part of the morning.

PW4 did not also mention the name of the polling official who issued multiple ballot papers to voters and further did not name any of the 10 people who received the votes. PW 14 did not name the Police Constable who declared that the 1st Respondent's agents will vote as they pleased either.

I find the rebuttal in the evidence of RW3,RW 20, and RRW 8 more credible. The allegations of voter harassment and ballot stuffing at Morikswa Health Center were not proved to the satisfaction of the court.

Morgwang Deliverance Church.

Okoth Fred(PW 15) who claims to have been appointed as the agent for the Petitioner claims that he was chased away from the Polling station by a Local Defence Unit personnel he does not name. That he was later informed by Geno Mark Opowo and a one Kanyangi that there was ballot stuffing in favor of the 1st Respondent.

The court cannot rely on what PW 15 as evidence since it is hearsay. PW 15 who also claims to have been an agent of the petitioner did not attach proof of the appointment letter he claims to have retained despite the scuffle he was involved in with the local defense personnel.

Osinde Boniface(PW 25) claims to have been harassed and threatened by the "kiboko squad" including Othieno Zed, Kigeen Omal and the 1st Respondent's son known as Jupe. PW 25 left the village but had been verified and had his fingerprints captured by the BVVM. PW 25 did not report the alleged harassment to any Police station and witnessed no ballot stuffing.

Oketcho Vincent(RW 9) and Owor Alex (RW 28) denied the allegations and were corroborated by Ineno Yowana (RRW 9) the presiding officer for the 2nd Respondent.

I note that none of the two witnesses for the Petitioner linked those who allegedly harassed them to the 1st Respondent as his agents and that they did all that with his knowledge, consent and approval.

I fail to find satisfaction in the evidence of PW 15 and PW 25 relating to the alleged harassment and ballot stuffing at Morgwang Deliverance Church.

Bribery at Machar Primary School and Mbula Polling stations.

Ochwo John(PW 10) stated that on the eve of the polling day a one Marijani invited him to his home with about thirty other people and bribed him with Ugx.5,000 to vote for the 1st Respondent. On the polling day as he went to vote another group of people gave him Ugx.2,000 and being the Christian he is, he got ashamed and voted for the 1st Respondent.

Oyuki Richard(PW 26) was asked by Othieno Oloka why he did not like the 1st Respondent at 6.00 AM on the polling day. At 10.00AM of the same day PW 26 saw Oloka giving out Ugx.2,000 notes to women at Mbula, Machari West Zone. As he proceeded to vote PW 26 saw Ochari and Ofeyo receiving Ugx.2,000 notes from Othieno Oloka.

Okoth Ivan(PW 16) was assigned the duty of coordinating the Petitioner's agents on the election day and left home at 6.20 AM. On the way PW 16 saw a gentleman wearing a black jacket opening a black bag and he started issuing out two notes of Ugx.1,000 to each of them while telling them to vote for the 1st respondent.

RW 30 and RRW 4 rebutted the bribery allegations for the 1st and 2nd Respondents respectively.

Jurisprudence on the offense of bribery in election matters is well settled. A person alleging bribery must to the satisfaction of the court prove (i) that a gift was given to a voter (ii) that the gift was given by a candidate or his agent and (iii) that the gift was to induce the receiver to vote for the candidate or to influence a voter to refrain from voting his preferred candidate.

Kiiza Besigye V Yoweri Kaguta Museveni. SC EP No.1/201; Apolot Stella Isodo V Amongin Jacqueline. EPA No.0060/2016.

It is also necessary to call independent evidence to confirm the allegations since both the giver and the receiver are accomplices in committing the offence. PW 10 failed to mention any of the thirty people with who he was bribed by Marijani. PW 26 did not mention any of the women he saw receiving money from othieno oloka. PW 16 did not name the giver and the receivers of the alleged bribe.

I fail to find any iota of credibility in the bribery allegations raised by the Petitioner.

Remedies available to the parties.

It is an accepted fact that no flawless election can be held but the gravity of any incident must be weighed vis avis the final results. This explains why consistent and cogent evidence must be presented by whoever seeks the setting aside of an election and the standard of proof is higher than in ordinary civil suits.

I find the statement made by Justice V. F. Musoke -Kibuuka(RIP) on this aspect of election litigation worthy quoting;-

"It is quiet 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 of both individual and national importance. The removal of the elected member of parliament render 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 affected constituency. When the election is set aside, the member of parliament affected suffers both serious personal remorse as well as adverse *financial effects."*

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Karokora v Mondo Kagonyera. EP No.002/2001.

I found it strange that all accusations of election malpractices were from an area where the 1st Respondent allegedly had great support. Nothing amiss was reported in the area where the Petitioner appears to have had support. Justice V. F Musoke Kibuuka(RIP) further observed;-

"A court of law does not operate a a meta-physical level.... It acts on human evidence laid down and at a human level. It would be difficult for a court to believe that supporters of one candidate behaved in a saintly manner while those of the other candidate were all servants of the devil."

Karokora V EC & Mondo Kagonyera. EP No.002/2001.

All in all, I have failed to find cogent evidence of the kind which is free from contradictions, truthful and compelling to the satisfaction of the court that merits the setting aside of the election of the 1st Respondent as the directly elected Member of Parliament for West Budama County North Constituency.

The Petition is dismissed with costs to the 1st Respondent and the 2nd Respondents. The 1st Respondent prayed for costs for two counsel but I have not detected any justification for such a certificate given that the nature of the proceedings adopted by Counsel.

> Moses Kazibwe Kawumi Judge 1st December 2022.

THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT MBALE****ELECTION PETITION NO 0.14 OF 2021**

OTHIENO OKOTH RICHARD ::::::::::::::::::::

VERSUS

1. OCHAI MAXIMUS
2. ELECTORAL COMMISSION ::::::::::::::::::::

JUDGMENT PROCEEDINGS

\$2/12/2022\$

Bandondo Nicholas:

for petitioner.

Petitioner

present.

Sekandi Gonzanga Kironde Orach Sabastian

for 1st Respondent.

1st Respondent \$ \cdot \cdot \$

present.

Hilda Katuntu Patrick Wetaka

for 2nd Respondent.

Court:

Judgment delivered.

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Prepared on 14 October 2026 · Esheria