

UGANDA / JUDGMENT

Watenga v Mudoï and Another
(Election Petition No. 16 of 2021) [2021]
UGHCEP 14 (30 September 2021)
[2021] UGHCEP 14

COURT

Election Petitions of Uganda

BEFORE

Bashaija, J

CASE / FILE NUMBER

Election Petition No. 16 of 2021

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5 THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE****IN THE MATTER OF PARLIAMENTARY ELECTIONS ACT CAP 17****AND****IN THE MATTER OF ELECTIONS (ELECTION PETITIONS) RULES SI 141-2 AND****10 IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR MEMBER OF
PARLIAMENT FOR LUTSESHE COUNTY CONSTITUENCY HELD ON THE 14TH DAY
OF JANUARY 2021****HCT- 04-CV- EP -016 - 2021****WATENGA GODFREY NABUTANYI:::PETITIONER****15 VERSUS****MODOI ISAAC:::1 ST RESPONDENT****ELECTORAL COMMISSION:::2 NDRESPONDENT**

BEFORE: HON. JUSTICE DR. BASHAIJA K. ANDREW

JUDGMENT.

20 Watenga Godfrey Nabutanyi *(hereinafter referred to as "Petitioner")* and Modoi Isaac *(hereinafter referred to as "1 st Respondent")* along with four other candidates, contested in the election held on 14th January 2021, for Member of Parliament (MP) seat for Lutsheshe County Constituency in Bududa District. The Electoral Commission (EC) *(hereinafter referred to as "2 nd Respondent")* returned the 1st Respondent as the winner and gazetted him, on 17th February 2021. The Petitioner filed this petition challenging the outcome of the election contending that the 1st 25 Respondent was not validly elected, that 2 nd Respondent did not conduct the election in accordance with the law, and the non-compliance affected the result of the election in a substantial manner. The Petitioner sought a declaration that the 1st Respondent was not validly nominated for the position of MP as he used the academic documents belonging to "Modoi Abdul Isaac" who is a different person from the 1st

- Respondent; that at the time of his nomination the 1st 5 Respondent lacked the requisite minimum academic qualifications of advanced level standard or its equivalent, to stand as MP; that the election of the 1st Respondent as MP be annulled, set aside and the Petitioner be declared the winner; in the alternative, that fresh elections be conducted for the MP seat in the constituency; and the Respondents pay costs of this petition.
- 10 Mr. Padoko Gerald represented the Petitioner, Mr. Muhwezi Ronald jointly with Mr. Godwin Tumwesiga represented the 1st Respondent, and Ms. Gilda Katutu represented the 2nd Respondent. Counsel filed submissions with legal authorities to argue the petition. The respective submissions will occasionally be referred to but not reproduced in detail in this judgment. In the joint scheduling memorandum, the following were agreed for court's determination: -
 - 1. *Whether the 1* 15 *st Respondent was validly elected.*
 - 2. *Whether the election of the directly elected Member of Parliament for Lutsheshe County Constituency Bududa District, was conducted in accordance with the law, and if not; whether non-compliance, if any, affected the result of the election in a substantial manner.*
 - 3. *Whether the 1 st Respondent committed any electoral offences personally or through his* 20 *agents with his knowledge, consent or approval*
 - 4. *What remedies are available to the parties?*

In determining the issues, court must bear in mind the principle that in an election petition, the burden of proof lies on the petitioner who initiates the action. This was re-affirmed in *Muhindo Rehema vs. Winfred Kiiza and Electoral Commission EPA No. 29 of 2001.* Court further held that the standard 25 of proof is on the balance of probabilities to the satisfaction of court, in accordance with Section 61 (3) of the Parliamentary Elections Act, 2005. A similar position was re-echoed by the Supreme Court in *Mukasa Anthony Harris vs. Dr. Michael Lulume Bayiga EPA No.

18 of 2007.* Also in *Sematimba Peter Simon and NCHE vs. Sekigozi EP Nos.008 & 10 of 2016,* it was held that the petitioner is required to adduce cogent evidence to prove his or her case and it has to be the kind of evidence which is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favor, and cogent means compelling or convincing. It is also now well established that the standard of proof in election petition is higher than that which is applied in ordinary civil cases i.e. on balance of probability, although it is not equal to the standard of proof beyond reasonable doubt that is applied in criminal cases. See: *Hellen Adoa and Electoral*

- 5 *Commission vs. Alice Alaso, EPA Nos. 57 & 54 of 2016.* The other principle court is guided by, is that the more serious an allegation or the more serious its consequences if proven, the stronger the evidence has to be before a court to find that the allegations were proved on balance of probabilities. The petitioner must offer proof cogent enough to secure judgment in his/her favour. See: *Mujuni Vincent Kyamadidi vs. Charles Ngabirano and Electoral Commission, EPA No. 84 of 2016.* With
- 10 these principles in mind, court will determine the issues in the order they were framed. *Issue No.1: Whether the 1st Respondent was validly elected.*

The Petitioner's contention is three fold. Firstly, that the 1st Respondent was not validly nominated, as at the time he lacked the requisite minimum academic qualifications of Advanced Level Standard or its equivalent to stand as MP. Secondly, that the 1st Respondent illegally used for his nomination, on 16th 15 November 2020, academic documents belonging to "Modoi Abdul Isaac" and not "Modoi Isaac", who is a different person from the 1st Respondent. Thirdly, that the 1st Respondent presented for his nomination academic documents that were in names different from those which appear in the national voters' register and his national identity card.

As proof, the Petitioner adduced in evidence a letter dated 9th April 2021, *Annexure "A"* to his 20 supplementary affidavit, written by his lawyers, M/s. Lukwago & Co. Advocates, to the Registrar of documents Uganda Registration Bureau (URSB). In the letter, the lawyers were inquiring whether the affidavit of the 1st Respondent attached to the answer to the petition, was registered with URSB. The said affidavit was made by the 1st Respondent in 2014 clarifying on use of his names interchangeably. By letter dated 19th April 2021, *Annexure "B"* to the Petitioner's supplementary 25 affidavit, URSB replied that a search on their records revealed that the affidavit in the names of MODOI ABDUL ISAAC is not reflected in their database. URSB requested for any documentation in the lawyers' possession pertaining to the said name that can aid any further search. This is all the evidence adduced to prove the 1st Respondent's lack of the requisite minimum academic qualifications at the time of his nomination.

30 Counsel for the Petitioner relied on the case of *Rehema Tiwuwe Walongole vs. Proscovia Salaamu Musumba, EPA No. 27 of 2016,* to the effect that once questions are raised as to the authenticity of academic documents, the burden of proof shifts to the 1st Respondent to show that they are genuine. Counsel argued that in the present case, the 1st Respondent failed to explain the discrepancies in the names he presented for nomination.

- In reply, the 1st Respondent in paragraphs 6, 7 and 8 of his answer to the petition, and paragraph 6,7,8,9 and 10 of the affidavit in support of the answer to the petition, insisted that the academic documents he presented at nomination bearing names, "Modoi Abdul Isaac", are truly his and refer to him and identify him as the same and one person. That he was nominated and elected under his true names "Modoi Isaac" and that "Modoi Isaac Abdul" are his true names and have been used by
- 10 him interchangeably. That in 2014 he swore an affidavit to that effect and registered it with the URSB. The 1st Respondent also adduced in evidence copy of the nomination record collectively marked as *Annexure "D"* to his affidavit. He maintained that no other person has ever appeared to claim to be known by the name "Modoi Abdul Isaac" or "Modoi Isaac".

The 1st Respondent further adduced in evidence the nomination record he presented to 2nd Respondent at the time of his nomination. It includes a letter dated 28th 15 October, 2015, titled *Notification of NRM Flag bearer"*, attached to the affidavit in support of the answer to the petition. The letter introduced and presented the 1st Respondent to the EC as "Modoi Isaac". He also adduced *Annexure "B"*, to his affidavit, a copy of the passport issued to him in 1993 in the names, "Abdul Isaac Modoi". The visas issued therein, were variously in the names, "Modoi Abdul Isaac", "Modoi A. I", and "Modoi Isaac". 20 Another passport issued in 2007 was issued in the names of "Modoi Isaac". The Advanced Certificate of Education issued by the East African Examination Council in December 1978 bears the names "Modoi Abdul Isaac". It was obtained from Mbale Secondary School whose Code Number is U00511 531. Further, UNEB verified exam results of the 1st Respondent in *Letter of Verification of Results*, dated 19th August, 2015 under the same names "Modoi Abdul Isaac".

- Counsel for the 1st Respondent distinguished the *Rehema Tiwuwe Walongole* case (supra) in that the question raised in that case was on the authenticity of the academic documents. That in the present case, the authenticity of the academic documents is not questioned, but only the registration of the affidavit; of which URSB required further information to enable a search, but that the Petitioner did not follow it up to conclusion. That the 1st Respondent's affidavit to verify his names was registered
- 30 in 2014 and URSB does not disown it. Counsel also cited *Okello P. Charles Engola Macodwogo and Electoral Commission vs. Ayena Odongo Krispus Charles, EPA Nos. 026 & 094 of 2016*, where court held that interchanging of names cannot affect one's qualifications. That by verifying his name, the appellant did not change or forfeit the rights attached to his former name. Further, that the

5 respondent bore the burden to prove the allegations he fronted and mere allegations are not sufficient to cause the burden to shift.

After carefully evaluating the evidence and submissions of counsel in light of the law applicable on this issue, it is found that real controversy is on the use of names interchangeably by the 1st Respondent, and not lack of academic qualifications to stand as MP. The position on the matter is

10 settled. In **Okello P. Charles Engola Macodwogo** case (supra) it was held that interchanging of names cannot affect one's qualifications. Further, that by verifying his name, the appellant did not change or forfeit the rights attached to his former name. Also in **Mutembuli Yusuf vs. Nagwomu Moses Musamba and Electoral Commission, EPA No. 43 of 2016,** court re-affirmed that writing of same names in a different order cannot affect one's qualification and that alone cannot constitute proof of invalidity, and addition of a name does not amount to change of a name.

In the present case, other than a singular letter of his lawyers inquiring from URSB the authenticity of an affidavit sworn by the 1st Respondent in 2014, and a reply by the URSB which required the lawyers to provide any further documentation that can aid further search, the Petitioner furnished no any other evidence proving that the 1st Respondent lacked the requisite minimum academic 20 qualifications, or presented for his nomination academic documents which were of a different person. There was need to call evidence of the alleged other person whose academic documents the 1st Respondent submitted at nomination. There was also need for evidence to prove that the 1st Respondent indeed presented academic documents of a different person at nomination, or that the academic document presented at nomination were in different names from those of the 1st Respondent. 25 The evidence fell far too short of the test in **Mutembuli Yusuf** case (supra).

The consequence of failure to adduce evidence casting doubt on the authenticity of the academic documents, is that the burden could not shift to the 1st Respondent to be required to explain his academic qualifications. As held in **Ninsiima Grace vs. Azairwe Dorothy and Electoral Commission,**

EPA No.05 of 2016; and **Mulindwa Isaac Ssozi vs. Lugudde Katwe Elizabeth, EPA No.14 of 2016;**

30 for the burden of proof to shift, there must be clear evidence creating doubt as to the authenticity of the documents in question that demands explanation from the 1st Respondent. In the present case, the burden could not shift merely on the unsupported allegations of the Petitioner.

- 5 This court is also of the view that **Rehema Tiwuwe Walongole** case (supra) is distinguishable from the present case on facts. In that case, the authenticity of the academic documents was in question, while in the instant case the authenticity of the academic documents was not questioned. It was the registration of the affidavit of the 1st Respondent with URSB in 2014 that was being queried. URSB requested for more information from the Petitioner's lawyers to enable further search, but no such

- 10 information was furnished. Court therefore, adopts the same reasoning in *Okello P. Charles Engola Macodwogo* and *Mutembuli Yusuf* cases (supra) and holds that use of the names "Modoi Abdul Isaac" or "Modoi Isaac" interchangeably, would not affect the 1st Respondent's qualifications. He was able to prove that he possessed the required minimum qualifications to be nominated MP. Section 4 (1) (c) PEA stipulates the requisite minimum qualifications as follows;

15 "A person is qualified to be a member of parliament if that person-

(c) has completed a minimum formal education of Advance Level standard or its equivalent."

The above stated minimum academic qualifications for MP, are besides other higher qualifications the 1st Respondent presented for his nomination, which include a Bachelor of Arts Degree (Hons)

- 20 from Makerere University in 1982. It is also not true that he presented for nomination academic documents of a different person, or that the names he presented for nomination as MP are different from those which appear in the national register and his national identity card. *Issue No.1* is answered in the affirmative. The 1st Respondent was validly nominated and elected MP for Lutseshe County Constituency.
- 25 *Issue 2: Whether the election of directly elected MP for the Lutseshe County Constituency, Bududa District, was conducted in accordance with the laws, and if not, if the noncompliance, if any, affected the result of the election in a substantial manner.*

The allegations herein are essentially more against the 2nd Respondent than 1st Respondent, and are in two aspects. The first is that the 2nd Respondent failed to conduct the election in accordance with the provisions of the law. The second is that the 2nd Respondent compromised the principle of impartiality and transparency by failing to restrain the 1st Respondent from committing illegal practices and offences during the election, with the full knowledge of the 2nd Respondent. The

particular incidents singled out are the failure to use biometric data machines, allowing multiple voting, ballot stuffing, allowing ghost voters to vote, and having votes exceeding the total number of the registered voters at various polling stations.

(i) Ballot stuffing:

In *Toolit Simon Akecha vs. Oulanya Jacob Lokori and Electoral Commission CA EPA No. 19 of 2011*, "ballot stuffing" was defined as an election malpractice which involves voting more than 10 times either in the names of the people who do not exist at all or those who are dead or absent at the time of voting yet they are recorded to have voted.

In paragraphs 5 of the petition and 12(d) of his affidavit accompanying the petition, it was alleged that the 1st Respondent's agents stuffed ballot boxes with ballot papers at different polling stations in order to defeat the Petitioner. The named affected polling stations are Shikusi and Budesi 15 primary school. The Petitioner, in paragraph 12 (d) of his affidavit accompanying the petition,

stated that he was informed by "Nadunga Susana" that she was given pre-ticked ballot papers in favor of the 1st Respondent and ordered to stuff them in the ballot boxes.

A careful search of the entire record, revealed no any affidavit sworn by any one by the names "Nadunga Susana", whom the Petitioner named as his source information regarding ballot stuffing.

- 20 The Petitioner's evidence thus remained unsupported and hearsay. In their submissions, counsel for the Petitioner introduced a different name of "Nantuka Suzan" who was not mentioned by the Petitioner as his source of information. It would be unsafe to assume that "Nadunga Susana" named by the Petitioner was the same person as "Nantuka Suzan" in counsel's submissions. Even assuming that she was one and the same person, her evidence remained hearsay for failure to 25 disclose the name of the person who allegedly gave her pre-ticked ballot papers. Even for the particular named polling station of Budesi primary school, one Lodim Tadeo, a police constable at the said polling station, in paragraph 6 of his affidavit, totally refuted the allegation of ballot stuffing. He swore that all voters were identified and verified prior to being issued with ballot papers to vote. That deposition effectively rebutted the allegation of ballot stuffing, which in any
- case lacked any supporting evidence. It also dispelled counsel's submissions that the 2nd 30 Respondent did not reply to the allegations of ballot stuffing on the particular polling station.

(ii) Multiple voting/failure to use biometric data voter registers:

- 5 In paragraphs 6 (a) (b) (c) (d) and (e) of the petition, and 9 and 14 (c) (d) (e) (f) (g) in supporting affidavit, the Petitioner averred that he was informed by Marofu John and Wanga Isaac, his sub county coordinators for Budesi sub county, that the 2nd Respondent allowed people who did not appear on voters register to vote, and did not use biometric data machines during the process, in order to defeat the Petitioner in two sub counties of Budesi. Also, that one Kabalatsi Robert and
- 10 Masawi Samuel, the Petitioner's coordinators for Bukalasi sub county, informed him that biometric data voter registers were not used in Bukalasi sub county. In paragraph 14(d) that he informed the 2nd Respondent's Returning Officer several times of the illegalities, but he was ignored. In paragraph 14 (f) that some voters who are known to have died and others migrated due to mudslides, but voting was more than 100% at Bunasitya, Bukibalera, Renyeri, Shikusi and 15 Tembi polling stations. Also, that at Shikusi polling station, the votes exceeded registered number

- of voters; the register had 162 registered voters but votes cast were 180.

In his affidavit in reply, Nsereko Ronald, the 1st Respondent's District Returning Officer for Bududa Electoral District, denied all the allegations of non-compliance with the electoral laws. Specifically, on the election results of the impugned polling stations of Bukibalela, Kubewo, 20 Shimiya, Shikusi and Budesi primary school, he stated that all candidates' polling agents, including those of the Petitioner, signed the Declaration of Results Forms (DRFs) and never contested the results. As proof, he attached copies of the DRFs of the contested polling stations. He also denied that the Petitioner complained to the EC officials who ignored him. In paragraph 10 of the affidavit, he stated that the Official Report Book of the polling stations in question shows that no such 25 complaints occurred.

After carefully evaluating all the evidence on multiple voting and failure to use biometric data voter registers, court finds that the allegations were not proved to the required standard. The Petitioner based his allegations on information from Marofu John and Wanga Isaac. Of the two, only Wanga Isaac filed an affidavit. Even then, in paragraph 8, he only deposed to alleged bribery 30 at Shilay trading center, and not ballot stuffing or multiple voting. That renders the Petitioner's evidence hearsay and contradictory; which cannot be safely acted upon. Similarly, there were no affidavits of Kabalatsi Robert and Masawi Samuel who were named by the Petitioner as his sources of information, on the failure to use biometric data voter register. The two named coordinators do not even disclose any of the affected polling stations in the respective sub counties. In that regard, 5 the Petitioner's evidence was hearsay of the weakest kind to prove the fact in issue and it would not be acted upon.

The DRFs attached to the Returning Officer's affidavit also revealed that the Petitioner's agents, at the impugned polling stations, signed the respective DRFs. No adverse comments from any of the polling agents were noted in the space provided for that purpose on the DRFs. That was

10 invariably a confirmation by the agents of the contents and results entered on DRFs. The net effect is that the allegation of noncompliance with the electoral laws, was not proved by the Petitioner against the Respondents to the required standard. *Issue No.2* is wholly answered in the negative.

Issue No.3: Whether the 1st Respondent committed any electoral offences personally or through his agents with his knowledge and consent or approval.

The alleged illegal practices and offences against the 1st 15 Respondent personally or by his agents with his knowledge and consent or approval, appear in paragraph 10 -13 of the affidavit accompanying the petition. They include bribery, violence, intimidation, forgery of agents' signatures on DRFs, multiple voting and ballot stuffing, at various polling stations.

(i) Violence and intimidation:

20 In paragraph 4(a) and (b) of the petition and 12(a) and (b) of the affidavit in support, the Petitioner alleged that the 1st Respondent deployed stick wielding men to intimidate and beat up voters and Petitioner's agents. He singled out Bukibalela polling station where his agent, Nabutanyi Patrick, was allegedly beaten and arrested by agents of the 1st Respondent. Further, that at Kubewo polling station his agent Namara Solomon was chased away by supporters and agents of the 1st 25 Respondent, who confiscated his appointment letter and he was not allowed to witness the whole polling exercise, and that his signature was forged on DRF. In paragraph 12(c) that his agent, Mafooto Michael at Shimiya polling station was chased away by agents of the 1st Respondent, and Kibeti Peter also his agent, was beaten and chased away and his phone confiscated and gumboots removed. That Kibeti Peter was conditioned to first sign DRF before his items could be returned 30 to him.

Nabute Paul Yasin also attested to the alleged violence and intimidation. He stated in paragraph 4 of his affidavit, that he was stopped by one Kaboolo Aloysius Modoi, who identified himself as

- Chairman LC2 for Namalila Parish and 1st 5 Respondent's agent. In paragraph 5, he stated that the said Kaboolo Aloysius Modoi in the company of 1st Respondent's supporters, who he did not name or state how he knew they were 1st Respondent's supporters, pounced on him and started to beat him and that Police Constables nearby just watched unbothered. That he was arrested by same people and taken to Bukalasi Police Station and detained in Police cells. Further that the 1st
- 10 Respondent came to the Police Station and asked for the cells key so that he kills them himself as they were supposed to be killed before being arrested. In paragraph 12, that around 1:00pm they went and reported a case of assault at Bududa Police Station *Vide SD REF: 28/14/01/2021* and he was given PF53 and referred for medical examination at Bududa Hospital. He attached medical form as *Annexure "C":*
- The 1st 15 Respondent, in paragraph 13 of the affidavit in support of the answer to the petition, denied all the allegations of violence and intimidation. He stated that he did not personally or with his knowledge and consent or approval or through anyone, commit the alleged illegal acts at any polling station. To rebut allegations of Nabutanyi Patrick and Wambete Samson, the 1st Respondent adduced evidence of Kooko Stephen, a Police Constable for Bukibalela polling 20 station, who stated that the Petitioner's agents were present at the polling station throughout the polling exercise and signed DRFs. As proof, he attached to his affidavit, a copy of DRF to show that Wambete Samson was indeed present during the polling exercise and signed DRF. Kooko Stephen also denied that there were any incidents of violence at the polling station.

The 1st Respondent, also denied knowledge of the persons named as his agents and supporters. In 25 paragraph 14 of his supplementary affidavit in reply, he also denied ever setting foot at Bukalasi Police Station on election day. This was corroborated by Wamboya Hassan who was said to be the 1st Respondents' first cousin. He averred in his affidavit, under paragraph 5,6,7,8 and 9, that he stayed with the 1st Respondent at home that whole day, and that the 1st Respondent never went to Bukalasi Police Station in the morning of 14th January 2021.

30 From the evidence, it is clear that the Petitioner never personally witnessed the alleged incidents of violence and intimidation, but premised on information supplied to him by his agents. It meant that he swore to facts that were not within his personal knowledge, which rendered his evidence hearsay, which court would not act on to invalidate an election. Similar position was taken in

5 *Kasirye Zzimula Fred vs. Bazigatirawo Kibuuka Francis Amooti and Electoral Commission, EPA No.01 of 2018.*

Further, Nabutanyi Patrick, whom the Petitioner stated to have been beaten by stick-wielding agents and supporters of the 1st Respondent, did not mention of "stick- wielding" men anywhere in his affidavit. He instead stated that he was "kicked and boxed" by one Magidu Mamukali, Nakuti

- 10 Atwita and others. None of these persons he mentioned was shown to be the agent or supporter of the 1st Respondent. In addition, PF3 which Nabutanyi Patrick attached to his affidavit as the proof of the alleged assault shows that he reported to Police on 17th January 2021, three days after the alleged assault occurred. If this indeed was a case that required Police and medical attention, it raises doubts as to why he waited for all those days to report it to Police and get medical attention.
- 15 The same applied to Wambete Samson, in his affidavit in paragraph 4, where he stated that he was stopped by one Matsasa Rashid who identified himself as 1st Respondent's agent and "three other supporters" of the 1st Respondent, who pounced on him and started beating him. That they arrested him and took him to Bukalasi Police Station. By the same design, Wambete Samson also reported a similar case of assault at Bududa Police Station on 17th January,2021 and was issued with PF3.
- The history he gave on the PF3 was that on 14th 20 January,2021 around 07:30 am, he was "boxed" by people who accused him of trying to bribe voters.

A careful reading of the medical forms of all the alleged victims of violence, revealed fundamental contradictions. For Nabute Paul Yassin, it was issued on 17th January,2021 in respect of the assault alleged to have occurred on 14th January,2021. Further, *SD REF 28/14/01/2021* also bears the date of 17th 25 January,2021, yet Nabute in his affidavit, in paragraph 12 and 13, claims that it was issued on 14th January, 2021 at around 1:00pm. In addition, all PF3s to the alleged victims were issued to White Cross Medical Centre, but the examination was done at Bududa Hospital. It was not explained as to how the request to White

Cross Medical Centre ended up presenting results from Bududa Hospital. These contradictions and inconsistencies are fundamental and were not satisfactorily explained. They

30 left a lot of doubt that they could have been a calculated design intended to mislead or to deceive.

Besides the above, no proof was furnished showing that the alleged assailants were agents and supporters of the 1st Respondent. It also never featured anywhere in the witnesses' respective affidavits, that the alleged assault by agents if any, was committed with knowledge and consent or approval of the 1st Respondent. This fell short of proving particulars as required by Section 61(1) (c)

- PEA, if the Petitioner were to succeed in linking the 1st 5 Respondent to his agents' or supporters' acts or omissions amounting to illegal acts or other offences under the Act. The provisions stipulate that;
- *(1) The election of a candidate as member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court –*

(c) that the illegal practice or any other offence under this Act was committed in 10 *connection with the election by the candidate personally or with his or her knowledge and consent or approval;"*

It is also not shown as to who the so-called "other persons" were that allegedly assaulted Wambete. A lot remained unexplained on the alleged violence and intimidation if any, and who was responsible for it. Counsel for the Petitioner also submitted that the 2nd Respondent never filed any

15 affidavit in reply to deny allegations of violence and intimidation and that as such it is taken to be admitted. The record, however, shows that the allegations of violence and intimidation were attributable to the 1st Respondent and /or his agents and hence the 2nd Respondent needed not to answer to allegations that were not specifically levelled against them.

(ii). Forgery.

20 The allegations were made, as if in passing by the Petitioner, in respect of Wambete Samson's and Namara Solomon's signatures. It was alleged that their signatures on the DRFs were forged. The No evidence was adduced to prove the allegation of forgery. It was not stated as to who actually allegedly forged the signatures of the two persons, if at all. It is trite law that the onus is on the person who alleges forgery to establish it. Other than the agents' word, no other cogent evidence 25 was adduced to establish the truthfulness of their claims. To prove forgery, evidence of a handwriting expert was essential but none was called. That left evidence on the DRF intact in as far as its content was concerned.

Section 47 PEA requires the presiding officer to ensure that only true and proper entries are entered on the DRF. In the case of **Betty Muzanira Bamukwatsa vs. Matsiko Winfred EPA No. 65 of* 30 *2016,** court held that;

****"...A declaration of results Form is a true verified and authentic record of what indeed transpired at the polling stations...DRFs are a check on the system to prevent fraud and****

*5 *improprieties...filling these forms is not a mere formality but a matter of substance. Every entry must be made as safeguard against malpractice...as a principle. DRFs containing glaring irregularities cannot be relied upon and ought to be excluded..."**

Applying the above decision to the instant case, in absence of contrary evidence to show that the signatures of the witnesses on the DRFs were forged, the DRFs remained a true verified and 10 authentic record of what transpired at the polling station in question. There is thus no need to belabor the issue further.

****(iii). Bribery:****

Both counsel for the Petitioner and 1st Respondent, correctly cited the law on voter bribery in election petitions in their submissions. The offence of voter bribery is created under Section 68 (1) 15 PEA which spells out the ingredients and prescribes a punishment as follows;

"A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or refrain from voting for any candidate, gives or provides or causes to be give or provided any money, gift or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine* 20 *not exceeding seventy-two currency points or imprisonment not exceeding three years."

Bribery is categorised under Section 68 (4) PEA, as an illegal practice. In **Kamba Saleh Moses vs. Hon. Namuyanga Jennifer, EPA No. 027 of 2011,** court held that the standard of proof in allegations of voter bribery is slightly higher than that of ordinary balance of probabilities and it must be to the satisfaction of court. It must be proved that the people bribed were voters at the time of the alleged 25 bribing. Further, in **Mathina Bwambale vs. Crispus Kiyonga and the Electoral Commission EP No.007 of 2007**, it was held that for allegations of voter bribery to succeed, three things must be

satisfied to wit; a gift must be given to a voter, it must be given by a candidate or his agent with his knowledge and consent or approval; it must have been given with the intention of inducing to vote or not to vote for a particular person.

In the instant case, it is alleged in paragraph 8(a) (b) (c) (d) and (e) of the petition, that the 1st 30 Respondent committed the offence of bribery personally or through his agents with his knowledge and consent or approval. In paragraph 11(a), (b) and (f) (sic) of the affidavit accompanying the

5 petition, the Petitioner disclosed sources of his information on the alleged bribery, who included Marofu John, Kutosi Esau, Mafuma Julius and Wakoba Bernard. Of the four named as sources, however, only Wakoba Bernard and Mafuma Julius put in affidavits. Also to note, is that others persons who put in affidavits on the alleged bribery were never mentioned by the Petitioner as his sources of information. It appears they volunteered evidence to support his case but the Petitioner 10 chose not to acknowledge their evidence as his source of information.

It is the position under Order 19 r.3(1) of the Civil Procedure Rules, that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, and where the deponent swears an affidavit based on information, sources of the information must be disclosed. See: *Bombay Flour Mills vs. Patel [1962] EA 802* and *Abdu Serunjogi vs. Ssekito [1977] HCB*

15 *242.* Since the Petitioner in the present case did not disclose the particular witnesses as his sources of information, they could not constitute the basis of his allegation of bribery against the 1st Respondent. That leaves only evidence of Wakoba Bernard and Mafuma Julius to prove the alleged bribery.

In paragraph "f" (sic) of the affidavit accompanying the petition, the Petitioner stated that he was informed by Wakoba Bernard that on 13th January 2021, on the eve of election day, the 1st 20 Respondent through his campaign agents to wit; Walyamboka Joseph and Walimbwa Charles, offered free local beer locally known as "Kamalwa" to voters in Shilayi trading centre in Bundesi sub county, and Nyende trading centre in Mabono sub county. Further, that Wakoba Bernard informed him that Wandekwa Nangulo and Shiswabula Joseph, distributed free "Kamalwa" to Namukhuya trading center in Bumayaka sub county, and the 1st 25 Respondent's agents thereafter requested voters in those trading centers to vote for the 1st Respondent the following day.

In his affidavit in paragraph 2, Wakoba Bernard stated that on 13th January, 2021, the 1st Respondent came to Shilayi trading center at around 10:00am and met voters and requested for votes due the following day. That thereafter, he gave out Shs. 250,000/= to one Kalongolo Vincent

30 in denomination of Shs 2000/= and the same was distributed immediately by Kalongolo amongst the voters present, including Wakooba Bernard who got a note of Shs. 2000/=. That Kalongolo then told the people that he had brewed "Kamalwa" on instructions of the 1st Respondent and he invited them to his home that evening to take the local brew. Wakoba Bernard further stated that he and others took the brew till morning using light from solar panel earlier donated by the 1st 5 Respondent. That all the while Kalongolo pleaded with people to vote for 1st Respondent.

Kalngolo Vincent swore an affidavit in reply, and in paragraph 8, totally denied ever hosting or serving "Kamalwa" brew to voters on instructions of the 1st Respondent or receiving a solar panel from 1st Respondent as a donation. In paragraph 7, he also denied ever receiving money from the

1st Respondent to distribute to voters at Shilayi trading center. In paragraph 6, he denied knowledge of any campaign rally held at Budesi and Shilayi trading centers by 1st Respondent, and averred that he has never attended any. He surmised that the Petitioner could have implicated him in the serious allegations of bribery because during NRM party primaries, he supported the Petitioner who lost to the 1st Respondent. That following the NRM party policy, he supported 1st Respondent as the party flag bearer for parliamentary election and he believes his shift in support never pleased the Petitioner.

After carefully evaluating the evidence as a whole, it emerges that the Petitioner's affidavit accompanying the petition, under paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 is purely hearsay evidence and court would be reluctant to rely on it. Firstly, the Petitioner swore the affidavit, in 20 paragraph 14 thereof, "to the best of his knowledge and belief". Such evidence is inadmissible in all those aspects premised on information and belief, for offending the rule against hearsay evidence. In *Kiiza Besigye vs. Yoweri Kaguta Museveni and Electoral Commission*, SC EP No. 1 of 2001, Odoki CJ (as he then was) held that: -

"...an election petition is not an interlocutory proceeding but a final proceeding, which is* 25 aimed at determining the merits of the case. Therefore, affidavits admissible in such proceedings must be based on the deponents' knowledge, not information and beliefs."* [underlined for emphasis].

Secondly, the evidence adduced by and for the Petitioner on voter bribery allegations, is grossly contradictory. It manifests an attempted patch work just to bolster a case of voter bribery. Besides 30 naming persons as his sources of information who never put in affidavits, the Petitioner under paragraph 11(f)(sic) of affidavit accompanying the petition, named Walyamboka Joseph and Walimbwa Charles, as persons whom his informant Wakoba Bernard told him had offered free local "Kamalwa" brew to voters at Shilayi and Budesi trading centers. However, the alleged informant,

- 5 Wakoba Bernard, in paragraph 2 of his affidavit, mentioned nothing of those persons, but instead introduced the name of Kalongolo Vicent, who instead was stated to have offered money at Shilay trading center and not "Kamalwa" brew at his home as alleged. Wakoba Bernard's evidence never mentioned anywhere Walyamboka Joseph and Walimbwa Charles at all, yet the Petitioner named them as agents and supporter of the 1st Respondent whom Wakoba Bernard allegedly told him bribed
- 10 people at Shilay trading center. Similarly, Wakoba Bernard never mentioned Wanduka Mangulo and Shishwabula Joseph, whom the Petitioner stated, in his affidavit, were disclosed to him by Wakoba Bernard to have participated in the distribution of free "Kamalwa" brew at Namukhuyu trading center in Bumayaka sub county. It is not known where the Petitioner got the particular information from on allegation of voter bribery when the named source of his information, Wakoba Bernard, never rendered such information in his affidavit.

Mafuma Julius was the only other witness mentioned by Petitioner in on allegations of voter bribery concerning solar panels. In paragraph 11 (b) of his affidavit accompanying the petition, the Petitioner stated that Mafuma Julius informed him that in December 2020, while at a campaign rally at Shafusi trading center in Bulwali sub county, the 1st Respondent addressed a gathering who informed him of the problem of lack of lighting at night in the trading center. That at the end of the address, the 1st Respondent gave out solar panels to Matanda Peter who put the same on erected poles in the trading center. That the 1st Respondent also gave out solar panels to voters in Bumakita and Bumuyonga trading centers, and requested persons gathered to vote for him on election day.

Further, in paragraph 2 of his affidavit, Mafuma Julius stated that the 1st Respondent campaigned in Bumakula trading center in early December 2020 and requested for votes; come 14th 25 January 2021. That he further promised to give solar panels free of charge throughout the constituency if elected MP in January 2021. That on that day, the 1st Respondent gave Mafuma Shs. 50,000/= to buy a pole to hoist solar panels. That two weeks after, the 1st Respondent called Mafuma to collect solar panels from his home and install them in Bumakita trading center, which Mafuma did. That thereafter Mafuma moved around telling people that the 1st Respondent had fulfilled his pledge, and together

with other voters in Bumakula trading center Mafuma promised to vote for 1st Respondent on 14th January 2021.

The 1st Respondent filed an affidavit in reply totally refuting Mafuma's depositions. This dispels submissions of counsel for the Petitioner, that the 1st Respondent never challenged evidence of

- Mafuma Julius. The 1st Respondent denied ever holding rallies as alleged or giving out solar panels or money as an inducement to voters of Bumakila and Shafusi trading centers. He also denied ever appointing Mafuma Julius as his mobiliser and stated that he only knows Mafuma as his strong political enemy who on several occasions directly confronted and abused him.
- Upon the evaluation of all the evidence together, it merged that evidence adduced by the Petitioner failed to meet the standard required to prove voter bribery. Bribery is a serious offence and should not be taken lightly based on casual narrations of a witness. It requires other cogent evidence to corroborate it. There was no independent evidence to corroborate Mafuma's allegations of voter bribery. No other witness named by the Petitioner to have informed him of voter bribery put in such evidence. As was held in **Achieng Sarah and Electoral Commission vs. Ochwo Nyakecho Keziah,**
- 15 **EPA No. 39 of 2012,** there is need for other evidence to confirm that a particular witness is telling the truth about bribery, due to the tendency by partisan witnesses to exaggerate claims of what might have happened. In the present case, only Mafuma Julius named by the Petitioner, swore an affidavit in respect solar panels. His evidence lacked other independent evidence to confirm the truthfulness about voter bribery.

- 20 Worthy of note is that one of the ingredients of voter bribery, under Section 68 PEA, which must be satisfied as was stated in **Mathina Bwambale** case (supra) is that a gift must be given to a registered voter. In the present case, Mafuma Julius who claimed to have also been bribed by the 1st Respondent, failed to furnish the required proof of being a registered voter at Bunasaba polling station as averred in paragraph 1 of his affidavit. He only attached his national identity card as **Annexure "A"** to prove his status as a registered voter. In **Wakayima Musoke and Electoral Commission vs. Kasule Robert Sebunya, EPA No.72 of 2016**, it was held that;

"By terms of section 1 (1) of the Parliamentary Elections Act, No.17 of 2005, conclusive proof of being a registered voter is by evidence of the person's name appearing in the National Voter's register, and not by possession of a National Identity Card. By virtue of section 66 of the registration of persons Act, 2015, the National Identity Card is only used to cross check and confirm particulars in the Voter's register before a voter could be allowed to vote. The National Identification Card does not replace or do away with the National Voters' Register, which was a special document prepared by the 2nd respondent." [underlined for emphasis].

- 5 In addition, Mafuma Julius did not furnish mobile money print outs to prove the alleged money transfer by the 1st Respondent to him or phone call record or print out, to prove that he was communicating with the 1st Respondent or his wife during the period. He also created suspicion as to why he would implicate himself as an accomplice in such serious offence of bribery, which he did not report to Police or to the 2nd Respondent. He instead knowingly participated in commission of the
- 10 offence only to turn around and swear an affidavit in support of the Petitioner's case disclosing all details of the alleged bribery. He is a highly questionable witness whose evidence is too transparent to be a whitewash. It only gives credence to the 1st Respondent's claim that Mafuma Julius was his avowed political enemy. There was indeed no other credible explanation why Mafuma would only turn around later to swear an affidavit in support of 1st Respondent's political rivals. The evidential value attached to his evidence is greatly diminished and would not meet the threshold cogency test.

Issue No.3 is answered in the negative.

Issue No. 4: What are the remedies available to the parties? Having found as above, the Petitioner is not entitled to the remedies sought. The petition fails in its entirety and it is dismissed with costs to the 1st and 2nd Respondent, respectively.

BASHIJA K ANDREW

JUDGE

30th September, 2021.

Mr. Muhwezi Ronald counsel for the 1st Respondent present.

25 Mr. Robert Mulano holding brief for Mr. Padoko Gerald, counsel for the Petitioner present.

> Mr. Wetaka P and Ms. Gilda Katutu counsel for the 2 nd Respondent present.

1 st Respondent present. 5 Ms. Dorothy Kenyange Court Clerk present.

Judgment read in open court.

BASHIJA K ANDREW

JUDGE

30th 10 September, 2021.

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