

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 82 OF 2016.

(Arising out of High Court Election Petition No.10 of 2016
presided over by Hon. Margaret Mutonyi. J sitting at Jinja)

MUYANJA SIMON LUTAAYA -----APPELLANT

VERSUS

1. KENNETH LUBOGO

2. THE ELECTORAL COMMISSION ----- RESPONDENTS

CORAM:

HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ

HON. MR. JUSTICE S.B.K. KAVUMA, JA

HON. MR. JUSTICE RICHARD BUTEERA, JA ✓

Background

The appellant and the first respondent together with 3 others contested for the seat for Bulamogi County constituency directly elected Member of Parliament in Kalilo District in the Parliamentary elections held on 18th February 2016.

The first respondent was declared winner by the second respondent with 19,179 votes against the petitioner's 16,546 votes.

Dissatisfied with the result the appellant petitioned the High Court. The petition was basically premised on allegations of bribery. The High Court did not find merit in the petition and dismissed it with costs to the respondents.

The appellant dissatisfied with the decision of the High Court appealed to this Court.

The appellant set out the following grounds of appeal:-



1. The learned trial Judge erred in law when she rejected/expunged from the record appellants affidavit in rejoinder containing the National Voters Register and MTN CALL LOGS.
2. The learned trial Judge erred in law and when she refused to call the MTN Security Officer as a Court witness to verify the MTN and mobile money logs.
3. The learned trial judge erred in law and fact when she failed to properly evaluate the evidence of the offence of bribery and thereby came to the wrong conclusion that it was insufficient.
4. The learned trial judge erred in law when she rejected the 28 affidavits of the Appellant on grounds of variation in signatures or lack thereof.
5. The learned trial judge erred in law and fact when she failed to reject and or expunge the affidavit of the 1st respondent in support of his answer or parts thereof as of no evidential value to the answer to petition.
6. The learned trial judge erred in law and fact when she failed to reject the affidavits of the 1st respondent because they had no identification.
7. The learned trial judge erred in law when she rejected the appellant's affidavits in rejoinder to the respondent's 27 affidavits in support of the answer to the petition.

The petitioner proposed to ask this Court to set aside the judgment and orders of the High Court and substitute them with the following orders:-

- (a) That the 1st respondent was guilty of the electoral offence of bribery and was therefore not validly elected as a Member of Parliament for Bulamogi County, in Kaliro District.
- (b) Alternatively order a retrial.
- (c) The costs be provided for here and in the Court below.

Representation

At the hearing learned Counsel, Mr. John Matovu, appearing together with Mr. Medard Lubega Segooona, Mr. Asuman Nyonyintono and Mr. Cristiana Katumba represented the appellant. Learned counsel, Mr. Musa Sekaana together with Mr. Hassan Kamba represented the 1st respondent.

Learned Counsel, Mr. Musa Sekaana represented the 2nd respondent as well.

Submissions of counsel for the Appellant.

Counsel argued grounds 1, 3, 4, 2 and 7 together.

5 They argued ground 5 and 6 together.

Grounds 1, 2, 3, 4, and 7.

10 Counsel submitted that the learned trial judge erred when he expunged the appellants 23 affidavits on account of variations with the witnesses identity cards and their signatures and therefore for being suspicious.

15 Counsel argued that the trial Judge had no capacity to verify the authenticity of signatures and thumb marks of deponents without an expert giving an opinion on the matter. The trial Judge could not tell whether or not the person who signed the affidavit before him is not the same person appearing on the identity card which was annexed.

20 Counsel submitted further that the 1st and the 2nd respondents could not challenge the authenticity and veracity of the affidavits after opting not to cross- examine the deponents.

25 Counsel contended that the trial Judge erred in rejecting the MTN call logs and National Voters' Register as they were in direct answer to the 1st Respondent's affidavits in reply which set up an alibi and lack of knowledge/connection with the alleged agents of the 1st Respondent.

30 Counsel contended further that the MTN call logs and mobile money transfers were not a departure from the pleadings but they were simply evidence of the pleadings alleging bribery.

Counsels' contention was that once the 1st respondent pleaded and established an alibi and denied knowing his agents it was incumbent on the appellant to adduce

evidence of the call data to destroy his alibi, as well as show that he knew the agents whom he had denied knowing.

5 Counsel submitted that the trial court should have on its own motion summoned the witness from MTN to testify and tender in the MTN call logs. According to counsel, the court should have called MTN witness as court witnesses since an election petition has to be conducted by court as an inquiry.

10 Counsel contended that in election matters courts have to take a liberal view of affidavits and this court should find that the short comings of the affidavits of the appellants could not have led to striking them out as long as the affidavits complied with the provisions of section 6 of the Commissioner for Oaths Act.

15 Counsel submitted further that the learned trial Judge erred in law and fact in the evaluation of evidence of the offence of bribery and thereby erred when he held that there was no evidence of bribery and there was no (corroboration) of the petitioner's witnesses.

20 **The Busereka Namavundu A Mosque village incident of 5th February 2016**

Counsel submitted that the learned trial Judge failed to properly evaluate the evidence of bribery in the Busereka, Namavundu A village Mosque incident.

25 According to counsel, there were no major contradictions in the evidence of Kisira Ali and that of Sooka Ali and their evidence should have been believed by the trial Judge. Counsel contended that the trial judge failed to give reasons for not believing the consistent testimonies of Kisira, Sooka and Namusobya on the promise made by the 1st respondent during the NRM campaigns and the bribe of iron sheets given to the Mosque.

30 Counsel submitted further that there was independent corroborative evidence in the affidavits of Waako Yakubu and Ahmed Jabise which were wrongfully expunged when they would have corroborated the existing affidavits of Kisira, Sooka, and Namusoobya.

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There was also corroboration in the call logs and the MTN mobile money to the evidence of Jaberu and Kireli but these too were rejected by the trial Judge.

5 **The St. Stephen's Church Bulumba incident of 7th February 2016**

According to counsel, the trial Judge did not properly evaluate the evidence of bribery by the 1st respondent through his agent Kibampawo Steven when the latter delivered 5 bags of cement as a donation to Bulumba Church of Uganda on the 7th February 2017. Counsel submitted that the cement, was a bribe and the trial Judge should have believed the evidence of the Reverend Kosamu, as the leader of the Church rather than that of Kirimuka Yokana, a mere church member. He submitted, further that the analysis and evaluation of the evidence by the trial Judge was omnibus and the Judge failed to explain why she believed Kirimuka and not Rev. Kosamu. Counsel contended that the trial Judge should have found that the evidence of Rev. Kosama required no corroboration.

The Kabiri incident

20 Counsel submitted that there was evidence of Christopher Walubo, Gonzaga William, Mujumba Richard, Kigonere Brian and Magala Godfrey which was to the effect that the 1st respondent had offered bribes of soap for voters to elect him. According to counsel the soap was being distributed by a car driven by agents of the 1st respondent who were giving soap to voters to elect the 1st respondent.

The Kiganda incident

30 Counsel submitted that there was the evidence of Mutti Martin that the 1st respondent himself called the people of Kigoodo and Bugada for a meeting. According to Martin Mutti there were between 50 to 100 people and the 1st respondent gave him 80,000/= to distribute to the money to people so that they vote for him. Martin Mutti proceeded to distribute the money.

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The Namavundu B and A incident

According to counsel, there was bribery with money at Namavundu B and A. There was the evidence of Samson Nabeta and Wambuzi Richard that the 1st respondent gave out the money personally and asked people to vote for him.

The incidents at the following villages; Nabukalu, Namuzigo, Nabinyonyi, Kisozi and Namuzigo.

Counsel submitted that there was sufficient evidence for proof of bribery of voters by the 1st respondent in those villages and the trial Judge should have so found in her Judgment if the judge had properly evaluated the available evidence.

Issue No. 5 and 6.

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The two issues were concerned with

- (1) whether the trial Judge erred in law and fact when he failed to expunge the 1st respondent's affidavit in support and
- (2) whether the learned trial Judge erred in law when he failed to reject the affidavits of the 1st respondent because they had no identification.

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Counsel submitted that the 1st respondents affidavit in support of the answer to the petition was defective and incompetent or parts thereof. That it was argumentative, it was derogatory in material parts and included matters of hearsay and for those reasons it should have been rejected by the trial Judge.

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Counsel submitted further that the affidavits of the 1st respondent should have been rejected for having no proper identification for the deponents.

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Submissions of counsel for the respondent

Issue No.1, 2.

Counsel submitted that the learned trial Judge properly expunged the appellant's affidavits in rejoinder because the parties had closed their pleadings and no other

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pleadings would be admitted and the admission would prejudice the respondents as they would have no opportunity to answer to the new affidavits filed when the pleadings were closed.

- 5 Counsel contended that rule 4 (8) of the Parliamentary Elections (Interim Provisions) Rules provides that a petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely.
- 10 The petitioner according to counsel, was filing the rejoinder when the pleadings were closed and would thus introduce new evidence without the leave of court which was illegal and prejudicial to the 1st respondent.

15 Counsel submitted that the appellant should have sought leave of court to file a supplementary affidavit rather than file a rejoinder which the respondents would have no opportunity to reply or answer.

20 Counsel submitted that the learned trial Judge was correct not to have called a witness from MTN as a court witness to verify the MTN and Mobile Money Logs since the court plays a neutral role and would not therefore proceed to assist the petitioner to introduce new evidence on a matter that had not been pleaded.

25 **Issue 3, 4 and 7**

Counsel submitted that the trial judge had properly evaluated the evidence on record.

30 Counsel contended that the petition was solely premised on the allegation of bribery and the evidence on bribery was disjointed and suspect. The evidence was not cogent and credible to warrant setting aside the election. According to counsel the appellant secured the evidence of bribery after election in a manner he failed to explain to court. There was no credible evidence of bribery in respect of any of the incidents.

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The Busereka, Namavundu A village Mosque incident of 5th February 2016

5 Counsel submitted that the trial Judge, properly considered the evidence of Kisira Ali, Jabise Ahamed, Sooka Ali and Namusobya on this incident and found it contradictory and not credible. He also correctly found that there was no evidence establishing that the person who is alleged to have delivered the iron sheets was an agent of the 1st respondent.

The St. Steven's Church Bulumba incident.

10 Counsel submitted that this incident had not been pleaded in the petition as an incident where bribery had occurred and therefore discussing evidence in respect of the incident was a waste of time.

15 Counsel submitted further, that the evidence given by Rev. Tuliraba Kosmu, Mutalya Henry, and Kibampawo Stephen was contradictory.

20 Counsel contended that Rev. Tuliraba explained that he had never received a bribe of cement in his life. Kirimuka Yokana a Member of the Church denied any delivery of cement to the Church on 07/02/2016 as alleged. According to counsel, there was no credible evidence to prove this illegal practice and the trial Judge was right to find that bribery was not proved.

Busalamuka Primary School incident

25 Counsel submitted that the witnesses gave contradictory affidavit evidence. According to counsel, whereas the appellant said the people at Busalamuka Primary School were given 40,000/=, Tibanguluka in his affidavit said they were given shs.60,000/= which is a grave contradiction. The other evidence in respect of
30 this incident was by affidavits of Wilber, Kunya and Bernard which affidavits were all expunged and were therefore not on court record.

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Namakunyu incident

Counsel submitted that there were two witnesses for this incident, Nabeta Samson and Musobwa Nelson and the two contradicted each other making their evidence
5 unreliable. Their evidence was not corroborated by any other evidence and the trial Judge was justified not to have relied on their evidence. The incident thus remained with no-evidence for proof of bribery.

Namavundu village

10 Counsel submitted that the evidence of the witnesses to this incident was contradictory and unreliable. The witnesses were also accomplices to the alleged bribery and it was also not proved that they were registered voters. The witnesses were discredited so the alleged bribery was not proved.

Busalamuka Catholic Church and Bulamu Kasozi Trading Centre and Nabinyinzi Trading Centre.

15 Counsel submitted that the bribery at the three incidents was not proved as the witnesses gave contradictory evidence that lacked corroboration and was
20 unreliable. The trial Judge was correct not to have believed or relied on their evidence. No bribery was proved to have occurred in those incidents.

Namukooge Trading Centre at Kagere's Home.

25 Counsel supported the decision of the trial Judge that the available evidence on court record was of a single witness which was not reliable and it was not supported or corroborated by any other evidence.

Kigoodo village and Nabukalu village at Rogers Home.

30 Counsel supported the trial Judge in respect of both incidents that the evidence of the available witnesses was not supported and was not corroborated by any
35 independent evidence. The bribery in respect of both incidents was not proved.

Counsel submitted that the appellant/petitioner had not adduced sufficient evidence to prove any of the alleged incidents of bribery. The trial Judge, counsel argued, had properly evaluated the evidence in respect of each of the two incidents separately and had appropriately found the evidence of both incidents wanting and this Court should uphold the decision of the lower court that no bribery was proved.

Issues No.5 and 6.

10 Counsel submitted that the Court was correct not to have struck out the affidavit of the 1st respondent in support of the answer to the petition as it was part of the pleadings. The affidavit contained information given by the candidate's agents and stated the source of the information given.

15 Counsel contended that there was no legal requirement for every affidavit to have an identity card of the deponent. The trial Judge would therefore not reject an affidavit for lack of an identity card when that was not a legal requirement.

20 Counsel submitted that appellant had volunteered to attach photocopies of identity cards to their affidavits which identity cards had suspicious signatures that made the affidavits suspicious and questionable. The trial Judge found them not authentic and that was the reason why the affidavits were expunged.

The decision of Court

25 We have a duty as a first appellate court to re-evaluate the evidence adduced at the trial so as to reach our own conclusions. This is in line with Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions Statutory Instrument 13-10, hereinafter referred to as the Rules of this Court.

30 This duty has been echoed in many decisions of the Supreme Court including **Father Nasensio Begumisa and 3 Others versus Eric Tibebaga, SCCA 17/02** unreported. We shall proceed to do that.

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Grounds 1, 2, 3, 4 and 7.

We shall first examine whether the trial Judge erred or not when she expunged the appellants 23 affidavits on account of variations of the witnesses signatures on the attached photocopies their identity cards.

The 23 affidavits were contested on the ground that the witnesses identity cards had differing signatures thus bringing into question how the evidence was obtained.

All the 23 affidavits had photocopies of witnesses respective identity cards attached. They all had differing signatures in two categories:-

(1) 18 affidavits had signatures that were at variance with those on the identity cards.

(2) 5 affidavits were of deponents who had indicated they were unable to sign on their IDs but did sign the affidavits or had thumb printed on the affidavits because they were illiterate but had signed the IDs.

The trial Judge, after listening to the submissions of counsel for the parties, expunged the 23 affidavits and stated:

“The differences in signature are so obvious to the naked eye that the only logical conclusion would be that signatures belong to different people. Those with thumb prints on one document and signature on the other and vice versa with clear indication that they are unable to write on the IDs are also there for all to see”

The authenticity of the affidavits was challenged on the ground that the identity of the deponents was inconclusive. The trial Judge analysed the evidence and found the affidavits suspicious.

The identity of a deponent to an affidavit is extremely important.



The Supreme Court had occasion to state the law on the issue of identity of deponents to affidavits in **Makula International Ltd versus Cardinal Nsubuga Wamala (1982) HCB1** and held:-

5 **“Given the importance of affidavits in election petitions generally, it is equally the case that the identity and integrity of deponents of such affidavits is a matter of keen interest to the court, given that an election can only be set aside, if it is proved to the satisfaction of the court.**

10 **Indeed the identity and integrity of a deponent goes to the root of the substance and probative value of his or her affidavit and this cannot be regarded as a mere technicality in any way.”**

We find a persuasive decision on the issue in the case of the High Court **Election Petition 17/2016 Kalazani Charles versus Musoke Paul Sebulime** when it held:

15 **In respect to the signatures of the deponents that are inconsistent with those on the National Identity Card, it is my view that such an inconsistency that is apparent on the face of the record, makes the affidavit to be suspect and unreliable.**

20 **A suspicious document is inherently unreliable and no probative value can be attached to it at all by court in respect to its contents.**

25 **Such affidavits will be ignored by the court as they are inherently unreliable and with no probative value that a court can attach to them in the consideration of whether or not an election ought to be set aside.”**

30 **In the Indian case of V.R. Kamath vs. Divisional controller AIR 1997 Kant 275, when the Court was considering proper identification of a deponent in affidavit evidence, it held:-**

30 **“Administering oath/affirmation to a wrong deponent is nothing but permitting impersonation of a witness giving evidence. Making an endorsement relating to administration of oath or affirmation in the**

absence of a party is similar to recording evidence in the absence of the witness. Such things should not happen; these things cannot be permitted to happen. ”

5 It is important that the identity of a deponent to an affidavit is not in doubt. The trial Judge is being faulted for not having called a Handwriting Expert. We agree that courts should act with caution and call for handwriting experts evidence when handling issues of handwriting evidence.

10 In the case of **Hon. Kipoi Tonny Nsubuga vs Ronny Waluku Wataka and 2 others (Election Petition Appeal No.07/2011** unreported, this Court held that its not prohibited for a trial Judge to compare signatures/handwriting in the absence of Expert evidence; but Court has to exercise great caution because of the lack of expertise on the matter.

15 The issue at hand, however, fell in the category of matters that are obvious to court. In the Indian case of **Lalit Popli v Canara Bank and Others [2003] Insc 99 (1st February 2003)** the Court held:

20 **“It is clear that even when experts’ evidence is not there, Court has power to compare the writings and decide the matter [See Murari Lal vs. State of Madhya Pradesh (1980) 1 SCC 704. In the instant case, the Enquiry Officer and the Disciplinary Authority took pains to carefully consider the Handwriting Expert’s report and also looked at the documents to arrive at their own conclusions.”**

25 We find that the trial Judge was right to expunge the 23 affidavits on the ground that the identity of the deponents was in doubt. The trial Judge considered the evidence which we have had opportunity to examine. He found the affidavits not credible. We do not find any fault with the reasoning and the conclusion of the trial Judge.

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The trial Judge was also faulted for having rejected/expunged the appellant's affidavits in rejoinder containing the National Voters Register and MTN call logs. The affidavits in issue were filed by the petitioner on 6th and 16th June 2016 as rejoinders. According to the appellant this was in answer to the reply by the 1st respondent. They were objected to by the respondents because they were filed late after the pleadings were closed and the affidavits were introducing new matters that had not been pleaded. The respondents objection was also because they would be prejudiced since they would not have opportunity to respond to the affidavits since parties had closed their pleadings.

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The evidence in Election Petitions is adduced mainly by way of affidavits. Hon. Justice Tsekooko, JSC in **Col. (RTD) Dr. Besigye Kiiza versus Museveni Yoweri Kaguta Election Petition No.1 of 2001** held:-

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"I have already stated that the import of this rule is to advance expeditious disposal of petitions without forgetting to do Justice to the parties. Speed is the reason why the trial of the petitions is by way of affidavits. The expeditious disposal of Election Petitions is emphatically put by Section 63(2) of the Parliamentary Elections Act which requires the Court to hear and determine the Election Petitions expeditiously and the Court may for that purpose suspend any other matter pending before it.

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The filing of Election Petitions and the affidavit evidence is governed by PEA and the Parliamentary Elections (Interim Provisions) Rule. Rule 15 of the said Rules is the relevant Rule it provides:-

"15 Evidence at Trial

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15(1) subject to this rule, all evidence at the trial, in favor of or against the petition shall be by way of affidavit read in open court."

This Court had occasion to elaborately state the law on admission of affidavit evidence in Election Petitions in, **Ernest Kiiza versus Kabakumba Labwoni Matsiko Election Petition No.44 of 2016**

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"...all evidence at the trial of an Election Petition is required to be adduced by affidavits. Cross-examination of the deponents may be permitted only

with the leave of court as stipulated under Rule 15 of the *Parliamentary Elections (Interim Provisions) (Election Petition) Rules*.

5 Rule 15 which deals with evidence at trial provides that all evidence at the trial in favor of or against the petition shall be by way of affidavit read in open court. With leave of the court, any person swearing an affidavit which is before the court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn. The court may, of its own motion, examine any witness or call and examine or recall
10 any witness if it is of the opinion that the evidence of the witness is likely to assist it to arrive at a just decision. A person summoned as a witness by the court under subrule (3) of this Rule may be cross-examined by the parties to the petition.

15 Rule 17 of the same rules provide that the Civil Procedure Rules applicable to Electoral Petitions. It provides that the practice and procedure in respect of a petition shall be regulated, as nearly as may be, in accordance with the Civil Procedure Act and the Rules made under that Act relating to the trial of a suit in the High Court, with such modifications as the court may consider necessary in the interest of justice and expedition of the proceedings.

20 The CPR which are applicable to Election Petitions does not specifically provide guidance on filing of Supplementary Affidavits, but rather provides for the filing of subsequent pleadings generally under Rule 18.

25 Rule 18 which deals with subsequent pleadings allows a plaintiff to file a reply within fifteen days after the defence or the last of the defences has been delivered to him or her, unless the time is extended. No pleading subsequent to the reply shall be filed without leave of the court, and then shall be filed only upon such terms as the court shall think it. Where a counterclaim is pleaded, a defence to the counterclaim shall be subject to the rules applicable to defences.

30 As soon as any party has joined issue upon the preceding pleading of the opposite party without adding any further or other pleading to it, or has made default in pleading, the pleadings as between those parties shall be

deemed to be closed, and all material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.”

The appellants rejoinder was filed after the pleadings were closed and without the leave of court.

5 This Court when faced with affidavits that were filed late, a situation similar to the one in the instant case, in the case of **Esrom William Alenyo versus The Electoral Commission and Another Election Petition No.09 of 2007**, held:-

10 **“It was grossly erroneous for the petitioner to file any affidavit in support of his allegations with his final submissions. This would offer no option to the opposite party to cross examine the deponents had he so wished, even if they had been served on him, which was not done. Final submissions are mere summations of the evidence already tendered in Court. They are not an avenue for introducing new matters.”**

15 We find that the trial Judge was correct to have struck out the affidavits containing the National Voters Register and call MTN Logs as they were filed out of time, without the leave of the Court and that would have been prejudicial to the respondents who would have no opportunity to respond to those affidavits.

20 The next issue to consider is whether the learned trial Judge erred when he refused to call the MTN Security Officer as a court witness to verify the MTN and Mobile Money Logs.

The contention by the appellant was that the trial Court should have herself summoned that witness as a Court witness. Counsel argued that the Court should have summoned the witness since it has a duty to conduct an inquiry in Elections Petitions.

25 We shall first state the law on the power of court to call a witness in a Parliamentary Election Petition.

Witnesses in Parliamentary Election Petitions are provided for by Section 64 of the PEA.

“64. Witnesses in election petitions.

30 **(1) At the trial of an election petition-**

- 5
- (a) Any witness shall be summoned and sworn in the same manner as a witness may be summoned and sworn in civil proceedings;
 - (b) The court may summon and examine any person who, in the opinion of the court is likely to assist the court to arrive at an appropriate decision;
 - (c) Any person summoned by the court under paragraph (b) may be cross-examined by the parties to the petition if they so wish."

Rule 15 of the Parliamentary Elections (Interim Provisions) Rules provides:

"15. Evidence at trial

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- (1) Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.
 - (2) With leave of the court, any person swearing an affidavit which is before the court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.
 - 15 (3) The court may, of its own motion, examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence of the witness is likely to assist the court to arrive at a just decision.
 - 20 (4) A person summoned as a witness by the court under subrule (3) of this rule may be cross-examined by the parties to the petition."

Both S.64 (1)(b) of the PEA and Rule 15(1) of The Parliamentary Elections (Interim Provisions) Rules quoted above give court the power to call, examine or re-examine witnesses if the court thinks that may assist it to arrive at an appropriate decision.

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We find that the power given to Court in Section 64(1)(b) of the PEA and Rule 15(3) Parliamentary (Interim Provisions) Rules is discretionary. The court may summon and examine the witness if in its opinion the witness would assist the court. Where the court does not find it necessary to summon a witness that would be a decision in exercise of its discretionary power.

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We as an appellate court cannot interfere with a discretionary decision of the lower court unless it is demonstrated that the exercise of the discretion was made in a non-Judicious manner; which we do not find was the case here.

5 The burden for proof of the case in an Election Petition lies on the petitioner as was stated by the Supreme Court in **Election Petition No.18 of 2007 Mukasa Anthony Harris versus Dr. Bayiga Michael Philip Lulume:**

10 **“It is settled law that the burden of proof in an election petition lies upon the petitioner who is required to prove every allegation contained in the petition to the satisfaction of the court. The standard of proof is a matter of statutory regulation by Subsection 3 of Section 61 of the PEA, 2005. The subsection provides that the standard of proof required to prove an allegation in an election petition is proof upon the balance of probabilities.”**

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Counsel for the appellant contended that the trial Judge was duty bound to summon the witness from MTN as he was bound by Section 63(4) o the PEA to conduct an inquiry in the handling of the election petition.

20 The issue of the conduct of an inquiry in election petitions was handled and clarified by the Supreme Court in **Presidential Election Petition No.01 o 2016 Amama Mbabazi versus Yoweri Kaguta Museveni** when it held:-

25 **“From the above analysis, it is our opinion that the PEA leave no doubt that the inquiry into a Presidential Election Petition by the Supreme Court is by way of trial. This, in our view, is most appropriate. Where the petition has named respondents and accused the respondents of committing certain misdeeds including offences, the respondents must be given a hearing as per Article 28 of the Constitution. The Court must necessarily inquire not only into the petition but also into the responses to the petition. Since the Act requires proof of certain matters to the satisfaction of the Court, such**
30 **proof must be by way of evidence which the opposite party must have a right to challenge.”**

The Court went ahead to further hold:-

5 **“As already noted, Article 104(3) of the Constitution directs this Court to inquire into and determined the petition. Two things are envisaged by the provision. First, is for the Court to make an inquiry and this involves taking evidence from the parties and witnesses. Furthermore, the Court can in exercise of this discretion call any witness whose information would enable the Court reach a just and fair decision. Second, is that after the inquiry, Court is to determine the legal issues raised by the parties using the information it received during the process of inquiry. This we believe is the**
10 **proper interpretation of the inquiry process envisaged in the Article.”**

Our understanding of the envisaged inquiry in election petitions is the observance of the due process of a trial. The parties and not the court have a duty to adduce their evidence.

15 We do not find reason to fault the trial Judge when in exercise of his discretion he did not find it necessary or even proper to call the witness from MTN on the facts and circumstances of the case.

Issue No.5 and 6

20 In the two issues, the learned trial Judge was faulted for failure to reject and or expunge the affidavit of the 1st respondent in support of his answer or part thereof as of non-evidential value to the answer to the petition.

25 Counsel argued that the affidavits of the 1st respondent should have been rejected because they had no identification.

30 At the trial, counsel Matovu for the petitioner/appellant had objected to the 27 affidavits in support of the answer to the petition in that none of the deponents identifies himself or herself. That they should have identified themselves by way of National Identity Cards.

The affidavit of the 1st respondent was also objected to for being argumentative and containing derogatory statements.

5 The trial Judge overruled both objections which dissatisfied the appellant thus the 2 issues on this appeal.

10 Counsel argued that the trial Judge compared signatures for the appellant's affidavits on their National Identity Cards and they were expunged for variations on the cards. He should not have admitted affidavits even with no National Identity Cards for identification.

15 Counsel contended that the affidavit of the 1st respondent had facts that he personally could not have witnessed since he could not have been at all the places where the alleged facts occurred and the affidavits should therefore have been rejected.

We shall deal with the affidavit of the 1st respondent on information not in his own knowledge.

20 The admission of such affidavits was considered and clarified by the Court of Appeal for East Africa in the case of **Life Insurance Corporation of India vs. Panesor [1967] EA 614** and it held:

25 **"That being so, the appellant was entitled, under Order 18 r 3, to include matters of information and belief in his affidavit, provided he disclosed, in that affidavit, the source of his information or the ground of his belief"**

The Court of Appeal for Eastern African had earlier stated in **A.N. Phakey vs. World Wide Agencies (1948), 15 EACA.1**

“That where affidavits are submitted (as in this case) stating that such affidavit is on information and belief, the source of the information and grounds of belief must also be stated.”

5 We find that on the above stated legal principals the 1st respondent’s affidavit in reply was justifiably admitted by the trial Judge.

The objection raised that the affidavits did not have identification of the deponents does not raise any legal ground for the objection.

10 The trial Judge in handling it stated:

There is no specific provision that requires a deponent to attach his identity card to an affidavit or that such failure invalidates the said affidavit. In any case, the deponent can be subjected to cross examination to verify the identity in doubt.”

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We agree with the holding of the trial Judge.

Issues No.5 and 6 are both answered in the negative.

20 **Issue No.3.**

The trial Judge was faulted for failure to properly evaluate the evidence of the offence of bribery and was alleged to have erred when he held that there was no evidence of bribery and there was no corroboration of the petitioners’ witnesses.

“S.68 of the Parliamentary Elections Act, (PEA) provides:

25 **(1) A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given 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 not exceeding seventy two currency points or imprisonment not exceeding three years or both.”

5 (2) For proof of bribery the Supreme Court stated the law in **Kizza Besigye v Kaguta Museveni, SC Election Petition No.1 of 2001**, Odoki CJ held:-

“I accept the submission of Mr. Bitangaro that the petitioner must prove the following ingredients to establish the illegal practice of offering gifts:

- That a gift was given to a voter
- That the gift was given by a candidate or his agent
- 10 • That the gift was given to induce the person to vote for the candidate.”

When allegations of corruption are made in an election petition it is essential for the petitioner to prove to the satisfaction of Court all the elements of the illegal practice of bribery on a balance of probabilities (See **Harris Mukasa Bagiga**) 15 (**supra**). The Commission of an illegal practice once proved to the satisfaction of the Court, is sufficient in itself under Section 61(c) of PEA, to set aside the election of a candidate as a Member of Parliament. (See: **Election Petition Appeal No.24/2006 Kirunda Kivenjinja Ali versus Katuntu Abdu**).

20 We have perused the court record and read the judgment of the trial Judge on the issue of bribery at the different venues where the bribery is alleged to have been committed. We have also carefully considered the submissions of all counsel on the incidents of bribery.

25 We note that when arguing this appeal counsel for the appellant dwelt a lot on evidence for proof of bribery that was in affidavits that were expunged by the trial Court. We have already found that the affidavits were justifiable expunged by the trial Judge. This in many respects and incidents let the appellants evidence without 30 corroboration.

The expunged affidavit evidence was therefore not on the trial court record and is not on this court's record having been justifiably expunged at the trial stage. It was not relied upon by the trial Court and will not be relied upon by this Court in the analysis of evidence for proof of bribery. We have re-evaluated the evidence on record in respect of each of the different incidents of the alleged bribery.

We have therefore, perused the evidence on court record to the exclusion of the evidence in the expunged affidavits.

(1) The incident of 5th February 2016 at Busereka Mosque Namavundu A village, Kiyunga Parish, Bumanya sub-county.

For this incident it was alleged that the 1st respondent had pledged iron sheets during NRM Primaries and they were delivered by Kaloli Grace on 5th February 2016. The 1st respondent denied giving out iron sheets and denied that Kaloli Grace was his agent.

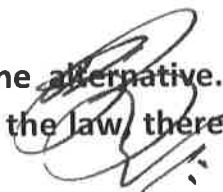


There was no evidence by the petitioner/appellant that Kaloli Grace and Ngobi Saberi were agents of the 1st respondent and that the iron sheets were delivered with the knowledge and consent of the 1st respondent.

This was a lacuna in the appellants evidence that led to one of the ingredients of the illegal practice of bribery remaining not proved for this incident.

In allegations of bribery by an agent, its essential to prove that the alleged agent is in fact an agent of the principal. It is also necessary to prove that the alleged agent was acting with the authority, knowledge and consent of the principal.

This Court in **Election Petition No.27/2011 Kamba Saleh Moses versus Hon. Namunyang Jennifer** held:-

"These ingredients are inclusive and not in the alternative. To establish whether a bribe was given to a voter, the law therefore,

requires, among other things, proof that the person alleged to have received the bribe was a registered voter at the material time and that the bribe was intended to influence his/her voting or nonvoting. The motive for the bribe must, therefore, also be proved. See *Kizza Besigye vs. Kaguta Museveni* (supra).”

This was the evidence that the trial Judge found wanting. We find that without the expunged affidavits there was no evidence and the trial Judge was correct to have held as he did.

We would agree with the trial Judge that bribery, therefore, was not proved for this incident.

(2) The incident of 7th February 2016 at St. Stephen Church Bulumba.

5 bags of cement were allegedly offered as a bribe to the Church Members by the 1st respondent and the cement was delivered on 7th February 2017 by Kibampawo Steven. The 1st respondent denied that Kibampawo Steven was his agent. He denied offering or sending Kibampawo Steven to deliver the cement. According to the 1st respondent both Kibampawo Steven and Rev. Tuliraba were supporters of the petitioner/appellant.

We have not found any evidence on record that Kibampawo Steven was an agent of the 1st respondent and that he delivered the cement with his knowledge and consent.

In addition to the contradictory evidence that the trial Judge found, Karimuka Yokana, a Church member denied the delivery of the cement. We agree with the trial Judge that there was not sufficient evidence to prove bribery for this incident.

(3) The incident of 11th February 2016 at Busalamuka Primary School

The evidence in respect of this incident was given by the petitioner in paragraph 7(g) of his affidavit. The other evidence would have been by the affidavits of:

- 5 (1) Tibangeleka Salif.
(2) Kunya Salif.
(3) Kalulu Brenda Vincent.

10 These 3 affidavits were expunged by the trial Court. The evidence that remained for consideration by the trial Court was that of the appellant who in his affidavit conceded that he was not at the venue when the bribery took place. The first respondent denied having given out any money to bribe voters at Busalamuka Primary School.

3 witnesses, swore affidavits in support of the 1st respondent and stated that he was at Gadumire and not Busalamuka on the 11th of February 2016.

15 The appellant's affidavit remained not supported by any evidence of anybody who witnessed the bribery.

We find that the trial Judge was justified when he found that bribery at Busalamuka Primary School was not proved.

20 **(4) Bribery on 11th February, 2016 at the Trinity Church Namakunya.**

The allegation was the 1st respondent met voters from Namakunya, Nabukali, Namavundu B and Kabozo and he offered them 100,000/= with a request to vote for him.

25 There was the evidence of 2 witnesses, Nabeta Samson and Musobya Nelson.

30 Both of these witnesses state in their affidavits that they each received 1,500/= shillings although both had also stated that the money given out was in denominations of 2,000/= notes. They also said some people got 500/= and others 200/=. Under cross examination Nabeta Samson testified that he received no bribe. That leaves the evidence of the 1st Musobya Nelson not

corroborated and contradictory on amounts o money received and the denomination.

5 The 1st respondent denied involvement in the bribery. Three witnesses who live in the area swore affidavits denying that the 1st respondent was in the area and that he paid the bribes.

10 Musobya Nelson was an accomplice since he testified that he received 1,500/= as a bribe. His being evidence of an accomplice needs corroboration as the trial Judge held. There was none. The trial Judge was correct to have found that bribery for this incident was not proved.

15 **The incidents of 16th February 2016 at Kasozi village, Bumanya sub-county Bulima Kasozo Trading Centre, Nabinyonyi Trading Centre and Namulonge Trading Centre at Kagere's Ground.**

20 The evidence of the petitioner/appellant for these incident was affected by the expunged affidavits. The appellants evidence remained uncorroborated when the affidavits of would be witnesses was expunged. The 1st respondent denied the alleged incidents of bribery.

25 The petitioner/appellants evidence was shaky and not corroborated and the trial Judge cannot be faulted for holding that the incidents of bribery were not proved.

30 We find that the appellant's claims of bribery for the different incidents were not supported by cogent evidence sufficient to annul an election and we so hold.

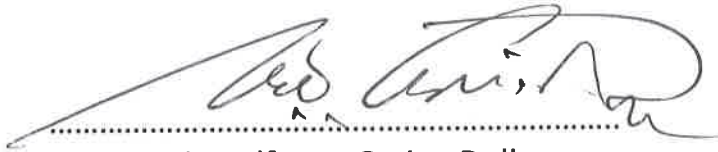
In the result, the appeal does not succeed on any of the grounds. It was without merit and is accordingly dismissed with costs to the respondents.

We so order.

10 5.3

Dated at Kampala.....22nd.....this day of.....Nov.....2017.

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Hon. Justice Alfonse Owiny Dollo
DEPUTY CHIEF JUSTICE

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Hon. Justice S.B.K. Kavuma
JUSTICE OF APPEAL

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Hon. Justice Richard Buteera
JUSTICE OF APPEAL

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