THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. ~~67~~ 72 OF 2016

(ARISING FROM ELECTION PETITION NO. 13 OF 2016)

NABUKEERA HUSSEIN HANIFAH :::::::::::::::::::::::::::::::::::: APPELLANT

VERSES

1. KUSASIRA PEACE K. MUBIRU :::::::::::::::::::::::::::::::::::: RESPONDENTS
2. THE ELECTORAL COMMISSION

CORAM:
HON. JUSTICE ALFONSE OWINY DOLLO, DCJ
HON. JUSTICE. S.B.K. KAVUMA, JA
HON. JUSTICE PAUL K.MUGAMBA, JA

JUDGMENT OF THE COURT

Introduction.

This is an Election Petition Appeal from the Judgment and orders of the High Court of Uganda at Jinja (Benjamin Kabiito J), delivered on 12th August 2016, in Election Petition No.013 of 2016.

Background

The appellant, the respondent and three others participated in elections for Woman Member of Parliament for Mukono District held on the 18th day of February 2016. The 1st respondent emerged winner and was declared as such by the 2nd respondent. Being dissatisfied with the results and subsequent declaration, the appellant petitioned the High Court on

grounds that it was conducted in non-compliance with electoral laws which substantially affected its outcome and that the 1st respondent personally and/or through her agents, with her knowledge and consent or approval committed electoral offences and illegal practices. The trial Judge dismissed the Petition hence this Appeal. The Appeal is premised on 10 grounds of appeal which read as follows:

1. **The learned trial Judge erred in law in placing a higher burden of proof on the Petitioner than is required by law.**
2. **The learned trial Judge erred in law and fact in holding that the petitioner's witnesses Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny recanted their evidence, thereby reaching a wrong decision that their evidence was not reliable.**
3. **The learned trial Judge erred in law in relying on the evidence of witnesses he had already expunged.**
4. **The learned trial Judge erred in law when he relied on the 1st respondent's purported and incompetent affidavit in rejoinder.**
5. **The learned trial Judge erred in law and fact in holding that the petitioner's witnesses were not registered voters.**
6. **The learned trial judge erred in law and fact in holding that the 1st respondent did not commit acts of voter bribery during elections.**
7. **The learned trial Judge erred in law and fact in holding that the incident at Namuganga S.S.S was an NRM executive meeting and that the money given out was for transport refund and not a bribe.**

8. **The learned trial Judge did not properly evaluate the evidence on record thereby coming to a wrong conclusion that the petitioner had not proved her case against the respondents.**
9. **The learned trial Judge erred in law and fact when he indulged in assumption, conjecture and speculation that the petitioner's evidence had been fabricated and or manipulated.**
10. **The learned trial Judge erred in law and fact in holding that the elections for Mukono District Woman Member of Parliament were substantially conducted in compliance with electoral laws.**

Representation.

At the hearing of the Appeal Mr. Tebyasa Ambrose was counsel for the appellant while Mr. Musa Ssekaana was counsel for the 1st respondent. The 2nd respondent was represented by Mr. Brian Kabayiza.

Duty of this Court

It is our duty as the first appellate court, to re-appraise or re-evaluate all the evidence on record and come up with our own conclusions in accordance with Rule 30(1)(a) of the Rules of this Court. This Rule has been amplified in **Kifamunte Henry V Uganda, SCCA No. 10 of 1997, [1998] UGSC 20** and **Bank of Uganda V Banco Arabe Espanol,SCCA No.8 of 1998,[1998] UGSC 1.**

The burden of proof lies on the petitioner to prove the assertions in an Election Petition and the standard of proof required is on a balance of probabilities. The facts in the Petition must be proved to the satisfaction of court. See: **S. 61 (1)** and **(3)** of the Parliamentary Elections Act; (PEA)

Mukasa Anthony Harris vs. Dr. Bayiga Michael Philip Lulume, Supreme Court Election Petition Appeal No.18 of 2007, Masiko Winifred Komuhangi vs Babihuga J. Winnie, Court of Appeal Election Petition Appeal No.9 of 2002, as well as **Paul Mwiru vs Hon. Igeme Nathan Nabeta and 2 Others, Election Petition Appeal No.6 of 2011.**

We bear in mind the above stated principles of law regarding the duty of this Court and the burden and standard of proof required as we proceed to resolve the Appeal.

Ground 1

Counsel for the appellant argued that the learned trial Judge erred in law in placing a higher burden of proof on the petitioner than what is required by law. Counsel faulted the trial Judge for relying on the case of **Col (RTD) Besigye Kizza V Museveni Yoweri Kaguta, Presidential Election Petition No. 1 of 2001** to interpret Section 61 of the PEA. He argued that the trial Judge grossly misdirected himself on the burden and standard of proof by erroneously importing and relying on the provisions of the Presidential Elections Act and **Presidential Election Petition No. 1 of 2001** which dealt with Presidential and not Parliamentary Elections. It was submitted by counsel that the Act related to then had since been repealed and replaced by the Presidential Elections Act, 2005. Counsel said that the misdirection influenced the Judge's mind to believe that he should have been convinced beyond reasonable doubt rather than on a balance of probabilities. He added that the Judge should have followed Section 61(3) of the PEA rather than seek guidance from a non applicable law.

In response, counsel for the 1st respondent submitted that the trial Judge set out the provisions of the law governing the standard of proof in Parliamentary Election matters and that he stated this to be proof on a balance of probabilities. Counsel concluded that the Judge did not allude to any higher standard as alleged by the appellant since he applied the right standard.

The 2nd respondent submitted on this ground that the trial Judge was very alive to and correctly guided himself as to the law regarding the burden and standard of proof he was required to apply in evaluating the evidence on record. He added that the Judge's reference to **Presidential Election Petition No. 1 of 2001** was in an effort to guide himself further as to the interpretation of Section 61(3) of the PEA. He said that reference to 'absence of reasonable doubt' in the interpretation of the words 'to the satisfaction of court' does not refer or equate to 'beyond reasonable doubt' as in criminal matters, but refers or points to the now widely accepted position in the electoral jurisprudence of Uganda that, owing to the gravity or importance of electoral matters as well as the implications of setting aside an election result, the correct interpretation of Section 61(3) of the PEA is that grounds of an Election Petition are required to be proved on a balance of probabilities, which is slightly higher than in an ordinary civil case.

We note that the trial Judge when dealing with the issue of the burden and the standard of proof stated:

"BURDEN OF PROOF

In terms of section 61(1) PEA, the burden of proof lies with the petitioner to prove his case to the satisfaction of court. (Col. (Rtd) Dr. Kiiza Besigye Vs Museveni Y.K EP No1of 2001, followed).

STANDARD OF PROOF.

The standard of proof is on the basis of balance of probabilities as set out in section 61(3) of the PEA.

The Supreme Court in the Besigye case, (Supra), held that owing to the gravity of the matter to be proved and its implications, the phrase. "proved to the satisfaction of court" connotes absence of "reasonable doubt."

I shall follow the directives of the Supreme Court in the interpretation of section 61 of the PEA, which is a similar provision to that considered by the court."

Counsel for the appellant faulted the trial Judge for relying on **Presidential Election Petition No. 1 of 2001** and misdirecting himself to believe that he should have been convinced beyond reasonable doubt rather than on a balance of probabilities as set out in Section 61(3) of the PEA.

Looking at the statement by the trial judge on the burden and the standard of proof, he clearly placed the burden of proof on the petitioner to prove his case to the satisfaction of court. The Judge added that the standard of proof is on the basis of a balance of probabilities. After stating as such, he then relied on **Presidential Election Petition No. 1 of 2001**, where it was held that owing to the gravity of the matter to be proved and its implications, the phrase. "*proved to the satisfaction of court*" connotes absence

of "reasonable doubt." He stated that he would follow the directives of the Supreme Court as such in the interpretation of Section 61 of the PEA.

What we observe from the above statement by the trial Judge is that he did not depart from Section 61(3) of the PEA, which places the standard of proof on the basis of the balance of probabilities. His reliance on **Presidential Election Petition No. 1 of 2001**(Supra) was to stress the fact that the matter to be proved was of great importance as courts have observed in several authorities, the critical importance of Election Petitions to the public. Given that importance, the standard of proof is not merely on a balance of probabilities but also to the satisfaction of court. The phrase *'proved to the satisfaction of court'* connotes absence of 'reasonable doubt' as the trial Judge held but does not mean that the matter is to be proved beyond reasonable doubt as the appellant's counsel submitted. It means that no court would be satisfied if they were in a state of reasonable doubt.

In **Blyth Vs Blyth [1966] AC 643** Lord Denning related to the import and meaning of the word "satisfied". He observed:

> *'The courts must not strengthen it, nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When Parliament has ordained that a court must be satisfied only Parliament can prescribe a lesser requirement. No one whether he be a judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt.....'*
> Emphasis added.

In **Kamba Saleh Moses Vs Hon. Namuyangu Jeniffer, Election Petition Appeal No. 27 of 2011**, it was held:

> *"...This court is alive to the fact that bribery is such a grave illegal practice and as such it must be given serious consideration. The standard of proof is*

required to be slightly higher than that of the ordinary balance of probabilities and applicable to ordinary civil cases. It does not, however, call for proving the bribery beyond reasonable doubt as in the case in criminal cases. What is required is proof to the satisfaction of court."

We relate to the position in the decisions stated above which is in conformity with Section 61(1) and (3) of the PEA. The trial Judge erred in no way and placed the appropriate standard of proof. We find the authority of **Rtd Col. Besigye Kizza Vs Museveni Yoweri Kaguta, Presidential Election Petition No. 1 of 2001,** to the same effect wherein Odoki CJ (as he then was) had this to say on this same issue;

"In my view the burden of proof in an election petition as in other cases is settled. It lies on the Petitioner to prove to the satisfaction of Court. "

Counsel for the appellant referred to **Presidential Election Petition No. 1 of 2001** as only applicable to Presidential Elections and not Parliamentary Elections.

The standard of proof applied is the same as that applied in all Election Petitions. The trial Judge clearly stated and relied on Sections 61(1) and (3) of the Parliamentary Elections Act on the burden and the standard of proof. We find nothing in the Judgment that shows that the trial Judge was influenced and applied any higher standard.

The appellant's counsel also contended that **Presidential Election Petition No. 1 of 2001**(supra) as relied on by the trial Judge was based on the Presidential Elections Act, 2001 which Act, counsel submitted, had since been repealed and replaced with The Presidential Elections Act, 2005 and was therefore bad law for the trial Judge to have considered. We reject this position. When certain sections in statutes are repealed they are re-enacted

in the new laws. The provisions do not necessarily cease to exist and therefore remain relevant. The position of the law on the burden and the standard of proof in Election Petitions is still the same. This is a frivolous argument which lacks merit. Ground 1 fails.

Ground 2

The gist of the complaint in ground 2 is that the learned trial Judge erred in law and in fact in holding that the petitioner's witnesses Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny recanted their evidence which was consequently not reliable.

Counsel for the appellant submitted that the 1st respondent on receiving the affidavits of Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny did not respond, rebut or challenge the contents of the said affidavits but instead hatched a plan to have the said evidence recanted by procuring the signatures of the said witnesses onto documents. Counsel argued that affidavit evidence can only be recanted by a proper affidavit deponed in compliance with the law but that the affidavits deponed by Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny dated 30th May 2016, seeking to recant their earlier affidavits could not stand as such for reasons that they were involuntary and that they were not signed before a Commissioner for Oaths. He said this was contrary to Section 5 of the Commissioner for Oaths (Advocates) Act Cap. 5 and Section 6 of the Oaths Act Cap 19. Counsel relied on the authority of **Kintu Alex Brandon vs. E.C and Walyomu Moses, EPA No. 64 of 2016** where court condemned the

habit of litigants and their advocates approaching witnesses on the opposite side to lure or force them into recanting their evidence.

Counsel for the 1st respondent submitted that the trial Judge evaluated the evidence of Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny against all the evidence on record and exercised his discretion when he found it incredible, suspect and unreliable given that those witnesses had earlier recanted their evidence.

On perusal of the Judgment of the lower court, we note that the trial Judge before delving into the resolution of the issues stated the position of the law in respect to recanted affidavits. He observed:

> *'In respect to a situation where a deponent has offered an affidavit in support, then purports to recant such an affidavit by offering an affidavit in reply, in favor of the opposing party, to state that what was stated in the earlier affidavit was false and then later purport to offer yet another affidavit in rejoinder to reassert what was deponed in their first affidavit, raises a question of credibility and integrity of such a witness.*
>
> *An affidavit is a solemn declaration that is made under an oath and before a commissioner for oaths. The integrity and probate value of an affidavit is in the solemnity of the oath that is administered on the basis of which the deponent is bound. If a deponent comes forth after offering an affidavit, having an oath administered, and then having had it commissioned turns around and confesses to have made a false averment therein, that deponent has no credibility or integrity and cannot be relied upon to be truthful as a*

witness, whatsoever, in any further affidavit. In ***Election Petition No. 008 of 2011 Ourum Okiror Sam vs EC and Ochwa David****, the court ruled;*

"The practice of witnesses in election petitions switching sides is becoming too common. The fact that they can state one thing on oath one day state a contradictory thing on oath the next day portends very bad news for the state of law and order in the country.

As far as this petition is concerned, I agree with counsel for the 2nd respondent that for a court of law to rely on the evidence such a witness would be untenable. The credibility of a witness who appears on both sides of a case, stating contradictory statements is left considerably compromised. The safest course of action for court to take is to completely disregard his/her evidence."

The evidence of witnesses that recanted their affidavits will be rejected.'

When resolving the issue of bribery at Namuganga S.S.S where it was alleged in the Petition that the 1st respondent personally and through her agents, while campaigning at Namuganga S.S.S on 25/01/2016 gave out money to voters with a view of inducing them to vote for her during the Elections, the trial Judge considered the evidence of Kyaterekera Francis, Musisi Robert and Sembatya Ayub each of whom averred that they were given 10,000/= at the NRM meeting convened by Kyakuwa Dauson, the NRM Sub County Chairperson of Namuganga Sub county. The Judge also considered the supplementary affidavits of Kyaterekera and Sembatya Ayub where they referred to an incident whereby they had been forced to sign affidavits against their will and also considered the affidavits of the

same witnesses filed in support of the 1st respondent's Answer to the Petition sating that it was not true that the 1st respondent had given out any money as they had earlier averred in their affidavits in support.

In addition, the trial Judge considered the evidence of Kayanja Ronald who stated that the said witnesses approached him so that he could take them to the 1st respondent to clarify what they stated in their affidavits and that the witnesses made the recanting affidavits freely. The trial Judge upon evaluation of all the evidence in this respect believed the evidence of Kayanja Ronald that the witnesses in question approached him seeking to cash in on opportunities offered in the Election Petition by either side. The Judge considered the witnesses' actions of offering affidavits in support of the Petition and then also offering affidavits in opposition to it a recantation of their earlier affidavits which evidence he considered incredible, suspect and unreliable. He proceeded to disregard the same. The Judge concluded that the occasion was an NRM executive meeting for in house elected members and considered the money disbursed as a transport refund.

When we analyse of the affidavits of Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny, we note that the first set of affidavits sworn in support of the Petition and deponed on 1st April 2016 reflect that the 1st respondent gave out money to voters at Namuganga where each stated to have received Shs 10,000/= to support the 1st respondent.

In the next set of affidavits, deponed in support of the 1st respondent's Answer to the Petition, dated 30th May 2016, the witnesses changed their

earlier statements and stated that the 1st respondent did not give them any money and that they had had to make subsequent affidavits in order to clarify the untrue statements contained in the earlier affidavits.

In the third phase of affidavits deponed by the same witnesses on 6th June 2016, the three deponents gave evidence to the effect that they were subjected to threats and coercion by the lawyers of the 1st respondent who forced them to change their evidence contained in the first affirmation. They each denied making any affirmation on 30th May 2016 and ever appearing before a one Barnabas Dyadi Kamya, a Commissioner for Oaths. In response to Kayanja's averments, the witnesses each stated in their affidavits in rejoinder that Kayanja's affidavit was full of falsehoods. They added that Kayanja Ronald and Kabega Musa had both suggested that they change their affidavits and remove the issue of the 1st respondent giving them money at Namuganga S.S.S.

In his affidavit in rejoinder, Mubiru Tonny, stated that they reported the incident that occurred at the 1st respondent's lawyers' office to Naggalama Police Station and that the matter was transferred to Nakifuma Police Post vide GEF10/30/04/016. During cross examination Kayanja Ronald admitted that he was indeed summoned to Nakifuma Police Post to answer complaints filed against him.

We consider this clear evidence that the witnesses were approached by the 1st respondent's lawyers to wit Kabega Musa with the help of Kayanja Ronald who coerced them to change their testimonies by recanting their earlier Affidavits in Support of the Petition. We find such action by counsel

not befitting of their professional integrity and in contravention of **Rule 19 of the Advocates (Professional Conduct) Regulations SI 267/2** which states:

> *'Advocates not to hinder witnesses*
>
> *An advocate shall not, in order to benefit his or her client's case in any way, intimidate or otherwise induce a witness who he or she knows has been or is likely to be called by the opposite party or cause such a witness to be so intimidated or induced from departing from the truth or abstaining from giving evidence.'*

Counsel for the 1st respondent should have followed the right process and challenged adverse evidence through cross examination.

The trial Judge ought to have considered the evidence of intimidation and struck out the affidavits obtained illegally. Questionable affidavits cannot be said to have recanted the witnesses' earlier evidence properly deponed and affirmed as truthful by the said witnesses in their affidavits in rejoinder. We disagree with the trial Judge to that extent and accordingly strike out the affidavits attempting to recant the evidence of Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny.

We associate ourselves with the holding in **Kintu Alex Brandon Vs EC and Walyomu Moses, EPA No. 0064 of 2016** where court stated:

> *'…this brazen and egregious breach of the rules by both the 2nd respondent and his legal team, who ought to have known better, was an outrageous attempt to destroy the evidence that pointed directly to the 2nd respondent's commission of an illegal practice during the campaigns. The motivation is*

clear. The 2nd respondent knew that what was alleged he had done was true and, in concert with his legal team, set out, by hook or crook, to neutralize the same. …'

Counsel for the appellant submitted that the said Affidavits in Support of the 1st respondent's case were not signed before a Commissioner for Oaths contrary to Section 5 of the Commissioner for Oaths (Advocates) Act Cap. 5 and Section 6 of the Oaths Act Cap 19. Having found that the same were procured through an illegal manner and having struck them off the record, we do not consider it gainful to discuss their legality any further.

We find the evidence of Kyaterekera Francis, Sembatya Ayub and Mubiru Tonny credible and reliable and we will consider it for its value to the case. Ground 2 succeeds.

Ground 3 and 4

These two grounds rotated around the same issues as to the admissibility of affidavits. We will therefore resolve them together.

The complaint in ground 3 is that the learned trial Judge relied on the evidence of witnesses he had already expunged. Counsel for the appellant submitted that the trial Judge in resolving the issue of bribery at Namuganga Secondary School and Kasiso Kitale relied on the affidavits of Kayanja Ronald and Mivule Abdalla which he had rejected and expunged from the record. He said that the Judge also relied on the affidavit in rejoinder of the 1st respondent and yet he had ruled that witnesses who had not offered Affidavits in Support of the Petition could not rejoin. According to counsel, that ruling had expunged the 1st respondent's affidavit in

rejoinder. The Appellant's counsel submitted that the trial Judge had expunged the affidavits of Kyobe Robert and Kizza Christopher because they had filed affidavits in the form of rejoinders and yet they had not filed affidavits in support. To counsel, the Judge therefore expunged the affidavit in rejoinder of the 1st respondent for the same reason and should not have considered it. This was the gist of the complaint in ground 4 which we stated to resolve within ground 3.

Counsel for the 1st respondent in response submitted that the trial Judge never stated specifically that the affidavits of Kayanja and Mivule had been expunged. He added that the said affidavits were therefore not expunged and remained on record as evidence and court properly evaluated it. Counsel for the 1st respondent went on to submit that the 1st respondent had a right to file an affidavit in rejoinder in response to the petitioner's affidavits or supplementary affidavits.

The trial Judge when stating the preliminary points of law pointed out the position of the law on the controversial affidavits as objected to by counsel. He stated:

> *'UNDATED AFFIDAVITS*
>
> *There are affidavits of deponents that are undated such affidavits were commissioned in contravention of the Oaths Act that requires the Jurat of the affidavit to indicate the place and date when the commissioning took place.*
>
> *For this reason these affidavits will be rejected.*

COMMISIONING OF AFFIDAVITS

There are deponents of affidavits that have testified that they swore their affidavits at Mukono and yet the Jurat of their affidavits indicates that such affidavits were commissioned in Kampala.

In these circumstances it is evident that such affidavits have not been commissioned in terms of the Oaths Act and for this reason will be rejected.'

With the Judge's finding as such, the affidavit of Kayanja Ronald was rejected for not being commissioned in accordance with the law contrary to Section 5 of the Commissioner for Oaths (Advocates) Act Cap. 5 and Section 6 of the Oaths Act Cap 19. Similarly, Kayanja's other two affidavits dated 30th May 2016 which he stated during cross examination to have deponed on 27th April 2016 and not on 30th May 2016 were as such rejected. The affidavit of Mivule Abdalla was also rejected because it was undated. The affidavits of Nakibuuka Rovinsa and Kyakuwa Dauson which reflected that they were deponed in Kampala yet the witnesses during cross examination stated that they made the affidavits in Mukono were also rejected.

We note that the trial Judge when resolving the issues of bribery at Namuganga SSS and at Kyanika P/School considered the affidavit evidence of Kayanja Ronald and Mivule. The Judge quotes paragraphs from the said affidavits of Kayanja Ronald and Mivule and goes on to state that he was persuaded by the same evidence.

The method adopted by the trial Judge in expunging affidavits created a lot of uncertainty which could have been avoided. It is not enough to state the position of the law and what amounts to its contravention without clearly applying the same to the entirety of the case. Doubt was created as to whether the affidavits were expunged or not. The Judge appeared to have expunged the affidavits but later referred to them. This we find is an error. It is the duty of the court to pass a definite and clearly ascertainable decision. Since the affidavits of Mivule Abdalla, Nakibuuka Rovinsa, Kyakuwa Dauson and Kayanja Ronald did not meet the requirements of proper affidavits they are inadmissible and cannot form part of the record. They should not have formed part of the trial Judge's decision either.

Counsel for the appellant faulted the trial Judge for relying on the affidavit in rejoinder of the 1st respondent and yet he had ruled that witnesses who had not offered Affidavits in Support of the Petition could not rejoin.

The trial Judge held that all witnesses who had offered Affidavits in Rejoinder without any Affidavits in Support of the Petition would have those affidavits rejected. He relied on the position stated in **Mutembuli Yusuf vs Nagwomu and the EC, EP No. 13 of 2016**, where court noted that:

> *"The procedure and practice in election petition takes after the same format. Although the rules do not specifically provide for or require the petitioner and other deponents who initially swore affidavits supporting the petition to file affidavits in rejoinder, the petitioner and those other deponents may file affidavits in rejoinder pursuant to the practice and procedure under the CPR by virtue of the operation of Rule 17.*

It follows that it is the very persons who initially swore affidavits supporting the petition who could swear and properly file affidavits in rejoinder"(sic)

The Judge also considered the position that an affidavit in rejoinder cannot be permitted to introduce new matters or issues of fact that were never raised by the affidavit in reply or those supplementing it. To do so would tantamount to reopening the applicant's case with entirely new causes or fresh issues of fact which the respondent would not have had the opportunity to answer to. That it is an ambush with new causes disguised under the garb of rejoinder and there would be no telling of when filing of pleadings and affidavits would end. See **Mutembuli Yusuf** (supra).

We find it imperative to state the position in **Chebrot Stephen Chemoiko vs Soyekwo Kenneth and the EC, EPA No. 56 of 2016** where this Court held:

'...Affidavits in rejoinder are essentially sworn for the purpose of giving an opportunity to the Petitioner to rejoin to and controvert or dispute matters introduced by the respondents in their affidavits in reply, or rejoining to affidavits sworn on his or her behalf. It is not in dispute that the appellant had a right to file affidavits in rejoinder if he found it necessary to rejoin to the contents of the respondents' replies to the Petition. A rejoinder allows the petitioner to present a more responsive and specific statement challenging allegations made by the respondent in his reply, which are new in character. They are however, not meant to come up with new facts to buttress the Petitioner's case. We find that in principle, there is nothing in law that barred persons who had not sworn affidavits in support of the

petition from swearing affidavits in rejoinder to the respondents' reply, if it is that they are possessed with the facts forming the rejoinder.'

Looking at the 1st respondent's affidavit in rejoinder, she is responding to facts already in issue. Her response is directed to particular averments in affidavits which she indicates in her rejoinder. In addition she controverts the allegations raised against her in the Petition itself and its supporting affidavits. No new facts were brought to buttress the petitioner's case. When the trial Judge held that all witnesses that have offered affidavits in rejoinder without any affidavits in support of the Petition will be rejected; he simply meant those deponents that had not sworn any affidavits and sought to introduce fresh facts. The 1st respondent's affidavit in rejoinder was part of the record and the Judge erred in no way in considering it. Ground 3 succeeds while ground 4 fails.

Ground 5

Counsel for the appellant faults the trial Judge for holding that Muwonge Alatif, Shangaliya Livingstone and Nantongo Stella did not prove that they were registered voters and thereby rejected their evidence on bribery. He submitted that Muwonge stated in his affidavit that he was a registered voter at Namuganda and attached his National ID to prove the same and Nantongo stated in her affidavit that she was a registered voter at Luguzi zone, Namasuni-Ntonto, Mukono District and also attached her National ID. Shangaliya Livingstone stated in his affidavit that he was a registered voter at Butumbiri Polling Station, and also attached his National ID. Counsel argued that the 2nd respondent had a voters register and should

have produced it in court to controvert the respective witnesses' evidence. Appellant counsel relied on the authority of **Amama Mbabazi Vs Yoweri Museveni, Supreme Court Presidential Election Petition No. 1 of 2016,** where court considered National ID's sufficient proof that one was a registered voter rather than voter's card.

Counsel for the 1st respondent supported the trial Judge's finding that the said witnesses were not registered voters. He quoted the definition of a registered voter according the Parliamentary Elections Act, S.11 to be a person whose name is entered on the voter's register and submitted that in the absence of a voter register it becomes unclear whether a person is a registered voter or not.

We note that the evidence brought forth by counsel for the appellant in proof of this issue were affidavits of the witnesses who in addition stated that they were registered voters. Further, the witnesses attached copies of their National Identity Cards.

Section 1 of the Parliamentary Elections Act defines a registered voter as a person whose name is entered on the voters' register.

A voters' register is defined to mean the National Voters' Register compiled under Section 18 of the Electoral Commission Act. See **Section 1 of the PEA.**

In **Kabuusa Moses Wagaba vs Lwanga Timothy, EPA No. 53 of 2011,** it was held that ...in cases of bribery during elections, it must be shown that the person bribed was a registered voter. It is not enough to swear an affidavit that one is a registered voter and even quote the voter's card. It is

necessary to produce copy of the voters' register showing the name of the bribed person with or without his or her photograph.

We will also consider **Hon. Otada Sam Amooti Owor vs Tabani Idi Amin & The EC, EPA No. 93 of 2016** where this Court held that:

> *'By virtue of the provisions of Section 1 of the PEA, conclusive proof of a registered voter is by evidence of a person's name appearing in the National Voters' Register and not possession of a National Identity Card….'*

We note that the trial Judge held that:

> *'My other concern is that Muwonge did not enclose any evidence to confirm that he was a registered voter such as a voters' location slip or even aver that he voted in the election. It cannot be assumed that Muwonge did vote without him expressly stating so. '*
>
> *'In any event Nantongo , did not enclose any evidence to confirm she was a voter such as voters location slip or voters card and it cannot be assumed that she is one.'*
>
> *'Shanraria did not enclose any evidence that he was a registered voter on the National voter's Register such as a voters location slip and it cannot be assumed that he is one.'*

The Judge holding as such lowered the standard required for proof that one is a registered voter. We associate ourselves with the position of the law that conclusive proof of a registered voter is by evidence of a person's name appearing in the National Voters' Register. The appellant fell short of this proof. Witnesses stating to be registered voters and attaching their

National Identity cards is not the required proof. The appellant did not prove that the said witnesses were registered voters. Appellant's counsel submitted that the 2nd respondent had a voters' register and should have produced it in court to controvert the respective witnesses. We do not accept that position. The appellant bore the burden to prove the allegations in his case and that burden did not shift to the 2nd respondent. Ground 5 fails.

Ground 6

Ground 6 is to the effect that the trial Judge erred in law and in fact in holding that the 1st respondent did not commit acts of voter bribery during elections.

The allegations of bribery were in different areas as follows:

(i) Bribery of voters at Namuganga SSS with Ushs 1,500,000/=

The appellant's counsel argued ground 7 together with the incident at Namuganga S.S.S. **Ground 7** is to the effect that the trial Judge erred in law and in fact in holding that the incident at Namuganga Secondary school was an NRM executive meeting and that the money given out was for transport refund and not a bribe.

We acknowledge the position of the law that proof of a single act of bribery to the required standard by or with knowledge and consent or approval of a candidate is sufficient to invalidate an election.

Section 61(c) of the PEA provides that:

"The election of a candidate as a member of parliament shall only be set aside on any of the following grounds if proved to the satisfaction of court-

That an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval."

Section 68(1) of the Parliamentary Elections Act provides that:

'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'

We note the ingredients the petitioner needed to prove bribery were:

a. The 1st Respondent or her agents gave out money or gifts.
b. The giving was to a person who was a registered voter.
c. The giving was with intent to influence the voter to vote or refrain from voting.
d. The 1st Respondent committed bribery personally or through his agent with his knowledge, consent and approval.

Counsel for the appellant submitted that on the 25th day of January 2016 the 1st respondent personally and through her agents, while campaigning at Namuganga Secondary School, gave money to voters in order to induce them to vote for her and refrain from voting for the petitioner or any other candidate, an act that amounted to voter bribery. He said that the appellant relied on the evidence of Kyaterekera Francis Sseguya to prove the act of bribery and submitted further that the evidence of Kyaterekera was

corroborated by that of Ssembatya Ayub who deponed to have received part of the money given out by the 1st respondent. Counsel submitted that the said recipients of the money were all registered voters. He added that the two witnesses were not cross examined by the 1st respondent's lawyers.

Counsel for the appellant contended that the affidavits in support of the 1st respondent's affidavit in respect to this issue to wit the affidavits of Kyakuwa Dauson, Kayanja Ronald, Malingha Abbas Yahaya were rejected by court and as such expunged from the record which left the 1st respondent with no evidence in response to the said allegations. He concluded that the evidence adduced in respect of the allegation of bribery at Namuganga Secondary School was sufficient to overturn the election, adding that court ought to have found that there was no evidence to prove that the meeting at Namuganga Secondary School was an NRM party meeting under the NRM Party structures.

Counsel for the 1st respondent in response supported the trial Judge's findings that the incident at Namuganga S.S.S was an NRM executive meeting and that the money was given out for transport and not as a bribe. He added that all the appellant's witnesses on this incident are office bearers of the NRM Executive Committees in the area and that the appellant alleging otherwise wanted to claim it was a campaign rally whereas it was not. He submitted that the said committee members were given a transport refund of shs 10,000/= each which counsel for the appellant alleges was a bribe. Counsel for the 1st respondent also submitted that the trial Judge properly evaluated the allegations of bribery at Nalongo

Mukwenda's home, at Kyanika P/S, at Kasiso-Kitale and at Kabumba Village.

It was further submitted by counsel that the Petition was filed as an afterthought upon the appellant losing the election. He asked court to consider the fact that the 1st respondent stated that she was not aware of any bribery of voters at Namuganga S.S.S or other places before she was declared the winner of the election. Counsel pointed out that the appellant never reported any acts of bribery to the Police or any other authorities and that this meant they never occurred.

We have considered the trial Judge's analysis of the evidence concerning the alleged bribery incident at Namuganga S.S.S. In his Judgment he took note of the evidence of Kyaterekera Francis, Sembatya Ayub and Musisi Robert which was to the effect that they attended a meeting convened by Kyakuwa Dauson, the NRM Sub County Chairperson and were given 10,000/=

The Judge considered the 1st respondent's evidence that the meeting was an NRM Executive one. He considered also the witnesses who gave evidence in support of the 1st respondent's case as such, to wit Malinga Abbas, Kyakuwa Dauson and Tamale Aramathan. They gave evidence that the 10,000/= was a transport refund paid out by Kyakuwa. The Judge was convinced that the occasion alluded to was an NRM Executive Meeting for the in house elected members of the sub county and that the money paid out was transport refund and not a bribe.

We note that the trial Judge in resolving the issue utilized evidence which he had expunged but later stated that he had been persuaded by it. This was an error. The Judge should not have considered the affidavit evidence of Malinga Abbas and Kayanja Ronald. We accordingly find it of no value.

However we find that the evidence left standing to shade light on this incident was contained in the affidavits of Kyaterekera Francis and Sembatya Ayub which we found credible and admissible. There is no doubt that the meeting occurred and that the 1st respondent attended it. The said affidavits show that the meeting was convened at the request of the 1st appellant for the purpose of requesting for support from the party leaders. We believe the evidence of Kyaterekera Francis and Sembatya Ayub that they were given money to share and that each got 10,000/=. No explanation was given as to the source of the funds other than what the petitioner's witnesses stated. The 1st respondent is not known to be a coordinator for financial facilitation for the NRM Party Committees. No evidence was brought to court to prove that a committee meeting occurred on that day under the NRM Party structures, no minutes were produced in court to confirm the same. We consider the respondent's version of events an afterthought and an attempt to create a story. We are further fortified in this view by the actions of counsel for the 1st respondent who approached the said appellant witnesses and attempted to have them recant their evidence so as to depart from their original testimony. The evidence of Kyaterekera Francis and Sembatya Ayub was not challenged through cross examination and as such was not weakened. We are convinced that the 1st

respondent had a meeting convened for the purpose of requesting for support from the NRM party committee members and that she gave out money to the said members for transport. Ground 7 succeeds.

We note that the only evidence available to prove that Kyaterekera Francis and Sembatya Ayub were registered voters were copies of their National Identity Cards. We discussed in ground 5 that there was need to produce copies of the voter's register reflecting the witnesses' names as registered voters. This was not the case. We find this adds credibility to the fact that the allegation of bribery at Namuganga S.S.S was not proved.

(ii) Bribery of voters at Namasumbi-Ntonto

Counsel for the appellant submitted that the 1st respondent went around in Namasumbi-Ntonto visiting voters door to door at their homes giving them money and other gifts to induce them to vote for her. To support this allegation counsel relied on the evidence of Nantongo Stella who swore an affidavit in support of the Petition that the 1st respondent on the eve of the election went to her house in Namasumbi-Ntonto and gave her 10,000/= to vote for her. Counsel added that Nantongo had demonstrated in her evidence that she was a registered voter capable of being bribed. It was counsel's submission that the appellant adduced sufficient evidence of bribery at Namasumbi-Ntonto against the 1st respondent.

In her affidavit the 1st respondent dismissed the allegations. She stated that she never gave out any money or gift to voters at Namasumbi-Ntonto. It was argued by counsel for the 1st respondent that the alleged incident was never reported to Police and that this meant it never occurred.

The trial Judge considered the allegation at Namasumbi-Ntonto that the 1st respondent personally gave out Shs 200,000/= to voters. In this connection he considered the evidence of Nantongo Stella who stated that the 1st respondent personally gave her Shs 10,000/= on the eve of voting day as transport to go and vote for her. The Judge considered also the affidavit of the 1st respondent denying giving out money at Namasumbi-Ntonto and went on to consider the evidence of Bisiikirwa Hamida and Arinaitwe Amon. Those stated that Nantongo was not a resident of Lugazi. The Judge also took into account the fact that Nantongo responded and attached a letter of introduction from the LC1 Chairperson, Makubuya Joseph. He invited court to disregard the evidence of Bisiikirwa Hamida. The Judge analysed the evidence further and decided that the said letter of introduction was not on a headed paper and could have been written by any one. He observed that the stamp on the letter had no date and that the signature of Makubuya could not be verified as that of the Chairman. The Judge considered the exercise as an effort by the petitioner to overturn the election and concluded that the witness had been approached by the petitioner to offer this evidence. Court found that the matter of the residence of the witness was not independently verified for the court to make a determination thereof given the conflicting evidence of Nantongo.

We have re-evaluated the evidence of Nantongo and find that she was clear as to the day, time and place she met the 1st respondent to receive the Shs. 10,000/=. She stated it to be on the 17/2/2016, the eve of the elections, and that it was about 7:30 pm. She gave the venue as her residence. A mere

'denial by the 1st respondent does not render Nantongo's statement false. When allegations were raised by Basiikirwa that she was not a resident of Lugazi Zone, she rejoined stating that she was a resident of Lugazi and attached a letter of introduction from Makubuya Joseph, LC1 chairperson Lugazi. The Judge decided to disregard this letter stating that it was not on a headed paper and as such could have been written by any one, also that the stamp on the letter had no date and the signature of Makubuya could not be verified as that of the Chairman. We do not find the evidence of Nantongo conflicting in any way. She responded to the allegations made against her and brought to court a letter from the LC Chairperson, unlike Basiikirwa. Court could have summoned Makubuya Joseph to clarify the doubt created in the Judge's mind pursuant to rule 15 (3) of the Election Petition Rules. This issue was left hanging. We believe the evidence of Nantongo that the 1st respondent approached her on the eve of the election. Her evidence was not rebutted by Basiikwa's averments.

We find however that Nantongo's evidence requires independent evidence to corroborate it. In ground 5 above, we found that Nantongo's evidence fell short of the required standard of proof that she was a registered voter which is key in proving allegations of bribery. The allegation of bribery of voters by the 1st respondent at Namasumbi-Ntonto was not proved.

(iii) Bribery at Kasangalabi

Counsel for the appellant alleged that the 1st respondent while campaigning in Kasangalabi and at the home of Nalongo Mukwenda personally and through her agent Nakibuuka Rovinsa (Nalongo

Mukwenda) gave out money and maize seeds to voters to induce them to vote for her. The appellant relied on the evidence of Nantume Maddalene, Kyobe Robert and Kizza Christopher, eligible voters of Kasangalabi who deponed that they were invited to the house of Nakibuuka Rovinsa where they found the 1st respondent who asked for their votes and gave them maize seeds and in addition gave Nantume Maddalene and Kyobe Robert Shs. 2000/= to help in the planting process. Counsel for the appellant contended that the 1st respondent's actions were geared at inducing the said deponents to vote for the 1st respondent.

Counsel for the 1st respondent in his submissions/conferencing notes did not submit on this issue particularly. He dealt with the allegations of bribery generally. He submitted that the allegations had been manufactured by the appellant after she realized that she lost the election.

The trial Judge considered the evidence of Nantume Maddalene and the averment in her affidavit that she received 2kgs of maize and Shs. 2000/= from the 1st respondent at the home of Nalongo Mukwenda.

The Judge rejected the evidence of Kyobe Robert and Kizza Christopher saying that they did not swear affidavits in support and could not therefore swear affidavits in rejoinder. Also rejected was the affidavit of Nalongo Mukwenda because it was not properly commissioned.

The trial court considered the testimony of the 1st respondent who stated that when she gave out some maize seeds it was before the campaign period. The 1st respondent stated that she did so during her tenure as Woman MP.

'The Judge noted that there was no indication of any report having been made to the authorities about the alleged occurrences. The Judge disregarded the petitioner's evidence of the maize seeds she attempted to produce in court during cross examination. She sought to justify the irregularity saying she did not trust the Police to have submitted it earlier. The Judge concluded that the petitioner did not prove the alleged acts of bribery at Mukwenda's home.

The affidavits presented by the petitioner/appellant to prove this allegation were those of Nantume Maddalene, Kyobe Robert and Kizza Christopher. The trial Judge expunged the affidavits of Kyobe Robert and Kizza Christopher leaving the evidence of Nantume uncorroborated. The evidence of Nalongo was also expunged from the record, which left the evidence of the 1st respondent also uncorroborated. In instances where there are accusations and counter accusations from both sides, court requires evidence from an independent source to confirm what really happened. We noted that bribery is a grave illegal practice which must be given serious consideration. Cogent and credible evidence must be adduced in proof and not mere raising of suspicion. Like the trial Judge found, we too find that the evidence adduced lacks such proof. We add that there is need for further or independent evidence in order to prove the alleged offence. No evidence was led to prove that Nantume Maddalene was a registered voter. Earlier on we resolved that it is important to prove that the recipients of the money/gift were registered voters. This allegation was not proved.

(iv) Bribery at Kyanika P/S

Counsel for the appellant in arguing the allegations of the bribery incident at Kyanika P/S relied on the evidence of Musitafa Lukananso a voter at Gimbi II Polling Station who deponed to have received maize seeds and money from the 1st respondent. Counsel for the appellant submitted that Musitafa Lukananso was not cross examined and that this left his evidence unchallenged. He added that there was sufficient evidence to prove that bribery took place at Kyanika P/S and that the trial Judge ought to have considered it.

Musitafa Lukananso in his Affidavit in Support of the Petition stated that in late December 2015, towards Christmas, he attended a meeting at Kyanika Primary School. He added that the 1st respondent addressed voters including himself and gave them Shs. 200,000/= and maize seeds. He went on to state that Musitafa Lukananso's share of that amount was Shs 2000/=. He stated that in addition he got half a kilogram of maize seeds from Mrs Kibudde and Ssewamala Fred, coordinators of the 1st respondent.

The 1st respondent denied the allegations and relied on the evidence of Mrs Kibudde, Ndibalekeera Kamiyati Isabirye, Nambi Justine and Ssewamala Fred. The trial Judge rejected the evidence of Ssewamala Fred.

Mrs Kibudde, Ndibalekeera Kamiyati Isabirye and Nambi Justine in their affidavits aver that the said meeting occurred on 3/8/2015 and not in December 2015 and that no money or maize were given out.

We note that the only evidence supporting the allegations in the Petition regarding Kyanika P/S is the affidavit of Musitafa Lukananso. He stated that he was in the company of Nsandu Faisal, Nambozo Fatuma, Zikusoka Peter, Joseph Odola and Tunde Geoffrey but none offered evidence to corroborate his statement. There is no other evidence on record or any other person claiming to have been present at the meeting and witnessed the alleged incident despite the allegation that the items were given out in the open to several persons. We find that the evidence adduced lacked independent evidence in support of the allegations. It was not proved also that Musitafa Lukananso was a registered voter as required by law.

(v) Bribery at Kasiso-Kitale

The allegation in this incident is that the 1st respondent personally or through her agents including Mivulle Abdallah and Kayanja Ronald bribed voters with money amounting to Shs. 200,000/= while at a party organised at the home of Kayanja Ronald in December 2015. The appellant relied on the evidence of Mubiru Tonny who deponed that he attended a party at the home of Kayanja Ronald and the 1st respondent through Mivulle Abdallah gave them Shs. 200,000/= to share. He stated that his share was Shs. 10,000/=

We dealt with the issue of the credibility of the evidence of Mubiru Tonny in ground 2. We noted that he swore his first affidavit dated 1/4/2016 to the effect that he attended a party at the home of Kayanja Ronald and the 1st respondent through Mivulle Abdallah gave them Shs. 200,000/= to share of which he got Shs. 10,000/=. Mubiru swore a second affidavit

recanting his evidence; that the 1st respondent never gave out any money. He then swore yet another affidavit stating that he had been coerced by the lawyers to recant his first affidavit and that he had filed a complaint with police. We believed the evidence of Mubiru as credible and ignored the affidavit seeking to recant Mubiru's first affidavit implicating the 1st respondent.

Muwonge Alatifu gave evidence to the same effect that in December 2015 he attended a party at the home of Kayanja Ronald and the 1st respondent came in with Mivulle Abdallah and handed Shs. 200,000/= to Mivulle Abdallah of which he got Shs. 10,000/=.

We should recall that the affidavits of Mivulle Abdallah and Kayanja Ronald were expunged and the only evidence that remains in support of the 1st respondent's case is the denial by the 1st respondent in her affidavit. We find corroboration of the evidence of Mubiru in that of Muwonge as to the occurrences herein. We however note that both witnesses merely attached their National Identity Cards to prove that they were registered voters. The fact that they were registered voters was not proved and as we held earlier evidence of a voters' register is a key factor in proving allegations of bribery. Suffice to say the incident of bribery at Kasiso-Kitale was not proved.

(vi) Bribery at Kabumba Village

The evidence of Okoth Caleb a voter at Namuganda S.S.S Polling station is to the effect that the 1st respondent gave out sodas to voters at Kabumba.

Okoth Caleb averred to have personally received a bottle of riham soda from the 1st respondent through a one Sentongo. Appellant's counsel submitted that the riham soda was given with a view to influencing the voters including Okoth Caleb to vote for the 1st respondent and that indeed Okoth Caleb stated that he was influenced by the drink into supporting the 1st respondent. The 1st respondent denied these allegations.

Concerning the allegations, counsel for the 2nd respondent submitted that the uncontroverted evidence of the returning officer Namugambe Sarah in her affidavit in support thereof is that the petitioner/appellant never lodged a complaint in regard to any acts of bribery by the 1st respondent personally or by her agents with her knowledge, consent or approval which to counsel meant the alleged acts never occurred. Counsel for the 2nd respondent added that the appellant had a duty to prove the allegations of bribery which duty he failed to carry out and that the trial Judge rightly rejected the allegations.

We note that the trial Judge on examining the affidavit of Okoth Caleb found that it had differing signatures from what appeared on his National Identity Card and based on that the trial Judge disregarded the affidavit. We have looked at the two signatures appearing on the National Identity Card and on the witness' affidavit and agree with the trial Judge that it cannot be ascertained that they belonged to the same person. The witness swore no Statutory Declaration to verify that he was the same person and perhaps possessed two different signatures. The trial Judge rightly rejected the affidavit, which left this allegation with no other evidence supporting

it. It was as such not proved. Ground 6 fails because all allegations of bribery were not proved.

Ground 9

Appellant's counsel combined ground 8 with ground 9 which faults the trial Judge for indulging in assumption, conjecture and speculation when he found that the petitioner's evidence had been fabricated and or manipulated.

Counsel for the appellant referred Court to the general comments and observations made by the trial Judge in his Judgment. He said the Judge had a pre conceived perception that the appellant did not have a genuine complaint and genuine evidence. He submitted that the Judge believed the appellant had fabricated evidence in order to overturn the election. Counsel for the appellant referred to the comments by the trial Judge that the appellant appeared angry throughout the course of the proceedings and appeared desperate to overturn the election, that the appellant showed extreme contempt and anger towards the Police and the Electoral Commission. Counsel submitted that the Judge's statement was speculative when he held that witnesses whose testimonies were that they had received gifts and money had decided to keep quiet but were simply persuaded by the petitioner to reveal the details of the incident. Counsel added that the Judge was of the view that the witnesses were also approached by the appellant to offer affidavits. Counsel contended that the trial Judge was wrong to state as he did because the petitioner was entitled

to solicit and gather evidence in support of her Petition and should not have been faulted for doing that.

Counsel for the 1st respondent on the other hand submitted that the trial Judge's general comments were deduced from the nature of the evidence presented in support of the Petition. He added that the allegations of bribery of NRM executive members was a clear case of fabrication just like the whole Petition and also that it was true that the appellant was willing to use whatever means were available to overturn an election at whatever cost and that the trial Judge was justified for holding as he did.

We note that in his Judgment, the trial Judge opined that the petitioner appeared angry and desperate to overturn the election and showed extreme contempt and anger towards the Police and the Electoral Commission in the conduct of the elections. The Judge observed that the said hostility explained why no reports were made by the petitioner to those institutions. Court further observed that the petitioner set out to look for evidence to overturn the results of the election once the results were declared and approached witnesses who offered affidavits in support of the Petition. The Judge stated further that the claims of the witnesses, if they were to be believed, suggest that they received gifts and money and decided to keep quiet about it until the petitioner persuaded them to reveal the details of the incidents. The Judge went on to hold that it is such state of affairs that the courts of law are weary of as there is a real likelihood of a candidate, being angry, a sour loser and aggrieved by the outcome of an

election to fabricate evidence with witnesses that can be procured to help in such effort to mount a Petition against the winning candidate.

It is important to note that the above remarks were made by the trial Judge before he delved into the evidence and resolution of the allegations against the 1st respondent on bribery. We appreciate that the trial Judge had the opportunity of observing the demeanor of the witnesses and the petitioner herself, which opportunity this Court does not possess and as such we cannot fault him on his comments in respect to the appearance of the appellant. In our view however, we disagree with the comments that followed wherein the trial Judge appeared to fault the petitioner for collecting evidence after the 1st respondent was declared winner. He appears to find fault with the witnesses coming forward with their evidence at the stage of filing the Petition. We note also that in evaluating the evidence particularity when dealing with the incident of bribery at Namasumbi-Ntono the Judge when anaysing Nantongo's letter of introduction found fault with it being dated 4/06/2016 which he stated to be a date of interest in this petition far from 17/2/2016 when the incident allegedly occurred. Based on such perceptions the Judge did not consider Nantongo's evidence. We respectfully disagree with the trial Judge regarding this position. An aggrieved party has every right to gather evidence in support of his or her case. The same evidence need not be brought in at the polling stage considering polling, tallying and declaration often occur on the same day or in a close period, giving no time for investigations. Finding like the Judge did would be needlessly limiting the

efforts of any intending petitioners. Additional evidence is acceptable to court at a later stage. In **Bantalibu Issa Taligola vs Wasugirya Bob Fred, EPA No. 11 of 2006,** this court considered the matter. Earlier the trial court held:

> *"The allegation about bribery is vague … it raises the inference that at the time of filing the petition the petitioner did not have any evidence of anybody who had been bribed but after filing the same he went on a fishing expedition to look for evidence to support the blank accusations."*(sic)

It was on appeal to this Court where Engwau J.A overruled the High Court when he stated:

> *"under rule 30 of the rules of this court I have re-appraised the evidence on record as a whole and my conclusion is that had the trial Judge considered subsequent affidavits he would have found that the allegations of bribery and canvassing for votes on polling day had been proved to the satisfaction of court. By its nature an election petition in my view time is of the essence a petitioner may not have all the necessary evidence he/she would like to put in the affidavit in support of the petition at the time of filing the same, subsequent affidavit evidence should be allowed and considered as a whole and a finding should be made on them… all in all the trial Judge was bound by the decision of the supreme court in Dr. Kizza Besigye Vs Museveni Yoweri Kaguta and the Electoral Commission, Presidential Election Petition No. 1 of 2001 where Odoki, CJ considered such subsequent evidence and made a finding"*

In addition we acknowledge that Election Petitions are of critical importance to the public and we do not find it surprising that the petitioner was emotional about her case. This does not necessarily mean she went to all length to fabricate evidence. Without any proof of such, we find it was speculative and uncalled for for the trial Judge to make the remarks he did. Needless to say, such statements appear to be an inclination towards the respondents' case. They should be avoided at any cost. Ground 9 succeeds.

Ground 10

The learned trial Judge erred in law and fact in holding that the elections for Mukono District Woman Member of Parliament were substantially conducted in compliance with electoral laws.

The core of this ground of appeal is that the trial Judge failed in his duty to properly evaluate the evidence in regard to the allegations of non-compliance with the electoral laws, thereby arriving at a wrong conclusion that the elections for Mukono District Woman Member of Parliament were substantially conducted in compliance with the electoral laws.

Counsel for the appellant submitted that the election was conducted in contravention of the principles and provisions of the constitution and such other laws governing parliamentary elections. He said that the election was not free and fair and that the results declared did not reflect the free will of the people of Mukono District. He added that the said non compliance affected the results in a substantial manner. Counsel for the respondents supported the trial Judge's finding that the elections for Mukono District

Woman Member of Parliament were substantially conducted in compliance with the electoral laws.

We noted earlier that to succeed in setting aside an election under Section 61(1)(a) of the Parliamentary Elections Act, the petitioner must prove that there was non compliance and that the non compliance affected the result in a substantial manner.

Several complaints on non compliance were put before the trial Judge. On appeal some of the complaints were abandoned. We shall consider the complaints argued on appeal.

Failure to control the use of ballot papers

Counsel for the appellant submitted that the 2nd respondent failed to control the use of ballot papers and that this led to massive rigging of votes through multiple voting, ballot stuffing and pre-ticking of ballots for voters. He said this was confirmed by the cancelation of results for some polling stations after it was discovered during tallying that the number of ballot papers used at the polling stations exceeded the number that was supplied to the station before the start of voting.

On the issue of ballot stuffing, counsel for the 2nd respondent submitted that discrepancies could have arisen due to errors by Polling Officers because of the pressure they worked under. Counsel for the 2nd respondent submitted that the Returning Officer explained in both her affidavits that she cancelled the results of the said polling stations because she could not ascertain the polling results in each of those stations for various reasons explained in her affidavit and that the trial Judge rightly held that though

the said cancellation was an apparent non compliance it did not affect the overall electoral results in question, in a substantial manner.

The appellant's counsel based this allegation on the evidence of the Returning Officer Kalyowa Sarah Namugambe who stated in her affidavit that results of some polling stations were cancelled because it was discovered during the tallying that the number of ballot papers used at the polling station exceeded the number that was supplied to the stations before the start of voting. The trial Judge considered the explanation offered by the Returning officer in her affidavit in reply that she cancelled the results for polling stations such as Kalengera, Namataba, Kitale, Kiwanga Rwanda (N-NAR) for reasons that for some stations there were no DR Forms in the tamper proof envelops and in the sealed ballot boxes, that some DR Forms had missing results such as was the case for candidate Kusasira Peace, that the total votes polled by all candidates were higher than the total number of valid votes at the polling station. Another issue was that the total number of ballot papers counted was less than the total number of votes polled by all the candidates. Finally it was argued that the total number of all votes polled by all candidates when added to the total number of ballot papers and to the total number of invalid votes was higher than the total number of ballot papers used at the polling station. The Returning Officer stated that she took into account all the anomalies in respect to the said stations and was unable to verify the results. Hence the decision to cancel them.

The trial Judge considered the Polling Station Agents' failure to ensure transmission of DR Forms and resolve the anomalies therein an act of non compliance with the provisions and principles of the PEA. He added that the petitioner offered no evidence regarding the effect of the impugned cancellation upon the overall outcome of the results and the margin of the victory of the 1st respondent.

The Returning Officer gave reasons for cancelling the results for Kalengera, Namataba, Kitale, Kiwanga Rwanda (N-NAR) polling stations. The trial Judge faulted the Presiding Officer for failing to avoid the anomalies that led to the cancellation of the said results. Like the trial Judge found, we too find the cancellation of the results from the 5 polling stations for the reasons stated to be symptomatic of non compliance with the electoral laws.

Section 61(1) (a) of the PEA anticipates, failure to comply with the provisions of the Act and provides a remedy of nullification of results provided substantial effect of the non compliance is proved to the satisfaction of court. The implication here is that the Act provides for the operation of the electoral process but provides a rider which must be fulfilled. The non compliance must affect the result in a substantial manner. The petitioner/appellant did not bring to court any evidence as to the effect of the impugned cancellation upon the overall outcome. The non compliance therefore did not affect the overall results in a substantial manner. The Judge rightly found as he did on this issue. We find no cause to fault him.

False entries onto the DR Forms and the tally sheet and tampering with electoral materials

Counsel for the appellant submitted that the 2nd respondent and its agents in connivance with the agents of the 1st respondent made false entries onto the DR Forms and the tally sheet to the advantage of the 1st respondent. He stated also that the same agents tampered with the electoral materials and illegally opened ballot boxes and thereby altered and/or forged the results on the DR Forms to benefit the 1st respondent.

Counsel for the 2nd respondent submitted that the petitioner did not adduce evidence to show interference with electoral materials or falsified results at the tally centre. He said no formal complaint was ever brought to the 2nd respondent or to the Police in respect of the allegation of the seals of ballot boxes being broken and added that the petitioner had Polling Agents in all the polling stations who accepted the results polled at each station and endorsed the DR Forms on behalf of the petitioner. Counsel relied on the authority of **Sekigozi Stephen vs Sematimba Peter and Electoral Commission, E.P.No. 10 of 2016** which is to the effect that when an agent signs a DR Form, he is confirming the truth of what is contained in the DR Form. He supported the trial Judge in rejecting the petitioner's allegations of falsification of results in DR Forms or the tally sheets.

The trial judge considered the allegations raised by the petitioner as to the falsification of the DR Forms and also looked at copies of the DR Forms that were said to have false entries. He looked at the results for Najja-Kireku and Natyole Polling stations with wrong computations. The Judge

went through the evidence of the Returning Officer who stated that the mathematical errors or lapses as appear on some DR Forms can be accounted for by the pressure that bears on the Presiding Officers at polling stations to meet the tight time lines with respect to the polling day activities. Court concluded that in the circumstances the claim of falsification of results on the DR Form had not been proved to the satisfaction of court, as an act of failure to conduct the elections in accordance with and/or of non compliance with the provisions and principles of the PEA by the 1st and 2nd respondents.

The allegations of tampering with electoral material were stated in the Petition and the Affidavit in Support thereof. The petitioner accused the 2nd respondent of colluding with the 1st respondent and tampering with the electoral materials by illegally opening ballot boxes and forging the results on the DR Forms to the advantage of the 1st respondent. The evidence brought forth to prove this allegation is of Byekwaso Isaac, Nambooze Betty, Nkanji Julius and Mawanda Mutale Jackson. Mawanda Mutale, a Polling Supervisor, in his Affidavit in Support of the Petition stated that on the night of the 19th February 2016 while at the Electoral Commission office he together with Ssali Andy and Byekwaso Isaac found ballot boxes being broken at the Electoral Commission store. He stated that the boxes were being broken by Kiwanuka God the EC driver and one Ezra the Assistant Returning Officer. Byekwaso Isaac gave evidence in support of the Petition to the same effect. Both witnesses stated that the ballot boxes were then whisked away by Police and later returned to the Electoral Commission

office. We find no reason why we should not find the witnesses truthful. What remains unanswered however is whether the particular boxes that were being broken into were those with the contents of the Woman MP electoral materials. We bear in mind the fact the 2nd respondent conducted elections of three categories on the same day. The witnesses merely mention they saw ballot boxes being broken. This alone cannot suffice to conclude that ballot boxes related to the Woman MP election were broken into and results were altered. The petitioner alleged that she had seals of the ballot boxes broken into which would verify this claim. However no evidence was led of the same or of dispatch lists of seal numbers offered to candidates to confirm that the broken seals belonged to the category of Woman MP. No witnesses adduced evidence in respect to the seals. No reports were made to the concerned authorities such as the Police and Electoral Commission as to the breakage. We also note that all the Polling Agents duly signed the Declaration of Results Forms and raised no complaints. It is now settled law that once candidates' agents sign the DR Forms without complaint, it is conclusive evidence that the election at that station was free and fair. See **Mbagadhi Frederick Nkayi and Another vs Dr. Nabwiso Frank Wilberforce, Election Petition Appeals No. 14 and 16 of 2011.** We find the allegation fell short of proof. We are unable to find sufficient evidence supporting the allegations of the false entries on the DR Forms and the alleged tampering with the polling materials.

Failure to ensure a conducive environment for the conduct of elections and violence

The appellant's counsel argued that the 2nd respondent failed to ensure a conducive environment for the conduct of elections and that there was violence by the agents of the 1st respondent against the supporters of the appellant, in contravention of the provisions of the law.

This allegation of violence arose at Bamuzale Gardens. The appellant faulted the 2nd respondent for not providing a conducive environment for the conduct of the elections and for failure to stop the 1st respondent, her agents and security personnel in meting out violence against her and her agents at the Bamuzale Gardens on the night of 17/2/2016 and the morning of 18/2/2016.

The trial Judge went through the evidence surrounding the said meeting at Bamuzale Gardens and found that it was a secret meeting. He found that over 200 people attended it without notification to the Police. He found that Police later raided the meeting for security considerations, given the timing of the gathering, which was the eve of the polling day and that the meeting was prohibited under the law. He referred to Section 20(5) of the Parliamentary Elections Act. The Judge rejected the claims by the appellant that violence was meted out to her and found that if she suffered any fallout it was as result of the dispersal and arrest of some of the participants at the meeting which was convened without notification to the authorities. He concluded that the incident at Bamuzale Gardens was not proved to amount to an electoral offence, that it was not related to an act of violence, and that it was not an act of failure on the part of the 2nd

respondent to conduct an election in accordance with the principles and provisions of the Parliamentary Elections Act.

From the evidence before us on the allegations of violence, we are unable to find differently from the trial Judge's position. In our view he properly evaluated the affidavit evidence from all sides and arrived at the right conclusion. The meeting at Bamuzale Gardens on the eve of polling day was in contravention of Section 20(5) of the PEA and the Police was within its right to intervene. We must observe that there is no Police Report indicating violence or intimidation of voters during the campaign period. It is therefore not true that the 2nd respondent failed to ensure a conducive environment for the conduct of the elections.

We find generally that there was compliance with the Electoral laws and that what non compliance existed was not proved to have affected the election in a substantial manner. Ground 10 must fail.

Ground 8 states that:

The learned trial Judge did not properly evaluate the evidence on record thereby coming to a wrong conclusion that the petitioner had not proved her case against the respondents.

We find that the resolution of all the other issues of appeal incorporate ground 8. Discussing this ground would be a repetition of the entire content herein which we opt not to do.

This appeal partially succeeds as indicated on grounds 2, [illegible] and 9. It however fails on grounds 1, 4, 5, 6 and 10.

In the event we make the following orders:

1. The elections for the Woman Member of Parliament for Mukono District and subsequent declaration are upheld.

2. The respondent is entitled to ½ of the costs of this Appeal and full costs in the High Court.

We so order.

Dated this ..... day of 2017

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HON. JUSTICE ALFONSE OWINY DOLLO
DEPUTY CHIEF JUSTICE

.....

HON. JUSTICE S.B.K. KAVUMA
JUSTICE OF APPEAL

.....

HON. JUSTICE PAUL K.MUGAMBA
JUSTICE OF APPEAL

-1-

EPP No. 72/16

Nabukera Hussein

Vs

Kusasira Peace Kanyeregye M

& Another

- M/s Sekaana Musa for the 1st respt

- Ambrose Tebyasa for the appellant

- Nakato Stella for 2nd respt

- The appellant in Ct.

- The representative of the 2nd respt

is in Ct Onyango Israel.

- Amin Judgement delivered in open Ct

CT: Judgement