THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: ***BYAMUGISHA, NSHIMYE&ARACH-AMOKO, JJA***

ELECTION PETITION APPEAL NO.6/11

BETWEEN

10

PAUL MWIRU::: APPELLANT

AND

1. **HON. IGEME NATHAN NABETA SAMSON**
2. **THE ELECTORAL COMMISSION::::::::::::RESPONDENTS**
3. **NATIONAL COUNCIL FOR HIGHER EDUCATION**

[Appeal from the judgment and orders of the High Court of Uganda sitting at
20 ***Jinja (Mugenyi J) dated 28th June 2011 in Election Petition No.3/11]***

JUDGMENT OF BYAMUGISHA, JA.

This is a first appeal from the decision of the High Court wherein the appellant's petition seeking to annul the election of the first respondent as a Member of Parliament for Jinja East Constituency was dismissed. The court ordered each party to bear its own costs. There is a cross-appeal against that
30 order.

On 18th February, 2011 Parliamentary Elections were held throughout the country. The appellant, the first respondent, Dhikusoka Cranimer, Mudago Rogers, Mugabi Cyrus, Nagayi Moses, Osinde Oyo and Waiswa Alex were duly

nominated and gazetted as candidates by the second respondent to contest for Jinja Municipality East Constituency. At the end of the polling exercise the following results were declared by the second respondent:

1. **Hon. Igeme Nathan Samson Nabeta 8,203 votes (49.52 %).**
2. **Mwiru Paul 7,060 votes (42.62 %).**
3. **Dhikusoka Cranimer 378 votes (2.28 %).**
4. **Mugabi Cyrus 296 votes (1.78%).**
5. **Waiswa Alex Mufumbiro 262 votes (1.58 %).**
6. **Nagaya Moses 135 votes (0.81%)**
7. **Osinde Oyo Ritchie 127 votes (0.77 %)**
8. **Mudago Rogers 105 votes (0.63%).**

Consequently the second respondent declared the first respondent as the duly elected Member of Parliament for Jinja Municipality East Constituency. He name was gazetted in the Uganda Gazette of 21st February 2011. He was sworn in and he is currently the Member of Parliament for that constituency.

The appellant was dissatisfied with the outcome and on 16th March 2011, he filed a petition in the High Court Jinja Circuit under **sections 4, 60, 61(a) (c) (d), 62** and **63** of the Parliamentary Elections Act (**PEA**) (Act 17/05) challenging the outcome. The main thrust of the appellant's case was that the

first respondent at the time of his election was not qualified to be validly elected a Member of Parliament for lack of the requisite academic qualifications.

In the alternative but without prejudice to the forgoing, the appellant alleged the following:

1. **The electoral process in Jinja Municipality East Constituency was not conducted in compliance with the provisions and principles of the Constitution, the Electoral Commissions Act and the Parliamentary Elections Act.**
2. **The failure to conduct the elections in compliance with the provisions and principles of the electoral laws affected the final result in a substantial manner and benefited the 1st respondent.**
3. **The 1st respondent personally or through his agents, with his consent, knowledge or approval, committed numerous election offences and illegal practices, which affected the final results in a substantial manner.**
4. **The 2nd respondent compromised the principle of impartiality and transparency thereby failing to conduct the election in accordance with the law which affected the results of the election in a substantial manner**
5. **The 2nd respondent incompetently computed the results of the election thereby indicating that in its final tally that the appellant had obtained less votes than the actual votes cast in his favour.**

He sought the following declarations that:

1. The 1st respondent was not qualified for nomination as a candidate for the position of Member of Parliament as the certificate of completion of formal education of Advanced Level or its equivalent issued to him by the 3rd respondent and accepted for nomination by the 2nd respondent is invalid under the law.
2. The 1st respondent was not validly elected as a Member of Parliament of Jinja Municipality East Constituency.
3. The election of the 1st respondent as a directly elected Member of Parliament be annulled and instead, the petititioners who came second in the election be declared winner of the Parliamentary election for Jinja Municipality Constituency.
4. In the alternative but without prejudice to the forgoing, a fresh election be conducted in the said constituency.
5. The respondents pay the costs of the petition.
6. Such other remedies available under the electoral laws as the court considers just and appropriate.

The first respondent filed an answer to the petition in which he denied the allegations leveled against him. In particular he averred that he holds the prescribed academic qualifications to contest for Member of Parliament and was duly issued with a certificate of completion of formal education of advanced

level standard or its equivalent by the National Council of Higher Education. He denied that he personally or through his agents with his knowledge, consent or approval committed numerous election offences and illegal practices, which affected the final results in a substantial manner.

He prayed for the dismissal of the petition with costs.

The second respondent in its answer contended that the nomination and conduct of elections were carried out in accordance with principles of transparency, free and fair elections laid down in the electoral laws of Uganda and that the results

10 in the constituency reflected the true will of the majority voters.

In the alternative but without prejudice, the 2nd respondent contended that if there were any irregularities or non-compliance with electoral laws, such non-compliance did not affect the results in a substantial manner.

It, too, prayed for the dismissal of the petition with costs.

The third respondent in its answer averred that it carried out consultation with Uganda National Examinations Board (UNEB) before issuing the first respondent with a certificate of equivalency in 2010.

It was further the case for the third respondent that once UNEB has duly

20 verified any qualifications following consultation there is *no requirement for repeated or fresh consultation* with UNEB for every new election as once a certificate is granted by NCHE for election, it is valid for future elections.

It too, prayed for the dismissal of the petition with costs.

The petition and the answers were accompanied by many affidavits. Some of the deponents were cross-examined at the trial.

The following were the issues framed for the lower court's determination:

1. **Whether the 1st respondent was at the time of his nomination and election possessed of the minimum academic qualifications for election as a Member of Parliament.**
2. **Whether the 1st respondent by himself or his agents committed any illegal practices.**
3. **Whether or not there was non-compliance with the electoral laws in the elections for Jinja Municipality East.**
4. **If so, whether the non-compliance affected the results in a substantial manner.**
5. **Remedies available.**

The learned trial judge answered all the issues in the negative and dismissed the petition and ordered each party to meet its costs- hence this appeal and cross-appeal.

The parties filed a joint conference memorandum in this court on 22nd September and agreed on the following issues for our determination:

1. **Whether the learned trial judge failed to properly record the evidence.**
2. **Whether the learned trial judge failed to properly evaluate the evidence on record and thus came to a wrong conclusion.**
3. **Whether the learned trial judge erred in law when she placed a higher standard of proof on the petitioner than required by law.**
4. **Whether the learned trial judge erred in law and fact when she held that the 1st respondent was possessed with minimum academic qualifications for nomination and election as a Member of** *10* **Parliament based on the certificate of advanced level study or its equivalent dated 4th August 2010 issued to him by the 3rd respondent.**
5. **Whether the learned trial judge erred in law and fact when she held that the 1st respondent did not personally or through his agents with his knowledge, consent and approval commit act of bribery before and during elections.**
6. **Whether the learned trial judge erred in law and fact when she held that the elections for Member of Parliament of Jinja Municipality East was subsequently held in accordance with electoral laws and any non-compliance did not affect the elections in a substantial** *20* **manner.**
7. **Whether the learned trial judge erred in law and fact in ordering that each party to the petition meet its respective costs.**

8. **What are the remedies available to the parties?**

I shall commence with the issue of academic qualifications of the 1st respondent. **Article 80** of the Constitution provides for qualifications and disqualifications of members of Parliament. For purposes of the matter now before us, it states:

(1) A person is qualified to be a member of Parliament if that person-

(a)…………

(b)…………

10 ***(c) has completed a minimum formal education of Advanced Level standard or its equivalent which shall be established in a manner and at a time prescribed by Parliament by law."***

Parliament enacted the Parliamentary Elections Act and provided in **section 4 (1)** thereof that:

"A person is not qualified to be a member of Parliament if that person-

(a)………..
(b)…………
20 ***(c) has completed a minimum formal education of Advanced Level standard or its equivalent."***

Subsection 5 states:

"For purposes of paragraph (c) of subsection (1), any of the following persons wishing to stand for election as a member of Parliament shall establish his or qualification with the Commission as a person holding a minimum qualification of Advanced Level or its equivalent at least two months before nomination day in the case of a general, and two weeks in
30 ***the case of a by election-***

(a) persons, whether their qualification is obtained from Uganda or outside Uganda, who are claiming to have their qualification accepted as equivalent to advanced level education;

(b) ***persons claiming to have advanced level qualifications from outside Uganda;***
(c) ***Persons claiming to have academic degrees which were obtained outside Uganda.***

Subsection 6 provides:

"A person required to establish his or her qualification under subsection (5) shall do so by production of a certificate issued to him or her by the National Council for Higher Education in consultation with the Uganda National Examination Board."

The provisions of the article and the section have received judicial consideration in this court and the Supreme Court. See ***Nicholas Gole v Loi Kiryapawo – Election Petition Appeal No.7/09(SC); Abdul Nakendov Patrick Mwonda – Election Petition Appeal No.9/07*** and ***Ahmed Kawoya Kaugu v Bangu Aggrey –Election Petition Appeal No.9//06.***

The plain or literal meaning of **section 4(1) (c)** of the above Act is that a person qualifies to be a member of Parliament on proving to the satisfaction of the Electoral Commission to have completed 'A' level standard of education or its equivalent as the minimum level of education. In doing so the candidate has to produce a certificate issued by the National Council for Higher Education in consultation with UNEB. Such certificates which are presented for equating must be valid and authentic.

The word consultation as was rightly submitted by both counsel is not defined in the Act. The modalities it should take is also not specified. In the case of

Rollo& another v Minister of Town and Country Planning [1947] 2All 488

which Mr Wakida cited, it was held:

"In considering whether or not there has been consultation within S.1(1) of the Act, between the Minister and local authorities it is necessary to look at the substance and reality of what occurred and to determine whether the local authorities have had proper opportunity of expressing their views and rendering advice."

10 Mr Kyazze submitted on the first respondent's academic qualifications. He stated that the certificates which were presented by the first respondent for equating were obtained outside Uganda. He claimed that the equating and evaluation is done by UNEB and not the third respondent. He submitted that the concern of the appellant is not that the certificates were not genuine but that they were not equated by UNEB. He further stated that it had to be shown that there was consultation. He claimed that it is not enough to state in the body of the certificate of equivalency that there was consultation. He cited the case of ***Ahmed Kawooya Kaugu v Bangu Aggrey Fred-Election Petition No.5&6/06*** (CA) which judicially considered the provisions of section 5(4) (supra). This

20 court held that the consultation between UNEB and the third respondent is mandatory under the section. On the document (IN9) at page 320 of the record of appeal, learned counsel submitted that the said document does not amount to consultation under the law and it was just a mere proposal. He maintained that there was no consultation from UNEB which is the equating body and the section requires individual consultation.

Mr Wakida, learned counsel for the third respondent, in his reply submitted that the first respondent presented to the NCHE a certificate of High School equivalency issued by the State of California and a degree of Bachelors Science of Administration by Oklahoma State University. He stated that there is no dispute that the institutions mentioned do not exist.

He pointed out that the word 'consultation' is not defined under the PEA. He cited the case of ***Rollo &another v Ministry of Town Planning (1948)1 All ER 13*** where the court discussed what amounts to consultation. He claimed that UNEB was given sufficient information and it has cleared the 1st respondent

10 since 2001.

The first respondent deponed in his first affidavit of 25th March 2011 that he does not possess any qualification higher than 'O' Level from a recognized institution in Uganda and thefore falls outside the ambit of persons set out in section 4(13) of the PEA. These persons do not require a certificate of equivalency from the third respondent. There is also no dispute that the 1st respondent has contested for Parliamentary elections since 2001 on the strength of a certificate of equivalency issued by the 3rd respondent.

The case for the appellant as I understand it is that the 3rd respondent did not

20 consult UNEB on the academic papers of the 1st respondent which required equating before it issued the certificate in question. The 3rd respondent maintained that it was not necessary to consult UNEB since it had done so in the

past. The 1st respondent in paragraph 9 of his affidavit on 25th March 2011

stated:

"That I submitted all my aforesaid qualifications for equating and verification with the Uganda National Examination Board for the 2001 parliamentary elections and UNEB cleared me, which election I won. A copy of the UNEB letter of clearance and the Gazette containing the UNEB clearance will be produced at the hearing."

The letter and the gazette were not produced at the hearing.

The evidence as a whole clearly shows that in 2010 the 3rd respondent did not consult UNEB about the academic papers of the 1st respondent.

The reason for this lack of consultation was explained by Ms Bukirwa(RW1) to the effect that in 2005 or thereabouts the stakeholders who included the Ministry of Education, UNEB and the 3rd respondent held a general consultation on equating of academic papers. As a result of this general consultation, general guidelines were issued by UNEB. They are contained in a document which was annexed to Bukirwa's affidavit as annexture ***IN 9.***

On the basis of this document and probably many others the 3rd respondent issued a statutory instrument titled **The Universities and Other Tertiary Institutions (Equation of Degrees, Diplomas and Certificates) Regulations-S.I.No.84/05.** The instrument was issued under **sections 5(k)** and **123(2) of** the **Universities and Other Tertiary Institutions Act No.7/2001.** The sections give the 3rd respondent the mandate to equate academic qualifications.

It is now necessary to examine the evidence of consultations between UNEB and the 3rd respondent regarding the academic qualifications of the 1st

respondent. The evidence was given by Bukirwa an advocate and legal officer of the 3rd respondent. In her affidavit dated 28th March 2011. The following paragraphs are relevant:

"3. That the 1st respondent before contesting for Parliamentary Election in 2006presented his academic qualification for equating and verification (see annexture A, B, C&D).

4. That NCHE wrote a letter to UNEB for verification of the 1st respondent's qualifications (see annexture E)

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5. That UNEB duly replied confirming the genuineness of the 1st respondent's 'O' Level (see annexture 'F')

6. ***I verily believe by virtue of my knowledge of the law that once there is proper verification by UNEB, there need not be fresh consultation on the same qualifications for every new elections."***

20 The witness was cross-examined. On consultation with UNEB she said:

"***For 'O' Level in the present case we consulted UNEB, for the foreign qualifications, we consulted Oklahoma State University and the U,S Council for Higher Education and Accreditation.***

Before issuing a certificate of equivalence NCHE consults UNEB on the totality of a candidate's qualifications.

In 2006 and 2010 NCHE consulted UNEB on the totality of the 1st respondent's qualifications."

30

In order to determine whether there was consultation between the 3rd respondent and UNEB, I think it is necessary to evaluate the evidence of what actually occurred. The affidavit of Bukirwa had a number of annextures to it. One of them was a letter dated 10th January 2006 addressed to the Secretary Uganda

National Examination Board from the 3rd respondent. It was signed by one Yeko Achato for the Executive Director.

The letter in part read:

“Re: Igeme Samson Nabeta –Reg. No.U0059009

The above named person has presented to this council the document mentioned below:

1. **Uganda Certificate of Education, Busoga College Mwiri(1989)**

The purpose of this letter is to request you to confirm to this Council

10 **whether the said qualification was awarded to him by UNEB.”**

On the same day UNEB sent its reply. It confirmed that the 1st respondent was a candidate at Busoga College Mwiri and he sat for his ‘O’ Level Examination at the School in 1989. The letter set out the grades he obtained in each subject and the final grade.

To me this summarizes what actually happened between UNEB and the 3rd respondent over the 1st respondent’s academic qualifications.

The learned trial judge in dealing with the question of consultation between

20 UNEB and the 3rd respondent said:

"In 2010 NCHE consulted UNEB on the 'A' Level status of the 1st respondent courtesy of a general inquiry on what constituted A level equivalence. The basis of NCHE's issuance of a certificate of completion to the 1st respondent in 2010 was the decision by NCHE, UNEB and MOES that equated Mature Entry Certificates in Uganda to Pre-entry certificates in foreign jurisdictions, both of which equated to 'A' Level in Uganda, which decision UNEB purportedly confirmed.
This position reconciles the contents of the2 letters from UNEB referred to earlier in this judgment in so far as it clarifies that indeed in 2010 no fresh inquiry was specifically made about the 1st respondent's qualification, NCHE having opted for a more generalist approach for the equating of politicians academic documents".

The learned trial judge went on to discuss whether the general inquiry satisfied the legal requirements of **section 4(6)** about consultation and concluded that it did.

With due respect to the learned judge, I think she misconstrued the provisions of the section. The section makes UNEB a component in equating the academic qualifications of each candidate. The certificate which is issued by the 3rd respondent to each candidate has to state that it is issued in consultation with UNEB. A general inquiry in my view does not satisfy the requirements of the section. Moreover the document ***RN9*** at page 320 seem to be mere policy proposals which UNEB was putting forward and there seems to be no concrete decision on its contents. Moreover policy decisions cannot tantamount to legal or statutory requirements.

The testimony of Bukirwa to the effect that there was consultation on the totality of the 1st respondent's qualifications cannot be true. the consultation must be actual.

Iam not persuaded by the case put forward by the 3rd respondent when it claims that once it issues a certificate for one election, the certificate is valid for future elections. This would tantamount to amending the law. Equating of academic papers for purposes of elections is not a once life time exercise unless the law is amended. The evidence on record prove that there was no consultation between UNEB and the 3rd respondent on the totality of the 1st respondent's academic qualification before the issuance of the certificate dated 4th August 2010. The only inquiry which the 3rd respondent made with regard to the 1st respondent's academic papers concerned the authenticity of his 'O' certificate. UNEB replied

10 to that query. It stated that the 'O' level certificate was genuine. This inquiry in my view did not satisfy the requirements of the law. There was no other evidence showing the participation of UNEB in the equating exercise

The fourth issue of appeal would succeed.

I shall now consider the 5th ground of appeal on bribery.

Mr Tebyasa submitted on this ground on behalf of the appellant. He stated that the allegations of bribery were proved on a balance of probabilities and the learned judge was wrong to hold otherwise. In particular he pointed out that the electricity connection was carried out during the campaigns. He claimed that the

20 1st respondent was a liar when he stated that he learnt about the electricity connection during his door to door campaigns and that it was part of Government programme.

On the welding machines, learned counsel submitted that the trial judge failed to properly evaluate the evidence. He pointed out that welding machines were delivered to different garages and all the 1st respondent did was to deny his involvement. He further submitted that Bukenya stated that machines were delivered to his garage but did not disclose who delivered them. On the acknowledgment sheets, counsel stated that the trial judge should not have believed that evidence because there was no evidence from H.E. the President or Moses Byaruhanga that they delivered the machines. He claimed that the evidence on welding machines was suspect and should have been rejected.
He submitted on the other evidence of bribery which he claimed was sufficient to prove the allegations on a balance of probabilities.

Mr Kibedi who represented the first respondent argued grounds three and five together. He supported the evaluation of evidence by the trial judge. He pointed out that the allegations of bribery were rebutted by the 1st respondent. He further submitted that the trial judge was alive to the need of corroborative evidence and she resorted to documentary evidence which indicated the source of the machines. On the need for corroborative evidence learned counsel cited two authorities namely ***Dr Kiiza Besigye v Museveni Yoweri Kaguta-Election Petition No.1/2001(SC)*** and ***Mbayo Jacob v Electoral Commission &another – Election Petition Appeal No.7/06(CA).***

He invited court to disallow the ground.

Section 68 of the PEA makes provisions for illegal practices. For purpose of the instant appeal it provides as follows:

"(1) A person who, either 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 provided any money, gift or other consideration to that other person, commits an offence of bribery and is liable on conviction to a fine not exceeding seventy currency points or imprisonment not exceeding three years or both.

(2)A person who receives any money, gift or other consideration under subsection (1) also commits an offence of illegal practice under this section.

The provisions of the section make the giver and recipient guilty of an illegal practice. The commission of an illegal practice once proved to the satisfaction of the court is sufficient ground in itself under **section 61** of PEA to set aside the election of a candidate as a Member of Parliament.

It is therefore essential in allegations of bribery for the party alleging the same to prove on a balance of probabilities that the person or the persons allegedly bribed were registered voters. See ***Harris Mukasa v Dr Lulume Bayiga-Election Petition Appeal No.18/07***(SC) ***Bakaluba Peter Mukasa v Nambooze Betty Bakileke-Election Petition Appeal No.4/09***(SC), and ***Fred Badda v Prof. Muyanda Mutebi –EPA No.21/07(SC)*** all unreported.

I shall now re-examine the evidence of bribery made against the 1st respondent personally and determine whether they were proved to the satisfaction of the court. I shall commence with welding and spraying machines.

The evidence was given in the affidavit of Mutebi Muhammed, Magezi Daniel, Lwala Abdulla, Bamuranzaki Godfrey and Kalema Emmanuel for the appellant. These witnesses stated in their respective affidavits that on 7th February 2011 the 1st respondent visited their respective garages accompanied by six men. He donated welding and spraying machines to their respective garages and asked them for their votes. They were registered voters.

The 1st respondent in his second affidavit dated 24th May 2011 in paragraphs 16 and 17 denied the allegations. He stated that on 7th February 2011 he carried out

10 door to door campaigns in Community Centre within Walukuba West in accordance with approved campaign programme.

Four other witnesses deponed affidavits to explain the origin of the spraying and welding machines which were donated during the campaign period. The witnesses in question are Muwereza Kalulu, Daniel Bukenya, Wakita Najib and Kasaija Edison.

Kalulu in his affidavit stated that long before the 2011 Presidential and Parliamentary elections H.E. the President toured NAADS projects in Busoga Sub-region. The witness and several other people held a meeting with one Moses Byaruhanga, a Presidential Assistant.

20 They told him that NAADS programmes cannot benefit people who live in town. Moses Byaruhanga is said to have promised that Government will get them one central place and provide them with machinery which they require.

The witness stated that during the February elections Government delivered to several garages some of the machinery that had been promised. On 5th February 2011 the witness received a compressor and a welding machine on behalf of Agaliwamu Garage and signed for them. The acknowledgment sheet was attached to his affidavit. It is quite short and for purposes of clarity I shall reproduce it in full:

ACKNOWLEGEMENT SHEET

I MUWEREZA KALULU/ AGALIWAMU MOTOR GARAGE.

Received item: Compressor & welding machine

10 **From: H.E.PRESIDENT MUSEVENI**

Being: JUAKALI WORK

DATE: 05/02/2011

RECEIVED BY: MUWEREZA KALULU

TELEPHONE: 075296493.

The affidavit of Bukenya Daniel admitted that he, too, received a welding and compressor machine as part of government programme towards the *jua kali* works. He denied the involvement of the first respondent in the distribution of the machines. He signed an acknowledgment sheet indicating that the machines

20 were received from H.E. President Museveni. Wakita Najib on his part stated that he personally and one State House official called Lubanga are the ones who

delivered welding and compressor machines to four garage owners in Jinja on 5th February 2011 as part of prosperity for all programme.

Kasaija Edison also stated in his affidavit that he personally received the machines and in the acknowledgement sheet he stated that he received the same from H.E. President Yoweri Museveni

From the affidavit evidence which I have tried to summarize, there is no dispute that welding and compressor machines were delivered to a number of garages in and around the constituency which the 1st respondent represents in Parliament.

10 The exercise took place during the campaign period of the last elections.

The issue to resolve is the origin of the machines. Whereas Bukenya and Kalulu claimed in the acknowledgment sheet attached to their respective affidavits show that the machines were received from H.E.President Museveni they contradicted themselves when they stated that it is government which gave out the machines. H.E. the President did not depone any affidavit to support the claim of the witnesses that indeed he is the one who gave out the machines or that he sent some one to deliver the same on his behalf.

Wakita on his part stated that he gave out machines to four garages with a State House official called Lubanga who did not depone any affidavit. He also

20 claimed that Moses Byaruhanga had promised to communicate the concerns of the garage owners to H.E the President and revert back to him (the witness)

There is no evidence that Moses Byaruhanga communicated to H.E. the President and what his response was.

Government ministries including the office of the President are governed by the Public Procurement and Disposal of Assets Act which regulates the procurement of goods and services. The welding and compressor machines are goods and how they were procured by the office of the President had to be explained. At least there should been some paper trail of some sort.

The absence of any documentary evidence about the welding machines contrasts with the allegations of electric power connections which were carried out in some areas of Jinja East Constituency as an inducement to bribe voters to vote for the 1st respondent. There is a letter (***N2)*** dated 21st January 2011 written by the Ag, Principal Private Secretary to H.E. the President. It was addressed to the Minister of Energy and Minerals. The letter was copied to area Members of Parliament who included the 1st respondent. The subject was power extension. In the letter, the Ag. Principal Private Secretary to the President informed the Minister that during his tour of Busoga region, the residents requested for power extension. The areas to be covered were:

1. Soweto- Masese 11
2. Kibuga Mbata- Masese 1
3. Loca- oldbooma
4. Kirombe-Masese 11.

The purpose of the letter was to communicate the President's directive for implementation. Indeed the electricity was connected during the campaign period and the connection was perceived as a bribe to voters to vote for the 1st respondent.

The implementation of any government programme like the connection of electricity during the campaign period is bound to raise suspicion and is likely to be portrayed as a bribe to the voters. But government programmes do not come to a halt during election campaigns. The electricity connection was reasonably explained by the letter written on behalf of H.E. the President. The involvement of the 1st respondent if any was because he was the incumbent Member of Parliament. It was not proved to the satisfaction of the court that the electricity connection was a bribe although it might have appeared as such.

On the other hand welding and compressor machines were not proved to have been sourced from the office of H.E.the President. The acknowledgment sheets which the learned judge relied upon to find as she did that it provided corroborative evidence had very little probative value.

The absence of any communication from the office of the President renders it difficult to conclude that the machines were procured by the said office for distribution in the areas mentioned. I therefore find that the evidence of Mutebi Muhammed, Magezi, Kalema, Lwala and Bamuranki proved to the satisfaction of the court that the 1st respondent is the one who personally distributed the said

machines thus committing an illegal act of bribing voters. This act alone is sufficient to nullify the 1st respondent's election as a Member of Parliament.

I shall deal with the 1st, 2nd and 3rd issues together. The said issues state as follows:

1. ***Whether the learned trial judge failed to properly record the evidence.***
2. ***Whether the learned trial judge failed to evaluate the evidence on record and thus came to a wrong conclusion.***
3. ***Whether the learned trial judge erred in law when she placed a higher***
10 ***standard of proof on the petitioner than required by law.***

The above issues were formulated by the appellant in the conferencing notes. Mr Bakayana, learned counsel for the appellant submitted half-heartedly on the complaint that the learned trial judge failed to record all the evidence during cross-examination. However he did not specifically point out areas where the trial judge failed to record essential evidence.

Rule 87 of the **Judicature (Court of Appeal Rules) Directions** governs the contents of the record of appeal. It states:

"(1) For purpose of an appeal from the High Court, in its original
20 ***jurisdiction, the record of appeal shall, subject to subrule(3) of this rule, contain copies of the following documents-***

- ***(a) An index of all the documents in the record with the numbers of the pages at which they appear;***
- ***(b) A statement showing the address for service of the appellant and the address for service furnished by the respondent and, as regards any***

respondent who has not furnished as address for service, then as required by rule 78 of these Rules, his or her last known address and proof of service on him or her of the notice of appeal;

(c) The pleadings;
(d) the trial judge's notes of the hearing;
(e) the transcript of any shorthand notes taken or any other notes howsoever recorded at the trial;
(f) the affidavits read and all documents put in evidence at the hearing, or if those documents are not in English language, certified translations of them;
(g) the judgment or reasoned order;
(h) the order, if any, giving leave to appeal,
(i) the notice of appeal; and
(j) any other documents necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant."

The provisions of this rule give guide lines of what ought to be included in a record of appeal. The record is not supposed to include each and everything. What is important is for the record of appeal to contain sufficient material to enable the appellate court to determine the appeal. The record of appeal before us, I think contains material witness evidence and documents to enable this court to determine the appeal.

Moreover the record has a certificate of correctness by the Registrar. Iam unable to find that the appellant suffered any injustice. This issue ought to fail.

On evaluation of evidence, I think there is some merit in this issue. The trial judge adopted an omnibus evaluation of all the evidence especially allegations of bribery thus coming to the wrong conclusion that the allegations were not proved. She relied on two decisions –***Dr Kiiza Besigye v Museveni Yoweri***

Kaguta and ***Mbayo Jacob v Electoral Commission &another*** (supra) to find that the evidence on both sides in its entirety was quite subjective and cannot be relied upon without testing its authenticity from a neutral and independence source.

The two decisions mentioned above did not lay down any hard and fast rule that in election matters there must be corroboration before the evidence can be accepted as being truthful.

Section 133 of the Evidence Act states that "subject to the provisions of any other law, in force, no particular number of witnesses shall in any case be

10 required for the proof of any fact."

It was therefore important for the learned judge to state why the evidence of a witness is preferred against another or which particular evidence needed corroboration. She needed to state which particular witnesses were untruthful or unreliable. I shall quote an extract from the judgment to illustrate the point. At page 403 line 29 she said:

"In the present case Iam faced with 2 contradictory sets of evidence: allegations by the petitioner and rebuttals by the 1st respondent. I therefore revert to documentary evidence to confirm the truthfulness of either case. Iam fortified in this approach by **Sarkar's Law of Evidence, 1993 14th Edition at**

20 **p.924** ***which states as follows:***

"In contradictions of oral testimony which occurs in almost every case, the documentary evidence must be looked to in order to see on which side the truth lies."

I did not find any evidence that conclusively proves that the 1st respondent personally committed the acts of bribery complained of. On the contrary the documentary evidence adduced by the 1st respondent suggested otherwise. He attached a campaign program as proof that he did not go to the Napier market on the day he is alleged to have offered a bribe to the market vendors as he

was not scheduled to campaign there on that day. He availed a letter (ANNEX IN2) that confirms that the electrification of Soweto area was a government programme that he participated in as area MP, not an act of inducement by him to voters……….”

The learned trial judge did not subject the evidence to evaluation in order to find which evidence required corroboration and which one did not. There was evidence which I have already evaluated regarding welding and compressor machines. This evidence alleged that it was the appellant who personally

10 handed over these machines. It was thus important to look at the entire evidence before concluding as she did that all charges of illegal practices were not proved conclusively. This issue would succeed.

On the burden and standard of proof Mr Kyazze submitted that the standard of proof is on the balance of probabilities according to **section 61(3)** of the PEA and the decision of the Supreme Court- ***Mukasa Anthony Harris v Dr Micheal Lulume Bayiga- EPA No.18/07.*** He criticized the trial judge for adopting a higher standard of proof and the authorities she relied upon were inapplicable to the election petition. The authorities she relied upon were ***Dr Kiiza Besigye v***

20 ***Museveni Yoweri Kaguta*** (supra) and ***Karokora Katono Zedekia v Electoral Commission &another.*** Learned counsel cited the case of ***Jugnauth v Raj Direvium Nagaya Ringadoo [2008] UKPC 50*** which discussed the standard of proof in election petitions.

Mr Kibedi and Mr Wakida supported the trial judge for relying on the authority of ***Dr Kiiza Besigye Museveni Kaguta (***supra) and for applying the standard of proof which was set out by the Supreme Court because its decisions are binding on all courts in Uganda by virtue of **Article 132(4)** of the Constitution.

Section 61(3) of the PEA sets out the standard of proof in parliamentary election petitions. The burden of proof lies on the petitioner to prove the allegations in the petition and the standard of proof required is proof on a balance of probabilities. The provision of this subsection was settled by the

10 Supreme Court in the case of ***Mukasa Harris v Dr Lulume Bayiga*** (supra) when it upheld the interpretation given to the subsection by this court and the High Court. In the case of ***Jugnauth v Raj Direvium Nagaya Ringadoo*** which Mr Kyazze cited the Privy Council put the standard thus:

"An election petition is unquestionably a civil proceeding. Their Lordships are persuaded that the legislature used the language in section45 (1), by contrast with the language used in section 64(1), it was deliberately choosing to approach the matter, not as one where criminal standard should apply, but as one in which the court t should adopt the civil standard of proof."

20 In instant appeal the learned judge in dealing with the standard of proof said:

"The forgoing authorities suggest that election petitions should be determined on a high degree of probability; and certainly in the event of reasonable doubt as to the allegations pleaded, a petition(or ground thereof) should be disallowed."

In reaching the above conclusion the learned judge was relying on two decisions which I have already cited. The said decisions were inapplicable because one was dealing with a petition under the Presidential Elections Act which did not have a statutory standard of proof and the other was determined before the enactment of the PEA. The two decisions were inapplicable to the instant appeal. The learned trial judge was influenced by the two decisions she cited when she was evaluating the evidence of bribery against the 1st respondent. In particular she stated that the allegations of bribery against him were not 'conclusively' proved. This was another way of saying that the allegations were
10 not proved beyond reasonable. The learned trial judge erred in so holding.

The last issue to deal with is about a cost which was the ground for the cross-appeal.

The law is settled that costs in civil litigation follow the event and a successful party is entitled to costs except for good reason connected with the case. The decision to award or not to award costs is within the discretion of the court which tried the case.

Normally an appellate court will not interfere with the exercise of discretion unless it is shown that wrong principles were followed by taking into account an
20 irrelevant factor or failing to take into account a relevant factor. In the case of ***Software Distributors (Africa) Ltd &another v Kambaho Perez –CA No.07/06*** this court said:

"We agree with the statement of the law as cited by both counsel that an appellate court will not interfere with the exercise of discretion by a lower court unless it is clearly shown that the exercise was unjudicially or wrong principles were followed. If there are grounds to support the exercise by the trial judge of the discretion he or she purports to exercise the question of sufficiency of those grounds for this purpose is entirely a matter for the trial judge to decide, and the appellate court will not interfere with the discretion. It is immaterial that the appellate court would have exercised its discretion differently."

10

Section 27 of the Civil Procedure governs the award of costs in civil matters in general. The section has a proviso which states that:

"Provided that the costs of any action, cause or other matter shall follow the event unless the court or the judge shall for good reason otherwise order."

20

In election matters the court determining who should bear the costs of an election is guided by ***rule 27*** of the **Parliamentary Petitions Rules- S.I 141-2** which state as follows:

"All costs of and incidental to the presentation of the petition shall be defrayed by the parties in such manner and in such proportions as the court may determine."

The trial judge in determining how the costs should be defrayed said:

30

"Ordinarily, costs of any action should follow the event. To that extent, I would have awarded 75% costs to the 1st and 3rd respondents and 25% costs to the petitioner given that he was successful against the 2nd respondent on issue No.3.
However, Iam aware that petitions are matters of national or political importance for which court should be hesitant to award costs. Iam also mindful of the considerations of **Bamwine PJ** ***who, in*** **<u>Kadama</u>**

Mwogezaddembe v Gagawala Wambuzi Election Petition No.2 of 2001
held:

"There is another dimension to such petitions; the quest for better conduct of elections in future…..Keeping quiet over weaknesses in the electoral process for fear of heavy penalties by way of costs in the event of losing the petition.. would serve to undermine the very foundation and spirit of good governance."

Furthermore, in the present case very pertinent issues were diligently raised and prosecuted in a remarkably expeditious manner. A party that exhibits such judicious conduct of their case should be applauded and need not, in my view, suffer costs. Particularly so, in an election that by law should be expeditiously prosecuted. Consequently, in exercise of the court's discretion, I do refrain from making any order as to costs. Each party shall bear their costs."

The trial judge gave reasons for her decision. In order to succeed on this issue the cross-appellant has to demonstrate that the reasons given for the exercise of discretion were not based on facts in the case.

Mr Kibedi submitted that the reasons given by the trial judge were wrong in law and were not founded on evidence on record. He cited the case of ***Kiska Ltd v De Angelis [1969] EA 6*** where the court held that a successful party can only be deprived of his costs when it is shown that his conduct either prior to or during the course of the suit, has led to litigation, which, but for his own conduct might have been averted,

Learned counsel contended that the reasons given were not good.

Mr Tebyasa on the other hand supported the trial judge's exercise of discretion and the reasons she gave. He claimed that the cross-appellant has not shown how erroneous the reasons advanced by the trial judge were.

The trial judge gave reasons for the exercise of discretion. I have not been persuaded that the reasons she gave were erroneous in law as Mr Kibedi submitted. I would not interfere with the orders she made.

Remedies

The findings on the issues that were framed for our determination would entitle the appellant to the following declarations and orders:

1. **The learned trial judge erred when she placed a higher standard of proof on the petitioner than what the law required.**
2. **The learned trial judge erred when she held that the 1st respondent was possessed with minimum academic qualifications for nomination and election as a Member of Parliament.**
3. **The 1st respondent personally committed an illegal act of bribery. His election as a Member of Parliament for Jinja East Constituency would be annulled. I would order for fresh election**
4. **The appeal would be allowed with costs and the cross-appeal would fail.**
5. **The appellant would be awarded costs of the appeal and cross-appeal.**

Since my Lords Nshimye and Arach –Amoko agree, there will be judgment in the terms set out in this judgment.

Dated at Kampala this…16th ...day of……December……2011

C.K.Byamugisha
Justice of Appeal

<u>JUDGMENT AOF A.S.NSHIMYE, JA</u>

I have had the benefit of reading in draft the lead judgment of Hon Lady Justice

C.K.Byamugisha, JA.

10 I agree with the reasoning and conclusions reached therein.

Dated at Kampala this *…16th* …day of *…December…* 2011

…………………..
A.S.A NSHIMYE
JUSTICE OF APPEAL

<u>JUDGMENT OF M.S. ARACH AMOKO, JA</u>

20 I had the benefit of reading in draft the lead judgment prepared by Hon Lady Justice C.K.Byamugisha, JA

The judgment sets out my own views of the case and I concur with the reasoning and conclusions therein.

Dated at Kampala this *…16th* ….day of *…December…2011*

……………………………
M.S. ARACH AMOKO,
30 **AJUSTICE OF APPEAL**