THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 013 OF 2011

(Arising from the Judgment of His Lordship Hon. Justice Vicent T. Zehukirize dated 13th July, 2011 in Election Petition No. 003 of 2011, Mbarara Registry)

BETWEEN

ODO TAYEBWA ::: APPELANT

AND

1. BASSAJJABALABA NASSER]
2. THE ELECTORAL COMMISSION]::::::::::::::::::::::::: RESPONDENT

CORAM:

HON. JUSTICE A.E.N. MPAGI BAHIGEINE, DCJ
HON. JUSTICE C, K BYAMUGISHA, JA
HON. JUSTICE M.S. ARACH AMOKO, JA

JUDGEMENT OF A.E.N. MPAGI BAHIGEINE, DCJ

This election petition appeal arises from the judgment and order of the High Court at Mbarara (Zehurikize J.) dismissing Election Petition No. 003 of 2011.

The background is as follows. Odo Tayebwa, the appellant herein, Basajjabalaba Nasser the 1st respondent and six others contested for the Parliamentary seat of Bushenyi – Ishaka Municipality constituency in the countrywide Parliamentary elections held during February 2011.

The elections were organized by the Electoral Commission, the 2nd respondent, which declared the 1st respondent winner with 5446 votes. The appellant came third with 2831 votes, and feeling aggrieved petitioned the High Court, challenging the results.

The petition was dismissed with costs as aforesaid. Hence this appeal.

It is premised on four issues namely:

1. **Whether or not the learned judge erred when he held that the non compliance with the electoral laws did not affect the results in a substantial manner.**

2. **Whether or not the learned judge erred when he held that no election offence or illegal practice was committed by the 1st**

respondent personally or by any of his agents with his knowledge and consent or approval.

3. **Whether or not the trial judge properly evaluated the evidence on record and whether or not the 1st respondent was validly elected.**

4. **Whether or not the trial judge erred when he ordered the appellant to pay all the costs of the petition in the given circumstances**

Mr. Wandera Ogaro appearing with Mr. Ngaruye Ruhindi represented the appellant while Mr. Obedi Mwebesa and Mr. Kandeebe Ntambirweki were for the 1st respondent. Mr. Kandeebe also represented the 2nd respondent.

Before evaluating the submissions by counsel it is noteworthy that in accordance with the general principles of evidence, the burden of proof in an election contest rests ordinarily upon the contestant, to prove to the satisfaction of the court the grounds upon which he relies to get the

election nullified. The burden does not shift. Many of the issues relating to trials in Civil Cases are generally applicable.

As regards the standard of proof ***section 61 the Parliamentary Elections Act (PEA) (17 2005)*** specifies that:

> (1) 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 the court-
>
> ……
>
> (3) Any grounds specified in subsection (1) shall be proved on the basis of a balance of probabilities.

This issue has been exhaustively dealt with by their Lordships of the Supreme Court in ***Election Petition No. 1 of 2001, Col (Rtd) Dr. Kiza Besigye v Museveni Yoweri Kaguta & Election Commission.***

In sum the standard of proof is slightly higher than proof on a preponderance of probabilities but short of proof beyond 'reasonable doubt.' This is because of the importance of election petition to the public as a whole **– *Baxter v Baxter (1950)2 All E R 458.*** Also see

Matisko Winfred Komuhangi v Babihuga T. Winnie – Election Petition Appeal No. 9 of 2002. It is incumbent upon the petitioner to produce credible cogent evidence to prove his allegations and not to rely on the weakness of the respondent's case.

I turn to the Issues.

Concerning Issue No. 1 Mr. Ngaruye Ruhindi argued that there was glaring non compliance with the electoral laws and that the learned trial judge erred to hold otherwise.

He submitted that there was massive transfer of voters from areas where the appellant was popular by the 1st respondent and pointed to the Judge's ruling:

> ***"In view of this piece of evidence I find that 147 votes were transferred from Kakoma polling station in Igara West Constituency to Fort Jesus polling station in the Bushenyi – Ishaka Constituency. According to Ninyesiga Onesmus this was due to mistaken belief that***

Kakoma was part of Kigoma parish which was moved to the Municipality upon the creation of Bushenyi – Ishaka Municipality.

I find that it was a failure on the part of the 2nd respondent not to ascertain exactly which part of Kigoma parish had been moved to the Municipality".

Mr. Ngaruye asserted that the said transfer was wrongful. The voters were moved to vote in a constituency which was not theirs. The movement was after the display of the register. This resulted in low voter turn-up. About 40% voters did not vote in this election. This represented about 8433 voters. This was due to the confusion of transferring voters long after the display of registers.

Learned Counsel referred to the affidavit of Tushabe Abby Clever in support of the appellant's allegations. Tushabe averred that himself and 146 other voters were, on 18th February 2011, picked in vehicles from Kakoma polling station in Igara West by the 1st respondent to go and

vote for him at Fort Jesus, Bushenyi Ishaka Municipality and that each was given shs. 5000/= by the 1st respondent.

According to the appellant's affidavit there were so many transfers of voters from areas where the appellant was very popular such as Nyakibirizi, Katungu, Rwanjeru, Keirere and Central Cell. They were transferred to other polling stations without their application, knowledge and/or consent. Agatha Kyosabire registered voter No. 35543348 was such a voter. She was transferred from Kahungu Mothers Union polling station to Nyakibirizi Division, 5 kilometer away, where she arrived after closure of the polling.

Learned Counsel contended that despite the foregoing allegations, the 1st respondent never advanced reasons for the low voter turn-out. The trial judge, nonetheless, wrongly held that there were other reasons for such low turn-out. In this way the judge was merely conjecturing. The judge erroneously reasoned that it was never explained whether the 1st respondent hired buses, lorries or taxis in ferrying such a big number of people. The learned judge also wondered why Tushabe Abby Clever did

not explain how he came to know that the voters were bribed with 5000/= and where and when they received the money let alone whether the voters affected were the appellant's voters. Mr. Ngaruye finally wondered as to where the judge got these reasons from since none was adduced by the other side.

Citing ***Election Petition Appeal No. 12 of 2002; Amama Mbabazi and Electoral Commission v Musinguzi Garuga James,*** learned counsel submitted that there was a very low turnout caused by rampant harassment and intimidation and the respondent had failed to explain how else the turnout could have been so low, the court applied the qualitative test (although the declared winner had votes which were more than double those obtained by the petitioner) the election was annulled and the Court of Appeal upheld the annulment.

Mr. Ngaruye further argued that in the instant case the 1st respondent conceded that after the display of registers, when some voters were transferred from one station to another and he never raised any complaint. This complacency in his view would suggest that he was a

beneficiary of these illegal transfers, because if he knew he would not benefit, he would have complained immediately.

He thus prayed court to find that there had been non-compliance with the electoral law which affected the results in a substantial manner and allow Issue No. 1.

Mr. Kandeebe Ntambirweki, disagreed contending that the petitioner enumerated 147 voters transferred from Igara West to Bushenyi but only attached a list of 80 names transferred from cell to cell. The judge found that the transfer of 147 people from Kakoma polling station to Fort Jesus was admitted by Ninyesiga Onesmus, Chairman LCI Rushoroza cell, but there was no evidence that all 147 transferred voted. The only complaint was that names were moved. Only 2 witnesses could not find their names. One claimed not to have voted but there was evidence he did. The other one did not.

Mr. Ntambirweki wondered whether even if the 147 from Igara voted, for whom did they vote? The 80 people the appellant listed did not vote. These too in counsel's view would not affect the results substantially.

The appellant came out No. 3 in the results, not even No. 2. The difference between the appellant and 1st respondent was a whole 2600 votes. There were 8 candidates in a small town with a small number of voters. The judge's reasoning was that even if all votes lost were cast, the petitioner would not even become No.2. Thus the learned judge was very correct. He asserted. The 1st respondent would not know as to why 39% did not vote because voting is voluntary. Nobody can compel anyone to vote.

He asserted that there was no evidence that the voters affected by the transfers were necessarily the appellant's voters. It is the appellant who should have given reasons and not the respondents. The learned judge should not be faulted.

Distinguishing ***Amama Mbabazi v Musinguzi Garuga Petition*** (supra) cited by Mr. Ngaruye he pointed out that there people were beaten, injured, imprisoned and the military was all over the place whereas, in the instant case the election was peaceful. The transfer of voters from Igara was the fault of Parliament which created new constituencies

dividing parishes. This was contrary to the Local Government Act where a Municipality should be taken as a whole. These were transferred by Parliament. The 1st respondent could not do anything about it. It was the appellant's duty to complain. Even the confusion caused was minor, very minimal. It was minimal, he claimed. Learned Counsel prayed court to dismiss issue No. 1.

The record indicated that the Chairman LC I Rushoroza, Ninyesiga Onesmus had complained to the 2nd respondent about transfer of about 147 names after the display of registers. He copied his letter to the2nd respondent, the RDC and various LCs in the Constituency.

In his affidavit, however, Ninyesiga explained that the movements of the names were necessitated by the creation of Bushenyi-Ishaka Municipality when various Parishes were moved. He denied that the 1st respondent ever sent any vehicles to transport voters.

I note that there was no rejoinder to Ninyesiga Onesmus's affidavit. The learned judge was thus correct to observe that nobody came out to corroborate Tushabe's claims/averrments. Tushabe did not even

mention nor did he explain the mode of transport used to transport the 147 voters, let alone who was paying them, Shs. 5000/= each.

I find this complaint quite unsustainable. There was no effort to substantiate whose voters the 147 transferred names could have been. It is however clear that it was the fault of Parliament to create new Constituencies so belatedly after the display of registers. It was thus the legislation causing the confusion, and not the 1st or 2nd respondents as rightly contended by Mr. Ntambirweki.

Be that as it may, the confusion did not seem to be out of proportion. There was no affidavit to that effect.

In ***Election Petition No. 1 of 2001, Col. (Rtd) Dr. Kiiza Besigye v Museveni Yoweri Kaguta, Karokora JSC (Rtd)*** had this to say, concerning non compliance with electoral laws:

> ***"The onus is on the petitioner to prove to the satisfaction of this court that on each of the complaints of non compliance with the law, the respondent unfairly got a substantial number of votes, which if there were***

no such non-compliance, their votes would have gone to the petitioner"

The appellant never showed how he was adversely affected. The standard of proof fell far short of that requisite to discharge the appellant's burden. The learned trial judge cannot be faulted.

Issue No. 1 thus fails.

I turn to issue No. 2 concerning bribery by the 1st respondent and/or his agents.

Bribery is defined under section **68 Parliamentary Election Act (PEA)** to mean:

> ***"(1) A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or to refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift or other consideration to that other person, commits***

the offence of bribery and is liable on conviction to a fine not exceeding seventy two currency points or imprisonment not exceeding three years or both.

……

(4) ***An offence under subsection (1) shall be an illegal practice****.”*

The offence of bribery is complete when it is proved that:

i) a gift was given to a voter.

ii) the gift was given by a candidate or his agent

iii) the gift was given to induce the person to vote for the candidate.

It has been held that clear and unequivocal proof is required before a case of bribery will be held to have been proved there were allegations of various incidents of bribery at diverse places:

Bribery at Fort Jesus:

The affidavit of Tushabe Abbey Clever in support of the petition was to the effect that the 1st respondent sent vehicles on 18th February 2011, to transport 146 voters including himself to go and vote for him at Fort Jesus and that each was given Shs. 5000/= to vote for the 1st respondent. This was rebutted by the affidavit of Ninyesiga Onesmus, Chairman LC1 Rushoroza who deponed that only the names of people were transferred after the display of registers. This was brought about by the creation of Bushenyi – Ishaka Municipality by Parliament. A number of Parishes were moved around, thus occasioning some confusion to a few voters.

I cannot fault the learned judge for observing that not a single individual amongst the 147 voters could come out to attest to having been ferried to vote for the 1st respondent let alone being paid Shs. 5000/=.

There was even no evidence for the court to consider.

Bribery at Rwatukwire

Byamugisha Esau in his affidavit deponed that the 1st respondent, on 18th February 2011 at around 12.00 noon, visited Rwatukwire Primary School Polling Station and left 5 boxes of mineral water which had labels in NRM colours with the portrait and that of the President. The voters scrambled for them while there the deponent picked one bottle and drunk it. He exhibited a bottle in court.

Anne Kagumire and Hajji Ziyimba in their affidavits refuted the averments in Byamugisha's affidavit. They denied that the 1st respondent even visited the polling station and also denied having seen Byamugisha at the scene.

The learned judge rejected Byamugisha's affidavit as being full of lies. In his view the 1st respondent could not have been so imprudent well knowing the consequences of such an act.

I can hardly agree with the judge's reasoning as oftentimes imprudent risks have ruled and marred this game. Election Petitions are mostly about such imprudent risks having been taken. However, as there was

only witness Byamugisha who had grabbed a bottle, and the judge correctly held that the confession of the person alleged to have received a bribe is not conclusive. Strong evidence is required to establish corrupt motive of the person who bribes another. Byamugisha's evidence needed corroboration in order to meet the required standard of proof.

I thus cannot therefore fault the learned judge.

Bribery at Ahakikoona Polling

Mwijukye in his affidavit deponed to having witnessed the 1st respondent arrive at Ahakikoona Polling Station, on 18th February 2011 at around 2.00 p.m. The 1st respondent was driving Motor Vehicle Reg. No. UAE 476W. He stopped at 10 meters from the polling station from where he started distributing mineral water with NRM colours and his protriat, with a message urging voters to vote for him, written on it.

John Ahimbisibwe, Godwin Byarugaba and Franklin Kahunire all deny that the 1st respondent ever did not go near the polling station nor did he distribute any water.

They all stated in their affidavits that the said water were being sold in the open market and the 1st respondent had no control over it.

In his affidavit paragraph 26(a) and (b) the 1st respondent states:

> "***26. (a) it is true that on 18th February, 2011, I reached Ahakikoona but only just outside the Polling Station which was in Mzee Rushambuza's farm.***
>
> ***(a) I reached Ahakikona at about midday and Polling was going on smoothly.***

He also denied driving Motor Vehicle Reg. No.UAE 476W when it was stoned and was rescued by the Police.

There was no rejoinder to Mwijukye Milton's claims, to conclusively prove possession of Motor Vehicle No. UAE 476W at the material time. This would have been very easy since the vehicle was impounded at the police.

Furthermore it was not established whether or not the 1st respondent was responsible for the manufacture of the water and for how long it had been on the open market.

Most importantly none of the recepients has come out to support this claim. Not much care was expended in trying to prove bribery at Ahakikoona.

This claim fails:

Bribery at St. Lwanga Ruharo Catholic Centre

Nuwagaba Elineo in his affidavit deponed that the 1st respondent, on 31st January 2011, at around 10.00 a.m., convened a meeting of our 100 voters at St. Lwanga Ruharo Church and gave Shs. 3000/= to each and promised to donate 20 plastic chairs and 2 tents to each village in the ward if they elected him.

Of these 100 people at the meeting, none of them came out to volunteer and claim having received shs. 3000/= from the 1st respondent.

Paragraph 3 of Nuwagaba's affidavit is to the effect that at the instance of the Catholics, the 1st respondent promised to send them one of his agents on 13th February, 2011, to assist them with the extension and renovation of their church.

Bahaki Edison and Kakuru Francis in their affidavits claimed to have attended church on 13th February 2011 when the 1st respondent's brother, Hassan Bassajjabalaba came in and campaigned for him while honouring his pledge earlier made of Shs. 3,000,000/= for 100 iron sheets, Shs. 1,500,000/= for cement and 700,000/= for 50 jerrycans of paint and Shs. 500,000/= for church choir, all totaling 5,700,000/=.

Tinkasimire Dodoviko disputed the claims of Elineo Nuwagaba, Bahaki Edinson and Kakuru Francis. He denied that they ever attended church on 13th February, 2011, and nor did Hassan Basajjabalaba campaign for his brother the 1st respondent as claimed. He however admitted that:

> ***"on that day he contributed a total of Ug. Shs. 5,700,000/= which he had promised earlier on to cover***

iron sheets, paint and uniforms for the church choir and there was no fund raising.

While Tinkasimire Dodoviko disputed the averrements of Nuwagaba, Bahaki and Kakuru, he clearly agreed with them on the question of the donation of Shs. 5,700,000/=. This is the total figure stated in their respective affidavits.

This sequence of events is lent further credence by Mr. Kandeebe's candid submission as follows:

> ***"Shs 5.700,000/= donation was made by Hassan Bassajjabalaba. The 1st respondent is Nasser Bassajjabalaba..... Hassan Bassajjabalaba made the donation a year after it had been requested.***
>
> ***The acts of Hassan Bassajjabalaba did not bind the 1st respondent. S.68 (7) and (8) PEA as amended prohibited donations/fundraising during campaigning there is no evidence that the 1st respondent approved of these donations...."***

Regarding the issue of agency here between the 1st respondent and Hassan Bassajjabalaba, I have to say it has been held that there is no precise rule as to what would constitute evidence of being an agent. Every instance in which it is shown that either with the knowledge of the member or candidate himself a person acts in furthering the election for him, trying to get votes for him, is evidence that the person so acting was authorsied to act as his agent.

It is thus any person whom the candidate puts in his place to do a portion of his task, namely to procure his election as a Member of Parliament is a person for whose acts he would be liable.- ***Halisbury's 4th Edition Vol. 15, para 698.*** Hassan Bassajjabalaba is not only a brother to the 1st respondent, but is clearly the person whom the 1st respondent said he would be sending to assist the Catholics on 13th February, 2011.

Indeed Hassan Bassajjabalaba visited them on the 13th February and assisted them as the 1st respondent had promised. There is unequivocal evidence he was the 1st respondent's agent. The 1st respondent cannot extricate himself from Hassan's actions.

As pointed out by Mr. Kandeebe and reflected by the evidence, the donation was to honour a pledge made a year earlier by the 1st respondent. It was being made two weeks to the general elections.

It has been held that the imminence of an election is relevant in order to determine whether donations/gifts are not mere specious and subtle form of bribery. A charitable donation may be unobjectionable so long as no election is in prospect but if an election is imminent the danger of the gift/donation being regarded as bribery is increased. ***Section 68 (7) and (8) PEA provides:***

> ***"(7) A candidate or an agent of a candidate shall not carry on fundraising or giving of donations during the period of campaigning.***
>
> ***(8) A person who contravenes subsection (7), commits an illegal practice.***

Subsection 7 enjoins politicians to keep charitable donations and fundraising in abeyance so as not to have a brush with the law.

Mr. Kandeebe submitted that the 1st respondent was not fundraising or giving donations but was only honouring an old pledge made almost a

year before. His arguments can hardly be sustained at law. The fact that a pledge made a year before could be honoured only a few days to elections makes it manifestly clear that it was honoured with the intention of corruptly influencing the voters among the Catholics of Ruharo Church to vote for him. He did not explain why the pledge could not have been made earlier. The issue of timing of the donations was discussed by this court in ***Fred Badda and Anor. V Prof. Muyanda Mutebi. Election Petition Appeal No. 25 of 2006***. In that case this court had occasion to observe:

> ***"Though elections are not supposed to do away with social events as commented by Mr. Kandeebe, the shifting of the dates for the tournament to coincide with the campaign period raises some doubts as to the bonafides of the 1st appellant, which was its sponsor…."***

The 1st appellant had conveniently shifted the tournament date at which he had the opportunity to donate a cow instead of the promised goat to the runners up at the tournaments who had vowed not to vote for him.

The gift of the cow was clearly intended to influence the voters to vote for the 1st appellant.

The Supreme Court unreservedly upheld the court's decision. Consequently for the foregoing reasons, I would hold that the appeal succeeds on this ground of bribery at Ruharo Church. There is sufficient ground for nullifying the 1st respondent's election as Member of Parliament for Bushenyi – Ishaka seat. – **Section 61 (1)(c) PEA** provides:

61(1) the election of a candidate as a Member of Parliament shall and only be set aside on any of the following grounds if proved to the satisfaction of the court –

………..

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

Bribery is an illegal practice falling under **S.61.(1)(c). PEA –** See **Section 68(1) PEA**

The election of the 1st respondent is thus hereby nullified.

The 2nd respondent is hereby directed to arrange for fresh elections.

Since my Lords C.K. Byamugisha and Stella Arach Amoko, JJA both agree the appeal succeeds as above stated with costs here and below.

Dated at Kampala this …17th…… day of …April… 2012

A.E.N Mpagi Bahigeine
DEPUTY CHIEF JUSTICE

JUDGMENT OF M.S. ARACH AMOKO, JA

I had the advantage of reading in draft judgment prepared by Lady Justice A.E.N.Mpagi Bahigeine, DCJ. I concur and I have nothing to add.

Dated at Kampala this …17th …day of …April…2012

M.S.ARACH AMOKO
JUSTICE OF APPEAL

JUDGMENT OF BYAMUGISHA, JA

I agree.

Dated at Kampala this …17th …day of …April…2012

C.K.BYAMUGISHA
JUSTICE OF APPEAL