

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (INTERIM
PROVISIONS) (ELECTION PETITIONS) RULES SI 141 -2 AMENDED
BY SI NO. 24 OF 2006**

ADOPTED /CONTINUED IN FORCE BY SECTION 101 (3) OF ACT 17 OF
2005

**IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR HOIMA
WEST DIVISION CONSTITUENCY HELD ON THE 14TH DAY OF
JANUARY 2021 AND GAZETTED ON THE 17TH DAY OF FEBRUARY, 2021**

IN THE MATTER OF AN ELECTION PETITION

KASULE ISMAIL :::::::::::::::::::::::::::::::::::::: PETITIONER

2. ELECTORAL COMMISSION ::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE ALEX MACKAY AJJI

Background

5. The Petitioner Kasule Ismail was a candidate who participated in the election for Member of Parliament of Hoima West Division constituency as a flag bearer for Alliance for National Transformation (ANT) in the 2021 Parliamentary Elections.
10. After the conclusion of the election, the 2nd respondent declared the 1st respondent the winner with 6,369 votes while the petitioner returned second with 6,212 votes. Aggrieved and dissatisfied by the outcome of the election, the petitioner filed the instant petition contending that the elections were conducted in contravention of the provisions and principles of the 1995 Constitution, the Parliamentary Elections Act. The Electoral Commission Act and other relevant provisions of the law.

Representation

15. The Petitioner was represented by Counsel Richard Kiboneka and Murungi Janet of M/s Nyanzi Kiboneka & Mbabazi Advocates while John Paul Baingana and Ahumuza Edward of M/s JP Baingana Advocates represented the 1st Respondent and Ms. Angella Karugirniya appeared for the 2nd Respondents.

Scheduling

20. The parties held a joint scheduling memorandum and agreed on the following issues for determination: -

- 1. Whether the election for the Member of Parliament for Hoima West Division Constituency was conducted in compliance with the Electoral laws.*

2. *Whether the non – compliance and failure to comply affected the results in a substantial manner.*

3. *Whether the 1st respondent committed illegal practices and offences under the laws governing Parliamentary elections.*

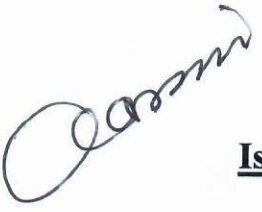
4. *What are the available remedies to the parties?*

25. *Section 61 (3) of the Parliamentary Elections Act as amended explicitly sets the standard of proof in election petitions as proof on a balance of probabilities. It is now settled law that the burden of proof lies with the Petitioner. This was aptly stated in the case of **Kiiza Besigye versus Yoweri Museveni Kaguta & Anor Election Petition No. 1 of 2001** where it was held as follows: - “In my view the burden of proof in election petitions, as in other civil cases, is settled. It lies on the petitioner to prove his case to the satisfaction of court.”*

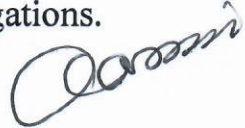
5. *At the onset of the submission of the petitioner, he had this to say; “we would like to submit that the petitioner’s affidavit in support of the petition, the affidavit in rejoinder to the 1st and 2nd respondents’ answer to the petition and is the only evidence that remained on record for the petitioner. Both respondents refrained from carrying out a cross examination on him and this only means that what he affirmed was/is taken as total admission. We therefore pray that court treats the said petitioner’s affidavit in support of the petition and his affidavits in rejoinder as admissions.”*

10. However, a mere mention of allegations without evidence and proof thereof does not give sufficient weight to those allegations. This is the import of section 101 of the Evidence Act Cap 6.

Against this background I shall now proceed to determine issue number 1 and 2 jointly.

 **Issue No. 1:** *Whether the election for the Member of Parliament for Hoima West Division Constituency was conducted in compliance with the Electoral Law.*

Issue No. 2: *Whether the non-compliance and failure to comply affected the results in a substantial manner.*

15. I have carefully studied and analyzed the submissions of both counsel in this petition and as such I shall now attempt to resolve the above issues accordingly.
20. The petitioner addressed Court on issues under paragraphs 5, 6, 7 and 8 of his affidavit in support of the petition and adduced what he called was evidence on the non-compliance with the electoral laws by the 2nd respondent by way of rigging, pre-ticking of ballot papers, disenfranchisement of voters, intimidation by the military, fabrication and falsification of results and illegal declaration of false and inaccurate results in favour of the 1st respondent.
25. The respondents submitted that there is no evidence that the 2nd respondent did not comply with the electoral laws while conducting the Hoima West Division Constituency elections. That the Petitioner makes blanket accusations in his Petition and simply lifts them into the Affidavit as an argument and does not provide the evidence to back up the allegations.
- 

5. Further in the answer to the petition the 2nd Respondent also contended that the election was free and fair, free from violence, intimidation, improper influence or bribery and administered in an impartial, neutral, efficient, accurate and accountable manner.
10. The respondents further contended that paragraph 8 of the affidavit was argumentative, not factual, that it offended Order 19 Rule 3 of the civil procedure Rules SI.71-1. Counsel for the respondent principally relied on the case of **Male Mabirizi vs Attorney General Constitutional Appeal No. 002 of 2018** where it was held that: - *Under Order 19 Rule 3 of the Civil Procedure Rules, a respondent who makes an argumentative affidavit which is incurable can be penalized by paying costs of the application.*
15. The petitioner relies on paragraphs 7 (a), (i), (iv), 8 (a), (i) and 9 of his affidavit in support of the petition.

Under paragraph 7(a), the petitioner contends that the Parliamentary election for Hoima West Constituency was fundamentally and substantially affected through various acts e.g rigging, pre ticking of ballots, ballot stuffing etc. However, he does not state who carried out this acts in that said paragraph.

20. Under paragraph 7(a) (i), he states that he himself recorded the voter turnout at some of the polling stations and hoped to apply for the opening of the ballot boxes to exhibit the voters' register in order to ascertain the number of voters who turned up to vote. He had also hoped to rely on the BVVK devices and their memory cards for each polling station to compare with the numbers recorded in the voters' register. This opportunity never came to be as his application for discovery was rejected by Court.

25. Under paragraph 7(iv) he states that his polling agents were chased away from the polling stations. He does not mention who chased them away.

Under paragraph 8(a) he states that the 2nd respondent failed to ensure protect and safeguard the integrity of the election results. Again he does not show how the 2nd respondent failed to ensure or omitted to protect the integrity of the election results.

5. Under paragraph 8(a)(i) he stated that the number of voters in the register counted was different from the number of votes counted and declared in the DR forms. He does not state how and by what number and the source of his information. However, at the end of his affidavit he said that he depones his affidavit upon his own knowledge and belief yet he does not disclose the grounds of his belief.

10. In disposing of this contestation, I refer to and note that section 59 (a) of the Evidence Act which imposes on a deponent a duty to depose to facts within his knowledge. Order 19 Rule 3 (1) of the Civil Procedure Rules provides that:- *"Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications on which statements of his or her belief maybe admitted provided that the grounds thereof are stated."*

15. In this particular case, looking at the above analyzed paragraphs, it is clear that the petitioner has been unable to prove all the assertions therein. In the case of **Kiiza Besigye vs Yoweri Kaguta Museveni and Anor Election Petition No.1 of 2001 Odoki CJ** (As he then was) noted in his judgment that:- *"An election Petition is not an interlocutory proceeding but a final proceeding, which is aimed at determining the merits of the case. Therefore,*

affidavits admissible in such proceedings must be based on the dependent's own knowledge, not on information and belief."

20. In this matter the petitioner relies on his own knowledge and belief. I also note that the above stated paragraphs the petitioner tries to rely on fall short of the required standard of the rules governing pleadings since they are argumentative and within some other peoples' knowledge who have not been disclosed as the sources. It would be unsafe to invalidate the election of the 1st respondent basing on such statements. In the same vein, the paragraphs offend provisions of Order 6 Rule 1 and 3 of the Civil Procedure Rules in as far as the petitioner did not particularize the allegation of non-compliance in his petition and affidavit in support of his petition and as such the petition is incompetent.
25. Further, while analyzing this aspect of non-compliance, I wish to refer to the affidavit of the 2nd respondent's returning officer a one Matsiko Douglas Twine who deponed that the election of Member of Parliament for Hoima West Constituency Hoima City was conducted in accordance with the Constitution, the Electoral Commission act the Parliamentary Elections Act and all other relevant enactments. He further added that the said election was free of violence, intimidation undue influence and was conducted independently, transparently and administered in an impartial, neutral efficient, accurate and accountable manner. He added that the allegations of mal practices, illegalities or election offences are unfounded, mere falsehoods, misconceived and intended to taint the image of the 2nd respondent.
5. Furthermore, I have perused through the affidavit evidence of the 2nd respondent's witnesses namely, DW3 to DW11. The totality of their evidence is that they dispute the allegations as contained in the petitioner's affidavit.

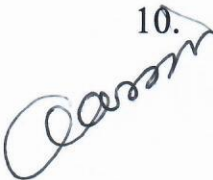
10. It should be noted that looking at the evidence of DW3, especially the evidence as contained in RR2 which were certified Declaration of Results Forms from pages 4 to 62 of the supplementary affidavit of Matsiko Douglas Twine, RR2 is a compilation of certified DR forms.
15. I note that from the evidence in the affidavit of DW3, he states as follows “that all the Declaration of Results Forms were duly signed by the candidates’ agents present at the respective polling station signifying a true reflection of what transpired at the polling stations.” He however alludes to only one DR form which was not endorsed by the agents of the petitioner otherwise, there was largely endorsement of the results at the polling stations.
20. Counsel for the petitioner has invited Court to interpret section 47 of the Parliamentary Elections Act to annul the election on account of that one unsigned DR form by the agent of the petitioner. However, section 47 (7)(d) and (e) of the Parliamentary Elections Act provides that: -
25. The refusal or failure of a candidate to sign any DR Form under subsection 5, or to record the reason for refusal to sign as required under this sub section shall not by itself invalidate the results announced under that section.

Section 47(7)(e) is to the effect that the absence of a candidate or agent from signing of a DR form or the announcement of results under sub section 5 shall not by itself invalidate the results announced.

5. Indeed, in the case of **Kabatsi Kafura versus Anifa Kawooya and Electoral Commission Supreme Court Election Petition No. 025 of 2007** The Justices stated; “*Even if more than half of that number had not been signed they would not have affected the results of the election in a substantial manner. The reason is that failure to sign the declaration of results forms per se does not*

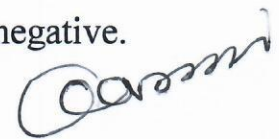
affect the quality of the election. Declaration of results forms are filled and completed after the polls are ceased and the votes are counted in a polling station, if there are failures in the correct filling or signing of the declaration of results form in many polling stations that could be a ground to justify a recount They do not affect the results of the election because such a failure does not invalidated the votes otherwise properly cast."

I am bound by the decision of the Justices of the Supreme Court in the above case since only one DR form was not signed.

10.  The petitioner also alluded to a table PEX3 showing votes differences of 266 from sampled 6 polling stations. It is not clear what the source of this information was and since it was a sample, it is therefore based on the imagination of the petitioner. This is not a case where you would attempt to rely on samples other than qualitative or quantitative data as was held in the case of **Joy Kabatsi Kafura versus Anifa Kawooya and Election Commission (Supra)**

15. The DR forms largely having been signed by the petitioner's agents indicate the truthfulness and the integrity of the election. It is therefore my finding that the election of Member of Parliamentary Elections for Hoima West Division Constituency was conducted in compliance with the electoral law, the Parliamentary Elections Act and other relevant laws.

The above analysis disposes off issue number 1 and 2 in the negative.



Issue No. 3: *Whether the 1st respondent committed illegal practices and offences under the laws governing Parliamentary elections.*

In this issue the petitioner majorly alludes to issue of bribery.

20. The petitioner in paragraph 8(d) of his affidavit alleged that the entire electoral process in the Parliamentary Election in Hoima West Constituency beginning with the campaign period up to polling day was characterized by acts of lack of freedom, transparency and unfairness through the commission of numerous electoral offences, illegal practices and acts of contravention of PEA. He enumerated many incidences where he alleges bribery contrary to section 68 of the PEA as amended.

25. He alleged that Dr. Ruyonga Joseph bribed voters when he: -

- gave out UGX. 100,000/= to members of Tugondezangane group who are voters in the western Ward Hoima west division so that they vote for him
- on 1st December, 2020, the 1st respondent gave out UGX. 100,000/= to members of Owomugisa women's group who were voters in Rusembe II.
- On 13th of January, 2021 he further gave them UGX. 32000/= as transport too vote for him on polling day.
- Between 5th and 9th January, he gifted them with a newly reconstructed well in order to influence them to vote for him.

5. He further alleged that the illegal practices and offences were committed by the 1st respondent and or his agents or supporters with the knowledge, consent and approval of the 2nd respondent and the 2nd respondent is liable for these offences and illegal practices.

10. Section 68(1) (c) of The Parliamentary Elections Act provides for illegal practices as one of the grounds for setting aside an election if proved to the

satisfaction of Court. Under Part XI of the Parliamentary Elections Act, section 68 to 71, illegal practices are set out and the type of offences therein include bribery and influence of voter to vote for a candidate by giving money, gifts, alcohol, beverage or any other consideration.

15. In this case the 1st respondent was said to have bribed members of Tugondezangane group with 100,000 UGX so that they vote for him but this was denied by the 1st respondent who also stated that none of his agents carried out such acts and he did not approve such acts.

20. Furthermore, in cross examination he denied all the acts of bribery such as giving money to members of Tugondezangane, Owomugisa and also denied constructing any well.

DW2 an LC official and a resident of Kyesiga Kyamuchumba upon being cross examined revealed that he is the one who did the repairs on the borehole and not the 1st respondent as alleged and that he got the money as a chairperson from those who buy land. This was very strong evidence.

25. Bribery was defined in the case of **Apolot Stella Isodo versus Amongin Jackeline Election Petition Appeal No. 60 of 2016** as an offence committed by a person who gave or promised to give or offered money or other valuable inducement to a voter in order to corruptly induce the latter to vote in a particular way or to abstain from voting or as a reward to the voter for having voted in a particular way or abstain from voting.

5. In order to constitute a bribe, certain ingredients of bribery ought to be satisfied;

1) that a voter has been given a gift

2) by a candidate or their agent

- 3) with the intention of inducing a person to vote in a particular way
- 4) the person receiving the bribe must be a voter

10. The petitioner invited this Court to annul the election of the 1st respondent based on the above stated acts of bribery however, there is no cogent evidence to prove that the 1st respondent gave out any monies to any voters as an inducement for them to vote for him. The said acts of bribery were not proved to the satisfaction of Court.

Issue No. 4: *What are the available remedies to the parties?*

15. The petitioner has failed to prove to the satisfaction of Court that the 1st respondent committed electoral offences or illegal acts in person or that the electoral offences and illegal acts were committed by his agents with his knowledge, consent or approval. Similarly, he has failed to prove that the offences were committed by the respondents jointly to the benefit of the 1st respondent.

20. In the final analysis therefore, the petition is incompetent and is hereby dismissed under section 63(4)(a) of Parliamentary Election Act, 2005 as (Amended) with costs to the 1st and 2nd respondents accordingly.

I therefore uphold the 1st respondent as the duly elected member of parliament for Hoima West Division Constituency.

Dated this 28th day of September, 2021 at Masindi High Court.



ALEX MACKAY AJJI
JUDGE