

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
ELECTION PETITION NO.003 OF 2021

NYAKECHO ANNET

PETITIONER

VERSUS

- 1. ELECTORAL COMMISSION**
- 2. EKANYA GEOFFREY**

RESPONDENTS

BEFORE HON. JUSTICE MOSES KAZIBWE KAWUMI
JUDGMENT

Introduction.

The Petitioner and the 2nd Respondent contested with other five candidates for the position of Member of Parliament for Tororo North County Constituency in an election organized by the 1st Respondent on 14th January 2021. The 2nd Respondent was declared the winner with 9,674 votes as opposed to 9,563 polled by the Petitioner.

Dissatisfied with the declared outcome, the Petitioner came to court citing various grounds based on which she wants a declaration for the annulment of the election and the cancellation of results from St. Karoli Church and Otirok East Polling stations. In the alternative the Petitioner seeks an order that a fresh election be conducted in accordance with the law.

Background.

The Petitioner contends that the election was invalid because it was not conducted in accordance with the principles laid down in the Constitution, the Parliamentary Elections Act (PEA) and the Electoral Commission Act (ECA) which she contends affected the results in a substantial manner. Specific acts of non-compliance pleaded are;-

1(a) Failure by the 1st Respondent to provide a secure environment for the conduct of the election which led to voters being threatened and denied the right to vote contrary to Article 61 of the Constitution and Sections 12(1)(e) and (f) of the Electoral Commission Act.

(b) Failure by the 1st Respondent to ensure that the election was transparent, free and fair, electoral materials properly distributed and the Petitioners Agents provided with security. The 1st Respondent is further faulted for failing to declare results at Polling stations and transmitting results after ascertaining and declaring the winning candidate before making proper and correct returns.

(C) The 1st Respondent is alleged to have failed to properly distribute ballot papers and to prevent multiple offences related to voting, chasing away of candidates' agents coupled with alleged interference with collection of election results.

(d) Contrary to Articles 59 and 61 of the Constitution, the 1st Respondent's officers are alleged to have connived with the 2nd Respondent to procure prohibited persons to vote, facilitate multiple voting, intimidation of the Petitioner's agents, ballot pre-ticking in favor of the 2nd Respondent and canvassing of votes for him on the polling day at a number of Polling stations detailed in the Petition.

(e) Contrary to Article 61(1) of the Constitution, Section 12(1)(e) and (f) of the Electoral Commission Act and section 80(1) of the Parliamentary Elections Act, the 2nd Respondent personally or through his agents but with his knowledge, consent or approval is alleged to directly or indirectly unduly influenced or threatened voters to vote for him at a number of polling stations.

(f) Contrary to sections 68(1) and (2) of the Parliamentary Elections Act the 2nd Respondent is alleged to personally or through his agents but with his knowledge and approval bribed voters with money and gifts at Akworot Primary School P/S, Railway P/S, Asinge Church P/S, Kamuli Primary School P/S, Aukot COU P/S, Ojelowendo trading center and other areas in the constituency.

(g) The Petitioner further contends that she had polling agents at all voting centers from whom she received DR Forms according to which and the tally sheet she polled 9,653 votes while the 2nd Respondent polled 9,674 votes. By her own tally however, the Petitioner asserts that she polled 9,671 votes while the

2nd Respondent polled 9,670 hence 12 of her votes were tallied in favor of the 2nd Respondent thereby increasing his winning margin to 111 instead of 99 votes.

(h) It is further contended by the Petitioner that on polling day goons attacked St. Karoli Catholic Church and Otirok Polling stations and took away ballot books which were recovered by Police with the ballots pre-ticked in favor of candidate Othieno Godfrey after some had been stuffed into ballot boxes. The Returning Officer however wrongly included the results from the two polling stations in the final tally.

1st Respondent's Answer to the Petition.

In response to the allegations in the Petition, the 1st Respondent asserts that the entire electoral process was conducted in a free and secure environment in accordance with the law. Polling materials were properly distributed, results properly computed in the presence of candidates agents and transmitted from polling stations.

The 1st Respondents denies any knowledge of connivance between her officials and the 2nd Respondent in the commission of electoral offences and that, if at all any such acts happened, they were not raised for redress as required by the law. It is further contended that no polling complaints were recorded by the Presiding officers at Otirok and St. Karoli Catholic Church Polling stations.

2nd Respondent's Answer to the Petition.

The 2nd Respondents asserts that he was validly elected in an exercise conducted by the 1st Respondent substantially in compliance with the provisions of the 1995 Constitution of the Republic of Uganda, the Parliamentary Elections Act and the Electoral Commission Act.

It is contended that if at all there were acts of non-compliance which is denied, they did not affect the final outcome in a substantial manner and were not committed with the 2nd Respondent's knowledge, consent and approval.

The 2nd Respondent specifically denies the alleged attacks on St.Karoli and Otirok East Polling stations. He contends that the alleged malpractices were decisively handled. That Polling and vote tallying were concluded in the presence of all

candidates' agents who also signed DR Forms. The 2nd Respondent prays for the dismissal of the Petition with costs.

Legal Representation and submissions.

The Petitioner was represented by Mr. Alfred Okello Oryem assisted by Mr. Ngonde Davis and Mr. Okello Arthur. The 1st Respondent was represented by Mr. Wetaka Patrick. The 2nd Respondent was represented by Mr. Joseph Kyazze and Mr. Ekirapa Obiro.

Counsel did not apply for leave to call any witnesses for cross examination but opted to rely on filed Affidavits for and against the Petition. The court guided counsel on a schedule for filing submissions which have been considered in the preparation of this judgment.

Burden and standard of proof.

Section 61(1) and (3) of the Parliamentary Elections Act provides for the grounds for setting aside an election. The burden of proof which does not shift to the Respondents is carried by the Petitioner who must prove to the satisfaction of the court that the irregularities or malpractices or non-compliance with the provisions and principles laid down were indeed committed, and that they affected the results of the elections in a substantial manner.

The standard of proof is stated to be on a balance of probabilities in section 61(3) of the same Act. The Petitioner is required to adduce credible or cogent evidence of the kind, which is free from contradictions, truthful and compelling as to convince a reasonable tribunal to give judgment in her favor.

Sematimba Simon Peter & Another v Sekigozi. EP Nos. 8 & 10 of 2016 Mukasa Anthony Harris V Dr. Bayiga Michael Phillip SC. EPA No. 18/2007.

Courts have further established a principle that in evaluating evidence in Election Petitions, regard must be had to the fact that since the trial is wholly premised on affidavit evidence, such evidence ought to be considered with caution due to the fact that witnesses tend to be partisan and testimonies may contain deliberate falsehoods and/or exaggerations.

Rtd. Col. Dr.Kizza Besigye V Yoweri Kaguta Museveni &Another.SC Presidential Election Petition No.1 of 2001.

Issues for determination by the court.

Counsel agreed on the following issues for the court's determination:

1. Whether there was non- compliance with the electoral laws and principles during the conduct of elections for Member of Parliament for Tororo North County Constituency in the January 2021 elections.
2. If so, whether the non-compliance affected the results of the election in a substantial manner.
3. Whether the 2nd respondent committed the alleged malpractices or electoral offences in connivance with the 1st Respondent's officers or personally or through his agents with his knowledge and consent or approval.
4. Whether the petitioner is entitled to the remedies sought.

Resolution of issues.

The Petitioner listed a number of alleged incidents of non-compliance with the electoral laws and principles at the respective polling stations which shall be handled under the 1st issue.

Electoral malpractices at Asinge Catholic Church.

The non-compliance raised in respect of Asinge Catholic Church are acts of multiple voting witnessed by Akello Nonsiata and Ochieng Alex. The latter also witnessed acts of obstruction of voters and voting by unauthorized persons. Ochola Bernard too witnessed the same illegalities and threatening of voters by the 2nd Respondent's supporters. Opendi Benedict corroborated what was witnessed by Ochola at Asinge Catholic Church.

Owere Jude was the Presiding Officer at Asinge Catholic Church and claims to have witnessed obstruction of voters. Omalla Walter stated to have been the Parish Supervisor for the 1st Respondent claims to be a long time politician in the area and knew the supporters of the 2nd respondent whom he saw bribing voters with t-shirts a month before the polling day.

The witness saw the 2nd Respondent's supporters wearing the t-shirts threatening voters and polling agents at Asinge on the polling day. He saw them ordering voters to vote for the 2nd respondent, witnessed the Officer in charge of Mile 5 Police station usurp the role of the Presiding Officer by taking over the distribution of ballot papers to voters irrespective of whoever had earlier voted which aided multiple voting.

For the 1st Respondent, Ekisa Peter who was a Polling Assistant at Asinge rebutted the allegations by the Petitioner's witnesses. It is his evidence that the election was smooth and devoid of threats to the Petitioner's supporters, multiple voting and all allegations raised in the various Affidavits.

The Polling Assistant contends that he only issued one ballot paper to each voter after due verification and denies that any voting took place inside the church when it rained. It is his evidence that Amulen Paulina a Police Officer at Mile 5 helped them reorganize voters when the rain stopped and stated that the candidates agents signed the DR Forms without registering any complaint.

The 2nd Respondent found support in the evidence of Oketcho John Martin a Polling Constable at the station, Okumu Gerald a Polling Assistant, Onder James the Forum for Democratic Change Parish Supervisor, Ochoko John the National Resistance Movement Supervisor and two registered voters namely Oketcho Adrian and Aketch Grace.

All the 2nd Respondent's witnesses corroborate the averments made by Ekisa Peter for the 1st Respondent. Much as the 2nd Respondent was nominated and stood as a candidate for the Forum for Democratic Change the averments by his witnesses were corroborated by a supervisor of a rival political party which also had a candidate in the same election.

In the filed submissions the Petitioner alleges that Ochieng Alex and Opendi Benedict witnessed obstruction of voters and multiple voting. I found no such evidence in the affidavit of Opendi Benedict Opeleli(No.28). The gist of his evidence is that he was a Supervisor and that he was informed that a brother to the 2nd Respondent gave out money to voters.

Opendi Opeli does not state the names of who told him, who received the money and for what purpose. He claims to have seen money being given out at Apokor by Berikiya Okware but names no recipients. The alleged bribery of voters at Maliri, Orowa and Pentecostal Church Polling stations was also not supported with names of those who were bribed.

A perusal of the Affidavits filed by the Petitioner relating to Asinge Polling station do not reveal the names of persons who were unauthorized to vote but were facilitated to do so. The supporters of the 2nd Respondent stated to have worn t-shirts he bribed them with and who threatened voters are not named and those allegedly intimidated did not swear affidavits to state what happened to them on polling day.

Ochieng Alex who claims to have been the Petitioner's agent stated that the 1st Respondent's agent Okumu Gerald intimidated the Petitioner's agents for supporting the NRM Candidate. I find this to be a strange averment. The Petitioner was an Independent candidate and the 2nd Respondent stood on the FDC ticket. Why then would the agents support a rival candidate and not their own who had appointed them as agents?

Failure to name the persons who committed the alleged electoral offences renders the evidence adduced worthless. Where allegations of bribery are raised, the Petitioner must prove that the bribes were given out by the Respondent's agents with his knowledge and approval. Both the giver and the receiver must be clearly identified and such evidence must be corroborated.

Hellen Adoa & EC V Alaso Alice. EPA No.57 of 2016.

It is also noted that all candidates had agents at the polling station. The Petitioner had Owere Jude Thadeus (PW33) and Ochola Bernard Owere (PW13) who without stating any complaint signed DR Forms. This confirmed adherence to the set process and authenticated the results.

Amoru Paul & EC V John Baptist Okello. EPA Nos.39&95 of 2016.

The evidence adduced by the Petitioner relating to the non-compliance at Asinge Polling station is not truthful and is full of contradictions. It does not meet the requisite standard of proof laid out herein above.

Electoral malpractices at Kidoko Central, Akworot Primary School, Railway station, Nankata Church, Kaching, Kidot Central and Kasaya Vision Church Polling stations.

Kidoko.

At Kidoko Central polling station the Petitioner contends through Amuron Stella(PW3) that polling Assistants would ask voters who they were going to vote for. That supporters of the 2nd Respondent and Othieno Godfrey would go and tick for the voters forcefully contrary to the rules. PW3 also claims to have witnessed several people voting more than once and voting for people who had died.

PW3 stated that during the vote tallying the number of votes counted exceeded the number of voters in the register and many did not vote because they were told that ballot papers were finished.

Ongaria Charles the presiding officer countered that forty nine (49) ballot papers remained unused and Olowo Desterion stated that all voters were verified. The two witnesses denied the alleged ballot stuffing alleged by PW3.

PW3 claims that the number of votes counted was more than the registered voters without showing the voters roll for Kidoko Central Polling station. Her evidence further contradicts the DR Forms and Results Tally Sheets. PW3 was not a truthful witness.

Allegations of ballot stuffing are further not supported by names of those who voted more than once or the agents who allegedly forced the voters to vote for the 2nd Respondent. The Petitioner got 15 votes and the 2nd Respondent got 46 votes at Kidoko Central which disproves PW3's allegations. PW3 was not a witness of truth and could not place any name in the Affidavit making her evidence worthless.

Akworot Primary School.

Immo Stephene(PW6) claims to have been appointed as a supervisor for Akworot Primary School and Akworot Catholic Church polling stations. PW6 claims to have seen Jerome Malongo with agents of the 2nd Respondent together with Okumu Thomas intimidating voters. PW3 called their agent at Akworot Primary School who informed him that they were also being intimidated and Okumu Thomas was giving out money telling voters to vote the 2nd Respondent.



PW3 called the Petitioner who went to the polling station with police. Okumu ran away but he and Malongo had voted more than eight times. The evidence was rebutted by Ekapolon David the Polling Assistant who was corroborated by Amusolo Sabina another Polling Assistant.

The Petitioner had agents at the polling station who did not swear Affidavits. PW3 cannot purport to give evidence on their behalf. PW3's Affidavit also portrays his absence from the place he claimed to have been when witnessing the alleged malpractices.

While PW3 states in paragraph 5 that he was at Akworot Primary School he claims to have called "their" agent at the same place who told him that Okumu was giving out money at the polling station. The evidence is not only hearsay and unreliable but also raises the question as to whether Okumu Thomas was in two places at the same time.

I disbelieve the Petitioner's evidence relating to the alleged malpractices at Akworot Primary School Polling station.

Railway station.

Ochieng James (PW 12) swore an affidavit alleging that he saw agents of the 2nd Respondent and those of Othieno Godfrey bribing voters. Named as the perpetrators are Wanyera Tanga and Eunice Achait. The evidence was rebutted by Akware Berna and Omollo Francis.

Bribery is a criminal offence and evidence to support it is normally higher than on a balance of probabilities. PW12 failed to name any person who received the bribe to vote for the 2nd Respondent. PW 12 did not prove that those who received the money were registered voters which renders the allegations hard to believe and far below the standard required for proving bribery in election petitions.

Nankata Church.

Okware Mesachi (PW 21) stated that supporters of the 2nd Respondent and those of Othieno Geoffrey forcefully ticked for voters. PW 21 further saw people voting more than once and others voting in the names of deceased persons. That at 1.00pm they were told that ballot papers were finished and at tallying the number of those who voted exceeded the number of voters in the register.

Stephen Orieba the Presiding Officer and Akisa Agnes a Polling Assistant, Muleffe Augustine the Polling Constable and Owori Simon Peter the LC1 Chairman rebutted the allegations. I find their evidence more credible than the allegations by PW 21.

PW 21 conveniently left out any name of the alleged perpetrators of the malpractices. PW 21 did not name any of the deceased ticked on the voters' roll as having voted and does not state the name of the person who chased him away from the polling station.

Having failed to name the persons who were involved in the respective malpractices and in the absence of corroboration from others who witnessed what is alleged to have happened, PW 21's evidence proves no electoral offence.

Kaching Polling station.

Owor John (PW 36) claims to have seen people fighting at Kachinga and was told that supporters of the 2nd Respondent were chasing away those of the petitioner. PW 36 a resident in the area did not state who told him and who were fighting.

At Otirok East Polling station where he voted from PW 36 saw the 2nd Respondents supporters chasing away those of the Petitioner. PW 36 does not attach any name to any perpetrators or any voter who was chased away and hence denied the right to vote.

PW 36 saw Othieno Godfrey's agent with stapled ballot papers and soon thereafter a car with men with pangas arrived and people ran away. PW 36 rushed to Merikit Police for assistance but does not name the people in the car or its registration details. PW 36 further claims to have witnessed ballot papers that were not lawfully cast being counted.

PW 36 was a partisan witness whose evidence lacks any iota of truth. Allegations without attaching names of those who committed them do not amount to evidence of the kind the court can believe in electoral matters.

Kamba Saleh Moses V Namuyangu Jennifer.EPA No.27 of 2011.

Kidok Central Polling station.

Counsel for the Petitioner contends that Owor Jeremiah (PW 35) witnessed obstruction of voters at Kidok Central Polling station. PW 35 claims to have been appointed as a Parish coordinator by the Petitioner but attached no evidence of his appointment as such to the Affidavit.

PW 35 claims to have seen candidate Othieno fighting with the agents over the register at St. Karoli Catholic Church Polling station and saw the 2nd respondent's agents intimidating the Petitioner's supporters.

PW 35 did not name the people who allegedly threatened the supporters of the Petitioner in whose interest he swore the affidavit and worked for as a Parish Supervisor. The allegations are further weakened by the fact that the agents of the petitioner who were allegedly intimidated did not come out to testify as to what happened.

PW 35's evidence did not add value to the Petitioner's claim to malpractices at Kachinga Polling station.

Kasaya Vision Church Polling station.

Oyet Martin (PW 39) claims to have been appointed as a Polling Agent at Otirok East Polling station where he claims to have witnessed Omonya stated to be an agent of the 2nd Respondent bribing voters. Omonya is stated to have dished out notes of shs.5,000 and shs.10,000 in the open until PW 39 and agents of other candidates called a Police Constable and the GISO.

The bribery continued when the Police Constable and the GISO left. PW 39 was warned by the agent of the 2nd Respondent that he would disappear if he again called the Police and the GISO.

Pw 39 did not attach evidence of his appointment and did not name any of the recipients. The names of the Police Constable and the GISO who intervened were also left out. The omissions cast doubt on the veracity of his evidence which falls short of the standard required in election matters.



Aukot Church of Uganda Polling station.

Okwiti James(PW 18) claims to have been the Sub-County coordinator for the Petitioner who attended a meeting at the home of a one Emiriat John at which plans to rig the election in favor of the 2nd Respondent were hatched.PW 18 saw voters being issued with more than one ballot paper and saw the GISO of Mukuju facilitate vote rigging in favor of the 2nd Respondent.

It is pertinent to note that the alleged meeting in which the GISO directly participated was never reported to either the 1st Respondent or the Police by either the Petitioner or PW 18 yet it happened a week before polling day.

PW 18 who was at the polling station does not name the Polling Assistant who issued multiple ballot papers to voters or any of those who received them.

Okware Robert(PW 23) the Petitioner's Polling Supervisor for Aukot Parish claims to have been called to Aukot Polling station by PW 18 to witness a Polling Assistant issuing multiple ballot papers. Both PW 18 and PW 23 did not name the culpable Polling Assistant.PW 23 also mentions a GISO he did not name who revealed to a one Oridi Rogers that they wanted to rig for the 2nd Respondent.

Oridi(PW 29) did not also name the culpable Polling Assistant and claims to have witnessed a scuffle between the supporters of the Petitioner and those of the 2nd Respondent.PW 18 and PW 23 who claim to have been at the same place did not witness the scuffle.

Otabong Denis the Presiding Officer,Etyang Stephen the 2nd Respondent's Polling Agent and Ekaroro Hannington the 2nd Respondent's sub county Coordinator testified to a smooth election at Aukot Church of Uganda Polling station. It is also not disputed that the candidates Agents endorsed the DR Form at the end of the polling exercise.

I have observed herein before that the signing of DR Forms by a candidate's Agent connotes that the polling exercise was carried out within the law and the results reflect the will of the voters at the particular polling station. This is what precisely happened with the Agents appointed to oversee the Petitioner's interests at Aukot Church of Uganda Polling station.

Kamuli Primary School Polling Station.

Odoi Francis(PW 16) claims to have witnessed Okege Omachara an agent of the 2nd Respondent bribing voters to vote for the 2nd Respondent and also witnessed other agents giving money to voters who had lined up to vote.

Those who received the money are not named. The names of the "*other agents*" said to have distributed money were also not stated in the Affidavit. The evidence was thus of no value.

Othieno Michael (PW 31) claims to have seen supporters of the 2nd Respondent harassing supporters of the Petitioner namely Omukaga Denis and Okongo Joseph. PW 31 also saw the 2nd Respondent's agents bribing voters. PW 31 did not adduce any evidence to show that he is a registered voter.

PW 31 did not name any one who was bribed hence no weight can be attached to his evidence. Omukaga and Okongo who were allegedly harassed did not swear affidavits to confirm the allegation.

Owere John Steven(PW 34) also claims to have seen Okege and Angelo Ongaria distributing money but does not name those who received it and whether they were voters. It was also not proved that Ongaria was an agent of the 2nd Respondent. I find the rebuttal in the affidavits of Othieno Emmanuel, Omukaga, Oguti Padde and Omachari more credible.

The Petitioner had agents at Kamuli Primary School Polling station who did not testify to the allegations raised by the three witnesses which further weakens the evidence raised to prove the allegations.

St. Karoli Catholic Church Polling station.

Counsel for the Petitioner submitted about multiple infractions at the polling station through the evidence of D/CPL Oboth Felix(PW4), where a one Remegio Ofwono was involved in all the malpractices. Ekwaro Francis(PW5) Ochieng Jackson (PW 11) and Okello Apollo are stated to corroborate the evidence of PW4.

The evidence of Ongaria Akisoferi(PW 27) Ouma Francis (PW 32), Owor Jeremiah (PW 35) and Owori Gedesian(PW 38) is further stated to corroborate what PW4 witnessed at the Polling station.

The acts complained of include overrunning the Polling station and snatching ballot books by Ofwono Remegio, multiple voting and voting in the names of deceased persons among other malpractices. I find it pertinent to analyze the evidence adduced by each of the witnesses since they all claim to have witnessed the same events.

D/CPL Oboth(PW4) claims to have investigated complaints of vote rigging at Otirok East Polling station which are attributed to agents of candidate Othieno Godfrey. 27 ballot papers ticked in favor of the candidate were recovered from the agents and handed over to Police. PW4 recorded statements which all pointed to Oloka Moses and Okware Don the agents of candidate Othieno Godfrey as culpable and they were stated to have evaded arrest.

PW4 was assigned to handle a complaint at St. Karoli Church Polling station where a one Ofwono Remigio had run off with a booklet of ballot papers and ticked them in favor of candidate Othieno. The ballot papers were recovered and handed over to the Polling Constable who handed them over to Molo Police station.

The gist of PW4's evidence is that the Presiding Officer at the polling station arrested the situation and the impugned ballots were not included in the final tally. PW4 corroborated the 2nd Respondent's witnesses Ofamba Fred and Okello Apollo in that respect. PW4 did not also swear to any other malpractice at the Polling station.

Ekwaro(PW5) claims to have witnessed supporters of the 2nd Respondent and those of Othieno forcefully tick for voters and also witnessed people voting in the names of deceased persons. It was also his evidence that votes counted at tallying exceeded the number of registered voters.

This assertion is not backed by the contents of the Tally sheet for the Polling station. A copy of the voters' roll for the station was also not submitted as evidence. PW5's evidence amounts to mere speculation and no such complaint was raised to the Chief Magistrate for a recount of the votes.

Like many deponents of affidavits relating to electoral malpractices the Petitioner relies on to set aside the election, PW5 did not name any of the people who were involved in the malpractices. His evidence is unreliable and of no probative value.

Ochieng Jackson(PW 11) who claims to have been appointed as the Petitioner's sub county supervisor did not attach evidence of the appointment and did not further attach evidence to show that he is a voter in the constituency. The court cannot believe his assertions about the occurrences at the Polling station.

Ongaria Akisoferi(PW 27) claims to have been an agent of Petitioner at the Polling station. That he saw Afamba Fred a Polling Assistant issuing multiple ballot papers to voters and allowing unregistered persons to vote.PW 27 also witnessed candidate Othieno and his family members being given multiple votes.

PW 27 testified to the recovery of 27 ballot papers ticked in favor of candidate Othieno which were taken by Police as exhibits.PW 27 did not name any person who was issued with multiple ballot papers or who voted in the name of a deceased person.PW 27 did not also name any unauthorized person who was allowed to vote by the Polling Officials.

PW 27 claims not to have signed the DR Form but saw a copy with Okello Apollo an agent of the Petitioner at the polling station implying that the signature on the DR Form is not his. The Petitioner did not submit a certified copy of the DR Form with the forged signature and no evidence of PW 27's authentic signature was adduced for court to make a comparison. The allegation about the alleged signature was not also formally raised to the 1st Respondent and it is an afterthought with no evidential weight.

Ouma Francis(PW 32) witnessed the snatching of ballot papers by Ofwono which is not denied by any of the parties.PW 32 did not sign the DR Form for his Principal who was a Presidential Candidate for the FDC.PW 32 did not attach a DR Form for the election he was involved in as an agent does not concern the matter in dispute.

Owori Gedesiana (PW 38) an agent for one of the candidates confirms that Ofwono snatched away a ballot paper book let which was later recovered and taken by Police.PW 38 corroborated the Respondents' evidence to the effect that the snatched ballot papers were not included in the final tally.

The alleged overrunning of the Polling station was exaggerated by Counsel for the Petitioner. PW4 's evidence points to only the incident of Ofwono grabbing a booklet which was later recovered and the ballots were not tallied in the final

results. The alleged multiple voting by the family of Othieno was raised by only PW 27 and remained uncorroborated.

It is crucial to note that the alleged malpractices at St. Karoli Church Polling station are attributed to Othieno and not the 2nd Respondent. The effect of whatever Othieno is alleged to have done, the magnitude of which was not proved, did not affect the results between the Petitioner and the 2nd Respondent.

It suffices to state that whatever malpractice took place at St. Karoli Church Polling station was not in favor of the 2nd Respondent who got 138 votes as opposed to the Petitioner who polled 55 votes.

Otirok East Polling station.

The Petitioner relies on the evidence of Alowo Juliet(PW2), Oburu Stanislaus(PW8), Ocand Godfrey (PW9), Ochwo Boniface (PW 14), Ochwo Christopher(PW 15), Okoth Peter (PW 20) Okware Richard(PW 22) Omare Christopher(PW 25) Oteng Godfrey(PW 30), Owor John(PW 36) and Nyaketcho Evelyn(PW 42).

The complaints raised include obstruction of voters, multiple voting, ballot stuffing, undue influence and violence all in breach of various provisions in the Electoral laws. PW 42 was the Petitioner's agent at the Polling station who narrates the events of the day from 6.00 am until she signed the DR Form for the Polling station.

PW 42 stated that voting went on smoothly from 7.00 am to 2.00 pm when it started raining and all the materials were moved to a classroom. Voting resumed when the rain stopped and continued up to 4.00pm. PW 42 witnessed no illegal practices during the voting exercise.

In the process of sorting votes for candidate Othieno Godfrey the Presiding Officer discovered two bunches of ballot papers stapled together all pre-ticked in favor of Othieno Godfrey. The Presiding Officer decided to exclude them and violence ensued. The ballot papers were handed to the Police Constable as PW 42 ran away from the station and reported to Police.

PW 42 does not know how the pre-ticked ballots came up and whether there were others in the ballot box. PW 42 did not witness any intimidation, undue influence or obstruction of voters. PW 42 does not state that she was forced to sign the

DR Form. Oburu(PW8) who was the Presiding swore an affidavit couched in similar words in all paragraphs with that of PW 42.

It is pertinent to note that PW4 alluded to the 27 ballot papers pre-ticked in favor of Othieno Godfrey that were recovered and kept as exhibits by Police. No evidence was led to show that others were stuffed into the ballot box since no evidence of discrepancies in the issued and tallied votes was adduced to prove ballot stuffing at the Polling station.

Alowo Juliet(PW2)claims to have arrived at the Polling station at 4.00pm and witnessed two gentlemen including a one Mark arrive in a vehicle armed with pangas. That they came with two pre-ticked ballot booklets and she ran to Merikit Police station but they ran away on seeing her with Police Officers.

PW2 also claims to have seen the GISO and Nyawere Juliet ticking ballot papers in favor of the 2nd Respondent and Othieno Godfrey. The two ran away on seeing her with Policemen.PW2 could not have seen what the GISO she failed to name and Nyawere were doing since they ran away on seeing her with Policemen.PW2 did not prove that Nyawere was an agent of the 2nd Respondent.

PW2 did not state that the ballot papers were dropped to prove in whose favor they had been pre-ticked and she did not state that they were eventually stuffed into the box. I also find it hard to comprehend that two people hid together in one place to pre-tick votes for different candidates.

Ochand Godfrey(PW9) was the Parish Supervisor appointed by the 1st Respondent who claims to have witnessed a group of people who came in a vehicle with machettes fighting the voters. The fighting was not mentioned by PW2,PW42 and PW8.The un named voters who fought with the men did not swear affidavits to the effect. The Investigation report by PW4 is silent about the incident.

PW9 claims that the men he saw had pre-ticked ballots which they gave to the agents of the 2nd Respondents.PW2,PW42 and PW8 did not testify to this. The agents who received the ballots are not named.PW9 claims to have captured the incidents on a video which was never introduced in evidence.

It is claimed by PW9 that in the process of tallying, a one Awino Florence an agent of the 2nd Respondent ran away with ticked ballot papers. This was not witnessed by PW8 and PW 42 who were involved in the tallying exercise.PW9 further claims

that candidates' agents signed DR Forms before the tallying of votes but PW 42 who was the Petitioner's agents did not state that.

To say the least, PW9 could not have been at Otirok East Polling station or he chose to swear to falsehoods in support of the Petitioner.

Ochwo Boniface(PW 14)claims to have been appointed as an agent by the Petitioner but no evidence to the effect was attached to his affidavit.PW 14 was also not mentioned to have been a co-agent by PW 42 who signed the DR Form on behalf of the Petitioner. The court cannot believe his evidence in that respect.

PW 14 states that a one Awino Florence ran away with *'all the 2nd respondents ballot papers'* and returned with *"booklets of ballot papers"*.PW 14 added that the Presiding officer counted the booklets of ballot papers much as he complained about it.

PW4investigated the incidents at the Polling station but the alleged incident does not form part of his report.PW 42 did not also mention the incident in her affidavit. I further find it hard to believe that ballot books were counted as votes in favor of the 2nd respondent and in the presence of PW 42 and other candidates' agents.

Okoth Peter (PW 20) confirmed that stapled ballot papers ticked in favor of candidate Othieno were impounded by Police and taken as exhibits. Okware Richard(PW 22) claims to have seen someone give pre-ticked ballot papers in favor of the 2nd Respondent to his agent. The giver and the receiver of the ballot papers are not named rendering the evidence worthless.

Omare Christopher(PW 25) the Polling Constable confirms that he passed on 27 ballot papers pre-ticked in favor of candidate Othieno to Police.PW 25 does not know if there were any other pre-ticked ballot papers in the ballot box and did not mention anything about Awino Florence.

Otenge Godfrey(PW 30) saw a person giving the agent of candidate Othieno a booklet of pre-ticked ballot papers.The giver and the receiver are not named and he does not state whether the ballots were stuffed into the box.

All the evidence relating to pre-ticking of votes and attempted ballot stuffing pointed to candidate Othieno and not the 2nd Respondent. All evidence shows that

the pre-ticked ballot papers were taken by Police and therefore did not form part of the final tally for the Polling station.

PW 42 like other witnesses did not testify to any other acts of non-compliance during the voting exercise and the alleged chaos started when men with machettes came during the vote counting which however proceeded to the end.

The Petitioner does not claim that the number of votes counted exceeded the number of those who voted at the polling station. The court thus lacks any basis on which to make a finding that the attempted rigging by candidate Othieno affected the votes obtained by the Petitioner and the 2nd Respondent.

Ninsiima Boaz Kasirabo V EC & Mpuga David. EPA No55 of 2016.

The fact that PW 42 who was the Petitioner's agent signed the DR Form without registering any complaint waters down any subsequent allegations of malpractices affecting her principal.

Amoru Paul & EC V John Baptists Okello. EPA Nos. 39 & 95 of 2016.

Failure to properly tally election results.

I have found it hard to establish the foundation on which this aspect of the Petition is crafted. The Petitioner did not plead Section 61(1)(b) of the Parliamentary Elections Act which provides for the setting aside of an election where a person other than the one elected won the election. She did not contend that she won but the 2nd Respondent was unlawfully declared.

The Petitioner sought that the election be annulled as provided in Section 61(1)(a) and (C) of the Act. The Petitioner sought an order for the cancellation of results from St. Karoli Catholic Church and Otirok East Polling stations and that she is declared the winner. In the alternative the Petitioner prayed for fresh elections to be conducted in accordance with the Law.

It is settled law that parties are bound by their pleadings. The Petitioner is required to prove the case she alleged and as covered by the issues framed. A party cannot build a different case from what was pleaded at the submissions stage when the pleadings were not amended.

Painetto Semalulu V Nakitto Eva Kasule.HCCA No.04 of 2008; Mbagadhi Fredrick Nkayi&Another V Dr.Frank Nabwiso. EPA Nos.14716 of 2016.

In paragraph 16 of the Affidavit in support of the Petition, the Petitioner attempted to adduce evidence challenging the computation by the 1st Respondent. I find it imperative to reproduce the text;-

"That I had polling agents at all the Polling stations, from whom I received all the Declaration of Results Forms .According to the DR Forms and the Tally Sheets, I polled 9,563 votes while the 2nd Respondent polled 9,674.By my own tally, I polled 9,671 while the 2nd Respondent polled 9,670.12 of my votes were tallied in favor of the 2nd Respondent thereby increasing his winning margin to 111 instead of 99."

Paragraph 16 is the Petitioner's own admission that she lost to the 2nd Respondent by a margin of 111 votes. Even if the court was to deduct the 12 votes she claims to have been wrongly tallied in favor of the 2nd Respondent a margin of 99 still amounts to a win for the 2nd Respondent.

The Petitioner who claims to have tallied her own results from the DR Forms she received from her agents had the option of raising a complaint to the 1st Respondent before results were announced. She did not take that option.

The Petitioner did not adduce evidence of certified copies of DR Forms and tally sheets she got from her agents showing that she got more votes than the 2nd Respondent. The Petitioner is bound by the Results Tally Sheets she adduced as evidence and they do not show that she won the election.

Counsel for the Petitioner contends that the 1st Respondent should have cancelled elections at Asinge Catholic Church, St. Karoli Catholic Church and Otirok East Polling stations based on the alleged malpractices at the respective stations.

The court analyzed the evidence adduced in regard to the malpractices at the respective polling stations. The Petitioner did not plead for the cancellation of results at Asinge Catholic Church Polling Station and this cannot emerge in submissions.

It was also the evidence of the witnesses from all the parties that the pre-ticked votes at the other two Polling stations were handed over to Police and the agents

signed the DR Forms raising no complaints about the voting at the respective Polling stations.

I resolve the 1st issue in the negative.

Issue No.2

If so, whether the non-compliance affected the results of the election in a substantial manner.

Counsel for the Petitioner correctly submits that an election can be set aside if, to the satisfaction of the court, there was failure to conduct the election in accordance with the principles laid down and that the non-compliance affected the results in a substantial manner.

In order to assess the effect, the court has to evaluate the whole process of the election to determine how it affected the results and the degree of the effect. The court can employ the qualitative or quantitative tests or even both. The choice of the test to be applied depends on the particular facts of the case.

Counsel invited the court to apply both tests based on the alleged irregularities at St.Karoli Catholic Church and Otirok East Polling stations. The basis of the contention is that according to the DR Forms for the two polling stations 1,275 votes were cast. The Petitioner polled 224 votes while the 1st Respondent polled 405 votes.

Counsel argues that the inclusion of the 1,275 votes affected the outcome in a substantial manner since the winning margin of 111 votes is far less than the 1,275 votes. It is further contended that the request by the Petitioner's agents to exclude the results was not accepted by the Polling Officials.

The court ruled on the evidence adduced by the parties relating to the two Polling stations. Evidence on all other allegations did not meet the standard of proof in election matters. What factually stood out are the acts of attempted ballot stuffing attributed to the agents of candidate Othieno Godfrey.

The pre-ticked ballots in favor of the candidate at the two Polling stations were taken by Police and were therefore not added to the final tally. The Petitioner did not also prove that votes in excess of the number of people who actually voted



were tallied by the 1st Respondent to lay claim to ballot stuffing as a malpractice that can lead to setting aside of the election.

It is also worth noting that elections were held in about 56 Polling stations. The Petitioner only seeks a nullification of results at two stations at which the number of voters is far less than those at the more than 50 Polling stations. Allegations of electoral malpractices at all the other Polling stations were not proved to the satisfaction of the court.

For the court to consider nullifying the results on account of malpractices that could have substantially and materially affected the outcome cogent, credible and consistent evidence must have been led. This was not achieved by the Petitioner.

Hellen Adoa & EC V Alice Alaso. EPA No. 57 & 54 of 2016.

The Petitioner did not prove that her supporters/ voters were prevented from voting due to the alleged acts of intimidation. This is evident from the analysis of the evidence adduced regarding the respective Polling stations. The Petitioner did not show that due to any of the alleged malpractices the 2nd Respondent got an advantage over her at any of the two polling stations.

Oboth Mark Jacob V Dr. Otaala Emmanuel. EPA No. 38 of 2011.

It is also important to note that the Petitioner who had agents at all Polling stations did not register any complaint with the 1st Respondent. The DR Forms signed by her agents do not also indicate any complaints which lent credibility to the electoral process at the two stations.

Gagawala Nelson Wambuzi V EC & Kenneth Lubogo. EP 008 OF 2011.

Even the reports from the Police Investigations the Petitioner personally initiated do not amount to evidence. The persons named as suspects were not processed through the due process and are still presumed innocent under the Law.

It is a fact that there were attempts at ballot stuffing at St. Karoli Catholic Church and Otirok East Polling stations. The pre-ticked ballot papers were not tallied which did not affect the results.

Applying both the qualitative and the quantitative tests, i have found no evidence of non-compliance that affected the election of the directly elected Member of Parliament for Tororo North County Constituency in a substantial manner.

I resolve the 2nd issue in the negative.

Issue 3.

Whether the 2nd Respondent personally or through his agents, with his knowledge or consent and approval, committed the alleged electoral offences and illegal acts.

The Petitioner's witnesses raised allegations of Obstruction of voters, Personation, Undue influence, obstruction of election officers and bribery. It suffices to note that witnesses in election matters are partisan and the propensity to exaggerate or swear to falsehoods to gain victory for their candidates cannot be ruled out.

Kabuusu Moses Wagaba V Lwanga Timothy Mutekanga &EC. EP No.15 of 2011.

Evidence on the allegations raised at the respective polling stations was analyzed and dismissed for failing to meet the required standard of proof.

The Petitioner's witnesses did also not satisfy the court that those alleged to be agents of the 2nd Respondent were indeed his agents and acted with his knowledge, consent or approval.

Bribery allegations.

A petitioner who alleges bribery is required to adduce evidence to the satisfaction of the court to prove the following elements under section 68(1) and (2) of the Parliamentary Elections Act;-

- i) That the Respondent gave out money or gifts.
- ii) That the receiver was a registered voter
- iii) That the giving was with intent to influence the voter to vote for the giver or refrain from voting
- iv) That the Respondent committed the bribery personally or through his agent with his knowledge and consent or approval.



Kamba Saleh Moses V Namuyangu Jennifer.EPA No.27 of 2011.

A single offence of bribery once proved is sufficient to set aside an election and given the gravity of the offence, Courts only consider direct evidence given first hand and mere suspicion is not enough. The giver and the receiver must be clearly identified and such evidence needs corroboration.

The Petitioner is required to prove that the persons bribed were registered voters. A registered voter is defined in Section 1 of the Parliamentary Elections Act as a person whose name is entered in the Voters' Register. Proof is by the Petitioner adducing a certified copy of the Voters' register with names of the persons alleged to have been bribed.

George Patrick Kasaja V Fredrick Gume & Another. EPA No.68 of 2016.

The Petitioner alleged bribery by the 2nd Respondent and his agents but surprisingly provided no names of those who were bribed in all the incidents. The Petitioner did not also prove that the un-named receivers of the bribes were voters in the constituency since no voters roll was certified and adduced in evidence.

On that ground per se all the allegations of bribery were not proved. I will pick out a few of the bribery instances for emphasis since almost all were canvassed in the 1st and 2nd issues.

Akworot Primary school,Railway station,Maga 1 zone and Tuba Primary school.

Immo Stephen (PW6) swore that he saw Jerome Malongo with Okumu Thomas and agents of the 2nd Respondent intimidating voters at Akworot Primary School. When he called the agent at Akworot Primary School he was told by the Petitioner's agent that Okumu Thomas was giving out money to voters.

PW6 called the Petitioner who went to the school with Police and Okumu Thomas ran away. The question where was PW6 when he called the agent of the Petitioner yet he claimed to have been at the same place. The agent he called was not mentioned and those who received the money. It is hearsay evidence on the part of PW6.

Ochieng James(PW 12) claims to have seen Wanyera Tanga an agent of the 2nd Respondent giving out money at Railway Polling Station.PW 12 a resident in the area did not even name any of those who allegedly received the bribe from

Wanyera. Oyet Robert Odiam(PW 41)stated to have corroborated the evidence of PW 12 did not also mention any of the voterswho were bribed.

In regard to the alleged meeting at the home of Okoth Magara in Maga Zone on 13th January 2022, PW 41 mentions agents with no names and voters who were bribed but with no names. One wonders why PW 41 did not involve Police or the 1st Respondent to stop the vice on the 13th January 2022.

In the alleged bribery incidents at Magodes Lower Polling station and Tuba Primary School PW41 refers to an agent he did not name and did not also name those who received the money at both places. All the bribery allegations at the named places were not proved to the satisfaction of the court.

Asinge Catholic Church, Kasaya Vision Church, Kamuli Primary School and Aukot Church of Uganda Polling station.

Omunyin Joseph (PW 26) states that he was the Petitioner's agent at Asinge.PW 26 claims to have heard the Presiding Officer complaining that he had been bribed with only Ugx. 200,000/=by the 2nd Respondent. This evidence was not corroborated and he did not see or hear the 2nd Respondent giving the money or hear him talk about it.

PW 26 further swore to acts of bribery but not only mentions agents and supporters without attaching names to them.PW 26 further introduced hearsay evidence when he states that Owere Jude told him that the 2nd Respondent had attempted to bribe him. The court could not rely on the evidence of PW 26 which did not meet the requisite standard.

Obbo Simon(PW7) claims to have seen Amonya,Kulumbano and Okware giving out money to voters in the vicinity of Kasaya Polling station and states that they were all supporters of the 2nd Respondent.PW7 did not name those who received the money.

Oyet Martin(PW 39) stated to corroborate the evidence of PW7 did not also name any person who received money from Omoya.It is also incomprehensible that Omoya stood in the open besides the line of voters to dish out money as alleged by PW 39.

Odoi Francis(PW 16) claims to have voted at Kamuli Primary School where he saw Okege Omachara an agent of the 2nd Respondent dishing out money to voters.PW 16 did not name any of the voters who received the money.

Owere John Steven(PW 34) who was at the same Polling station does also not mention any of the voters who allegedly received money from Okege Omachara.

Okwiti James(PW 18) a voter at Aukot COU Polling station claims to have attended a meeting in which rigging and bribery plan were discussed a week before the Polling day.In the meeting were three(3)Gombolola Internal Security Officers who talked to the 2nd Respondent and he offered to bribe them.

The Petitioner stated to have got information of the meeting from a one Owere Robert or PW 18 who attended the meeting did not report the GISO's to the 1st Respondent or any Authority.PW 18 did not also name anyone bribed by John Ekakoro on polling day .

Bribery at Ojowendo trading center and Ipurege Parish.

Okoth James(PW 19)swore about a meeting to bribe voters and rig elections held by the 2nd Respondent's supporters at the town hall.PW 19 did not name any of those who attended and could not even name the location of the town hall.

Opero Jacob,Omella Balam and Moses Kibang countered that there is no town hall at Pagoya and denied any bribery at the Polling station. PW 19 further mentioned a one Omella Balaam who is stated to have bribed voters at the Polling station. This was denied by Omella and no single name of those who received the money was mentioned by PW 19..

Omakada Godfrey(PW 24) claims to have heard from Omalla Godfrey that he was distributing money to supporters of the 2nd Respondent on 13th January 2021.The supporters confirmed receiving the money but PW 24 did not attach names to the supporters he interacted with confirming the bribery.

Bribery at Asinge East,Asinge West,Asinge Central,Orowa,Akol Primary School, Maliri Primary School, and Pentecostal Church Polling stations.

Opendi Benedict(PW 28)who claims to have been appointed as the Supervisor for the Petitioner for Merikit sub-county did not attach evidence to prove that he was appointed as such.PW 28 states that he was informed that a brother to the

2nd Respondent was seen giving out money in Asinge East, Asinge West and parts of Asinge Central.

The evidence relating to the three areas mentioned cannot be relied on since it is hearsay. The person who informed PW 28 is not named and those who received the money are not named.

PW28 claims to have seen Bekiriya Okware a supporter of the 2nd Respondent giving out money at Apkor Primary School but does not state who received the money.

In the same breath evidence to the effect that Okiru James gave out money at Maliri Primary School lacks any name of a person who received the bribe. At Orowa and Pentecostal Church Polling stations PW 28 just refers to supporters of the 2nd respondent giving out money to voters he does not name.

All the bribery allegations were rebutted by the Respondent's witnesses. Even if such allegations had not been rebutted, the burden to prove that the bribery took place remained with the Petitioner. Proof can only be derived from cogent evidence of the kind which is free from contradictions, truthful and compelling to the satisfaction of the court which was not adduced by the Petitioner.

Canvassing for votes on polling day.

Ochieng James, Okoth James, Omuyin Joseph and Owere Jude Thadeus swore affidavits to support allegations of canvassing for votes on polling day. The names of the purported agents are not indicated and no proof was provided to show that they were agents of the 2nd Respondent.

The 14th January 2021 election was for a number of positions from the President to Councilors. The necessity to prove that a particular person was an agent of a particular candidate cannot be over emphasized.

The 2nd Respondent voted at Asinge Catholic Church at 11.00am and returned home. The burden to disprove his alibi to the effect was carried by the Petitioner to place him at the scenes he is alleged to have been canvassing for votes. The burden was not discharged by the Petitioner.

Mujuni Vincent Kyamadidi VS Charles Ngabirano&EC.EPA No.84/2016.

I found no evidence proving that the 2nd respondent was involved in any acts of non-compliance personally or through his agents with his knowledge, consent or approval.

Issue No.4

Whether the Petitioner is entitled to the remedies sought.

The Petitioner raised a number of grounds seeking to have the election set aside but fell short of marshaling the compelling evidence to satisfy the court of the necessity to overturn the will of the voters in Tororo North County Constituency.

An election is an exercise of great public importance that can only be set aside where there is compelling evidence proving factors that prevented the electorate from exercising their under Article 59 of the Constitution.

Mugema Peter V Mudiobole Abed Nasser &EC.EPA No.30 of 2011.

I found no satisfactory evidence for the grant of any of the prayers sought by the Petitioner. The Petition is accordingly dismissed with costs to the Respondents. I grant a Certificate of Costs for two Counsel in the case of the 2nd Respondent.



.....
Moses Kazibwe Kawumi

Judge

12th December 2022

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBALE
ELECTION PETITION NO. 003/ 2021

NYAKECHO ANNET ::::::::::::::::::::::::::::::::::: PETITIONER

VERSUS

1. ELECTORAL COMMISSION ::::::::::: RESPONDENTS
2. EKANYA GEOFFREY

ELECTION PETITION PROCEEDINGS

15/12/2022

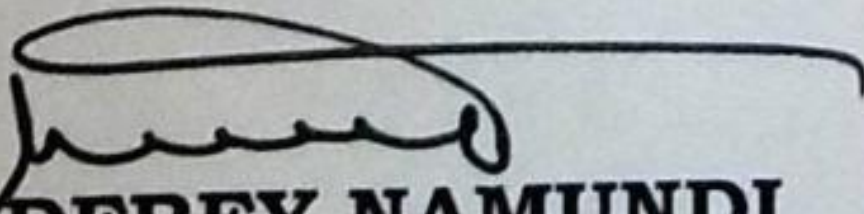
Patrick Wetaka : for 1st Respondent.

Napa Geoffrey on B/F : Ekirapa Obiro.

Kamukama Alex for : Joseph Kyazze for 2nd Respondent
2nd Respondent present.

Okware Meshak on BF : Okello Oryem for Petitioner.

Court: the judgement is delivered in open court.


GODFREY NAMUNDI

JUDGE

15/12/2022