THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G. ENGWAU, JA

HON. JUSTICE C.K. BYAMUGISHA, JA

HON. JUSTICE S.B.K. KAVUMA, JA

ELECTION PETITION APPEAL NOS. 1 AND 2 OF 2007

BETWEEN

1. ELECTORAL COMMISSION

2. BAKALUBA PETER MUKASA :::::::::::::::::: APPELLANTS

AND

NAMBOOZE BETTY BAKIREKE ::::::::::::::::: RESPONDENT

[Appeal from Election Petition No.14 of 2006 of the High Court, at Kampala (Amoko Arach,J.) dated 19th January 2007]

JUDGMENT OF ENGWAU, JA.

In their joint scheduling memorandum, counsel for the appellants and respondent agreed on the following facts: The National Elections were held on 23rd February 2006. The respondent (Nambooze) contested with Bakaluba Peter Mukasa, and one Kawadwa Dawood Katamba for the Parliamentary seat of Mukono North Constituency, contending on the DP, NRM and UPC tickets respectively.

At the end of the election, the 1st appellant, Electoral Commission (EC) declared the 2nd appellant [Bakaluba Peter Mukasa] as the winner with 22,680 votes; the respondent obtained 22,232 votes, while Kawadwa Dawood Katamba got 627 votes. The results were published in the Uganda Gazette of 27th February 2006.

Dissatisfied with the results, the respondent petitioned the High Court at Kampala vide Election Petition No.14 of 2006 challenging the results on the grounds that the elections were not conducted in compliance with the electoral laws thus affecting the result in a substantial manner; and that the 2nd appellant personally or through his agents committed election offences and illegal practices.

In her petition, the respondent sought the following orders:

A) Hon. Bakaluba Peter Mukasa was not validly elected as a Member of Parliament for Mukono North Constituency.

B) The election of the 2nd appellant as directly elected Member of Parliament be annulled and instead the petitioner/respondent be declared the winner of the Parliamentary election for Mukono North Constituency.

C) In the alternative but without prejudice to the foregoing, a fresh election be conducted in the said Constituency.

D) The appellants (then respondents) pay the costs of the Petition.

E) Such other remedies available under the electoral laws as the court considers just and appropriate.

The High Court allowed the petition and made the following orders and declarations, hence this appeal:

A) That Hon. Bakaluba Peter Mukasa was not validly elected as the directly elected M.P for Mukono North Constituency.

B) The election of Hon. Bakaluba Peter Mukasa as MP for Mukono North Constituency is hereby set aside.

C) That fresh election be conducted in the said Constituency.

D) The Electoral Commission and Hon. Bakaluba Peter Mukasa shall pay the costs of the petition to the respondent.

The appellants appealed individually vide Election Petition Appeal No.1 of 2007 and Election Petition Appeal No.2 of 2007 which were later consolidated into Election Petition Appeal Nos. 1 and 2 of 2007.

With leave of Court, both appellants filed an amended consolidated Memorandum of Appeal which reads as follows:

1. That the learned trial Judge erred in law and fact and denied the 2nd appellant fair trial when she considered and relied on specific particulars of alleged bribery not specifically pleaded in the petition and its attached affidavit to make findings that during the

conduct of Mukono North Parliamentary Election, the 2nd appellant committed illegal practices and/or offences personally or by his agents with his consent, knowledge or approval.

2. ***That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence presented before her and as a result came to wrong decisions that during the conduct of Mukono North Parliamentary Election –***
    a) ***The 2nd appellant committed illegal practices and/or offences personally or by his agents with his consent, knowledge or approval.***
    b) ***The 1st appellant's agents connived with the 2nd appellant's agents to commit electoral malpractices to the detriment of the respondent.***
    c) ***The 1st appellant had disenfranchised voters who were registered to vote at Gwafu I and Gwafu II polling stations and other polling stations that affected the result in a substantial manner.***
    d) ***The 1st appellant's agents forged election results.***
    e) ***The Declaration of results forms and tally sheet showed that there were ballot papers that were not accounted for.***
    f) ***No sufficient light was provided by the 1st appellant.***
    g) ***She shifted the burden of proof onto the appellants.***
    h) ***There was non-compliance of the provisions and principles with the Parliamentary Elections Act and the Electoral Commission Act which substantially affected the conduct of the Parliamentary Election of Mukono North Constituency.***

Counsel for the appellants and respondent framed the following issues for determination:

1. ***Whether the election of the 2nd appellant was conducted in compliance with the provisions of the Constitution, the Parliamentary Elections Act 2005, the Electoral Commission Act and in accordance with the principles laid down in the said laws.***

2. ***If so, whether the non-compliance substantially affected the result of the election.***
3. ***Whether the 2nd appellant committed illegal practices and/or offences personally or by his agents with his consent, knowledge and approval.***
4. ***Whether the learned trial judge denied the 2nd appellant a fair trial when she considered and relied on particulars of alleged bribery not specifically pleaded in the petition.***

Mr. Blaize Babigumira and Mr. Richard Mwebembezi represented the second appellant, Ms Christine Kahawa appeared for the 1st appellant and Mr. Erias Lukwago represented the respondent.

Mr. Blaize Babigumira, Richard Mwebembezi and Ms Christine Kahawa joined forces and argued grounds 1 and 2(a) together, grounds 2(b)-2(g) together and 2(h) alone, according to their conferencing notes. Apparently, Mr. Erias Lukwago also followed the same pattern and I shall follow the same.

Grounds 1 and 2(a) relate to the allegation of bribery in the petition.

Ground 1 reads:

"The Learned Trial Judge erred in law and fact and denied the 2***nd appellant fair trial when she considered and relied on specific particulars of alleged bribery not specifically pleaded in the petition and its attached Affidavit to make findings that during the conduct of Mukono North Parliamentary Election, the 2nd appellant committed illegal practices and/or offences personally or by his agents with his consent, knowledge or approval".***

Ground 2(a) states:

"2. The Learned Trial Judge erred in law and fact when she failed to properly evaluate the evidence presented before her and as a result came to wrong decisions that during the conduct of Mukono North Parliamentary Election:-

(a) The 2nd appellant committed illegal practices and/or offences personally or by his agents with his consent, knowledge or approval".

The offence of bribery is provided for in section 68(1) of the Parliamentary Elections Act thus:

" A person who, whether 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, gifts 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".

It is the complaint of the appellants that they were not given a fair trial as guaranteed by Article 28(1) of the Constitution. Article 28(1) of the Constitution provides:

> ***"28. Rights to a fair hearing***
>
> ***(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial Court or tribunal established by law".***

Counsel for the appellants submitted that a fair trial is a cornerstone in the determination of civil rights and obligations as envisaged in Article 28(1) of the Constitution. Further, Counsel cited Election Petitions Rule 4(8) of the Parliamentary Elections (Election Petitions) Rules 1996 which reads:

> ***"The petition shall be accompanied by an affidavit setting out the facts on which the Petition is based together with a list of any documents on which the Petitioner intends to rely"***

It is the contention of the appellants that the 2nd appellant was condemned on particulars of bribery not originally pleaded in the petition and supporting affidavits which was contrary to mandatory provisions of the law. It was further pointed out that a general allegation of bribery is contained in Paragraph 7(a) of the Petition and nothing in the two affidavits of the respondent. In counsel's view, the 2nd appellant was left in the dark as to the allegations of bribery when he was served with the petition.

It was further contended by the appellants that the rules of natural justice which require that a person be specifically informed of the allegations against him/her and have an ample opportunity to give an explanation were contravened. The 2nd appellant was given a very short time (20 days) to respond to so many affidavits yet most of the witnesses were partisan and so it was easy to get them. According to the appellants, the rules of natural justice not only do they require that a person be informed of specific allegations before him/her but he must also be given ample time to explain his case.

In support of their argument, the appellants relied on the decision of ***DE SOUZA vs TANGA TOWN COUNCIL [1961] EA 377*** where the former Court of Appeal for East Africa held:-

> ***"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice that decision must be declared to be no decision".***

It was further contended for the appellants that even if the particulars of the alleged bribery were properly pleaded, they were not proved at all. It is settled law that the burden of proof lies on the petitioner to prove his/her case to the satisfaction of the Court. In the case of ***Amama Mbabazi & Anor vs Musinguzi Garuga, Election Petition Appeal No.12 of 2002,*** it was held, inter alia, that:

> "There can be no doubt that the allegation of bribery by a candidate in an election process is a serious matter. It requires cogent evidence ***to prove it. In the instant case, there was assertion and denial. There was no independent evidence to corroborate the allegations".***

In the current appeal, the appellants submit that even if the particulars of the alleged bribery were properly pleaded, they were not proved at all by the respondent.

The appellants then considered each alleged incident of bribery one by one as follows:

1. ***<u>Bribery at the home of Namwandu – Zziwa.</u>***

   In his affidavit, Muwonge George deponed that on the 21st February 2006 at the home of Ms Namwandu Zziwa, he saw the 2nd appellant offer Ug.Shs.250,000/= to one Semyalo Patrick who in turn gave it to Namwandu Zziwa. The money was for soliciting votes from the drama group.

   In the same affidavit, Muwonge George saw the 2nd appellant at the home of one Birato offer shillings one thousand each to one Nyonjo Kawalaata, Kiiza Lukooya and others whose names he did not know for votes. The 2nd appellant also gave Muwonge George Shs.500= for the same purpose.

   It is the contention of the appellants that the said affidavit did not state that one or any of the groups was a registered voter. According to counsel for the appellants, the learned trial Judge chose to believe Muwonge George, a single witness and apparently confessed criminal who claimed to have received part of the money, leaving the affidavits in rebuttal of the alleged bribery.

   Counsel for the appellants pointed out that the affidavit of the 2nd appellant, and those of Patrick Senjolo, Margaret Nantongo alias Namwandu Zziwa, Oguzwa David and Maali alias Kawalaata all rebutted the allegations of bribery but the trial Judge did not believe them. According to appellants' counsel, the incident of the alleged bribery was not proved.

2. ***<u>Bribery at Walusubi Village</u>***

   There was a campaign rally at the village on 20th February 2006. According to the affidavit evidence of one Mugambwa Hamuzah and Asadi Ddembe, both witnesses attended the rally. The 2nd appellant during the rally offered Shs.150,000/= to the residents to have two boreholes repaired provided they voted for him.

   It is the contention of the appellants that the names of residents were not

disclosed and statement that they were voters. It is also contended that there were contradictions as to who received the money. Mugambwa Hamuzah said it was one Godfrey Balikuddembe, the agent of the 2nd appellant. Asadi Ddembe said it was NRM Chairman, Katuuka, who received the money. In such circumstances, it was contended for the appellants that the incident was not proved to the satisfaction of the court.

3. ***Bribery at Nasimanya Village***

Affidavit of John Ochieng alleged that at Wakiso village while campaigning, the 2nd appellant openly gave 100,000/= to a group of people to vote for him. Sowedi Lwanga, campaign manager for the respondent confessed to have received the alleged money. The 2nd respondent and one Kakande, in their affidavits denied the allegation. The appellants contend that the incident was not proved.

4. ***Bribery at Kitega village***

Affidavits of Muwada Walusimbi and that of Bengo George, allege the 2nd appellant gave gifts to leaders and bataka of the area while asking them to vote for him. Both witnesses also received gifts and their photographs were taken while the 2nd appellant was addressing the rally.

It is the contention of the appellants that there was no campaign rally on that day but a social gathering. The 2nd appellant explained the circumstances under which the picture was taken and he even produced its original negative. The appellants further contend that it was not proved that the 2nd appellant gave gifts to leaders and Bataka who were voters. The appellants pointed out that with modern technologies, it is possible to combine two pictures or parts thereof into one. In the circumstances, this incident was also not proved to the satisfaction of the court.

5. ***Bribery at Kiwalu village***

The affidavit of Kayondo Badru, a D.P Chairman of the village, the party under which the respondent contested, alleges that the 2nd appellant gave

20,000/= to Etyang William alias Nandeeba to buy local brew for the residents. Etyang denied receiving the money.

The appellants submitted that the evidence of one Musoke Nathan was rejected as being partisan but that of Kayondo was accepted wholesale although partisan double standards. In their view, the appellants submitted that this incident was not proved.

All in all, it is submission of the appellants that on the issue of bribery not a single allegation was proved to the required standard let alone not proved at all.

Mr. Erias Lukwago, learned counsel for the respondent, submitted that the citation of Rule 4(8) of the Parliamentary Elections (Election Petitions) Rule 51 141-2 to buttress the respondent's first ground of appeal is uncalled for. Counsel hastened to point out that all the affidavits accompanying the Petition in this case are headed "***Affidavit in support of the Petition".*** No single affidavit was ***"brought in belatedly".*** According to counsel, all the respondent's affidavit accompanying the petition were filed in time and that the appellants never complained about any ***"belated affidavit"*** during the trial.

Learned counsel further submitted that the averment of the respondent/petitioner in paragraph 7(a) of her petition that the 2nd appellant bribed voters contrary to section 68(1) of the Parliamentary Elections Act 2005 complied substantially with the requirement of the rules. Rule 4(2) of SI-141-2 provides: ***"Every petition shall state the holding and result of the election together with a statement of the grounds relied upon to sustain the prayer of the petition".*** In that regard, counsel submitted that paragraph 7(a) of the petition stated the grounds relied upon, to sustain the petition.

Counsel Lukwago pointed out that Rule 4(8) 51-141-2 which requires the petition to be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner

intends to rely should not be misconstrued to mean only one affidavit by the petitioner. In the petition, the respondent pleaded and duly substantiated several election offences and illegal practices, which various witnesses observed. For example, in paragraph 9 of her petition, the respondent stated that the petition was supported by her affidavit together with other affidavits of various deponents.

Mr. Lukwago further pointed out that the respondent made a clear averment about election offences including bribery in paragraph 6 of her affidavit as follows:

> ***"THAT the polling agents and the election supervisors reported to me that numerous electoral malpractices, illegal practices and offences were committed by the 1st Respondent, his agents and supporters, the officers of the Uganda Peoples' Defence Forces (UPDF) together with the polling officials and agents of the 2nd Respondent in respect of which several persons have made affidavits as evidence in support of my Petition".***

According to counsel, the said pleading was sufficient considering the requirements of O.19r3 of the Civil Procedure Rules which provide that save for interlocutory applications; matters deponed to in an affidavit must be confined to facts which the deponent is able of his or her own knowledge to prove. In the instant case, the respondent did not personally witness any act of bribery. In counsel's view, it was inconceivable to expect the respondent to know and include in her affidavit how much bribe was given, where and what time in each and every incident. According to counsel, the authority of ***Castestelino vs. Rodrigues [1972] E.A 223*** states that any reference to a document in pleadings incorporates the contents of that document in the pleadings.

Mr. Lukwago further submitted that in the case of ***Hon. Mukasa John Harris vs. Dr. Bayiga Michael Philip Lulume, Election Petition Appeal No. 14 of 2006,*** the Court of Appeal did not find anything wrong with the petition wherein the respondent had averred that the appellant bribed voters contrary to section 68(1) of the PEA. The court further observed that the particulars of bribery were given by different witnesses in their affidavits. According to counsel, this is the same finding of the trial Judge in

the instant case.

Learned counsel further submitted that the appellants were given adequate time to respond and indeed they filed all the affidavits they wanted. Thereafter, the appellants cross-examined the respondent's witnesses. In counsel's view, it comes as a surprise and indeed a frantic afterthought on the part of the 2nd appellant to allege that he was denied fair hearing as far as the issue of bribery is concerned.

Mr. Lukwago pointed out that the 2nd appellant swore an affidavit in rebuttal of the respondent's averment of bribery. Besides, the 2nd appellant's reply to the petition was properly evaluated by the trial judge as opposed to the respondent's evidence before making a finding. It is thus missing the point to allege that the trial judge was in error and denied the 2nd appellant fair hearing on the allegations of bribery.

Even if there was any slight deviation from the rules during the trial, which is absolutely not the case, Mr. Lukwago submitted that there is nothing on the record to show that there was a miscarriage of justice. In support of his argument, counsel cited the case of ***Idd Kisiki Lubyayi vs Ssewankambo Musa Kamulegeya, Election Petition Appeal No.8 of 2006 and Idd Kisiki Lubyayi vs Kagimu Maurice Peter, Election Petition Appeal No.06 of 2002.***

Bribery at Nakumbo village

Counsel for the appellants contend that it was wrong for the trial judge to make a finding that the election offence of bribery was proved by the respondent for the following reasons:

i) ***The learned trial Judge chose to believe evidence of Muwonge George who was a single witness.***

Mr. Lukwago submitted that it is trite law that there is no specific number of witnesses required to rove a given fact. In support that bribery in an election petition can be proved on the strength of evidence of a single witness, Mr. Lukwago cited the case of ***Mukasa Anthony Harris vs Dr. Bayiga Michael Philip Lulume, Election Petition Appeal No.14 of 2006 (supra)*** and ***Hon. Kirunda Kiveijinja***

vs Katuntu Abdu, Election Petition Appeal No.24 of 2006.

Mr. Lukwago pointed out that in the instant case, Mrs. Namwandu Zziwa alias Nantongo, did not deny receiving money from the 2nd appellant. According to counsel, her testimony in cross-examination essentially corroborates the evidence of Muwonge save fore the issue of the amount of money.

ii) ***On the question of Muwonge being a self-confessed criminal***, Mr. Lukwago pointed out that in his affidavit, Muwonge clearly stated that upon receiving the money, he informed the respondent and thereafter reported the matter to Mukono Police Station which referred him to Naggalama police Station where he recorded a statement under CRB No. NAG.205/2006. The file was forwarded to the Resident State Attorney who sanctioned it under Ref. MKN 250 of 2006. According to counsel, this evidence was admitted by Namwandu Zziwa thereby exonerating Muwonge.

iii) On the contention that Muwonge does not state that Namwandu Zziwa, Muwonge Tadeo and Nsumba were registered voters. Mr. Lukwago submitted that Namwandu Zziwa who received the money on behalf of all the group members, expressly stated during cross-examination that she was a registered voter at Buntaba polling station.

Namwandu Zziwa further stated that she distributed some of the money to the disabled persons who were registered voters. She spent 2000/= for hiring boda boda to transport voters to the polling station; 3000/= for fuel and 1000/= for the work she had done.

Learned counsel submitted that the offence of bribery is complete once the intention of the giver is ascertained. In support counsel cited the case of ***Mukasa Anthony Harris (supra)*** and that of ***Hon. Kirunda Kiveijinja (supra)***. In this case the intention of the 2nd appellant was very clear, according to counsel, to bribe voters.

iv) ***As for the assertion that the relationship between one Lukabwe and the 2nd appellant,*** Mr. Lukwago pointed out that the name Lukabwe was introduced at the trial by Namwandu Zziwa who invited him together with the 2nd appellant to come to her home and meet disabled and elderly voters. When asked about the role of Lukabwe in the 2nd appellant's campaign, she responded as follows:

"He was the one looking for votes. That is the reason I invited both of them".

v) The contention that the learned trial Judge made no reference to the other two witnesses; Oguzwa David and Maali Kawalaata, Mr. Lukwago hastened to point out that there were two acts of bribery at Nakumbo village. The first one was at the home of Namwandu Zziwa, and the second one was at Birato's home.

Counsel pointed out that the affidavit of Maali Kawalaata was specifically about the act of bribery at Birato's home. According to counsel, the trial judge made no findings against the 2nd appellant on that incident. In the premises, there is no legal grievance suffered by the 2nd appellant. The same applies to the affidavit of Oguzwa David which dealt with events of 7th March 2006, long after the elections.

vi) ***The contention that the trial judge stated that it was the 2nd appellant who gave the 10,000/=,*** Mr. Lukwago submitted that the record is clear that Namwandu Zziwa said that she received the 10,000/= from the 2nd appellant.

vii) Mr. Lukwago submitted that the argument that the judge was wrong to blame the 2nd appellant for not mentioning the 10,000/= since it was not mentioned in the affidavit, he was replying to is equally untenable. According to counsel, in pointing out the said fact, the trial Judge was pointing out discrepancies in the totality of the 2nd appellant's evidence which pointed to deliberate falsehood. Mr. Lukwago asked, if

the 10,000/= which Namwandu Zziwa says was given to her by the 2nd appellant was not a bribe, why didn't he talk about it, at least during cross-examination?

Bribery at Walusubi village

According to Lukwago, counsel for the appellants attacked the finding of the trial judge on two fronts:

1. ***Asadi Dembe is not a credible witness, for he swore two affidavits and he was partisan as a campaign agent and supervisor of the petitioner/respondent.***
2. ***That the respondent's evidence, particularly the affidavit of Mugambwa Hamzah, did not disclose the recipients' identity and whether they were registered voters in the Constituency. That how would a bribe be offered to a village?***

Regarding the 1st question, Mr. Lukwago submitted that it is not at all true that Asadi Dembe was a campaign agent and supervisor of the petitioner/respondent. He pointed out that the 1st affidavit signed by Asadi Ddembe was prepared by the 2nd appellant. In that regard counsel wondered how Asadi could become a campaign agent and supervisor of the respondent!

Mr. Lukwago further contended that if the argument of counsel for the appellants that Asadi Ddembe is not credible because he swore two affidavits, is to carry weight, then they are conceding that the affidavit the 2nd appellant allegedly swore in reply to that of Mugambwa Hamuzah should have been expunged from the record. Mr. Lukwago further pointed out that the witness was summoned for cross-examination but the 2nd appellant opted not to cross-examine him for fear that the witness was going to spill beans. In counsel's view, the trial judge rightly observed that the affidavit in rejoinder by the witness was never rebutted.

Counsel for the appellants contend further that the petitioner's evidence, particularly the affidavit of Mugambwa Hamuzah, did not disclose the recipients' identity and whether they were registered voters in the constituency. That how could a bribe be

offered to a village?

In his answer, Mr. Lukwago cited the case of ***Hon. Mukasa Philip Lulume (supra)*** in which it was held, inter alias, thus:

> ***"Mr. Mungoma submitted and I agree with him that the evidence of the respondent did not mention the individual voters who received money. Mr. Katiisa who was a chief campaign agent of the appellant must have been a registered voter. He knew the voters and he received the money from the appellant knowing the purpose for which it was intended. In my view the offence is complete the moment the money was accepted by Katiisa".***

In another case of Kirunda Kiveijinja (supra), Court observed, inter alia that:

"…… it is common knowledge that every village has registered voters because every village is a polling station. A donation to a village in a constituency by a candidate who is seeking votes would be targeting the registered voters in that village and those who can influence them to vote……".

In counsel's view, the decisions in these cases answer the questions raised by counsel for the appellants.

<u>Bribery at Wakiso Trading Centre</u>

Mr. Lukwago submitted that the learned trial judge was justified in finding that the 2nd appellant gave a bribe of Shs.100,000/= to a group of people at a public gathering at Wakiso trading centre. The evidence on record proved that the bribe was given to Kakande John Wycliff to distribute. Mr. Lukwago pointed out that the evidence of Kakande John Wycliff was disbelieved because he was not reliable.

As for the question of a bribe being offered to a group, Mr. Lukwago reiterated the authorities of **Hon. Mukasa Anthony Harris (supra) and Hon. Kirunda Kiveijinja (supra)** respectively.

<u>Bribery at Kitega village</u>

Mr. Lukwago submitted that the learned trial judge properly evaluated the evidence on record and made a correct finding that the 2nd appellant gave out bribes in form of

wrapped gifts, which turned out to be glasses, to the leaders and Bataka of Kitega village. They included, among others, Muwada Walusimbi and Bengo George. Mr. Muwada Walusimbi gave evidence that he was a registered voter at Kitega polling station. He was also a Mutaka of Kitega village.

Bribery at Mbalala

Mr. Lukwago submitted that the trial Judge had in mind the burden of proof and properly evaluated the evidence before her, before reaching the conclusion that the 2nd appellant gave out bribes at Mbalala.

Bribery at Kiwala Trading Centre

According to Mr. Lukwago, the learned trial judge made a correct finding that the 2nd appellant gave out a bribe at Kiwala trading centre. In counsel's view, the trial judge was right to believe the evidence of Kayondo Badru and disbelieved the evidence of the appellant and his witnesses. The bribe was handed over to the 2nd appellant's agent Etiang William alias Nandeeba, who was the village NRM Chairman, a party on whose ticket the 2nd appellant contested the election.

In conclusion, Mr. Lukwago submitted that the learned trial judge was justified in her conclusion that acts of bribery were committed by the 2nd appellant either directly or through his agents with his knowledge and consent or approval, as that finding was premised on the evidence on record.

In compliance with the provisions of rule 30(1) (a) of the Rules of this court, this being the first appellate court, I have re-appraised the evidence on record as a whole, before coming to conclusions. Bearing in mind that this court had neither seen nor heard the witnesses, it should make due allowance in this respect to the learned trial judge.

I have subjected the entire evidence on record regarding an election offence of bribery in this case to strict scrutiny. I have also considered the submissions of counsel for

both appellants and the respondent very carefully. The learned trial judge discussed the evidence adduced regarding the allegations of bribery in this case in details from her judgment commencing from pages 100-118 and came to the conclusion thus:
"In conclusion and on the evidence above. I find that several acts of bribery were committed by the 1st ***Respondent either directly or through his agents with his knowledge and I answer this issue in the affirmative".***

I have perused carefully the evidence adduced in connection with the allegations of bribery in this case and I agree entirely with the findings of the learned trial judge. I have no justification at all to fault her in her finding. In the premises, ground I of this appeal must fail.

Ground 2(b) – 2(g) and briefly ground 2(h) which overlaps all the grounds.
Ground 2(b)-2(g) states:

2) That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence presented before her and as a result came to wrong decisions that during the conduct of Mukono North Parliamentary Election:-

b) The 1st appellant's agents connived with the 2nd appellant's agents to commit electoral malpractices to the detriment of the respondent.

c) The 1st appellant had disenfranchised voters who were registered to vote at Gwafu I and Gwafu II polling stations and other polling stations that affected the result in a substantial manner.

d) The 1st appellant's agents forged election results.

e) The Declaration of results forms and tally sheet showed that there were ballot papers that were not accounted for.

f) No sufficient light was provided by the 1st appellant.

g) She shifted the burden of proof onto the appellants.

<u>Disfranchisement at Gwafu I and Gwafu II and other Polling Stations:</u>

Counsel for the appellants pointed out that the learned trial judge at page 15 of her judgment held thus:

> ***"After perusal of the evidence on this point, the Court also finds that the allegations that a number of voters who were issued voters cards to vote at Gwafu I and II did not vote because they were told on***

Polling day that their stations were non-existent is proved.

The Court is satisfied from their evidence that they were denied the opportunity to vote for their candidate namely the Petitioner as a result of the removal of the two Polling stations by the 2nd Respondent".

The above assessment by the learned trial judge, according to counsel for the appellants, is erroneous. First of all, appellants' counsel pointed out that it is inconceivable to believe that all persons alleged to vote at the said polling stations were only and only the petitioner's supporters. In their view, if the above allegations were to be taken to be true, even the 2nd appellant's supporters too were denied the same opportunity to vote.

Secondly, it is their contention that the mere being in possession of voters' cards that, had been issued in the previous voter's Registration process was not enough to prove that the said polling stations had been removed on the polling day. Counsel contended further that the said deponents did not show that during the display exercise they went to cross check their names and to verify where they were supposed to cast their votes from.

In paragraphs 4-7 of the affidavit of Badru Kiggundu, Chairman Electoral Commission and was alluded to by the trial judge in her judgment, the 2nd respondent/1st appellant had carried out an update of the Voters Register between 29th September 2005 and October 30th 2005. According to counsel, the same exercise was repeated between 22nd December 2005 to 17th January 2006 for purposes of giving all eligible persons the opportunity to cross check the particulars of their voter information in preparation for the election. Anomalies found would be corrected and missing persons were included in the Register. In their view, this evidence is credible and was not challenged at all.

Appellant's counsel submitted further that the respondent's evidence relied upon by the trial judge on pages 9-10 of her judgment was lacking in material particular to justify the finding of disenfranchisement of voters. In their view, most of these

affidavits are the same in material particular. It was counsel contention that the witnesses did not state whether they had previously checked their names during the update exercise.

It was further contended for the appellants that voters at Gwafu I and II had appeared in registers at different polling stations as per the evidence of Andrew Songa. This witness was an Election Official in charge of voter registration in Central Region and his evidence should have been accepted to that effect by the trial judge. The number of persons who were allegedly supposed to vote at Gwafu I and II was not ascertained. The alleged complaint lodged by the respondent was made on polling day.

Appellants submitted that the claim by the respondent that the disenfranchised voters at Gwafu I and II were over 1000 is not supported by evidence. It was also wrong for the learned trial judge to have found that it was those who were to vote for the respondent that were disenfranchised.

It was the contention of the appellants that a close analysis of the affidavits in support of the petition were exactly the same save the names of the deponents and polling stations. In their view, the evidence was concocted. According to the appellants, there is no evidence to show that it is only persons who were to vote for the respondent that were not on the Register.

Counsel further contend that another category of alleged disenfranchisement was persons who allegedly went to some polling stations and the Returning Officers hurriedly checked their names and told them to go away as their names were not in the Register. In yet another category, the deponents claim that they found their names missing during display and pointed out the anomaly to the Returning Officer who promised to rectify the same but on voting day their names were missing.

In both categories, counsel contend that the Returning Officer for the whole District was not a Display Officer at every polling station. Therefore, it is inconceivable that all these witnesses individually notified the Returning Officer. They do not show how they notified him. According to counsel, a perusal of these witnesses' affidavits

show that they are generic in nature.

Counsel pointed out that the learned trial judge in her judgment, made reference to the letter written by the respondent claiming disenfranchisement. The letter was received by the office of the Returning Officer. In the letter itself, the respondent claimed the election process had gone on for 5 hours. In counsel's view, the Court cannot estimate at what time the letter reached the office of the Returning Officer. The letter talks about the whole sub-county without specifying which polling stations that had such problems.

Counsel further contend that there is no reason why the learned trial judge did not believe the evidence of Namatovu Carol, Presiding Officer at Bajjo Polling Station. She narrated how she would thoroughly check the Register even if the person appeared without a voter's card. Her version was repeated by a number of Polling Officials. According to counsel, this is what the Polling Officials were duty bound to do.

As regards the evidence of Andrew Songa, the Election Officer in-charge of the voter's Register, Central North Region in the election, counsel submitted that the evidence of this particular witness shows that the complainants had their names appearing in other polling stations and as such his evidence should not have been rejected outright considering the fact that there had been a voter display exercise to keep the voters clear any such anomaly that would have appeared on the Register.

Counsel contend that the analysis of the learned trial judge appearing on pages 405-406 Vol. 3, seemingly shifts the burden of proof to the 1st appellant what would be expected of a Polling Official who is handling such an election. According to counsel, such officials should not have known every voter, he/she would only have to check names and if they appeared, issue ballot paper. In counsel's view, the learned trial Judge did not take note of the generic nature of most affidavits in support of the Petition. Their mere attachment of the voter's card of one's affidavit is not evidence that they did not cast their votes. Knowing every voter, he/she would only have to check names and if they appeared, issue ballot paper. In counsel's view, the learned trial Judge did not take note of the generic nature of most affidavits in support of the

Petition. Their mere attachment of the voter's card of one's affidavit is not evidence that they did not cast their votes.

Illegible voters

Section 19(2) of the Election Commission Act provides:

> ***"No person shall be qualified to vote at an election if that person is not registered as a voter in accordance with article 59 of the Constitution".***

Counsel for the appellants contend that the allegation of illegible voters was not pleaded for in the petition and accompanying affidavits. They submit that the respondent made a general allegation that the 1st appellant's officers and agents allowed persons not in the Register and not having voter's cards to vote. In support of their arguments, counsel pointed out that at page 40 of the judgment, the learned trial judge made the following finding:

> ***"In the petitioner's affidavit, general allegation of illegal acts and illegal malpractices were made. No specific averment on this allegation and no polling station or person was named".***

Having made the above finding, appellants' counsel contend that the learned trial judge should not have accepted the evidence of Nanjovu Justine that L.C.I Chairman, Lukomu came several times with persons not in the register but were allowed to vote. That not withstanding, counsel submitted that the learned trial judge still considered the affidavit of Nanjovu Justine and made a finding that her affidavit was not rebutted.

According to counsel, Nanjovu's affidavit was rebutted by the affidavit of Henry Lukomu in support of the 2nd appellant in which he denied the allegation. Further, counsel pointed out that Nanjovu claimed to have counted 17 people who had voted and that one Bengo George intervened but Bengo did not swear an affidavit to that effect.

As regards the ferrying of 69 students from Green Ville Secondary school, who were under age and without voter's cards but were allowed to vote at Takkajunge Polling

Station, appellants' counsel contend that at page 44 of her judgment, the learned trial judge formulated some questions thereby shifting the burden of proof to the appellants.

Counsel contend that Nakiwala Prossy, the Presiding Officer at Takkajunge Polling Station, in rebuttal in support of the 2nd Respondent/1st appellant, swore an affidavit stating that she saw only 10 students and allowed them to vote because they had voter's cards.

Counsel point out that the trial judge analysed the evidence of Nakiwala Prossy and made the following findings:

"This witness admits that there were complaints. That students from Greenville S.S came and voted. That Banana also came to the polling station. There is however a contradiction: She talks of only 10 students. Kyambadde Enoch, the Deputy H/M who actually drove them from school and ensured that each had a voter's card before leaving the school compound says he drove 20 students. Why are they lying? I reject their evidence and I believe the Senyondo's for that reason. I find that students from Greenville were ferried to vote at Takkajunge. They were over 60".

According to counsel for the appellants, the above findings were unjustified from the circumstances of the case because the affidavit of Nakiwala Prossy was not controverted.

<u>Issuing Voters Cards by Namutebi Joyce:</u>

Kawuma Abaas, an alleged election monitor the respondent claims Namutebi Joyce, campaign agent of the 2nd appellant, was found distributing voters cards at the polling station. This allegation is supported by evidence of Mukasa Elisa Nkoyoyo and Ssekatawa Robert. Counsel contend that in rebuttal, Namutebi Joyce swore an affidavit explaining that from the five cards one was for her, and the other 4 were for her children which she was keeping for safe custody.

According to counsel, the learned trial judge was in error and unfair to reject Namutebi's evidence wholesomely. Counsel contend further that the Police

Constable who allegedly had taken her to the police station did not swear an affidavit to that effect. Further, they submit that the witnesses for the petitioner/respondent do not state to whom the cards were issued and how many cards were confiscated.

CAMPAIGNING OUT OF TIME

Counsel for the appellants contend that the petitioner/respondent made general allegations of election malpractices committed by the 2nd appellant and/or his agents. They submit that the particulars of these allegations were neither contained in the petition nor its supporting affidavits.

Counsel contend that Lovincer Mugabe belatedly alleged in his affidavit that while at Kiwumu polling Station, as an agent of the respondent, she heard the Presiding Officer, Mubiru Bumbakali telling, several times that the NRM Bus appears near the 2nd appellant's picture and that they should tick there. The allegation was denied by Mubiru Bumbakali. He stated that he was busy with his work as a Presiding Officer and he did not tell anyone to vote for the 2nd appellant. Counsel submit that Mubiru's evidence was rejected. Counsel further submit no single voter who was told to look for the 2nd appellant was named.

Baganja Bernard alleged that he was the agent of the respondent at Nakanyi (A-M) Polling Station and saw 2nd appellant's agents approaching voters before they could join the line and tell them vote the 2nd appellant. Counsel contend that the said agents are not named nor are the voters named. That not withstanding, the allegations were denied by Sentongo Fathirlar but his evidence was rejected.

Lamula Bukenya, according to counsel for appellants, alleged that at Ntinda 1 Polling Station, he heard Betty Kyambadde, a Polling Assistant, telling voters to vote the Bus implying for the 2nd appellant. In rebuttal, counsel contend that although Betty Kyambadde admitted that she was a Polling Assistant at the Polling Station, she denied the allegation. Similarly, Sempebwa Robert also denied the allegation. Counsel contend that the trial judge rejected their evidence despite the fact that no voters were mentioned as having been told to vote the Bus.

At Kabembe Polling Station, Christopher Kayongo stated in his affidavit that he found Diriisa and Mirembe whom he knew very well as ardent supporters/agents of the 2nd appellant clad in NRM T. shirts and busy campaigning for the 2nd appellant. It is the contention of the appellants that this witness did not mention those who were told to vote for the 2nd appellant. Instead Mirembe Agnes denied wearing any NRM T-shirt and involving herself in open campaigning for the 2nd appellant.

At Namilyango Polling Station, Mukalazi David Salongo, respondent's agent, alleged that L.C. Chairman was appointed a Polling Assistant by the Presiding Officer because the polling Assistants were late. The Court held that he was illegally appointed and issued the ballot papers illegally. Counsel contend that the Presiding Officer appointed him to meet the exigencies of the situation to achieve the purpose of the law. In their view, counsel submitted that under section 50 of the Electoral Commission Act, the Commission is empowered to take such decision and acts through its staff.

Counsel contend further that the number of votes issued by the appointed Polling Assistant were not stated nor was it proved to the satisfaction of the court that such issuance of ballot papers affected the result in a substantial manner as envisaged under section 51 of the Election Petition Act. On the issue of illegal practices, counsel submitted that the particulars having not been pleaded in the petition and its supporting affidavits, the learned trial judge was in error to consider the belated affidavits containing the particulars. Further, counsel contend that there was no proof that they affected the result in a substantial manner.

The Declaration of Results Forms:

Counsel contend that all the alleged Declaration of Results Forms are not certified and some are not signed by the Presiding Officers. According to counsel, uncertified Declaration of Results Forms and those not signed by the Presiding Officers are of no evidential value. In support of this argument, counsel cited and relied on the decision of ***Kakooza John Baptist vs Electoral Commission & Anor (supra).***

Counsel submitted further that without the evidence of Declaration of Results Forms attached or annexed to the respondent's affidavits, the allegations relating to such

Declaration of Results Forms should be struck off as not supported by any evidence. According to counsel, no where is it shown that the votes polled by each of the three candidates were changed.

The respondent in Paragraph 9(i) of her affidavit in support of the petition stated that at some polling stations, the presiding officers filled the Declaration of Results Forms before the votes were counted and at some polling stations the time is not indicated. Therein she named the affected polling stations. The learned trial judge found that the allegations were proved. Counsel, however, contend that the allegations were not proved to the satisfaction of the court nor did it affect the result in a substantial manner.

As regards the complaint that some agents did not sign the Declaration of Results Forms, counsel submitted that even some agents of the 2nd appellant did not sign. On the issue that some Declaration of Results Forms had no serial numbers, counsel submitted that it is not fatal because the respondent does not contest the result. According to counsel, a number of Presiding Officers had explained the circumstances under which the Declaration of Results Forms were submitted and admitted and that does not affect the result since the votes polled by each candidate were not interfered with.

In paragraphs 13-14 of her affidavit, the respondent claims that the results at Kyungu polling station showed that the 2nd appellant had polled 184 instead of 154 votes while her votes remained intact. Counsel contend that if she wanted to prove this allegation, she would have applied to have that particular box opened and get certified copies of Declaration of Result Forms from the Electoral Commission. The learned trial Judge considered this allegation and made a finding that it was proved whereas not.

In conclusion, counsel for the appellants submitted that the errors in the Declaration of Results Forms did not affect the results polled by each candidate nor did they affect the result in a substantial manner.

Failure to adjourn the voting when it rained.

Section 29(1) of the Parliamentary Elections Act provides:

> ***"Polling should be conducted as far as possible in the open or in large premises of conveniences access".***

In the instant case, counsel submitted that the Presiding Officer did not need to adjourn the polling exercise since it was possible to have the exercise continued in the nearby unfinished building.

Ntinda I Polling Station

In her affidavit, Lamula Bukenya, a polling agent of the respondent, complained that counting votes started at 8:00p.m and the Presiding Officer was using a dim torchlight but a certain person took away the torch. Counting of votes continued in the darkness. Counsel contend that if that was true, she does not state who took away the torch.

Kiwanga I Polling Station

Sentongo Waswa alleges that counting at Kiwanga Polling Station was done using the light of a car which was later switched off. This allegation was rebutted by Issa Musoke, the Presiding Officer, who stated that the light of the car was never switched off. His evidence was rubbished by the trial judge on the ground of being partisan. Counsel submitted that this was a partisan election under multiparty politics whereby you would not rule out campaign agents and staunch supporters of the parties giving evidence.

Counsel contend further that it was wrong for the learned trial judge to condemn the witnesses of the 2nd appellant as being partisan without also condemning the witnesses of the respondent. According to counsel, this occasioned a gross miscarriage of justice to the 2nd appellant and indeed the 1st appellant as well.

Lutengo B and M

The 2nd appellant tendered the evidence of Nalwadda Justine and Phoebe Kiiza who

were Presiding Officers at Lutengo B and M and stated that they used steamer lamps at both polling stations. In her finding, the learned trial judge observed thus:

> ***"This evidence was manufactured to rebut the allegation by the petitioner's witness. There is no explanation why the rest of the stations used torches or even vehicle headlamps, if the 2nd Respondent had provided sufficient light in the form of steamer lamps".***

Counsel contend that the above holding is not based on the evidence of the 2nd Respondent's witness. The witnesses did not say the Electoral Commission provided steamer lamps. According to counsel, they stated that what was used at the said stations were steamer lamps. Counsel were wondering why the learned trial judge accepted the use of car head lamps but rejected the use of steamer lamps!

On the issue of ***"Disenfranchisement of voters at Gwafu I and II polling stations",*** Mr. Lukwago responded as follows:

First, according to counsel, it is not in dispute at all that the two polling stations, Gwafu I and II polling stations did not exist on the polling day. It is also not in dispute that the Electoral Commission issued voters' cards to voters indicating that they were supposed to vote at the said polling stations. Counsel for the appellants do concede that the said polling stations were not even gazetted. Counsel Lukwago is wondering why counsel for the appellants do not offer any explanation as to why the said polling stations never existed on the polling day, let alone being gazetted!

Secondly, Mr. Lukwago submitted that the contention that mere being in possession of voters' cards that had been used in a previous voters' registration process was not enough to prove that the polling stations had been removed on the polling day is therefore redundant. According to counsel, this is because there is no scintilla of evidence on record that the Electoral Commission made attempts to put them in place. Counsel pointed out that Makki, the Returning Officer of the Electoral Commission admitted during cross-examination that the two polling stations were non-existent.

Mr. Lukwago submitted further that counsel for appellants contend that it is inconceivable that all persons disenfranchised were only the respondent's supporters

but that even the 2nd appellant's voters were disenfranchised. Mr. Lukwago hastened to point out that the 2nd appellant is completely silent on this issue. He has never at any one time complained that the said polling stations never existed. Likewise, Mr. Lukwago submitted that no evidence was led to show that even one single supporter of the 2nd appellant was ever disenfranchised.

Mr. Lukwago contends that the trial Judge never made any finding that all the disenfranchised voters were supporters of the respondent. After analysing the evidence before her, the learned trial judge found that the majority of the disenfranchised voters were the supporters of the respondent.

Counsel for appellants attacked the affidavits of the said deponents on grounds that most of the affidavits were the same in material particular. According to Lukwago, this argument is untenable as all these witnesses were faced with the same situation and their fate was one: no polling station no vote.

Counsel for appellants contend that the number of voters at Gwafu I and II polling stations was not ascertained and that the claim that the disenfranchised voters at Gwafu I and II were over 1000 is not supported by evidence. This argument, according to Lukwago, is untenable because the 1st appellant which carried out the registration exercise, ought to have given the actual number of voters to rebut the respondent's claim. According to Tally sheet, there were 12 polling stations in Seeta Parish. The average number of voters in each of the 12 polling stations is 760. Therefore, Gwafu I and II polling stations would have more than 1000 voters as stated by the respondent whose evidence on this claim was not rebutted.

There is a contention by the appellants that the deponents did not show that during the display exercise they went to cross-check their names and verify where they were supposed to cast their votes from. According to Lukwago, the burden was upon the Electoral Commission to prove by evidence that whereas it carried out the display exercise, the petitioner's supporters did not turn up to check on where they would vote from. In counsel's view, the evidence of Engineer Badru Kiggundu, did not rebut the petitioner's evidence that voters issued with cards of Gwafu I and II polling

stations, who were her supporters, were disenfranchised. In that regard, the learned trial Judge was also right to reject the evidence of Andrew Songa.

Mr. Lukwago further submitted that the appellants' complaint on the finding of the learned trial judge on disenfranchisement of voters who went to the polling stations but were openly told by the respective presiding officers that their names were not on the voters' registers is, unjustified. That finding of fact, according to Lukwago, was supported by evidence before her which she analysed in her judgment from pages 15 to 29 thereof.

Mr. Lukwago further pointed out that the complaint that all the affidavits in support of the petition were exactly the same apart from the deponent's name and polling station is unfounded. According to counsel, all the deponents gave different registration numbers; some of them like Beatrice Nabasirye indicated the time when they went to their respective polling stations; others stated that they checked at nearby polling stations after being turned away. Further, counsel referred to the affidavit of one Nabisubi Deborah, who states that the presiding officer checked the register twice but her names were not found. Namutebi Juliet says her name was misspelled and that she pointed out this anomaly during display.

According to Mr. Lukwago, even if there were material similarities in the said affidavits, it would be quite erroneous for appellants' counsel to use that as a basis for their argument that the said evidence was concocted. This is because all the said disenfranchised voters who deponed affidavits had similar problems, as they were all victims of a systematic play by both appellants to rig the election. It is a surprise to Lukwago that counsel for the appellants argue that ***"there is no evidence that it is only persons who were to vote for the respondent that were not on the Register".*** The petitioner, according to counsel, proved that her supporters were disenfranchised. There is no scintilla of evidence on record to show that there is even a single known supporter of the 2nd appellant who was deleted from the Register. In counsel's view, the apparent desperate attempts by the appellants to suggest that even other candidates' supporters could have been affected is, misconceived, regrettable and not supported by evidence.

Appellants' counsel further contend that there is a category of deponents who claim that they found their names missing during display and pointed out the anomaly to the Returning Officer who promised to rectify the same but on voting day, their names were missing. Counsel for appellants contend that the Returning Officer for the whole District was not a Display Officer at every polling station, therefore, how did all these witnesses individually notify the Returning Officer?

Mr. Lukwago responded that no single witness ever claimed that he or she forwarded a complaint directly to the Returning Officer during the display exercise. It is only Nalubega Juliet who stated that when she was receiving her voter's card, she raised a complaint to the ***issuing officer*** about the spelling of her name and the issuing officer promised to rectify the same but did nothing up to polling day.

There is also contention that the trial judge makes reference to the letter made by the Petitioner about disenfranchisement. The appellants' counsel found it difficult for court to estimate at what time the letter reached the office of the Returning Officer. Mr. Lukwago referred us to paragraph 4 of the respondent's additional affidavit which reads:

"THAT on the 23rd day of February at around 11:00a.m, I notified the 2nd Respondent about the absence of the said two polling stations but no step was taken to address the situation (see copy of the letter addressed to the District Returning Officer attached hereto and annexed "T").

According to Lukwago, the above averment which was not rebutted, clearly indicates that the letter was delivered at around 11a.m.

Counsel for the appellants contend further that the said complaint of the respondent to the Returning Officer did not specify which polling stations were affected. According to Lukwago, the respondent clearly stated in her complaint that the problem was quite pervasive and the majority of the cases were from Goma Sub-County.

The appellants also seek to fault the finding of the trial judge on page 406 of her

judgment on grounds that the trial judge's analysis seemingly shifts the burden of proof to the appellants. Mr. Lukwago submitted that by posing the said questions, the trial judge was simply pointing out contradictions and discrepancies in the appellants' evidence which contradictions she found to be grave.

It is also argued by appellants that the presiding officer could not have known the voters save for checking their names. Mr. Lukwago pointed out that some of the presiding officers who swore affidavits claim to know the voters and they saw them vote, e.g. affidavit of Fredrick Lumala, presiding officer, Misindye polling station.

Ineligible Voters

It is the contention of counsel for the appellants that this particular allegation was not pleaded in the petition and accompanying affidavits. Mr. Lukwago referred us to Paragraph 5(7) of the petition that reads:

> ***Contrary to sections 29(4) and 34(2), (3) and (5) of the Parliamentary Elections Act, 2005, the 2nd Respondent's officers and agents allowed persons whose names did not appear on the voters' roll and/or who did not hold valid voters' cards to vote".***

Mr. Lukwago hastened to point out that Paragraph 5(d) also talks of failure by the Electoral Commission to control the distribution and use of ballot papers to eligible voters. In counsel's view, the allegations of ineligible voters was pleaded with all the accompanying affidavits.

There is also a contention that the finding of the judge on this issue was erroneous in as much as the judge observed that the evidence of Nanjovu Justine was not rebutted yet there was an affidavit by Lukomu. Mr. Lukwago submitted that the trial judge correctly found that Lukomu's affidavit contained general denials and therefore she rejected it. Counsel pointed out that Penninah Nakazibwe, the presiding officer, swore an affidavit but she never rebutted the averments of Nanjovu Justine.

Further, counsel for the appellants contend that Najovu's evidence required corroboration. Mr. Lukwago replied that there is no stringent legal requirement for corroboration in such cases. In counsel's view, the case of ***Amama Mbabazi vs Musinguzi Garuga (supra)*** is not applicable under the circumstances where the

evidence of Najovu pins the presiding officer, she opts to keep quiet about it.

On the question of ferrying students from Greenville S.S to vote at Takkajunge polling station, counsel for the appellants attack the finding of the trial Judge, specifically on the questions raised by the judge at page 44 and contend that the trial judge shifted the burden of proof to the appellants. According to Lukwago, the judge was pointing out contradictions and discrepancies in the appellants' evidence. In counsel's view, all the questions raised by the judge were supposed to be answered by the appellants' witnesses if only their evidence was to be believed.

Counsel for the appellants further contend that the respondent had a burden to prove that the students were not on the register and that some of them were underage. Mr. Lukwago's reply is that the respondent evidence, which was believed by the trial judge, is quite clear that these students never identified themselves and the presiding officer was not checking their names on the register, not even producing their cards.

Appellants' counsel further argue that it is not known for whom the students voted especially when the election was for three categories of candidates. Mr. Lukwago pointed out that the respondent's witness, one Ssenyondo Moses asserted in para. 4 of his affidavit that these students were under the patronage of 2nd appellant's campaigner, councillor Namubiru. Mr. Lukwago submitted that neither the 2nd appellant nor councillor Namubiru rebutted this averment.

There is also a contention that Nakiwala Prossy did not contradict Kyambadde as the former talked of 10 students yet the latter claims they were 20. According to Lukwago, this is a fact which is obvious. Counsel further contend that since Nakiwala was handling three categories of elections, she could not have counted the voters from Greenville. In counsel's view, this contention is hypothetical and not supported by evidence as Nakiwala claims she took trouble to count them and they were only 10 students.

Seeta IV Polling Station

Counsel for the appellants attacked the finding of the trial judge on the incident at

Seeta IV polling station involving one Namutebi Joyce, L.C.I Secretary for information and campaign agent of the 2nd appellant, who was found distributing cards at the polling station. Counsel argued that the learned trial judge was unfair to wholesomely reject the evidence of Namutebi Joyce for containing obvious lies.

Mr. Lukwago submitted that by using the word "wholesomely" counsel seem to suggest that at least there were some aspects of her evidence which were not false. According to Lukwago, counsel for the appellants do not point them out. They simply argue that if Namutebi held cards for children who were above 18 years, it would not be an exaggeration.

Campaigning at Kiwumu, Nakapinyi, Ntinda I and Kyampisi Polling Stations.

The finding of the trial judge on the issue of campaigning at the above polling stations is as follows:

> ***"In conclusion and based on the affidavits on record and the findings, court is satisfied that this allegation was proved by the petitioner".***

Counsel for the appellants contend that the above finding was erroneous. It is the submission of Mr. Lukwago that the trial judge properly analysed the evidence on record from pages 48 to 52 of the judgment and came to a proper finding.

Counsel Lukwago pointed out that counsel for the appellants are silent about Namilyango and Kikandwa polling stations which fall in the same category. In his view, counsel for the appellants are satisfied with the judge's findings as far as those polling stations are concerned.

Declaration of Results Forms and Falsification of Results

Counsel for the appellants contend that those Declaration of Results Forms ***"must have been obtained from the petitioner's supporters and agents"*** and that the normal practice is for the petitioner to ask for certified copies from the Electoral Commission or opening the ballot boxes to retrieve the Declaration of Results Forms therefrom.

According to Mr. Lukwago, the above argument is untenable for the following

reasons:

i) ***Declaration of Results Forms given to the candidates through their agents are as genuine as the Declaration of Results Forms sealed in the box or kept by the Commission as envisaged by the provision of section 50(1) (d) of the Parliamentary Elections Act.***

ii) ***Counsel for the appellants are basing their argument on what they call "normal practice", but they do not cite any law to that effect, as far as Mr. Lukwago is concerned. In counsel's view, such practice does not supersede the express provision of S.50(1)(d) of the Parliamentary Elections Act.***

iii) ***Mr. Lukwago pointed out that it was agreed by all parties at the commencement of the trial that all documents on record were admitted and no question as to the source was raised. In his view, it is not legally tenable to raise a question of admissibility at this stage of appeal.***

iv) ***Further more, Mr. Lukwago pointed out that some Declaration of Results Forms were adduced by the appellants' witnesses, for example: Sonde, Ntinda II and some others were confirmed and indeed adopted by the witnesses such as Beebwa Evasy (Kyungu), Sempebwa Robert (Ntinda II) and Makki Ibrahim (Returning Officer).***

The appellants further contend that whatever errors on the Declaration of Results Forms concerning the accountability of votes did not affect and/or change the number of votes polled by the candidates at the various polling stations. This argument, according to Mr. Lukwago, implies that counsel for the appellants concede that the trial judge was right to find as a fact that the Declaration of Results Forms were not accurate, which amounted to a breach of electoral laws.

As regards the contention that errors did not affect or change the number of the votes polled by the candidates at the various stations is, according to Mr. Lukwago, redundant as it is not supported by the evidence on record. In his view, the electoral laws give no room for polling officials to make false returns or inaccurate accountability of ballot papers and results. Therefore, the trial judge properly

analysed the evidence on record and came to a correct finding.

Counsel for the appellants raised several questions about the respondent's evidence concerning the issues of filling Declaration of Results Forms before the end of the polling process, and the chasing away of the respondent's agents. According to Mr. Lukwago, counsel do not point out the faults in the trial judge's findings on the issue. In his view, the trial judge properly analysed the evidence on record from page 53 to 57 of the judgment and came to a correct finding.

Counsel for the appellants also assert that the respondent's complaints in paragraph II of her affidavit that the 1st appellant's agents used Declaration of Results Forms which were fake because they do not show serial numbers. That the respondent does not contest the results but only questions the Declaration of Results Forms because they do not show serial numbers. Mr. Lukwago replied that this argument is also redundant because it does not point to a particular fault in the findings of the judge. In his view, counsel are silent on the validity of such Declaration of Results Forms without serial numbers.

Sonde Polling Station

According to Mr. Lukwago, counsel for the appellants do not specifically point out the faults in the trial judge's findings about the electoral fraud at this polling station save for the fallacious contention that if the respondent wanted to ***"verify the information"*** given by Mutesasira Mesach, the presiding officer, she should have applied to open the ballot boxes of the various polling stations; and that the trial judge should have rejected the affidavit of Nsumba Kefa.

Mr. Lukwago submitted that the trial judge properly evaluated the evidence on record and arrived at the following findings of fact at pages 67-70 of the judgment, which counsel for the appellants could not fault:

i) ***That there was no Declaration of Results Form filled at Sonde polling station and therefore, no copy was sealed in the box.***

ii) ***That the results were filled on five pieces of paper from an exercise book which indicated that the respondent polled 366 and 2nd***

appellant polled 260 votes.

iii) That the said pieces of paper on which the results were summarized were duly signed by the agents present.

iv) That the said pieces of paper were not supplied to the presiding officer by the Electoral Commission.

v) That the presiding officer gave three copies to agents of candidates.

vi) That Mutesasira admitted that the particular piece of paper which was exhibited in court was in his hand writing and had his signature.

vii) That the purported Declaration of Results Form was filled at the Sub-County headquarters contrary to the electoral laws, and

viii) That Mutesasira is a liar.

Mr. Lukwago submitted that all the above findings have not been challenged by counsel for the appellants. Counsel submitted further that the contention that the affidavit of Nsumba Kefa should have been rejected is neither here or there because the Judge looked at the totality of the evidence on record.

Kiwanga Polling Station

Counsel for the appellants simply state ***"My Lords, Annexture L2 pg 88 of the record, the presiding officer Musoke Issa states that he did not get the forms in time".*** According to Mr. Lukwago, they are not saying anything about the evidence of the respondent's witnesses, let alone the finding of the trial judge at p.72-73 of the judgment.

That not withstanding, Mr. Lukwago submitted that the evidence of Musoke Issa was riddled with grave contradictions and therefore incredible.

Ntinda II Polling Station

Counsel for the appellants admit that the Declaration of Results Form for polling station was whitewashed but the results remained the same to wit, the respondent polled 150 votes, 2nd appellant 103 votes. They therefore contend that the respondent does not show what the result was other than that shown on the

Declaration of Results Forms.

Mr. Lukwago submitted that the trial judge properly analysed the evidence on record and came to a proper finding that the purported Declaration of Results Form for Ntinda II was not genuine. The evidence of Mukyakaze Katende, respondent's agent, Teddy Nakabiri, presiding officer etc clearly indicated that the respondent had polled 259 votes and not 150 as alleged.

Counsel for the appellants further contend that much as teddy Nakabiri denies having signed the Declaration of Results Form, she signed it. According to Mr. Lukwago, counsel do not point out any evidence of any person who saw her sign. The 1st appellant did not adduce any evidence about this polling station, Lukwago emphasised.

In counsel's view, in light of the overwhelming evidence of the respondent, it would be untenable for counsel for the appellants to suggest that the trial judge should have ordered the re-opening of the ballot boxes.

Kyungu Polling Station.

The learned trial judge found that Ms Beebwa Evasy, polling official, altered the election results of Kyungu polling station behind the respondent's back after declaring results. The appellants argued that Beebwa was overwhelmed by task of handling a 3-in-one election. Mr. Lukwago was quick to point out that even the 2nd appellant's witness, one Ssempungu Kennedy pinned Beebwa for having altered the results deliberately.

In conclusion, Mr. Lukwago submitted that the appellants' arguments to the effect that because of the many discrepancies on the Declaration of Results Forms, the respondent should have sought for opening of the ballot boxes is untenable. The respondent has proved her averments, the excess votes at Buyuki, Namilyango, Misindye and Takajjunge polling stations, among others, it was incumbent upon the appellants to give satisfactory explanation for the excesses.

The criticism of the learned trial judge's finding on the averment that the Electoral Commission failed to provide light during the vote counting is unjustified. Mr. Lukwago pointed the evidence of Lumala Bukenya in respect of (Ntinda I), Sentongo Wasswa, (Kiwanga I), Christopher, (Nakapinyi A-M & N-Z), Sowedi Lwanga (Lutengo A & B) and Baliika polling stations respectively.

Regarding disenfranchisement at Gwafu I and Gwafu II and other polling stations, the trial judge in her judgment stated thus:

"After perusal of the evidence on this point, the court also finds that the allegation that a number of voters who were issued voters' cards to vote at Gwafu I and II did not vote because they were told on polling day that their stations were non-existent is proved.

The Court is satisfied from their evidence that they were denied the opportunity to vote for their candidate, namely the petitioner as a result of the removal of the two polling stations by the 2nd Respondent. Article 59 of the Constitution casts an obligation on the state to ensure that all Ugandans who qualify to vote vote. The Electoral Commission is charged with that duty under Article 61 of the Constitution.

The other category of voters that were allegedly disenfranchised are those voters who alleged that they went to the polling stations and were openly told by the presiding officers that they were not on the voters register after the presiding officers hurriedly looked through the registers or at times, did not look at the register at all".

After perusing the evidence on record and considering the submissions of counsel for the parties, I entirely agree with the above findings of the learned trial judge. I have no justification to fault her on those findings.

On the issue of illegible voters, the learned trial judge stated as follows: ***"In conclusion and based on the affidavits on record and the findings, court is satisfied that this allegation was proved by the petitioner".*** I entirely agree with her finding

on the allegation.

Regarding Declaration Forms and falsification of Results, the trial judge summed as follows:

> ***I have dealt with these Declaration of Results Forms in details earlier. I need not repeat the ruling on them. For emphasis, I wish to state that I am satisfied on the basis of the evidence adduced that the 2nd Respondent's officers did not comply with the provisions of sections 47 and 50 of the PEA in the way they handled the vote counting and the Declaration of Results Forms in most of the stations enumerated above. This ground succeeds".***
>
> I have no good reason to fault her on the above finding. She was also justified to find that the 2nd Respondent failed to provide sufficient light at the stations mentioned.
>
> At the end of the day, whether there was non-compliance with the provisions and principles set out in the PEA, the learned trial judge observed thus:
>
> ***"Having found as I have on most of the grounds raised, I agree with counsel Lukwago that the election held at Mukono North Constituency fell short of the election envisaged under our election laws. It is well known that there is no perfect election the world over. This one fell far below the required standard. There was a Declaration of Results Form which was white washed and a total of 30 votes added to the 1st Respondent. A number of Declaration of Results Forms were not filled at the polling stations because they were not provided with the rest of the election materials. They were later on filled at the Sub-County District headquarters. Results were filled on a piece of paper from an exercise book and later on transferred to a Declaration of Results Form leading to another difference of 100 votes in favour of the 1st Respondent. The election at Mukono North Constituency was extremely poor. This greatly affected the result in a substantial manner and the 1st Respondent benefited from it".***
>
> The above findings cover ground 2(h) and grounds 3 and 6 of the appeal by the appellants. In the premises, ground 2 of this appeal must also fail.

In the result, I find no merit in this appeal. Since my Lord Byamugisha, JA, also agrees, I would dismiss this appeal with costs here and in the High Court to the respondent.

Dated at Kampala this …26th.. day of …March …….. 2009.

S.G. Engwau

JUSTICE OF APPEAL

JUDGMENT OF BYAMUGISHA, JA

I had the benefit of reading in draft form the lead judgment prepared by Engwau, JA which has been delivered.

I agree with him that this appeal ought to fail in the terms he has proposed.

Dated at Kampala this …***26th*** .. day of …***March***…2009

C.K.Byamugisha

Justice of Appeal

JUDGMENT OF JUSTICE S.B.K. KAVUMA

I read in draft the judgment prepared by my learned brother S.G Engwau JA.

I have some different views from those of my brother in that judgment as will appear in the following pages .

The facts, the orders sought by the respondent and as responded to by the trial court, the subsequent appeals filed in this Court and their eventual consolidation and the consolidated memorandum of appeal, the four issues framed, the representations and generally the submissions of counsel for both parties are as stated in the judgment of S.G. Engwau JA. I need not, except for emphasis where I do, repeat them.

I find the following to be the most serious matters covered in the grounds of appeal and the issues framed therefrom.

a) The complaint that the 2nd appellant was denied a fair hearing and fair trial when the trial court condemned him on illegal practices and/or offences allegedly committed by him personally or by his agents with his

consent, knowledge or approval which were neither properly pleaded nor proved particularly the offence of bribery.

b) That the trial judge was in error to find that as a result of the conduct of the officials of the 1st appellant in connivance with the 2nd appellant and or his agents committed electoral offences and illegal practices as a result of which the results of the election in Mukono North Constituency were substantially affected to the benefit of the 2nd appellant and to the detriment of the respondent.

The right to fair hearing is provided for in our constitution in **Article 28** which reads in part:-

"28 Right to Fair Hearing

1) **In the determination of Civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impertial court or tribunal established by law**"

By this constitutional provision, which is one of those that are underogable under **Article 44** of the Constitution, the right to a fair hearing is extremely important in the adjudication of matters between parties.

To operationalise this constitutional provision with regard to the resolution of electoral disputers among contestants, rule 4 of the Parliamentary Elections (Election Petitions) Rules, S.I 141-2 was made under S93 of the Parliamentary Elections Act.
The rule provides inter alia

"**4 Form of Petition**

1) ……

2) **Every petition shall state**

a) ……

b) **The holding and results of the Election together with a statement of the**

grounds relied upon to sustain the prayer of the petition and

c) …….

3) …….

4) …….

5) …….

6) …….

7) …….

8) The petition shall be accompanied by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely.

This rule which is coached in mandatory terms is, to my mind, the foundation upon which pleadings, on the part of the petitioner, that will ensure fair trial of the petition from the point of view of the respondent, is based.

The Civil Procedure Rules made under the Civil Procedure Act which also apply to trials of election petitions, have substantially similar provisions.

The necessity and purpose of a clear system of pleadings in litigation cannot be underrated. Oder J.S.C, as he then was, in **Interfreight Forwarders (U) limited** and East **African Development Bank** stated thus:-

> "**The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between**

> **the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adijucate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern …….the trial and which the court will have to determine at the trial**"

In **DFCU Bank LTD Vs Dr. Nakate Lusejjere C.A.C.A No. 21 of 2004** (Unreported), Byamigisha JA had this to say.

> "**The system of pleadings is designed not only to define with precision and clarity the issues or questions which are disputed between the parties but also to fulfill some of the most fundamental principles of natural justice. These are that each party should have a reasonable opportunity of answering the claim or defence of his/her opponent and each party should have a reasonable opportunity of preparing and presenting his/her case**."

In **Esso Petroleum Company Ltd Vs South Port corporation [1956] AC 218** Lord Norman stated the purpose thus:-

> "**The function of pleadings is to give a fair notice of a case which has to be met so that the opposite party may direct his evidence to the issues disclosed by them**".

In **C.A Bisuti Vs Busoga District Administration C.S. No 83 of [1969]** the court addressing its mind to the function of particulars in pleadings had this to say:-

> "**The function of particulars was to carry into operation the overriding principle that the litigation between the parties and particularly the trial should be conducted fairly, openly and without surprise. They served to inform the other side of the nature of the case they had to meet as distinguished from the**

> **mode in which the case was to be proved; to enable the other side to know what evidence they ought to be prepared for trial and to prevent the other side from being taken by surprise**."

Though a high court case, I find it appropriate to quote **Bisuti** (supra) with approval.
In a nutshell, therefore, pleadings and the particulars thereof which should be given, should be precise not general, clear and timely, to afford the other party a fair and adequate opportunity to prepare his/her appropriate evidence and defence to the claim against him/her for a fair trial and to avoid any element of surprise to the opposite party.
Any pleadings that fall short of this, would in my view, fail to meet the constitutional requirements of **Article 28(I)** and the law on pleadings. It would also go contrary to fundamental principles of natural justice entrenched in our Constitution and other law.
A meaningful application of the law as stipulated above to the matter now before us must, in my view, address the trial of the petition holistically as a process and not as an event. Such application should start right from the time the respondent can be understood to have contemplated seeking redress from court over that election.
By her own pleadings, the respondent indicates she was anxious about the election right from campaign time. Further, in her letter to the Returning Officer dated the 23rd Feb 2006, she indicated she would hold him responsible for the consequences of his inaction. From this evidence, I infer the respondent started preparing for court action earlier than the election day but certainly, at the latest, on the election day itself. Necessarily, therefore, the respondent started gathering evidence to be used in the petition at that time.

When it came to filing the petition in court, the respondent did so referring to allegations against the appellants in very general terms as exemplified by paragraphs 6 and 7(a) of the petition. Then in paragraph 9 the respondent incorporates into the petition nonexistent documents referred to as 'other affidavits' to be filed in court. Five months later, when the hearing of the petition by the trial court is about to commence, the respondent confronts the appellants with numerous affidavits in ***support*** of the petition filed into court five months earlier. It is in these affidavits that

facts that should have been stated in the affidavit accompanying the petition are given.

To respond to the allegations and the evidence contained in the said affidavits assembled in five months, the appellants are given a mere 20 days. Within that short time, the appellants had the onerous task of looking for witnesses to rebut each and every allegation and piece of evidence in the respondent's pleadings in a situation where the enthusiasm with which the elections were held, six months before, had long died down making it extremely difficult for the appellants to organize witnesses and gather the necessary evidence from them.

Is this the kind of fair hearing and fair trial envisaged under **Article 28** of our Constitution, the other laws of the land and the fundamental principles of natural justice? To answer that question we shall first look at what may be regarded as constituting fair hearing and fair trial.

Examining the question what is a Fair Trial, the Lawyers Committee for Human Rights in its Basic Guide to Legal Standards and Practice, March 2000 states thus:-

> ***"The right to a Fair Trial is applicable to both the determination of an individual's rights and duties in suits at law and with respect to the determination of any criminal charge against him/her. The term "suit at law" refers to various types of court proceedings including administrative proceedings for example because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties…… The standards against which a trial is to be assessed in terms of fairness are numerous, complex and consistently evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving…… The right to fair hearing encompasses the procedural and other guarantees…. The single most important***

> ***criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms …….. Equality of arms which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position.***
>
> ***The right to adequate time and facilities for the preparation of a defence applies not only to the defendant but to his or her defence counsel as well and is to be observed in all stages of the proceedings…. What constitutes "adequate" time will depend on the nature of the proceedings and the factual circumstances in a case. Factors to be taken into account include the complexity of a case, the defendant's access to evidence, the time limits provided for in domestic law for certain actions in the proceedings etc.*** *See* ***http://www.ichr.org, http://www.ichr.org.***
>
> To the above, the Amnesty International Fair Trial Manual adds….
>
> ***"The right to trial within a reasonable time may be balanced against the right to adequate time to prepare a defence."***

All the above concepts are clearly embodied and rooted in **Article 28** of our Constitution and other laws of the land.

We now proceed to answer the question whether in the instant appeal, the appellants

were afforded a fair trial particularly the 2nd appellant.

Turning to the respondent's pleadings, it is clear to me they failed to comply with the law in that behalf.

All the illegal practices or other offences allegedly committed by the 2nd respondent personally or by his agents with his knowledge and consent or approval and indeed all those alleged against the 1st appellant are merely mentioned in various paragraphs of the petition in very general terms. They were similarly treated in the affidavit of the respondent in support which accompanied the petition. The learned trial judge acknowledge this shortcoming in her judgemnet when she stated

> "***In the petitioner's affidavits, general allegation of illegal acts and illegal malpractices were made. No specific argument on this allegation and no polling station or person was named*** *(sic)* (See pg 40 of the judgment)
>
> "There is no specific averment in the petitioner's supporting affidavit. She however makes a general statement on offences in paragraph 6" (See page 101 of the judgment),

The learned trial judge, then goes on to say

> ***"Specifics are given by her witnesses who named various villages where alleged acts of bribery were committed including…"***
>
> *(See* Pg 101 of the judgment).

Counsel were at variance on the status of these other affidavits by the petitioners' ***witnesses.*** Counsel for the 2nd appellant contends that they were not part of the petition envisaged under Rule 4 of S.I 141-2 of 2005. According to him, they did not ***accompany*** the petition within the meaning of rule 4.8 which, in his view, and I agree, is mandatory. Counsel for the respondent strongly contended that these affidavits, though filed five months after the respondent's petition had been presented to court, were part and parcel of the petition. They were all in support of the petition.

I have given very careful consideration to this matter and the law regarding the same. I am persuaded that both the petition and the affidavit of the petitioner accompanying

it dealt with the alleged malpractices and offences therein on the part of the appellants only in very general terms without giving the necessary particulars as correctly observed by the learned trial judge in the passages quoted above from her judgment. Granted, the affidavits of the other witnesses of the respondent are in support of her petition as argued by counsel for the respondent. The law however, in Rule 4.8 of S.I 141-2 specifically requires that the petition shall be ***accompanied*** by an affidavit setting out the facts on which the petition is based together with a list of any documents on which the petitioner intends to rely.

Agreeably, and as pointed out by learned counsel for the respondent, and correctly so, in my view, the law does not restrict the petitioner to filing only one affidavit. A petitioner may file one or more such affidavits. Such affidavit or affidavits however, must, accompany the petition and set out the facts on which the petition is based. Lists of documents to be relied upon by the petitioner must also be given in the affidavit or affidavits accompanying the petition. These facts, in our considered view, are what are otherwise elsewhere in law referred to in terms of pleadings as particulars.

It is a cardinal rule of statutory interpretation that where the words of a statutory provision are clear and un ambigious, they should be given their ordinary meaning. The Parliamentary Elections Act and the rules made thereunder do not define the word accompany. According to Black's Law Dictionary, however, the word accompany means 'to go along with'. It is our firm view that those affidavits in support of the petitioner's petition which were deponed to by her other witnesses, five months after the filing and presentation of the petition to court did not accompany the petition in terms of the meaning of rule 4.8 of S.I 141-2. They were, in our view additional evidence by the other witnesses of the petitioner.

The petitioners' additional affidavit in support, which too was filed into court in August 2006, five months after the filing and presentation of the petition, was additional evidence from the respondent. These could only substantiate matters that would have been properly pleaded in the petition and the affidavits that went along with it when it was first presented to court.

I am mindful of the fact that the respondent stated in paragraph 9 of the affidavit in support of the petition which accompanied it when it was presented to court, that there

would be other affidavits in support of the petition to be filled later. This was an effort, in my view, by the respondent to incorporate those other or additional affidavits into the petition by reference. We are of the view however, that incorporation of a document into election pleadings by referring to the document in those petition can only be proper and effective if the document sought to be so incorporated is in existence at the time of incorporation. That is how a document would help the parties to know the clear and precise facts or particulars called for by our system of pleadings to avoid surprise.

The learned trial judge, therefore, in our view, fell into error when she accepted the respondent's additional affidavit in support of the petition and those other affidavits in support of the petition deponed by the petitioner's other witnesses five months after the petition had been filed into court as part and parcel of the petition by virtue of incorporation of those documents by reference.

That being the case, for a period of five or so months, the appellants particularly the 2nd appellant were denied knowledge of the facts or particulars of the case they were to face and be required to answer. They were unfairly kept in the dark. This violated their right to know the facts of that case contravening the concept of fair hearing and fair trial, the general law on pleadings, rule 4.8 of S.I 141-2 and above all a fundamental principle of natural justice. The respondent, was in possession of these particulars for many months before she offered to furnish them to the appellants. The respondent did not even indicate in a list what documents she intended to rely on as required by rule 4.8, SI 141-2.

Learned counsel for the respondent put up a spirited argument that the 2nd appellant had had adequate time to respond to the allegations against him, that he did not raise any objection to the question of non availability of the necessary particulars of these allegations, that he admitted to all the affidavits on record and that he should not now raise any objection.

Counsel for the 2nd appellant submitted that in fact an objection was raised. He submitted, further, that the time in which the 2nd respondent had to respond to the allegations and evidence raised in the appellant's pleadings was too short and that when the particulars of the allegations against him were purported to be furnished to

him, it was too late. He saw no bar to the 2nd respondent raising these objections.

As clearly indicated in the judgment prepared by my learned brother S.G Engwau JA, this Court granted leave to file a consolidate Memorandum of Appeal in which paragraph 1 reads;

> **"That the learned trial judge erred in law and fact and denied the 2nd appellant Fair Trial when she considered and relied on specific particulars of alleged bribery not specifically pleaded in the petition and its attached Affidavit to make findings that during the conduct of Mukono North Parliamentary Elections, the 2nd Appellant committed illegal practices and/or offences personally or by his agents with his consent, knowledge or approval."**

In the issues which were framed by both counsel for the parties for determination by the Court, issue 4 thereof captures the substance of the above ground in the following words.

> **"4 Whether the learned trial judge denied the 2nd appellant a fair trial when she considered and relied on particulars of alleged bribery not specifically pleaded in the petition."**

Those two paragraphs, to my mind, offer a proper foundation for the 2nd respondent to raise the objections he raises. Further, our careful perusal of the record reveals to us that in fact, counsel for the 2nd respondent raised substantially similar objections at the trial. At page 312 of the record the following passage is found:

> *"2.30 Pm BYENKYA* ***(contnd)***
>
> ***BRIBERY-7(a) C/S 68(i) PEA***
>
> ***i) these allegations of bribery are not properly pleaded as required by the law. See Article 4(8) of PEA Rules. The petition shall be accompanied by an affidavit and list of documents to be relied on.***

The rule is mandatory.

There is a general statement in the petition (7(a)) does not identify any single voter who was allegedly bribed, it does not specify any place where the alleged bribery could have taken place, it does not specify any form of bribery. The petition therefore tells us nothing. This is what the 1st Respondent was served with. The affidavit is support says nothing at all about bribery,. All the facts must first be alleged in the petitioner's affidavit. They must not be hidden away. They must not be kept as a secret record. This petition is in breach of the mandatory requirements of rule 4(8) and does not make out any case worth investigating by this court, of bribery. In these matters the CPR still apply. When you allege fraudulent matters you must plead them and you must give particulars in your pleadings. The purpose is to give a fair trial. In this case the 1st respondent has not been given a fair trial because he only got to know the delegations after the affidavits had been filed. Then he had to scramble a round to look for affidavits in rebuttal. Our trial system is based on fair trial. All facts must be set out in the pleadings from the onset. This ground should fail." (sic)

The above, in my view, is a clear objection by the 2nd appellant which culminates into a complaint that he was not accorded a fair trial.

On counsel for the respondent's submission that the filing of the additional affidavits was agreed to by the 2nd appellant, we find no consent order on the record to that effect. The learned trial judge only says that after discussing with counsel, she directed that additional affidavits be filed.

Counsel for the respondent then, on the strength of this, statement argues that the 2nd appellants cannot now turn around and say that those additional affidavits cannot be part of the petition. In effect he raises the doctrine of estoppel.

As stated earlier, the law governing the form of petitions and the accompanying

affidavits is rule 4.8 of S.I 141-2. Even if counsel for the appellants were to have admitted to the filing of the additional affidavits, incidentally rule 4 does not have a proviso for filing additional affidavits, the law is well settled that incorrect admissions made by counsel during the course of hearing on a matter of law cannot bind a client.

Pushapa Vs Fleet Transport company [1960] EA 1025

Failure to comply with statutory provisions while filing an election petition is a matter of law. Further, it is well settled that statutory rights cannot be lost by the invocation of the doctrine of estoppel. See **Griffiths Vs Davies [1943] KB 618.** No estoppel, whatever its nature can operate to annul statutory provisions. See also **Income Tax Commissioner Vs A.K [1964] EA 648**. Most importantly however, the right to a fair trial is a constitutionally guaranteed right under **Articles 28** and **44** of the Constitution.

In **De souza v Tanga Town Council [1961]ea 3777** the former Court of Appeal for East Africa held:-

> **"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice that decision must be declared to be no decision."**

In the instant petition the appellants rights to a fair hearing and fair trial were clearly violated contrary to the provisions of **Articles 28** and **44** of the constitution, rule 4.8 of SI. 141-2 of 2005 and the rules of procedure under the Civil Procedure Act.

These provisions embody, inter-alia, important and fundamental principles of natural justice which were greatly compromised throughout the entire process of the preparation and prosecution of the petition to the disadvantage of the appellants. As such, the appellants did not have a fair hearing or fair trial.

This was a very complicated case involving numerous affidavits and witnesses, vital facts were kept away from the appellants in the general and imprecise pleadings of the respondent. While the respondent took more than five months to prepare for the legal

exchange with the 2nd appellant the former was given very short time to prepare and present his defence yet the necessary facts should have been given to him at the time of the filing of the petition and the affidavit of the respondent which accompanied the petition.

No list of the documents the respondent intended to rely on was ever given in the affidavit accompanying the petition. The kind of peacemeal pleading exhibited in this petition is exactly the kind of thing the Supreme court in **Halling Manzoor and Serwan Singh Baram, Civil Appeal No. 9 of 2001** condemned when Mulenga JSC as he then was, held:-

> "**With respect to counsel, this submission is strange and un acceptable. A party seeking relief from the court must present his case fully, not piecemeal or in installment**."

Iam aware of the need to expeditiously dispose of electoral petitions and the time frame stipulated by law but this must be balanced against the constitutional right of the appellants to a fair hearing and fair trial. Unlike in Presidential elections Petitions where the time benchmarks are rigidly fixed by the constitution, for parliamentary election petitions the provisions of the law are somewhat flexible in that the court has discretion to extend the time of disposal of an election petition in a deserving case. On the above grounds and on the authority of **De Souza's** case (supra), the whole of this appeal should fail and I so hold.

There is one other matter which concerns the additional affidavit of the respondent, those of the other witness in support of the petition and the annextures thereto. These, particularly the tally sheet and the Declaration of Results Forms were so heavily relied upon by the respondent to prove the alleged illegal practices and offences allegedly committed by the officials of the 1st appellant and with their connivance with the agents of the 2nd appellant with his knowledge, consent or approval or by the 2nd respondent himself.

All of these annextures or exhibits are, without a single exception, from sources other than the Electoral Commission. The said commission is the official body authorized to keep custody of those documents. The documents themselves are official

documents under S 73 of the Evidence Act. Therefore, as such they should be proved by certified copies from the Electoral commission. None of them is so certified, according to the evidence on record. There is hardly any evidence that the Electoral Commission was ever required or notified to produce them into court. Counsel for the respondent, when confronted with this problem from the submissions of counsel for the 1st appellant respondet that it was not true that the respondent never asked for those Declarations of Results Forms and the tally sheet. He pointed out that a letter had been written to the Electoral Commission asking for the documents. The letter in question is dated the 22nd June 2006.

Our careful perusal of the letter of the above date annexed to the appellant's additional affidavit in support of the petition as annexture **'U'** reveals that the letter requested for the National Voters Register for members of parliament for a number of parishes in Goma Sub County. Nowhere in that letter is either a request for, or a notice to produce the said documents by the Electoral Commission is revealed. It is our inference, therefore, that the Electoral commission was never asked to provide the appellant with either the tally sheet or any of those Declaration of Results Forms. Similarly, the 1st respondent was never notified, as required by law, that those Declaration of Results Forms and the tally sheet should be produced. See **Kakooza John Baptist Vs Electoral Commission and Another, Election Petition Appeal No. 16 of 2006(sc)**. The non certification of these documents and the failure by the appellant to ask for them from or give the required notice to the 1st respondent to produce them in court rendered the source of the Declaration of Results Forms and the tally sheet in issue highly questionable. In fact, it is on record that one of such Declaration of Results Form for Sonde polling station was retrieved from one, Kizito, a shop keeper in the locality neither being an official of the 1st appellant nor a polling agent of the respondent.

I am not persuaded that because under the provisions of the law the Electoral Commission officials are obliged to complete forms that are exactly the same for the retention of the 1st respondent in the sealed boxes containing the official results and those retained by the other recipients, the source of those used without complying with S 73 of the Evidence Act should not been questioned. This failure removed any evidential value from those documents that they may have had, had they been

certified or had they been requested for or had the 2nd appellant been duly notified to produce them in court.

The legislature must have had a reason to provide for that mode of proof of the contents of those official documents kept by official bodies. To depart from that mode would be to undermine the reason the legislature had to provide so. It is my view that the other copies of the Declaration of Results Forms and the tally sheet to other recipients were provided for different purposes other than for them to be used in court as sole evidence of proof of the contents of documents required by law to be kept and certified or produced as evidence by the 1st respondent in courts of law.
Another matter that calls for some concern is the fact that not sufficient court fees were paid for the affidavits and the exhibits annexed thereto.

On careful perusal of the record I noted that all the affidavits relied upon by the respondent were to be found in volumes marked as Vol I, where shs 18,000/= vide receipt No 3377753 was paid, which therefore covered 12 affidavits instead of the 38 affidavits in that volume which should have attracted a total payment of shs57,000/= at the rate of shs 1500/= per affidavit as required by law, Vol. II where a total of shs 51,000/= was paid to cover the fees for the 34 affidavits in that volume. Receipt no 2646125 is on record for this amount. Another volume is marked in hand writing as Vol II, 'owners copy'. On this one, no fee is indicated as paid at all. Last is the volume containing, the respondent's additional affidavit in support of the petition together with the various annextures thereto.

One conspicuous factor in all the affidavits in those four volumes is that no fee was paid and or endorsed as paid as court fees for any of the numerous exhibits annexed to those affidavits as is required by law.

I am not unmindful of the now settled position that nonpayment of court fees under rules is a minor irregularity which should not bar the court from pursuing substantive justice especially where, like in **Matsiko Winifred Komuhangi Vs Winie Babihuga Election Petition Appeal No. 9 of 2002** the deficiency in fees is made up though at a late stage.

Another case that merits consideration here is **Rtd Col Dr. Kizza Besigye Vs Electoral Commision and Yoweri Kaguta Museveni, Presidential Election Petition No. 1 of 2006** where non registration of an affidavit deponed to in a foreign country was considered a matter that could not bar the court to admit the affidavit.

To my mind however, each of those cases is distinguishable from the instant petition.
In **Matsiko's** case, (supra) the fees were actually paid into court belatedly though. Further, the courts were dealing with matters provided for in regulations and not situations provided for by a substantive provision in an Act of Parliament.
In **Rtd Col Dr. Kizza Besigye's** case (supra) the Supreme Court, which in matters of Presidential Election Petitions is both the court of first instance and the final court was dealing with a Presidential Election Petition.
Apart from the significancy of a presidential election to the nation, not anywhere near or comparable to the election in a Parliamentary constituency, the time benchmarks in the trial of a Presidential Election Petition are rigid fixtures of the Constitution. For Parliamentary elections the law allows some flexibility at the discretion of the court to extend the time within which the hearing of an election petition can be completed if circumstances so warrant.
In the case before one of a dispute over elections in a parliamentary constituency, the respondent fully appreciated the duty to comply with the law on payment of court fees. This is why in one volume full fees for the affidavits were paid and in other, attempts were made to pay though in part. For some reason however, despite the opportunity to cure the deficiency in court fees payment under S97 of the Civil Procedure Act, no efforts were made by the respondent to take advantage of the flexible situation now prevailing in this area. Laws are made for a purpose and they should be complied with by all, especially those who seek justice.
S.97 of Civil Procedure Act provides:-

> **"97 Power to make up deficiency of court fees.**
> **Where the whole or any part of any fees prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at Any stage, allow the person by whom the fee is payable to pay the whole or part, as the case may be, of that court fees; and upon the payment, the document in**

respect of which the fee is payable, shall have the same force and effect as if the fee had been paid."

The respondent did not take advantage of this provision. This was a serious omission on her part which the Court should condon. These affidavits for which no fees was paid and all the exhibits annexed to all the affidavits filed by the respondent in the petition cannot be accorded the full force and effect at law as if the fees had been paid in the first instance. The affected exhibits include inter-alia, all the Declaration of Results Forms, the tally sheet for Mukono County North Constituency, the Uganda Gazzette date the 27th March 2006 etc.

On the proof of the alleged irregularities, commission of illegal practices and election offences including bribery on the part of the 2nd respondent personally or by his agents with his knowledge, consent or approval, once I held as I did, that the offence and illegal practices were not properly pleaded, then logically it followed that there was nothing to prove. There is therefore no need to belabor the question of proof of the same.

However, I will make the following observations.

The offence of bribery is provided for in S.68 of the Parliamentary Elections Act which provides thus-:

"**68 Bribery**

1. **A person who, either before or during an election with intent to 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.**

2. **A person who receives any money, gift or other consideration under subsection (I) also commits the offence under that subsection**

3. **……..**

4. **……**

5. ……..

6. **A person who during the campaign in respect of an election solicits from a candidate or a candidate's agent any money, gift, alcoholic beverage or other consideration in return for directly or indirectly influencing another person to vote or to refrain from voting for a candidate or in consideration for his or her voting for the candidate or not voting for another candidate, commits an illegal practice"**

The language of the above section is clearly talking about a person targeted for a bribe to be a voter. It necessarily, in my view, follows that one of the ingredients to be proved in the offence of bribery is that the target person or persons is or are registered voters. Group bribery therefore, in my view, has no place in that law. The offence can only be proved against members of a group in their individual capacities basing on particulars relevant to each ones' status as a registered voter.

If Parliament intended to cast the net so wide as to get groups and villages, it would have clearly stated so. Iam comforted in this view by the holding of my learned sister C.K Byamugisha JA in **Kirunda Kivejinja Ali vs Katuuntu Abdu Election Petition Appeal No. 24 of 2006** at page 27 when she stated;

> "It is therefore essential in allegations of bribery for the party alleging the same to prove on a balance of probabilities that the person or persons allegedly bribed were registered voters." I am fortified in the same view by the holding of the Supreme Court in the case of **Rtd Dr.Kizza Besigye Vs Electoral Commission and Yoweri Kaguta Museveni, Presidential Election Petition No.I of 2006** in which Oder, JSC, as he then was stated;

"One of the conditions necessary for the operation of S63 of the Presidential Elections Act was to prove that the person who is bribed is a voter".

Mulenga, JSC, as he then was, agreed with his brother on this matter when he stated;

"There was no evidence to show that the one bribed was a registered voter"

Sections 63 of Presidential Elections Act and 68 of the Parliamentary Elections Act are in substantially similar terms.

The non certification of the Declaration of Results Forms and the tally sheet completely destroyed the evidential value of those vital documents. Further, non rectification of the deficiency in the court fees, in my view, fatally affected the affidavits in support of the respondent's petition which accompanied the petition, those which were deponed to by the Petitioners' other witnesses together with all the annextures thereto in that they could not be accorded full force and effect in law.

Much of the evidence in proof of the election offences and illegal practices allegedly committed by various officials of the 1st appellant was derived from these documents affected in the two ways shown above. Good examples are the numbers of over one thousand voters stated in the respondent's letter to the Returning Officer regarding the disenfranchisement of voters in Gwafu I and Gwafu II, and the Declaration of Results Forms so heavily relied upon by the petitioner to prove that over 100 votes were unjustifiably added to those polled by the 2nd appellant. Consequently this had serious adverse effect on the evidence that would otherwise go to support the petitioners' case to the required standard. To discharge the burden the petitioner had to satisfy the court on the allegations she made in the petition.

On a thorough scrutiny of all the evidence on non compliance with the principles and provisions of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act, I note that most of these affected the elections in one sub county of Goma and only two parishes in the Kyampisi sub county. Considering that the entire Parliamentary constituency of Mukono county North comprises of five sub counties and a town council, the non compliance, the offences and illegall practices allegedly committed were, in my considered view, not wide spread, not to the extent of

warranting invalidating the elections in the entire constituency. Further it is now settled law that a party seeking to overturn an election result on the grounds of non compliance and or irregularities irrespective of whether he goes by the quatitative or qualitative test must show not only the effect of the non compliance or irregularities but must also satisfy the court that that effect on the results was substantial .

I appreciate there were several weaknesses in the management of the Parliamentary election in Mukono county North exemplified by failure to provide some of the vital election materials like Declaration of Results Forms, lack of adequate lighting at some polling stations where the voting and counting of votes spilled over into the evening in the dark, e.t.c. There is however, on the whole, insufficient evidence, in my view, to determine the effect of those weaknesses and the non compliance to justify a finding that the results of the election for the member of parliament for the constituency were substantially affected and to the prejudice of the appellant.

In the final result and for the reasons given above, I would allow the appeal with costs to the appellants both here and at the High Court.

Dated this……**26th** ……day of…**March**…….2009

……..

STEVEN S.B.K KAVUMA,

JUSTICE OF APPEAL