

**THE REPUBLIC OF UGANDA  
IN THE SUPREME COURT OF UGANDA AT KAMPALA  
PRESIDENTIAL ELECTION PETITION NO. 01 OF 2016**

10 **(CORAM: KATUREEBE,C.J; TUMWESIGYE, KISAAKYE,ARACH  
AMOKO, NSHIMYE, MWANGUSYA ,OPIO-AWERI, MWONDHA,  
TIBATEMWA-EKIRIKUBINZA, JJ.SC.)**

**AMAMA MBABAZI .....PETITIONER**

15 **VERSUS**

**YOWERI KAGUTA MUSEVENI.....1<sup>st</sup> RESPONDENT  
ELECTORAL COMMISSION.....2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

20 **PROFESSOR OLOKA ONYANGO & 8 ORS.....AMICI CURIAE**

**DECISION OF THE COURT**

25 The Petitioner, who was one of the candidates in the Presidential election that  
was held on the 18<sup>th</sup> February, 2016 petitioned the Supreme Court, under the  
Constitution, the Presidential Elections Act and the Electoral Commission Act.  
He challenged the result of the election and sought a declaration that Yoweri  
Kaguta Museveni, was not validly elected and an order that the election be  
annulled.

30 On the 20<sup>th</sup> February 2016, the 2<sup>nd</sup> respondent declared the election results as  
follows;

5	- <b>Abed Bwanika</b>	<b>86,075 (0.93%)</b>
	- <b>Amama Mbabazi</b>	<b>132,574 (1.43%)</b>
	- <b>Baryamureeba Venansius</b>	<b>51,086 (0.55%)</b>
	- <b>Benon Buta Biraaro</b>	<b>24,675. (0.27%)</b>
	- <b>Kiiza Besigye Kifefe</b>	<b>3, 270,290 (35.37%)</b>
10	- <b>Mabiriizi Joseph</b>	<b>23,762 (0.26%)</b>
	- <b>Maureen Faith Kyalya Waluube</b>	<b>40,598 (0.44%)</b>
	- <b>Yoweri Kaguta Museveni</b>	<b>5,617,503 (60.75%)</b>

The petitioner contends that the election was conducted without compliance with the provisions and the principles of the Presidential Elections Act, 2000  
 15 the Electoral Commissions Act, 1997 ( hereinafter referred to as the “PEA”, and the “ECA” ) and the 1995 Constitution and that this affected the result of the election in a substantial manner. For this, he faults the 2<sup>nd</sup> respondent.

Among the specific complaints against the 1<sup>st</sup> respondent are that several illegal practices and electoral offences were committed by him either  
 20 personally, or with his knowledge and consent or approval.

The petitioner made no specific complaint against the 3<sup>rd</sup> respondent but several allegations were made against public servants and security personnel.

The 1<sup>st</sup> respondent denied the petitioner’s allegations of breaches of the law. The 2<sup>nd</sup> respondent opposed the petition and contended that the election was  
 25 held in compliance with the provisions of the electoral laws and asserted that, if there was any noncompliance, which was denied, it did not affect the results of the election in a substantial manner.

The 3<sup>rd</sup> respondent opposed the petition and also contended that the Attorney General was improperly joined as a party to the petition.

5 All the respondents sought the dismissal of the petition with costs.

At the commencement of the hearing, counsel for the petitioner applied under **Article 126 of the Constitution, Section 100 of the Civil Procedure Act and Rule 15 of the Presidential Elections (Election Petitions) Rules, 2001** vide **Miscellaneous Application No. 1 of 2016** to amend the petition. The application was allowed and the Amended Petition was filed on the 7<sup>th</sup> March 10 2016. The Respondents filed their answers to the Amended Petition on the 9<sup>th</sup> March 2016.

Two applications were brought before court prior to the hearing of the petition for leave to intervene as *amicus curiae* in the petition. The first one, **Professor** 15 **Oloka Onyango & Ors (MA No 2 2016)**, was brought by lecturers from Makerere University Law School jointly. The second application, **Foundation for Human Rights Initiative & Ors, (MA No 3 of 2016)**, was brought by Civil Society organizations. Court allowed **Miscellaneous Application No. 02 of 2016** and dismissed **Miscellaneous Application No. 3 of 2016**. The 20 Makerere University lecturers filed their amicus brief on the 17<sup>th</sup> of March 2016 which was copied to the parties.

The hearing commenced on **14<sup>th</sup> March, 2016** and ended on **19<sup>th</sup> March, 2016**. **Article 104** of the Constitution and **Section 58** of the Presidential Elections Act require that the petition must be inquired into and determined 25 expeditiously and Court must declare its findings not later than thirty days from the date the petition was filed. Judgment was thus set to be delivered on 31<sup>st</sup> March 2016.

In accordance with the Presidential Elections (Election Petitions) Rules 1996, the parties filed affidavit evidence in support of each party's case. Furthermore,

5 the chairman of the 2<sup>nd</sup> respondent, Engineer Dr. Badru Kiggundu was cross-  
examined by the petitioner's counsel. Although the petitioner stated in his  
affidavit that he had annexed affidavits set out in a list mentioned as Annexure  
'A' as well as copies of Election Observers reports, that was not the case.  
These affidavits were in fact never filed in Court nor were the Election  
10 Observer Reports. The petitioner however, filed other affidavits on or about the  
10<sup>th</sup> of March 2016.

At the pre hearing conference, the parties agreed on the following facts:

1. *That there was a presidential election conducted by the 2<sup>nd</sup> respondent on the 18<sup>th</sup> February, 2016.*
- 15 2. *That on 20<sup>th</sup> February 2016, the 1<sup>st</sup> respondent was declared as validly elected president with 5,617,503 votes representing 60.75% of the valid votes cast.*
3. *That on the 20<sup>th</sup> February 2016, the petitioner was declared to have polled 132,574 votes representing 1.43% of the valid votes cast.*

20 The agreed issues were:

1. *Whether there was noncompliance with the provisions of the, Presidential Elections Act and Electoral Commission Act, in the conduct of the 2016 Presidential Election.*
- 25 2. *Whether the said election was not conducted in accordance with the principles laid down in the Constitution, Presidential Elections Act, and the Electoral Commission Act.*

5        3. *Whether if either issue 1 and 2 or both are answered in the affirmative, such noncompliance with the said laws and the principles affected the results of the elections in a substantial manner.*

10       4. *Whether the alleged illegal practices or any electoral offences in the petition under the Presidential Election Act, were committed by the 1<sup>st</sup> respondent personally, or by his agents with his knowledge and consent or approval.*

5       5. *Whether the 3<sup>rd</sup> respondent (Attorney General) was correctly added as a respondent in this election petition.*

15       6. *Whether the petitioner is entitled to any of the reliefs sought.*

### ***Representation***

At the hearing, the petitioner was represented by learned counsel Mohamed Mbabazi, Michael Akampurira, Asuman Basalirwa, Severino Twinobusingye and Jude Byabakama. The 1<sup>st</sup> respondent was represented by learned counsels  
20 Didas Nkurunziza, Ebert Byenkya, Kiryowa Kiwanuka, Joseph Matsiko, Edwin Karugire and 30 others.

The 2<sup>nd</sup> respondent represented by learned counsels Enos Tumusiime, MacDosman Kabega, Alison Karuhanga, Okello Oryem, Enoch Barata, Eric Sabiti, Tom Magezi and Ivan Kyateka.

25       The learned Deputy Attorney General, Hon. Mwesigwa Rukutana led the team of learned counsel for the 3<sup>rd</sup> respondent which comprised the learned Solicitor General Mr Francis Atoke and learned counsel Martin Mwambutsya, Phillip Mwaka , George Karemera, Elisha Bafirawala, Patricia Mutesi and Jackie Amusugut .

5 **DISCUSSION AND COURT FINDINGS:**

We have since completion of the hearing had opportunity to peruse and evaluate the evidence before us. We have also studied the authorities cited to us and carefully considered the submissions by learned Counsel for the parties. We have made findings on each of the allegations presented to Court.

10 We are however, not in a position to give detailed reasons for our findings and decision due to the Constitutional timeline imposed on the Court to render judgment within 30 days from the date of filing the petition. We shall therefore announce our decision on the issues framed and will give our detailed reasons and findings at a later date.

15 **Burden and Standard of Proof**

Section 59 (6) of the Presidential Elections Act authorises the Court to annul an election only if the allegations made by the petitioner are proved to the satisfaction of the Court. An electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner to place **credible**  
20 evidence before court which will satisfy the court that the allegations made by the petitioner are true. The burden is on the petitioner to prove not only noncompliance with election law but also that the noncompliance affected the result of the election in a substantial manner. Once credible evidence is brought before the Court, the burden shifts to the respondent and it becomes the  
25 respondent's responsibility to show either that there was no failure to comply with the law or of if there was any noncompliance, whether that noncompliance was so substantial as to result in the nullification of the election.

Where a petitioner in a Presidential Election Petition brings allegations of noncompliance with electoral laws against the electoral body on the one hand

5 and allegations of electoral offences and/or illegal practices against a candidate  
declared as the President Elect on the other, as is in the matter before us, varying  
standards of proof exist within the same case. For the Court to be satisfied that  
an electoral offense was committed, the allegation must be proved beyond  
reasonable doubt. On the other hand, the standard of proof required to satisfy the  
10 Court that the Electoral Commission failed to comply with the electoral laws is  
above balance of probabilities, but not beyond reasonable doubt.

### **Evidence adduced**

The petitioner relied on his amended Petition as well as the following evidence  
to support his case:

- 15 (a) The Petitioner's Affidavit in Support of his Amended Petition and  
additional affidavit:
- (b) 67 Affidavits sworn in support of the Petition.
- (c) Video CDs attached to his affidavit but which his counsel neither  
referred to in his submissions nor specifically introduced in evidence  
20 and was thus not viewed during the hearing;
- (d) Oral evidence adduced by the petitioner through the cross examination  
of the Chairman of the 2<sup>nd</sup> respondent;
- (e) the Election Results of all the 112 Districts of Uganda, which included  
the Return Form for each respective District as at 20<sup>th</sup> February 2016,  
25 the Results Tally Sheet for each District as at 20<sup>th</sup> February 2016 and  
the Declaration of Result Forms for all the 28010 Polling Stations in  
Uganda;
- (f) We further note that in both his initial and amended Petition, the  
Petitioner indicated that he intended to rely on reports from election

5           observers. The reports were however neither attached to the pleading  
filed in Court nor to the copies that were served on the respondents.  
When counsel for the 1<sup>st</sup> respondent brought this matter to the Court's  
attention, the Court directed counsel for the Petitioners to file the  
attachments and also to serve the parties. On the 12<sup>th</sup> March ,2016,  
10          Counsel for the petitioner wrote to counsel for the 1<sup>st</sup> respondent copied  
to the Registrar of the Court enclosing the Observer Reports which he  
said had been inadvertently left out. However, on March 18<sup>th</sup> 2016,  
before the close of the hearing of the Petition, counsel for the  
respondent brought to the Court's attention the fact that they had agreed  
15          with counsel for the Petitioners for the said documents to be withdrawn.  
This position was confirmed by counsel for the Petitioner.

We further note that on the last day of the hearing, counsel for the Petitioner  
attempted to tender into evidence, a document he referred to as a matrix which  
he alleged would show polling stations where the total number of persons who  
20          voted exceeded the registered voters in the said stations. Upon objection of  
counsel for the respondents that the matrix was based on forgeries, the Court  
directed counsel for the petitioner to indicate the primary source of the  
information he was presenting. On failing to do so, Counsel withdrew the  
matrix.

25          The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents each filed various affidavits in rebuttal of the  
allegations.

30          **ISSUE No.1: Whether there was Non-compliance with the provisions of the  
Presidential Elections Act and Electoral Commission Act, in the conduct of  
the 2016 Presidential Election.**



5 In his Amended Petition, the Petitioner made several allegations of non-compliance with the provisions of the PEA and the ECA against the 2<sup>nd</sup> Respondent, the Electoral Commission (EC). Some of the allegations relate to noncompliance that occurred prior to the elections, while others focus on alleged noncompliance that happened on Election Day and those that happened  
10 after the close of polling up to the time of declaration of the 1<sup>st</sup> respondent as the winner of the Presidential elections.

### **Illegal Nomination of the 1<sup>st</sup> Respondent**

The petitioner alleged that **contrary to sections 9 and 10 of the PEA**, the 2<sup>nd</sup> respondent nominated the 1<sup>st</sup> respondent on the 3<sup>rd</sup> November, 2015, when he  
15 had not yet been sponsored by the National Resistance Movement (NRM) on whose ticket he purportedly contested. The Petitioner relied on his affidavit in support of his Petition to support this allegation.

The 2<sup>nd</sup> respondent denied the allegation and contended it properly and duly  
20 nominated the 1<sup>st</sup> respondent after he had complied with all the requirements of the law.

The 1<sup>st</sup> respondent also denied this allegation and relied on the affidavit of Kasule Lumumba, the Secretary General of the NRM party, which confirmed  
25 that the 1<sup>st</sup> Respondent was endorsed by the NRM Delegates' Conference on 2<sup>nd</sup> November 2016 as the presidential candidate for the NRM party, in accordance with its Constitution.

We have carefully considered the affidavit evidence adduced by the parties.  
30 We have studied the provisions of **section 9 and 10 of the PEA** which govern

5 sponsorship and nomination of presidential candidates. We have also carefully considered **section 11 of the PEA** which provides for the factors on the basis of which the nomination of a person duly nominated can be invalidated. The allegations made by the petitioner do not fit any of these factors.

10 Based on our findings above, we find that the 2<sup>nd</sup> respondent nominated the 1<sup>st</sup> Respondent as a Presidential candidate in accordance with provisions of the PEA.

15 (i) **Illegal Extension of deadline for nomination of Presidential Candidates**

The petitioner alleged that **contrary to sections 11 of the PEA**, the 2<sup>nd</sup> respondent failed to declare the 1st respondent's nomination papers null and void and instead acted improperly when it extended the deadline to give the 1st respondent more time after all other candidates had submitted their respective  
20 documents.

Counsel for the 2<sup>nd</sup> respondent acknowledged that the 2<sup>nd</sup> respondent extended the deadline for nomination. It was averred that **section 50 of the ECA** empowers the 2<sup>nd</sup> respondent to extend the time for doing any act and that the extension was necessitated by the late passing of electoral law reforms by  
25 Parliament. That the extension was not meant to benefit any of the presidential candidates.

We have carefully considered the affidavit evidence and respective submissions of the parties. We note that indeed **section 50 of the ECA** grants  
30 powers to the EC to extend the time for doing any act. Section 50(2) in

5 particular provides that the provisions of section 50 apply to the whole electoral process, including all steps taken for the purposes of the election which includes nomination. We are also of the view that **section 11 of the PEA** is not applicable to this situation.

10 Accordingly, we find that there was no failure on the part of the 2<sup>nd</sup> respondent to comply with **section 11 of the PEA**.

(ii) **Failure by 2<sup>nd</sup> respondent to Compile a National Voters' Register**

15 The Petitioner alleged that **contrary to Article 61(1) (e) of the 1995 Constitution, sections 12 (f) and 18 of the Electoral Commission Act**, the 2<sup>nd</sup> Respondent abdicated its duty of properly compiling and securely maintaining the National Voters' register. He further alleged that the 2<sup>nd</sup> respondent instead illegally and irregularly retired the duly compiled 2011 Voters' Register and purported to create another one, using data compiled by  
20 the Ministry of Internal Affairs for purposes of issuing National Identity Cards (National IDs).

The 2<sup>nd</sup> respondent contended that it properly compiled, revised and updated the National Voters' Register in accordance with its constitutional and statutory duties. That all voters were duly and legally identified as being on the voters'  
25 roll in accordance with the PEA.

We have carefully studied the provisions of **Article 61(1)(e) of the Constitution** and **sections 12 (f) and 18 of the ECA** which govern this issue. We have also carefully considered the affidavits and submissions of the parties and made the following findings:

30

5 (i) There was a National Voters’ Register which was compiled, updated, displayed and used by the Electoral Commission to conduct the 2016 Presidential Elections. We have noted that **section 18(1) of the ECA** obliges the 2<sup>nd</sup> respondent to ***“compile, maintain and update on a continuing basis a National Voters Register.”***

10

(ii) The petitioner received a copy of the National Voters’ Register in his capacity as one of the Presidential candidates.

15 (iii) The allegation that the 2<sup>nd</sup> respondent used data compiled by the Ministry of Internal Affairs is not correct. The data was compiled by the National Identification and Registration Authority, on whose Governing Board the 2<sup>nd</sup> respondent is a member.

20 (iii) The compilation of the National Voters’ Register was in compliance with the **Article 61(1)(e)** and **section 18(1) of ECA** and **section 65(2) of the Registration of Persons Act, 2015** which states that: ***“The Electoral Commission may use the information contained in the Register to compile, maintain, revise and update the Voters’ Register.”***

25 (iv) That the 2<sup>nd</sup> respondent’s use of data compiled by the National Identification and Registration Authority to compile the National Voters’ Register did not in any way negate the independence of the 2<sup>nd</sup> respondent which is guaranteed under the Constitution.

- 5 (v) That the petitioner did not adduce any evidence of any person who had been disfranchised by the 2<sup>nd</sup> respondent's use of the new National Voters' Register in the 2016 Presidential elections.

Accordingly, we find that the 2<sup>nd</sup> respondent complied with the provisions of  
10 the Constitution, the Electoral Commission Act and the Registration of Persons Act.

(vi) **Failure by the 2<sup>nd</sup> respondent to issue and use Voters' Cards during the Presidential Election, resulting into the Disenfranchisement of Voters**

15 The petitioner alleged that contrary to **sections 30(4) and 35 of PEA**, the 2<sup>nd</sup> respondent identified voters using the National ID issued by the National Identification and Registrations Authority instead of voters' cards issued by the 2<sup>nd</sup> respondent.

The 2<sup>nd</sup> respondent admitted that voters' cards were neither issued nor used  
20 during the last Presidential elections. Relying on **section 26 of the ECA**, the 2<sup>nd</sup> respondent submitted that that section is not couched in mandatory terms to require them to print and issue a voter's card for use at each election.

Further reliance was placed on section **66(2) (b) of the Registration of Persons Act, 2015**, which requires the mandatory use of national IDs for  
25 identification of voters.

In light of the provisions of the law cited, we find that the 2<sup>nd</sup> respondent complied with the law when it used the National ID for identifying voters instead of the voter's card.

5 (vii) **Use of unreliable Biometric Voter Verification Machine (BVVK)**  
**and Failure by the 2<sup>nd</sup> respondent to identify Voters**

The Petitioner alleged that **contrary to section 35 (1) and (2) of the PEA**, the 2<sup>nd</sup> respondent failed to identify voters by their respective voters' cards but instead applied an unreliable, slow and suspect biometric identification  
10 machines, thereby denying legitimate registered voters their right to vote and creating room for persons not duly registered to vote.

Further that contrary to **sections 30(4) of the PEA**, voters were identified on polling day using the National Identity Cards instead of the voters' cards. That  
15 as a result, eligible voters who did not register for the national identity cards were disenfranchised.

The petitioner relied on the affidavit of Nakafero Monica who was the petitioner's agent at Kasangati Headquarters Polling Station and who deponed  
20 that *“at 4:00 P.M., polling agents said that the biometric machine was no longer functional”*

The 2<sup>nd</sup> respondent admitted that each polling station was supplied with the BVVK machine. They contended that the purpose was to improve transparency  
25 and integrity of the process of identification of voters at polling stations; prevent multiple voting, impersonation and to confirm or direct a voter to their polling station. That each polling station was supplied with a hard copy of the voters roll as the basic document for identification of voters registered to vote at that particular polling station. That all registered voters were duly and  
30 legally identified as being the voters on the voters roll in accordance with the

5 PEA and were allowed to vote. The 2<sup>nd</sup> respondent further averred that voter identification was three faceted:-

1. Use of the BVVK through verification of a voter's fingerprints.
2. Use of National Identity Cards.
3. Use of a hard copy of the Voters' register at the polling stations.

10

There was evidence that some of the BVVK machines were not efficient and some did not work at all. However, the principal document used to identify voters was the Voters' register.

15 It is therefore our finding that the use of the BVVK did not, in itself, constitute noncompliance under the PEA and it did not disenfranchise voters.

(viii) **Late delivery of polling materials**

20 The petitioner alleged that **contrary to section 28(a) (b) (c) of the PEA**, officials of the 2nd Respondent delivered voting materials late on Election Day and that at many polling stations, voting did not commence until 2:00 p.m., 4:00 p.m. and 8:30 p.m. in some places and ended after 1:00 a.m. The Petitioner relied on affidavit evidence of several deponents to support these allegations.

25

The 2nd respondent averred that late delivery of election materials occurred only in some polling stations in 2 districts out of 112, to wit Kampala and Wakiso. It was further averred that in the affected polling stations, the time for voting was extended and voting was carried out and completed. It denied that  
30 there was any polling which commenced at 8.30 p.m. and/or went on up to 1.00

5 am anywhere in the country. The 2<sup>nd</sup> respondent relied on the affidavits of its chairman and of other officials.

The 2<sup>nd</sup> respondent conceded that polling material in some parts of Kampala and Wakiso were delivered late. Evidence was however adduced of late  
10 delivery of materials in some other polling stations in other parts of the country.

It is the Court's finding that the 2<sup>nd</sup> respondent did not comply with its duty under **Section 28 of the PEA**. The failure to deliver polling materials to polling  
15 stations within such close proximity to the Commission was evidence of incompetence and gross inefficiency by the electoral body.

(ix) **Failure by the 2<sup>nd</sup> respondent to control polling materials**

The petitioner alleged that **contrary to sections 12 (b) and (c) of the ECA**,  
20 the 2<sup>nd</sup> respondent failed to control the distribution of ballot boxes and ballot boxes resulting in the commission of numerous election offences in that unauthorized persons and or officials of the 2<sup>nd</sup> respondent got possession of election materials and used them to stuff the ballot boxes, tick the ballot papers on behalf of voters, vote more than once and/or doctor figures in the  
25 Declaration of Results Forms (DRFs) and Tally sheets.

The Petitioner relied on the affidavit evidence of two deponents to support his allegation.



5 The 2nd respondent averred that it carried out its duty of distributing ballot boxes and papers in accordance with the law and only authorized persons handled the polling materials, DRFs and Tally Sheets.

10 This allegation encompasses several other allegations made by the petitioner which include starting voting without opening ballot boxes, pre-ticking and stuffing of ballot papers which we deal with in our subsequent discussion.

(x) **Starting Voting without first Opening Ballot Boxes.**

15 This assertion by the petitioner was not supported by any other evidence. In the absence of evidence of persons who witnessed incidents of voting without opening ballot boxes, Court finds that noncompliance has not been proved.

(xi) **Allowing Voting without Secret Ballot**

20 The petitioner alleged that in some places such as in Kiruhura District and ‘the cattle corridor’, voting was not done following the principle of secret ballot. The petitioner relied on the affidavit of Kenneth Kasule Kakande, his appointed agent at Kinyogoga Barracks, Nakaseke District, who claims that when the voting started the ballot box was not sealed and the voters were dropping the votes in the open box rather than through the hole on top of the box.

25 The same witness claimed that a security official stood near the basin where the voters were ticking their votes and thus compromising the secrecy of their ballots.

5 The 2nd respondent denied that any voting was carried out in breach of the principle of secrecy of the ballot as alleged by the petitioner.

This claim could not be verified by the Court. It is therefore our finding that the allegation was not proved.

10 (xii) **Pre-Ticking and Stuffing of Ballot Papers**

The petitioner alleged in his petition and in his affidavit in support that there was pre-ticking and ballot stuffing at polling stations in favour of the 1<sup>st</sup> respondent. Several affidavits were sworn in support of this allegation.

15 There was, for example, the affidavit of Ruhangariyo Erias and Amanyire Fred who were Presiding officers in some polling stations in Kyangwali, Hoima District. They deponed that they were instructed by Nelson Atumanya, the Electoral Supervisor of Kyangwali sub county, to tick any unused ballot papers in favour of the 1<sup>st</sup> respondent and put them in their ballot boxes. Atumanya in  
20 his affidavit strongly denied this allegation. We find his affidavit in rebuttal more credible.

There was the affidavit of Patrick Gustine Orwata who claimed that he was a registered voter at Low polling station. He deponed that he saw pre-ticket  
25 ballot papers in the RDC of Oyam's car on the 18<sup>th</sup> February, 2016. This statement was strongly refuted by Akullu Julian, the RDC of Oyam District who deponed that she was not in Oyam District on that day but was instead in Lira District where she had gone to vote. This allegation was also refuted by Nabukenya Teddy, the Returning Officer of Oyam District who deponed that  
30 Loro polling station does not exist in Oyam District.

5

We also considered the affidavit of Makidadi from Nalukulongo who deponed that the Presiding Officer of Nalukulongo polling station M-N returned to the polling station with pre-ticked ballot papers at 4 pm. This affidavit was also strongly refuted by the respondents.

10

We have carefully analysed the affidavit evidence of both parties and we find that the evidence contained in the affidavit evidence in support of the petitioner's allegation is not convincing. We therefore find that this allegation has not been proved.

15

(xiii) **Voting before and after Polling Time**

The petitioner alleged that **contrary to section 30 (2) and (5) of the PEA**, the 2nd Respondent allowed voting before the official polling time. The Petitioner did not adduce any evidence to support this allegation.

20

The petitioner further alleged that **contrary to section 30 (2) and (5) of the PEA**, the 2nd Respondent allowed voting beyond the official polling time by people who were neither present at the polling stations nor in the line of voters at the official hour of closing. The Petitioner relied on his affidavit to support this allegation.

25

The 2nd respondent contended that the petitioner had not adduced any credible evidence of voting before official polling time. It was further asserted that all voting after polling time was a deliberate measure taken by the 2nd respondent in accordance with **section 50 of the ECA** to mitigate the effect of late delivery

5 of polling materials at the affected polling stations. The second respondent relied on the affidavits of its chairman and of other officials.

The petitioner is the one who asserts that there was polling before and after polling time, but there is no other evidence as to the circumstances under which voters voted outside the time allowed by the law except for those places where  
10 the Chairman of the second respondent explained the circumstances under which he extended voting to enable voters where voting material had been supplied late to vote.

On that basis, and given the vague nature of the allegation, we find no cogent evidence of noncompliance.

15 (xiv) **Multiple Voting**

The petitioner alleged that contrary to **section 32 of the PEA**, the Presiding officers in the course of their duties allowed some voters who had already voted to vote more than once.

The petitioner's allegation was supported by 4 other deponents.

20 The 2<sup>nd</sup> respondent contended that the petitioner had not adduced any credible evidence to support the alleged multiple voting. The 2<sup>nd</sup> respondent asserted that it took measures, including upgrading of the Voters Register to include biometrics, and introduced a Biometric Voter Verification System (**BVVS**) to enhance the transparency of the electoral process and the integrity of the result.

25 The 2<sup>nd</sup> respondent further averred that the (**BVVS**) was designed to eliminate the possibility of multiple voting and that no incident of multiple voting was reported to the 2<sup>nd</sup> respondent on polling day. The 2<sup>nd</sup> respondent relied on affidavits of its officers.

5 We have considered both the petitioner's affidavits and affidavits in rebuttal  
and we find that two of the petitioners affidavits are based on hearsay evidence  
and two are in respect of incidents where the deponent claims to have seen  
polling agents issuing four ballot papers to one voter and another, where a  
deponent claimed to have seen a lady being issued with two ballot papers.  
10 There is no evidence whether the ballot papers were actually cast as alleged.

We find no evidence of multiple voting because the allegations could not be  
verified, given the nature of the evidence adduced before us.

(xv) **Allowing unauthorized persons to vote in the Presidential Elections**

The petitioner alleged that contrary to **sections 30(4) and 35 of the PEA**, the  
15 Presiding officers in the course of their duties allowed people with no valid  
voters' cards to vote or denied those who had cards from voting.

The 2nd respondent contended that no credible evidence had been adduced by  
the petitioner to support this allegation as well. It averred that only voters  
20 appearing on the National Voters' Register and could be identified were  
allowed to vote.

Counsel for the respondent submitted that the EC's improvements in the  
National Voters Register and Voter identity verification technology; Biometric  
25 Voter Verification System (**BVVS**) eliminated the possibility of unauthorized  
voting. This was supported by affidavits of the respondent's officers.

The petitioner relied on the affidavit affidavits of three persons. One of the  
deponents was Waguma Amos who stated that he saw some individuals who

5 had turned up at the polling station when they were not on the Register. He does not state that these individuals voted. There is also the affidavit of Sezibera Moses who deponed that he saw an underage voter at a polling station but does not mention that he saw him voting. Then Kasule Kakande who said he saw around 50 youths at a polling station dressed in UPDF uniforms who  
10 appeared to him to be below 18 years. Apart from his own perception that they were below 18 years, there was no other evidence that they were indeed below 18 years and he has not stated that their names were not on the Register.

This evidence does not prove that anybody ineligible to vote was allowed to  
15 vote.

(xvi) **Prevention of Petitioner's Agents from Voting**

The petitioner alleged that contrary to **section 76 (b) of the PEA**, his agents and supporters were abducted and some arrested by some elements of the  
20 security forces to prevail upon them to vote for the 1st respondent or to refrain from voting. The petitioner did not adduce any evidence by way of affidavit to support his allegation about his agents being prevented from voting.

(xvii) **Chasing away Petitioner's Agents from Polling Stations**

25 The petitioner alleged that contrary to the provisions of **sections 33 and 48(4) and (5) of the PEA**, his polling Agents were chased away from the polling stations in many districts and as a result, his interests at those polling stations could not be safeguarded.

5 The petitioner further averred that contrary to **section 33 of the PEA**, the 2nd respondents' agents/servants, the Presiding officers, failed to prevent the petitioner's polling agents from being chased away from polling stations and as a result, the petitioner's agents were unable to observe and to monitor the voting process.

10 The petitioner relied on 10 affidavits to support this allegation.

All the three respondents denied this allegation. The 2nd respondent in particular contended that the petitioner had not adduced any credible evidence of the 2<sup>nd</sup> respondent's involvement in chasing away of the petitioner's agents.

15 The 2nd respondent relied on the affidavit of Eng. Badru Kiggundu.

Having considered all the affidavits in support and in rebuttal, we have found it difficult to believe that the absence of the petitioner's polling agents in the districts that were cited was caused by the chasing away of his agents.

20 When we looked at the Declaration of Results Forms of the Polling Stations where this allegedly happened especially in areas like Wankole, Kamuli, we found that his polling agents actually signed the Declaration of Results Forms. We also noted that this allegation would have been more credible if the polling agents in the polling stations allegedly involved had sworn supporting  
25 affidavits.

(xviii) **Denying Petitioner's Agents Information**

The petitioner complained in his petition that contrary to **section 48 of PEA**, his polling agents were denied information concerning the counting and  
30 tallying process. Apart from his own affidavit, other supporting affidavits were

5 sworn by his polling agents who were allegedly affected by the denial of information.

The 2nd respondent contended that the petitioner had not adduced any credible evidence to support this allegation. It averred that all voting and tallying was conducted in full view of the public at polling stations and Tallying Centers.  
10 The 2<sup>nd</sup> respondent generally denied this allegation but we did not see any affidavit filed specifically in rebuttal of the petitioner's allegation and the supporting affidavits.

Having carefully considered the affidavits in support of the petitioner's  
15 allegation, we find that in some cases the petitioner's polling agents were indeed denied information to which they were entitled.

(xix) **Alleged noncompliance by the 2<sup>nd</sup> respondent during the process of counting, tallying, transmission and declaration of results**

20

The petitioner made the following allegations of noncompliance by the 2<sup>nd</sup> respondent, which we shall consider together under this section.

1. **Counting and Tallying of Election Results in the absence of Petitioner's**  
25 **Agents**

Under this allegation, the petitioner contended that contrary to section **49 of the PEA**, the 2nd respondent's agents/servants allowed voting and carried out the counting and tallying of votes in the forced absence of the petitioner's agent whose duty was to safeguard the petitioner's interest by observing the  
30 voting, counting and tallying process and ascertaining the results. The



5 petitioner relied on the affidavit evidence of 7 deponents to support his allegation.

The 2<sup>nd</sup> respondent denied this and adduced affidavit evidence to show that at all polling stations, the counting of votes was done openly and in the presence  
10 of candidates' agents who chose to be present.

Our analysis of the evidence provided to us shows that at most polling stations, counting of votes was smooth and transparent. Only in a few of the polling stations were there reports of incidents. There is also evidence that the  
15 Petitioner did not have agents at all polling stations.

## 2. Declaration of Results without Declaration of Results Forms (DRFs)

Under this allegation, the Petitioner contended that the declaration of the 1st respondent as the winning candidate was illegal, unlawful because under **section 54 of the PEA**, the Returning Officer is required to receive all the  
20 envelopes containing the DRFs in the presence of the candidates or their agents before opening the same and adding up the number of votes cast for each candidate as recorded on each form.

He further contended that the 2nd respondent instead announced Provisional Results without the Returning Officer receiving all the Declaration of Results  
25 Forms. He further contended that the announcement was a calculated scheme by the 2nd respondent to manipulate and cook the figures that made the 1st respondent to appear to be in the early lead.

The petitioner relied on the affidavit evidence of two deponents.

5 The 2<sup>nd</sup> respondent contended that it used the Electronic Results Transmission and Dissemination System (ERTDS) to transmit results, the primary source of which were declarations of result forms from polling stations.

We have noted that **section 54(1) of the PEA** stipulates that a returning officer  
10 should open envelopes containing the Declaration of Result Forms when all the envelopes have been received. **Section 54(2) of the PEA** on the other hand, allows a returning officer to open envelopes and add up the votes even though all the envelopes have not been received. This should only be done where the candidates or their agents and a police officer not below the rank of inspector  
15 of police is present.

The petitioner appears not to have addressed himself to **section 54(2) of the PEA**. His claim therefore, in so far as it does not address **section 54(2) of the PEA** is misconceived.

Evidence on record shows that returning officers opened envelopes where all  
20 envelopes had not yet been received. It was stated in evidence that the 2<sup>nd</sup> respondent had to declare results within 48 hours from the end of polling. The results were transmitted as they came in. This was permitted under **section 54(2) of the PEA**. We find that there was no non-compliance with the PEA.

25 3. Unlawful Electronic Transmission of Results from Districts to the National Tally Centre using the ERTDS

The petitioner alleged that, the 2<sup>nd</sup> respondent, without receiving the requisite documents under **section 56(2) of the PEA**, announced the results of the election and declared the 1<sup>st</sup> respondent as the winning candidate, contrary to

5 **section 56 of the PEA.** The petitioner relied on his affidavit in support to support his allegation that the use of ERTDS was unlawful.

The 2nd respondent averred that it was in possession of the Declaration of Results Forms from polling stations before announcing the result and declaring the winner.

10

The 2<sup>nd</sup> respondent also submitted that it used the ERTDS to transmit results, the primary source of which were declarations of result forms from polling stations. That the system could also produce Tally Sheets based on information from the Declaration of Results forms.

15

The 2nd respondent further averred that in any event, receipt of the said documents by the 2nd respondent is not a prerequisite for announcing the results of the presidential elections.

20 We have carefully considered the evidence and submissions of the parties.

The allegations of the petitioner with regard to the electronic transmission of results, bring into focus the operation of **section 56 of the PEA.** Section 56(1) provides for the returning officer, after adding the votes as per section 54(1) to declare to all those present, including agents of candidates, the results obtained  
25 by each candidate. Thereafter he has to complete a return indicating the number of votes obtained by each candidate.

**Section 56 (2) of the PEA** is the crux of the matter, which states as follows:

*“Upon completing the return under subsection (1), the returning officer shall transmit to the Commission the following documents –*

- 5 a) *the return form*
- b) *(repealed)*
- c) *the tally sheets; and*
- d) *the declaration of results form from which the official addition of the votes was made.” (emphasis added).*

10 The Petitioner contends that the above documents were not submitted to the 2<sup>nd</sup> respondent. His agents did not see them and therefore there were no results to use to declare the first respondent as the winner of the presidential election.

For the 2<sup>nd</sup> respondent, it was submitted that the above documents were scanned at the District and the results were electronically transmitted to the 2<sup>nd</sup> respondent. The hard copies followed later. It was the electronically  
15 transmitted results that were used to declare the winning candidate.

This brings to focus the use of technology in the conduct and organization of elections. The law requires that the returning officer transmits the documents, but does not specify the mode of transmission. We received evidence that in  
20 the past, results could even be transmitted by phone or fax.

We have addressed ourselves to the legal meaning of the word “**transmit.**” According to Black’s Law Dictionary, 9<sup>th</sup> Edition, it has two meanings. It can mean “to send or transfer a thing from one person or place to another. It also means “to communicate.”

25 We have also considered the provisions of the **Electronic Transactions Act, 2011** and have concluded that in the absence of specific provisions as to the mode of transmission, the 2<sup>nd</sup> respondent while exercising its authority to organize and conduct elections, could use electronic transmission of the documents under **section 56 (2) of the PEA.** This is not non compliance with  
30 that provision.

5     However, care had to be taken to ensure that the information received by the  
2<sup>nd</sup> respondent could be verified as being consistent with that on the original  
documents that were scanned. This is the basis for the Petitioner’s demand for  
discovery and inspection of the Declaration of Results Forms, the Return Form  
and the Tally Sheets.

10    In his Petition, the Petitioner stated his case thus in paragraph 36(vi) and 37.

36(vi): ***“From the above process, there was room for switching DR  
forms, switching results when purportedly tallying and doing all  
malpractices of rigging to alter the final result.”***

15     37 - ***“In this regard the Declaration forms used by the 2<sup>nd</sup>  
Respondent to declare results are essential and critical to  
determine whether the results announced correspond to the  
Declaration Forms in possession of the 2<sup>nd</sup> respondent vis – a –  
vis those in possession of the Petitioner and other candidates.  
20     The Petitioner shall seek for their disclosure and discovery  
from the 2<sup>nd</sup> Respondent.”***

The Petitioner’s team of Lawyers and Data specialists did inspect the said  
documents at the offices of the 2<sup>nd</sup> respondents. They were subsequently given  
certified copies by the 2<sup>nd</sup> respondent and by agreement of both parties,  
25    certified copies of the same were exhibited in court.

The petitioner failed to produce those Declaration of Results forms he said  
were in his possession so that he could make comparisons with the  
documents in court and establish any discrepancies.

5 No material discrepancies were discovered or brought to the attention of the Court.

4. Illegal and Unlawful declaration of 1<sup>st</sup> Respondent as winner of the

Presidential election without District Returns and District Tally Sheets

Under this allegation, the petitioner contended that without Declaration of  
10 Results Forms from each of the 28,010 polling stations together with the Tally  
Sheets from the 112 districts and Return Forms, there were no results that the  
2nd respondent could use to declare a winner under **section 57 of the PEA**.  
Based on this allegation, the petitioner claimed that the 2nd respondent had no  
basis to declare the 1st respondent winner and contended that **section 56 of the**  
15 **PEA** had not been complied with. The petitioner relied on the Affidavit  
evidence of two deponents.

This evidence was rebutted by affidavit evidence of the 2<sup>nd</sup> respondent's  
Chairman and other officials. Mr. Kiggundu was also cross-examined on it and  
20 his evidence was not shaken.

We have carefully considered the evidence and submissions of the parties. We  
find that based on the documents which were exhibited in court by mutual  
consent of the petitioner and the 2<sup>nd</sup> respondent and which we have perused, we  
25 are satisfied that the results that were declared by the 2<sup>nd</sup> respondent on  
20<sup>th</sup>February 2016 were based on Tally Sheets and Returns submitted by  
returning officers from the 112 Districts as at 20<sup>th</sup> February 2016.

We have found no noncompliance with **section 56 of the PEA** because at the  
time of declaring the 1<sup>st</sup> respondent the winner, the 2<sup>nd</sup> respondent had already  
30 received results for 26, 223 out of 28,010 polling stations.

5 The 2<sup>nd</sup> respondent however confirmed that by the time it announced the  
winner of the Presidential elections, it had not yet received results from 1787  
polling stations representing 1,057,720 registered voters. The 2<sup>nd</sup> respondent  
contended that it announced the results because the 1<sup>st</sup> respondent had already  
emerged as a clear winner with more than 50% in his favour and because it had  
10 to comply with the constitutional and statutory requirement to declare a winner  
within 48 hours from the close of polling.

We note that the petitioner took particular issue with the 2<sup>nd</sup> respondent's  
announcement of a winner before all results were turned in by the respective  
returning officers. We recognize the very short timeline of 48 hours imposed  
15 on the 2<sup>nd</sup> respondent to ascertain and declare the results and the winner where  
one has attained more than 50% of the votes cast. We have noted however that  
the 2<sup>nd</sup> respondent did not in its answers provide any credible explanation why  
the results for 1787 polling stations had not been received.

With the exception of a few stations where the entire polling exercise was  
20 cancelled, we find it inexcusable for the remaining results not to have been sent  
by the returning officers. A review of the District Summary Report issued by  
the 2<sup>nd</sup> respondent as at 20<sup>th</sup> February 2016 shows that while distant Districts  
had either fully submitted their results, some Districts such as Jinja had only  
transmitted results for 11 Polling Stations representing only 3,607 valid votes  
25 out of a total of 399 polling stations of the District.

These delays explain the zero votes reflected for several polling stations in  
some District Tally Sheets that the petitioner brought to the Court's attention  
for the Districts of Jinja, Rukungiri, Kyenjojo, Kabale, Kampala and Wakiso.  
Following the completion of the hearing, the Court reviewed the District

5 Summary Report –Final Results as of 22<sup>nd</sup> February 2016 and confirmed that  
the missing results were eventually included in the final tally. We also did not  
observe major discrepancies in the results that were transmitted by the  
respective district returning officers through the district tally sheet and district  
return forms and the results for each District which the 2<sup>nd</sup> respondent declared  
10 on 20<sup>th</sup> February 2015.

5. Lack of Transparency in the declaration of results

The petitioner alleged that contrary to **Article 1(4) of the Constitution**, the  
election and the whole process of counting and consolidating the election  
15 results through tallying and transmission of results from each polling station to  
the district tally centre/Returning Officer and finally to the purported National  
Tally Center lacked fairness and transparency. He further contended that the  
process was instead shrouded in mystery and concealment in announcing the  
results and declaring the winner.

20 The Petitioner further alleged that the 2<sup>nd</sup> respondent did not have a National  
Tally Center established by law and instead received results from an illegal  
tally center run and operated by security agencies at Naguru.

Besides his affidavit in support of the petition, the petitioner did not adduce  
any other evidence to support the allegation that the 2<sup>nd</sup> respondent received  
25 results from an illegal tally centre based at Naguru. He however relied on the  
Affidavit evidence of 13 deponents to support his allegation that the  
declaration of results lacked transparency.

The 2<sup>nd</sup> respondent denied the petitioner’s allegations that there was no  
National Tally Centre and that it received results from illegal tally centres. The



5 2<sup>nd</sup> respondent averred that it had a well established national tally centre at the Mandela National Stadium at Namboole from which results from district tally Centers were relayed. Further, the 2<sup>nd</sup> respondent averred that there were no illegal Tally Centers from which the 2<sup>nd</sup> respondent received results. The 2<sup>nd</sup> respondent relied on the affidavit evidence of its Chairman and other officials.

10 We note that **section 57(1) of the PEA** requires the Commission to ascertain, publish and declare the results of the presidential election within 48 hours. However, PEA does not prescribe for the EC how a Tally Center should be set up for ascertaining results, nationwide, what it should look and where it should be located.

15 We note that the Petitioner made an allegation that the 2<sup>nd</sup> respondent received results from an illegal tally centre which was being operated by security agencies. The Petitioner did not adduce any affidavit evidence to support this allegation.

20 With regard to the allegation of non-compliance arising from the 2<sup>nd</sup> respondent's setting up of a national tally centre at Nambole, we have found no provision in the law which the 2<sup>nd</sup> respondent breached when it set up the National Tally centre to enable it collect and ascertain the results it had received from the Districts before it could declare the winner in 48 hours as it was required to do so by the Constitution and the PEA.

25 Based on our review of the law and evidence before us, we find that the Petitioner has not proved that the 2<sup>nd</sup> respondent failed to comply with the cited provisions of the PEA.

We however wish to note that the 2<sup>nd</sup> respondent should have done more to ensure that all candidates and their agents are properly briefed about the mode

5 of transmission of results at both the district level and at the National Tally Centre.

(xx) **Failure to accord equal treatment/coverage by State Media agencies**

The petitioner alleged that contrary to **section 12(1) (e) of the PEA**, the 2nd respondent failed to accord equal treatment to the petitioner when it failed to  
10 prevail upon the authorities and government agencies such as Uganda Broadcasting Corporation and New Vision to render equal coverage to the petitioner to enable him to present his programs but they offered preferential treatment to the 1st respondent. The petitioner relied on one affidavit to support this allegation.

15 The 2nd respondent contended that it executed its duty of educating all media houses on their responsibilities in the election period and issued guidelines to media houses for that purpose. Further, it did not receive any complaint from the petitioner to that effect.

20 **Section 12(1)(e) of ECA** requires the Electoral Commission to take measures that will ensure that the entire electoral process is conducted under conditions of freedom and fairness.

We note that **Article 67(3) of the Constitution** and **section 24(1) of ECA** require that all presidential candidates shall be given equal time and space on  
25 the State-owned communication media. The 2<sup>nd</sup> respondent, in its rebuttal, adduced evidence to show that it briefed media houses and also attached media guidelines which it issued to all media houses with respect to their obligations to grant equal access to all Presidential candidates.

5 We have also noted the affidavit evidence of Robert Kabushenga and the attachments thereto, including a Report of the African Centre for Media Excellence, in rebuttal to the petitioner’s allegation, which actually showed that the New Vision gave fair and impartial coverage to all the presidential candidates.

10 While the law grants equal access to all presidential candidates on equal coverage on state owned media, we also note that it is incumbent on the presidential candidate to prove that he/she sought coverage and took all the necessary steps to contact the state owned media and that the media houses either refused or denied him/her coverage.

15 In this particular case, the petitioner did not adduce any evidence before court to show that he had taken any of the steps outlined above and that he had lodged any complaint with either the media houses in question or the EC about unequal coverage.

We have also noted however that whereas UBC and New Vision may have  
20 been wholly owned by Government at the time the law in question was enacted, the situation has since changed. Today, the New Vision Printing and Publishing Company Ltd. is a public listed company.

We have carefully studied the provisions of **Article 67(3) of the Constitution** and **section 24(1) of ECA** which govern this issue. We have also carefully  
25 considered the respective submissions of the petitioner and the respondents with respect to this allegation.

We find that it is true that UBC failed to provide equal coverage to all the presidential candidates as required by the Constitution and the law. Although

5 the candidates may not have asked for the airtime from UBC, it was incumbent upon the UBC to show that it did offer time and space to all the candidates. The 2<sup>nd</sup> respondent had no control over the management of UBC and once it issued guidelines to all Media houses, including UBC, it cannot be held responsible for another Public Corporation's failure to obey the law. The non-  
10 compliance was by UBC and not the 2<sup>nd</sup> respondent.

We further note that the issue of unequal media coverage of state media has been a recurrent issue in previous election petitions. Unfortunately, no penalty is provided for under **section 24 of PEA** for noncompliance. This is an area that requires legal reform so that the public media houses can be compelled to  
15 comply with the law.

(xxi) **Failure to conduct free and fair elections resulting from use of Police and Military presence at Polling Stations**

The Petitioner alleged that contrary to **section 12 (1) (e) and (f) of the ECA**, the 2<sup>nd</sup> Respondent failed to ensure that the entire presidential electoral process  
20 was conducted under conditions of freedom and fairness and as a result the Petitioner's and his agent's campaigns were interfered with by some elements of the military including the Special Forces and the so-called Crime Preventers under General Kale Kayihura.

25 The petitioner relied on the affidavit evidence of 7 deponents to support this allegation.

The 2<sup>nd</sup> respondent denied this allegation and contended that the petitioner had not adduced any evidence to support this allegation. It averred that the election was conducted under conditions of freedom and fairness in that all polling

5 stations were manned by Presiding Officers assisted by Polling Assistants and  
unarmed Election Constables supervised by the Presiding Officers. The 2<sup>nd</sup>  
respondent relied on the 3 affidavits of its officials, including the returning  
officer of Kamuli district.

10 There was affidavit evidence from General Katumba Wamala and some other  
officers that indeed there was deployment of the Uganda People Defence  
Forces (UPDF) in some areas, to support the Police Force to maintain security.  
This evidence is further to the effect that there was intelligence information  
that there were some elements that wanted to disturb the peace during  
15 elections. But it was denied that the soldiers or the police engaged in any  
violent acts or intimidation.

Section 43 of the PEA prohibits the carrying of weapons by any person to  
within one kilometer of the polling station “*unless called upon to do so by*  
20 *lawful authority or where he or she is ordinarily entitled by virtue of his or*  
*her office to carry arms.*”

Therefore, in the absence of evidence of actual intimidation or violence, the  
mere presence of police or army is lawful, where called upon by lawful  
authority.

25 **(xxiv) Intimidation**

*1. During Consultations*

Evidence was adduced by the petitioner supported by evidence of Hope  
Mwesigye and Benon Muhanguzi that as he was proceeding to Mbale, to hold a  
consultative meeting about his candidature for President of Uganda, he was

5 intercepted at Jinja and brought back to Kampala where he was kept for a day at Kira Road Police station.

The Inspector General of Police in support of his action state that after consulting the NRMO Party, the Electoral Commission and the Attorney General on the candidature of the petitioner and relying on intelligence reports  
10 from Mbale, he stopped the petitioner from proceeding to Mbale on security ground.

Court finds that there was interference with the petitioner's aspirant consultation meetings in Njeru, Jinja, Soroti and Kapchorwa. Court further finds that the interception of the petitioner enroute to Mbale and his detention  
15 at Kiira Road Police Station was unjustified and highhanded and was contrary to **section 3 of the PEA.**

## *2. During Campaigns*

(i)The petitioner supported by affidavit evidence of Nduga Rogers, Mugabe Lawrence, Semakula Asadu, Medi Matovu, Onzima Ramadhani claim that his  
20 supporters including all witnesses named herein were arrested from the Go-Forward offices in Nakasero, detained in Kireka and later taken to Ntungamo where they were charged in court for offences of assault which they never committed. The arrest of these witnesses was related to an incident in Ntungamo where the supporters of the petitioner and those of the first  
25 respondent clashed at a rally. The case was subject to police investigations and is pending court trial.

(ii) The petitioner supported by evidence of Hope Mwesigye, Benon Muhanguzi, Annet Kokunda alleged interference with his rallies by supporters of the 1st respondent who also tore his campaign posters.

5 In response to the allegations of intimidation and disruption of the petitioner's rallies, the 1<sup>st</sup> respondent relies on a number of affidavits including the ones of Ronald Kibule, Muhoozi, Mugabi and Odokonyero.

After analysis of the affidavits for and against the petition, we find that there were clashes of supporters of the various candidates during which candidates  
10 posters were defaced.

However, we have found no evidence to associate the 1st respondent with the alleged intimidation and disruption of rallies.

### 3. During Voting

A group of witnesses namely, Tumusiime Gerald, Juma Bayi, David Mubiru,  
15 Sewanyana Joseph, Tito Sky, all describing themselves as members of a jobless group called KI-FACE testify as to how they were hired by the NRM mobilisers to beat up opposition supporters in parts of Kampala including Lugala, Nankulabye, Kawala and Nansana, which they accomplished.

The credibility of these witnesses is doubtful and we cannot rely on them to  
20 make a finding that opposition supporters were assaulted by the supporters of the first respondent before and during polling. There was no evidence of any of the victims of the assault that could have supported the story of the KI-FACE group.

25 **ISSUE NO.2: Whether the said election was not conducted in accordance with the principles laid down in the Presidential Elections Act, and the Electoral Commission Act.**

The principles which have been laid down are:

- (a) Freedom and fairness i.e. that the election must be free and fair.

- 5 (b) Transparency i.e. that the voting, tallying, and transmission of results should be done in conditions which are transparent.
- (c) Secrecy of ballot. A voter should cast his or her vote in complete secrecy and not in the open for anybody else to see.
- (d) Equal suffrage. Every person aged 18 years and above should be entitled  
10 to register and vote.

The petitioner contended that the election was not conducted in compliance with the above stated principles. The allegations made on this issue have already been covered in our consideration of issue 1, and we shall not need not repeat it.

- 15 Based on our earlier findings under issue no. 1, we find that there was noncompliance with the principles of free and fair elections in some areas (a) where there was interference with the petitioners' aspirant consultative meetings, (b) late delivery of polling materials (c) failure by Uganda Broadcasting Corporation to give the petitioner equal treatment with the 1<sup>st</sup>  
20 respondent, (d) interference with the petitioner's electioneering activities by some elements of the Police, some Resident District Commissioners and Gombolola Internal Security Officers.

25 **ISSUE NO 3: Whether if either issue 1 and 2 or both are answered in the affirmative, such non compliance with the said laws and the principles affected the results of the elections in a substantial manner.**

We note that both the Constitution (**Article 104 (1)**) and the **Presidential Elections Act (Section 59 (1))** provide that an aggrieved candidate may petition the Supreme Court for a declaration that a candidate declared by the



5 Electoral Commission as an elected president was **not validly elected**. If the allegation is proved the consequence would be annulment of the election.

**Article 104 (9) of the Constitution** provides that: Parliament shall make such laws as may be necessary for the purposes of this article, including laws for grounds of annulment and rules of procedure.

10 The Presidential Elections Act is rooted in the above specific constitutional mandate given to parliament and in its **Section 59 (6) (a)** the Act provides the grounds which the Supreme Court can rely on to annul an election.

**Section 59(6) (a) of the Presidential Elections Act** provides:

### **Challenging presidential election**

15 The election of a candidate as President shall only be annulled on any of the following grounds if proved to the satisfaction of the court—

a) noncompliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid  
20 down in those provisions *and that the non-compliance affected the result of the election in a substantial manner*;(Emphasis of Court)

The import of **Section 59 (6) (a) of the PEA** is that compliance failures **do not automatically** void an election. Where a party alleges non-conformity with the electoral law; the petitioner must not only prove that there has been  
25 noncompliance with the law, but also that such failure to comply did affect the results of the election in a significant (substantial) manner.

5 Counsel for the petitioner made a passionate plea to this Court to depart from its decisions in **Presidential Election Petition No. 01 OF 2001** and **N0. 01 OF 2006**, in which the Court held *inter alia* that in assessing the degree of the effect of noncompliance with the law on the result of an election, numbers are important. In both cases, this Court held that a court cannot annul an election on  
10 the basis that some irregularities had occurred, without considering the mathematical impact of the irregularities. In the opinion of Counsel for the petitioner, Court placed undue reliance on a quantitative test in interpreting the phrase ***“affected the result of the election in a substantial manner”*** and set an extremely restrictive and nearly impossible to meet test.

15 In applying **Section 59 (6) (a) of the PEA** to the matter before us, we were alive to the spirit ingrained in **Article 1 of the Constitution** which deals with the sovereignty of the people and provides *inter alia* that the people shall be governed through their will and consent.

**Clause (4)** specifically states that:

20 *The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections of their representatives or through referenda.*

We opine that the import of **Section 59 (6) (a) of the PEA** is that it enables the  
25 court to reflect on whether the proved irregularities affected the election to the extent that the ensuing results did not reflect the choice of the majority of voters envisaged in **Article 1 (4)** of the Constitution and in fact negated the voters' intent.

5 It is important that the Court asks the question: “given the national character of the exercise **where all voters in the country formed a single constituency**, can it be said that the proven defects so seriously affected the result that the result could no longer reasonably be said to represent the true will of the majority of voters?”

10 The petitioner alleged that the results announced by the 2<sup>nd</sup> respondent declaring the 1<sup>st</sup> respondent as winner were manifestly different from the votes cast at polling stations. The petitioner sought for the disclosure and discovery of the Declaration of Results Forms (DR) used by the 2<sup>nd</sup> respondent to declare results, in order that it be determined whether the results announced correspond with  
15 what was recorded on the DR forms in possession of the petitioner and other candidates. The discovery was ordered by the Court and it was done. By consent of the parties, the documents were exhibited in Court and introduced in evidence. Court had the opportunity to examine the Tally Sheets and Declaration of Results Forms. There was no evidence of discrepancy between what was  
20 recorded in the forms and what was declared by the 2<sup>nd</sup> respondent. We are satisfied that the results used by the 2<sup>nd</sup> respondent to declare the 1<sup>st</sup> respondent as winner were based on the tally sheets and Declaration of Results Forms introduced in court as evidence by the consent of the parties. The petitioner did not produce any DR forms which he had said was in his possession. Court  
25 therefore had no way of proving whether or not what was in the possession of the petitioner differed with the official record of the 2<sup>nd</sup> respondent. The petitioner therefore failed to discharge the burden of proving the allegation that serious discrepancies existed between what was declared by the 2<sup>nd</sup> respondent and what was declared at polling stations.

5 Court has been guided by the principle that in a democracy, the election of a leader is the preserve of the voting citizenry and that the court should not rush to tamper with results which reflect the expression of the population's electoral intent. Inherent in the section is the philosophy that the fundamental consideration in an election contest should be whether the will of the majority  
10 has been affected by the non-compliance. This is the very philosophy on which **Article 1 (4) of the Constitution** is founded.

In defining what constitutes a valid election, we must be guided by **both** the article on people's sovereignty as well as the article providing for challenging the "validity" of an election. Both constitutional provisions must be read  
15 together.

We must however emphasize that although the mathematical impact of noncompliance is critical in determining whether or not to annul an election, the court's evaluation of evidence and resulting decision is **not exclusively based** on the quantitative test. Court must also consider the nature of the alleged  
20 noncompliance. Annuling of presidential election results is a case by case analysis of the evidence adduced before the court. If there is evidence of such **substantial departure** from constitutional imperatives that the process could be said to have been qualitatively devoid of merit and rightly be described as a spurious imitation of what elections should be, the court would annul the  
25 outcome. The courts in exercise of judicial independence and discretion are at liberty to annul the outcome of a sham election.

Annuling of presidential election results is a case by case analysis of the evidence adduced before the court. On the one hand, the court must avoid upholding an illegitimate election result and on the other, it must avoid annulling

5 an election result that reflects **the free will of the majority of the electorate – the majority whose rights are inherent in Article 1 (4) of the Constitution.**

In the matter before us, we find that there was noncompliance as proven in issues 1 and 2, but we are not satisfied that the noncompliance affected the result in a substantial manner.

10 **ISSUE NO 4: Whether the alleged illegal practices or any electoral offences in the petition under the PEA, were committed by the 1<sup>st</sup> respondent personally, or by his agents with his knowledge and consent or approval.**

**Section 59 (6) (c) of the PEA** provides that the election of a candidate as President shall be annulled if it is proved to the satisfaction of the court that an  
15 offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval.

The Specific Allegations against the 1<sup>st</sup> Respondent were:

(i) **That contrary to Section 64 (1) and (4) of the Presidential Election Act, the 1<sup>st</sup> Respondent and his agents with the knowledge and consent or  
20 approval gave a bribe of hoes to the voters of West Nile with intent that they should vote the 1<sup>st</sup> respondent and to refrain from voting the Petitioner and other Presidential Candidates.**

In reply to the allegation, the 1<sup>st</sup> respondent deponed that, while he was campaigning in Terego, West Nile, the people asked him for hoes in support of  
25 their children’s education. He informed them that there was already an ongoing government programme under which hoes were to be distributed to the people of Northern Uganda. He promised to inquire into what had happened to the implementation of the program.

5     Thereafter, the 1<sup>st</sup> respondent wrote a letter dated 20.11. 2015 to the Prime Minister in which he directed that in the financial year 2016/2017 budget, the purchase of 18 million hoes be included.

10     The Prime Minister, Ruhakana Rugunda averred in his affidavit that he received the above mentioned letter from the 1<sup>st</sup> respondent in his capacity as president. He then travelled to Terego and informed the people that the hoe programme was ongoing. He presided over and witnessed the distribution of hoes.

15     In further support to the 1<sup>st</sup> respondent's reply, it was deponed by the Chief Administrative Officer of Arua District that in January 2016, he received hoes from the Office of the Prime Minister, for distribution as he had done on two previous occasions long before the campaign period.

20     We note that the 1<sup>st</sup> respondent's letter to the prime minister was to the effect that hoes be budgeted for in the next financial year-which would be after the campaign period and elections. The evidence on record also indicates that the supply of hoes to people in Northern Uganda commenced in 2013/14 Financial Year.

It is therefore, our finding that the 1<sup>st</sup> respondent did not engage in bribery as alleged.

25     **(ii) Contrary to Section 64 (1) and (4) of the Presidential Elections Act, between mid 2015 and the 16<sup>th</sup> and 18<sup>th</sup> February 2016, the 1<sup>st</sup> Respondent through his agents and with the knowledge and consent or approval gave a bribe of shs.250, 000 (Uganda shillings) to voters in every village throughout Uganda on two occasions with intent that they should vote the**

5 **1<sup>st</sup> Respondent and to refrain from voting the petitioner and other candidates.**

He repeated what he stated in his allegation as stated above. In addition there were 3 other affidavits relevant to the allegation.

In response, the 1<sup>st</sup> Respondent swore an affidavit and stated that to his  
10 knowledge the money was paid out by the National Resistance Movement Party to its branches to support its activities. His affidavit evidence was supported by a detailed affidavit of the Secretary General of NRM Justine Kasule Lumumba who stated that the money was to facilitate party branches to compile village registers, purchase of writing materials, food and refreshments.  
15 There were over 20 other affidavits in support of the respondent's reply.

**Section 64 (3) of the PEA** provides that the offence of bribery does not apply in respect of provision of money to cover expenses of a candidate's organization meetings or campaign planning.

It is therefore our finding that the 1<sup>st</sup> respondent did not engage in bribery as  
20 alleged.

***(iii)* That Contrary to Section 26(b) of the Act, the 1<sup>st</sup> Respondent organised a group under the Uganda Police Force a Political partisan militia, the so called 'Crime Preventers' under the superintendence of the Inspector General of Police, General Kale Kayihura, a paramilitary force-cum-militia to use force and violence against persons suspected of not  
25 supporting candidate Yoweri Kaguta Museveni hereby causing a breach of peace, disharmony and disturbance of public tranquility and induce others to vote against their conscious in order to gain unfair advantage for candidate Yoweri Kaguta Museveni.**

5 The evidence before Court by the Petitioner was a repeat on oath what is stated above.

The 1<sup>st</sup> Respondent stated in rebuttal that the crime preventers referred to, are a reserve force. That it was a concept of community policing where people work with police. People volunteer to ensure that there is no crime in their village.  
10 The police give some rudimentary training and it's a concept which works. In other countries they are conscripted whereas ours is simply voluntary. The joining is voluntary and in so doing one becomes a reserve.

The affidavit of the 3<sup>rd</sup> Respondent in support to his answer corroborated the 1<sup>st</sup> Respondent's evidence by stating that the Uganda Police Force is mandated by  
15 the Constitution to co-operate with civilian authority in execution of their mandate and that it is furtherance of this co-operation that crime preventers under community policing are trained. And further that it is through co-operation with crime preventers that law and order is maintained and life and property protected in communities.

20 We carefully perused and considered the Petitioner's and Respondent's evidence on this allegation. The evidence adduced by the Petitioner did not prove that the 1st Respondent had organised the Crime Preventers for the purpose alleged.

25 **(iv) That Contrary to section 24(5)(a)(i)(ii)(b)(c) and (d) and 7 of the PE Act, the 1<sup>st</sup> Respondent on several occasions threatened to arrest the Petitioner and Candidate Kiiza Besigye and used derogatory and reckless language when he stated that the petitioner and his supporters had touched the 'anus of the leopard' and would see what would happen to**



5 **them and this had the effect of scaring voters to vote for the 1<sup>st</sup> respondent for their own safety.**

The Petitioner adduced no evidence to substantiate this allegation.

The 1<sup>st</sup> respondent admitted making the statement but denied that the allegation referred to the petitioner or any other candidate.

10

We have considered the affidavit in response by the 1<sup>st</sup> respondent and we find that the words referred to did not have the meaning attached to them by the petitioner.

15 **(v) Contrary to Section 24(5)(a)(i)(ii)(b)(c)(d) and 7 of the PE Act, the 1<sup>st</sup> respondent on various occasions threatened that if the voters elected the petitioner or anybody else, Uganda would go back to war and this had the effect of influencing the voters to vote the 1<sup>st</sup> Respondent so as to maintain the status quo.**

20 The 1<sup>st</sup> respondent denied the allegation.

We considered the above evidence and case law referred to us by Counsel and find that the allegation was lacking in substance in that the various occasions referred to were not named and the actual words used were not pleaded.

The allegation made against the 1<sup>st</sup> respondent was not proved.

25

**(vi) Contrary to Section 27 of the PEA, the 1<sup>st</sup> Respondent made use of Government resources which are not ordinarily attached to and utilised by the President without proper authorisation by law thereby having unfair advantage over your petitioner.**

30 The Petitioner repeated on oath what was stated in the petition. In particular he stated that the 1<sup>st</sup> respondent involved Civil Servants such as Allen Kagina,

5 Executive Director of Uganda National Roads Authority and Jennifer Musisi, Executive Director of Kampala Capital City Authority in his political campaign in Kanungu and Kampala respectively.

There are affidavits in support of the 1<sup>st</sup> Respondent's answer to this allegation of Ms. Allen Kagina and Jennifer Musisi. They gave the functions of the  
10 Executive Director of UNRA and KCCA under the law. That being Public Officers, they were called upon by the 1<sup>st</sup> Respondent to explain the ongoing programs and were not involved in his campaigns.

The 3<sup>rd</sup> Respondent's affidavit in support of the 1<sup>st</sup> Respondent's answer to the amended petition corroborates the 1<sup>st</sup> Respondent's evidence. In effect that  
15 Allen Kagina and Jennifer Musisi Executive Directors of UNRA and KCCA respectively are not Government resources but Public Servants who were called upon by the 1<sup>st</sup> Respondent to explain ongoing programs and never campaigned for the 1<sup>st</sup> Respondent.

We have carefully perused and considered the evidence on record and we are  
20 satisfied that the two public officers were acting in their own capacity as public officers. They had not gone to campaign but to explain Government programmes. In the result, we find that this allegation that the 1<sup>st</sup> respondent misused Government resources was not proved.

**ISSUE NO 5: Whether the 3<sup>rd</sup> respondent was correctly added as a  
25 respondent in this election petition.**

The petitioner contended that the petition variously points out the role of security organs, specifically the Inspector General of Police, Uganda Police and UPDF, in interfering with his consultative meetings and campaigns. That

5 these complaints justified the need to join the Attorney General as a party to the petition.

The Attorney General contended that it is wrongly joined to the petition since the PEA Rules describe a “Respondent” to the petition as the person whose election is complained about and the EC, where the complaint includes the  
10 conduct of the EC. It should be struck out from the petition with costs for that reason.

We agree with the Learned Deputy Attorney General that the Rules as they now stand, do not envisage the Attorney General as a Respondent to a Presidential election petition. However, our view is that the allegations against  
15 Government officials could only be answered by the Attorney General in its capacity under **Article 119 of the Constitution**. We are of the view that in future the law should be amended to make the Attorney General a Respondent where there are allegations against Government and its officials to participate as a party.

20 **ISSUE NO. 6: Whether the petitioner is entitled to any of the reliefs sought.**

The petitioner sought the following reliefs:

**a) An order for vote recount in 45 districts mentioned herein.**

Counsel for the petitioner did not lay any ground for the prayer for recount in the 45 districts. We have perused and analysed the evidence on record  
25 and are of the view that it was not necessary to order a recount as prayed.

**b) A declaration that the 1<sup>st</sup> respondent was not validly elected as President.**

**c) An order that the election of the 1<sup>st</sup> respondent be annulled.**

**d) Costs of the petition be awarded to the petitioner.**

Prayers (b),(c ) and (d) are answered in the decision of the Court.

### **THE DECISION OF THE COURT**

Having made due inquiry into the petition and on the basis of our findings set  
10 out in the judgment:

1) We hereby declare that the 1st respondent was validly elected as  
President in accordance with Article **104 of the Constitution** and  
**section 59 of the Presidential Elections Act.**

2) Accordingly, this petition is dismissed with no order as to costs.

15 Before we take leave of this matter, we would like to point out a number of  
areas of concern:

Some of the areas that seem to come up at every Presidential election include:

- (i) An incumbent's use of his position to the disadvantage of other  
candidates
- 20 (ii) Use of state resources
- (iii) Unequal use of state owned media
- (iv) Late enactment of relevant legislation etc

We must also note that in the past two Presidential Petitions, this Court  
made some important observations and recommendations with regard to the  
25 need for legal reform in the area of elections generally and Presidential  
elections in particular. Many of these calls have remained unanswered by the  
Executive and the Legislature.

5 We have looked at some of the election Observer Reports. Although the Reports point to several instances where the Observers found irregularities and malpractices, the main thrust of these Reports must be seen to be directed at the need for structural and legal reforms that would create a more conducive atmosphere that would produce genuinely free and fair elections.

10 The Citizens Election Observers Net-work – Uganda (CEON -U) makes this very important Observation:

*“Uganda’s legal framework limits the foundation for conducting credible elections. These limitations prompted civil society to produce the Citizens’ Compact on Free and Fair Elections, which includes recommendations for*  
15 *legal reform: overhauling the Electoral Commission to ensure independence and impartiality; reforming the demarcation of electoral boundaries; ensuring recruitment of Polling officials is done in a transparently, competitively and based on merit; and the establishment of an independent judiciary to adjudicate on electoral disputes impartially. These*  
20 *recommendations were not taken up for the 2016 elections”.*

At the hearing of this Petition, we allowed, as *amici curiae*, a group of prominent Constitutional Scholars from Makerere University. They have given us a brief on issues pertaining to the holding of free and fair elections in Uganda. Suffice to say at this point that it is high time that the Executive and  
25 the Legislature started seriously to think about the crucial need to address legal reforms in our electoral laws.

We shall consider these proposals in deeper detail when we give our full opinion.

5 Dated at Kampala this.....day of.....2016

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10 **B.M. KATUREEBE,**  
**CHIEF JUSTICE.**

.....  
15 **JOTHAM TUMWESIGYE,**  
**JUSTICE OF THE SUPREME COURT.**

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20 **JUSTICE DR. ESTHER KISAAKYE,**  
**JUSTICE OF THE SUPREME COURT.**

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25 **JUSTICE STELLA ARACH-AMOKO,**  
**JUSTICE OF THE SUPREME COURT.**

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30 **JUSTICE AUGUSTINE NSHIMYE,**  
**JUSTICE OF THE SUPREME COURT**

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40 **JUSTICE ELDAD MWANGUSYA,**  
**JUSTICE OF THE SUPREME COURT.**

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10 **JUSTICE OPIO-AWERI,  
JUSTICE OF THE SUPREME COURT.**

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15 **JUSTICE FAITH MWONDHA,  
JUSTICE OF THE SUPREME COURT.**

20 .....

**JUSTICE PROF. DR. LILLIAN TIBATEMWA- EKIRIKUBINZA,  
JUSTICE OF THE SUPREME COURT**