**Besigye v Electoral Commission and another**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 6 April 2006

**Case Number:** 1/06

**Before:** Odoki CJ, Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba

and Katureebe JJSC

**Sourced by:** LawAfrica

**Summarised by:** H Kibet

*[1] Constitutional law – Annulment of presidential elections – Whether section 59(6)(*a*) of the*

*Presidential Elections Act was inconsistent with article 104(1) of the Constitution – Constitution –*

*Article 104(1) – Section 59(6)(*a*) – Presidential Elections Act.*

*[2] Election petition – Conduct of presidential elections – Electoral irregularities – Whether the*

*provisions of the Presidential Elections Act, the Electoral Commission Act and the Constitution had been*

*complied with – Whether failure to comply with provisions affected the results – Constitution –*

*Presidential Elections Act 2006 – Electoral Commission Act.*

**JUDGMENT**

**Odoki CJ, Oder, Tsekooko, Karokora, Mulenga, Kanyeihamba and Katureebe JJSC:** The

Petitioner Rtd Col Dr Kizza Besigye, who was one of the candidates in the Presidential Election held on

23 February 2006, petitioned the Supreme Court, seeking orders that the second respondent, Yoweri

Kaguta Museveni, declared elected President by the first respondent, the Electoral Commission, was not validly elected, that a rerun be held or that a recount be conducted.

On 25 February 2006, the first respondent declared the second respondent to have obtained 59.28% and the petitioner, who was the runner up, to have obtained 37.36% of the valid votes cast. Accordingly the second respondent having obtained more than 50% of the total valid votes cast, was declared by the first respondent duly elected President.

The presidential election was conducted under a multi-party system following a national referendum that approved change from a movement political system, under which the country had been governed for the past twenty years, to a multi-party political system. The petitioner ran for the election as the candidate for the Forum for Democratic Change (“FDC”), while the second respondent ran for the election as the candidate for the National Resistance Movement (“NRM”).

The petition was lodged in the registry of this Court on 7 March 2006 and the hearing of the petition commenced on 22 March 2006 and ended on 30 March 2006, being 30 days of the filing of the petition, in accordance with article 104 of the Constitution and section 59 of the Presidential Elections Act 2006.

In his petition, the petitioner made complaints against the respondents. Against the first respondent, he complained that it did not validly declare the results in accordance with the Constitution, and the Presidential Elections Act; that the election was conducted in contravention of the provisions of the

Constitution, Electoral Commission Act and the Presidential Elections Act; and that the provisions of section 59(6)*(a)* of the Presidential Elections Act are contrary to the provisions of article 104(1) of the

Constitution.

In the alternative the petitioner contended that the election was invalid on the ground that it was not conducted in accordance with the principles laid down in the Presidential Elections Act, and that the non-compliance affected the results in a substantial manner.

The petitioner complained further that the entire electoral process in the 2006 Presidential Elections beginning with the campaign period up to polling day was characterised by acts of intimidation, lack of freedom and transparency, unfairness and violence and the commission of numerous offences and illegal practices, contrary to the provisions of the Presidential Elections Act, the Electoral Commission Act, and the Constitution. Among the specific complaints are: disenfranchisement of voters by deleting their names, allowing multiple voting and vote stuffing, failure to cancel results at polling stations where gross malpractices took place, failure to declare results in accordance with the law, and failure to take measures to ensure that the entire electoral process was conducted under conditions of freedom and fairness.

The petitioner alleged in the petition that the second respondent personally committed several illegal practices and offences while campaigning. He complained that the second respondent, used words or made statements which were malicious, made statements containing secretarian words or innuendos against the petitioner and his party, made abusive, insulting and derogatory statements against the petitioner, FDC or other candidates; made exaggerations of the petitioner’s period of service in

Government and the reason why he was moved from several portfolios; used derisive or mudslinging words against the petitioner; used defamatory or insulting words; knowingly or recklessly made false statements at a rally that FDC had frustrated efforts to build another dam, that the petitioner was in alliance with Kony and PRA and other terrorists, and that the petitioner was an opportunist and a deserter.

The petitioner further contended that the second respondent committed acts of bribery of the electorate by his agents with his knowledge and consent or approval, just before or during the elections, by attempting and interfering with the free exercise of the franchise of voters, and by agents procuring the votes of individuals by giving out tarpaulins, saucepans, water containers, salt, sugar and other beverages, and making promises of giving such beverages.

In their answers to the petition both the first respondent and the second respondent denied the allegations made in the petition against them.

At the hearing of the petition, the petitioner was represented by a team of lawyers led by Mr Wandera

*Ogalo* and Mr John *Matovu.* The first respondent was represented by a team of lawyers led by the

Solicitor General Mr L *Tibaruha*, Mr Peter *Kabatsi* and Mr J *Matsiko*. Dr J *Byamugisha* assisted by

Didas *Nkurunziza*, led the team of lawyers for the second respondent.

At the commencement of hearing the petition, counsel for the petitioner made an application to refer to the Constitutional Court for interpretation, the question whether section 59(6)(*a*) of the Presidential Elections Act is inconsistent with article 104(1) of the Constitution. After hearing arguments from both sides, we rejected the application and reserved reasons for our ruling to be given later in our judgment.

We now give our reasons.

Firstly, the question as to the interpretation of the Constitution did not arise during the course of these proceedings but prior to the proceedings as it was raised in the petition to this Court instead of petitioning the Constitutional Court in the first instance. Therefore article 137(5)(*a*) of the Constitution was inapplicable to the application for a reference to the Constitutional Court. Secondly, these are special proceedings concerning the election of the President which must be completed within 30 days of filing the petition. It would be difficult to hear and determine the petition in the Constitutional Court, deal with a possible appeal to this Court, and finally dispose of the petition within the stipulated period. Thirdly, this being an enquiry into the petition, we thought we could deal with the question in the course of our judgment.

In our view, section 59(6)(*a*) of the Presidential Elections Act is not inconsistent with article 104(1) of the Constitution. The Constitution does not provide grounds for annulment of Presidential elections but expressly provides in article 104(9) that parliament shall make such laws as may be necessary for the purpose of the article, including laws for grounds of annulment and rules of procedure. Parliament implemented this article by enacting in section 59(6) of the Presidential Elections Act, the grounds for annulment of presidential elections. We find nothing in section 59(6)(*a*) which is inconsistent with article

104(1) of the Constitution.

All the evidence adduced by the parties was through affidavits filed before or during the hearing of the petition, and read by counsel in the court. The petitioner filed about 200 affidavits while the respondent filed about 280 affidavits.

The following issues were framed at the hearing of the petition:

(1) Whether there was non-compliance with the provisions of the Constitution, Presidential Elections

Act and Electoral Commission Act, in the conduct of the 2006 Presidential Election.

(2) Whether the said Election was not conducted in accordance with principles laid down in the

Constitution, Presidential Elections Act and the Electoral Commission Act.

(3) Whether if either issue one or two or both are answered in the affirmative, such non-compliance

with the said Laws and principles affected the results of the elections in a substantial manner.

(4) Whether any illegal practices or electoral offences alleged in the petition, were committed by the second respondent personally, or by his agents with his knowledge and consent or approval.

(5) Whether the petitioner is entitled to the reliefs sought.

After hearing counsel, perusing the pleadings, affidavit evidence, and considering the law, we have each made findings on those issues and the court as a whole, has come to the conclusion on the outcome of the petition. We are not in a position to give detailed reasons for our findings and decision due to constraints of time. We shall, therefore, announce the decision of the court, and give our individual detailed findings and reasons later.

The decision of the court on the issues framed is as follows:

(1) On issue number one, we find that there was non-compliance with the provisions of the

Constitution, Presidential Elections Act and the Electoral Commission Act, in the conduct of the

2006 Presidential Elections, by the first respondent in the following instances:

(a) In disenfranchisement of voters by deleting their names from the voters register or denying them the right to vote.

(b) In the counting and tallying of results.

(2) On issue number two, we find that there was non-compliance with the principles laid down in the

Constitution, the Presidential Elections Act, and the Electoral Commission Act in the following areas:

( *a*) The principle of free and fair elections was compromised by bribery and intimidation or violence in some areas of the country.

( *b*) The principles of equal suffrage, transparency of the vote, and secrecy of the ballot were undermined by multiple voting, and vote stuffing in some areas.

(3) On issue number three, by a majority decision of four to three, we find that it was not proved to the satisfaction of the court, that the failure to comply with the provisions and principles, as found on the first and second issues, affected the results of the presidential election in a substantial manner.

(4) On issue number four, by a majority decision of five to two, we find that no illegal practice or any other offence, was proved to the satisfaction of the court, to have been committed in connection with said election, by the second respondent, personally or by his agents with his knowledge and consent or approval.

In the result, by majority decision, it is ordered that the petition be, and it is hereby dismissed.

We make no order as to costs.

We are constrained to comment on a number of matters which have given us grave concern:

(1) The continued involvement of the security forces in the conduct of elections where they committed acts of intimidation, violence and partisan harassment;

(2) The massive disenfranchisement of voters by deleting their names from the voters register, without their knowledge or being heard;

(3) The apparent partisan and partial conduct by some electoral officials;

(4) The apparent inadequacy of voter education.

We also note with dismay the failure of the first respondent to avail to the court reports of returning officers on the ground that they were not available when it is mandatory for returning officers to transmit them to the first respondent.

The court found that certain provisions in the electoral law are contradictory and inadequate and should be reviewed, such as sections 24(5) and 59(6)*(a)* of the Presidential Elections Act and section 25 of the Electoral Commission Act.

The court is of the considered opinion that all institutions and organisations concerned should urgently address these concerns in order to improve electoral democracy in the country.

For the appellant:

Mr Wandera *Ogalo* and Mr John *Matovu*

For the first respondent:

Mr L *Tibaruha*, Mr Peter *Kabatsi* and Mr J *Matsiko*

For the second respondent:

Dr J *Byamugisha* and Didas *Nkurunziza*