

**A CRITICAL REVIEW ON THE 2016 PRESIDENTIAL ELECTION PETITION VIDE
AMAMA MBABAZI VS YOWERI KAGUTA MUSEVENI, ELECTORAL
COMMISSION AND ATTORNEY GENERAL NO. 1 2016**

BY

MAOMVINI PAMELLAH

LLB/42697/141/DU

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENT FOR THE AWARD OF
BACHELORS DEGREE OF LAW OF
KAMPALA INTERNATIONAL
UNIVERSITY**

MAY 2018

DECLARATION

“I declare that this thesis is the work of MAOMVINI PAMELLAH alone, except where due acknowledgment is made in the text. It does not include materials for which any other university Degree or Diploma has been awarded.”

SIGNATURE: *Pamella*

DATE: 16/05/2018

CERTIFICATION

“I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelors of Law of Kampala International University,”

MR. AGABA ARNOLD

HOD LAW AND JURISPRUDENCE

(SUPERVISOR)

SIGNATURE: Agaba.

DATE: 16th 05 - 2018

ACKNOWLEDGEMENT

I am grateful to the almighty God for he has been my strength and my guide that has seen me through the grey times of my life and has brought me this far. I acknowledge the authors and scholars whose clerical indulgence in the matters handled in this thesis gave me inspiration to persue the same. I further extend my heartfelt thanks to my family members most especially my father Asau Ambrose Azia, Mother Rose Okoboru Asau (RIP), my sisters Joseline Ayikoru, Caroline, Clementina, Claudia, Benadett, Grace, my niece Vusia Roseline Davina & family and to my brother Geoffrey & family, Robert, Salim and Alfred for their tireless effort, encouragement, parental love, physical, moral, material, financial and spiritual support that has enabled me to reach up to this level not forgetting my dear son Lwande Emmanuel who is my point of inspiration, a thought of his future gives me courage. May God reward you all immensely.

I am indebted to my mentors Counsel Madira Jimmy, Counsel Micheal, Counsel Beatrice, Rev.Fr. Birungi for mentoring and guiding me tirelessly throughout my course. I acknowledge the support and patience of my dear friends Doreen, Taus, Elija, Bonny, Christine, Folayan, Night and others whose names am constrained to mention for want of space. Your prayer, love, guidance and friendship made the time at law school a memorable and enjoyable one too.

Special thanks goes to my supervisor Mr. Agaba Arnold for his overwhelming guidance, enthusiasm, professionalism and positive criticism without which this research would not have been possible. Your role in editing, timeless support, academic seniority which has inspired me to see into it that this work is a success.

LIST OF ABBREVIATIONS

ACFODE	Observation of Election Monitoring Action for Development
ACHPR	African Charter on Human and People's Rights
CEDAW	convention on the Elimination of all forms of Discrimination against Women
ICCPR	International Convention on Civil and Political Rights
DPP	Director of Public Prosecutions
EC	Electoral Commission
ECA	Electoral Commission Act
FDC	Forum for Democratic Change
NGO	Non Governmental Organisation
NRM/A	National Resistance Movement/ Army
PEA	Presidential Election Act
POMA	Public Order Management Act
UDHR	Universal Declaration of Human Rights
UP	Uganda Police
FHRI	Foundations for Humans Rights Initiative
KY	Kabaka Yeka

DP	Democratic Party
UPC	Uganda People's Congress
UNLF/A	Uganda National Liberation Front/Army
SRB	State Research Bureau
NASA	Nationa Security Ag

LIST OF STATUTES

The Convention on the Elimination of all forms of Discrimination against Women

The Electoral Commission Act Cap 142 of 2005 as amended

The Presidential Election (Election Petitions) Rules of 2001

The 1995 constitution of the Republic of Uganda as amended

The International Covenant on Civil and Political Rights, 1996

The Police Act Cap 303

The Political Parties and Organisation Act of 2005 as amended

The Public Order Management Act

The Judicature (Supreme Courts) Rules Directions 1996

The Universal Declaration of Human Rights, 1984

TABLE OF CASES

Amama Mbabazi vs Yoweri Kaguta Museveni & 2 others Supreme Court Presidential election

Petition No.1 2016

Foundation for Human Rights Initiative & Ors Miscellaneous Application No. 3 2016

Professor Oloka Onyango & Ors Miscellaneous Application No. 2 2016

Raila Odinga & 5 others v Independent electoral & Boundaries Commission & 3 Others (2017)

KLR

Col Kizza Besigye Vs Yoweri Kaguta Museveni & Another presidential Election Petition No. 1

2001

Col Kizza Besigye Vs Yoweri Kaguta Museveni & Another Presidential Election Petition No. 1

2006

Charles Onyango Obbo & Another Vs Attorney General Constitutional Appeal No. 2 2002

Major General David Tunyefunza Vs Attorney General Constitutional Petition No. 1 1997

(SCU) (unreported)

Semogerere & another Vs Attorney General Constitutional Appeal No. 4 2002

TABLE OF CONTENTS

DECLARATION	i
CERTIFICATION.....	ii
ACKNOWLEDGEMENT	iii
LIST OF ABBREVIATIONS	iv
LIST OF STATUTES	vi
TABLE OF CASES	vii
TABLE OF CONTENTS	viii
CHAPTER ONE	1
1.0. INTRODUCTION.....	1
1.1. STATEMENT OF THE PROBLEM	2
1.2. PURPOSE OF THE STUDY	2
1.3. HYPOTHESIS	3
1.4. SCOPE OF THE STUDY	3
1.5. METHODOLOGY	4
1.6. LITERATURE REVIEW.....	4
CHAPTER TWO.....	12
ANALYSIS OF UGANDA’S ELECTORAL HISTORY	12
2.0 INTRODUCTION.....	12
2.1.THE 1958 ELECTIONS.	12
2.2. THE 1961 ELECTIONS	13

2.3. THE 1962 ELECTIONS AND THE ROAD TO INDEPENDENCE.....	13
2.4. THE 1979-1980 UNLF ADMINISTRATION.....	14
2.5. THE 1980 GENERAL ELECTIONS.....	14
2.6. THE 1989 ELECTIONS.	15
2.7. THE CONSTITUENT ASSEMBLY ELECTIONS	15
2.8. THE 1996 PRESIDENTIAL ELECTIONS	16
2.9. THE 2001 ELECTIONS	16
2.9.1. THE MOVE TO MULTI-PARTY SYSTEM	17
CHAPTER THREE.....	18
3.0 INTRODUCTION.....	18
3.1. PRESIDENTIAL ELECTION LEGISLATION AND HUMAN RIGHTS.....	24
3.1.1. THE RIGHT TO VOTE AND BE VOTED WITHOUT DISCRIMINATION.....	25
3.1.2. VOTER ELIGIBILITY REQUIREMENTS	25
3.1.3. REQUIREMENT TO RUN FOR POLITICAL OFFICE.....	26
3.2. FREEDOM OF ASSEMBLY, SPEECH, EXPRESSION AND ASSOCIATION.....	26
3.3. FUNDING OF POLITICAL PARTIES	27
3.4. FREEDOM OF MOVEMENT.....	27
3.5. FREEDOM OF INFORMATION AND ACCESS TO MEDIA	28
3.6. GENERAL LIMITATION TO FUNDAMENTAL AND OTHER RIGHTS AND FREEDOMS.....	28
3.7. CONCLUSION	29

CHAPTER FOUR.....	30
EFFECTS OF 2016 PRESIDENTIAL ELECTION IRREGULARITIES.....	30
4.0 INTRODUCTION.....	30
4.1. THE IRREGULARITIES IN ELECTORAL LAWS DURING THE PRESIDENTIAL ELECTIONS	30
4.1.1. MULTIPLE VOTING AND BALLOT STAFFING	30
4.1.2. BRIBERY.....	31
4.1.3. INTIMIDATION AND VIOLENCE	31
4.1.4. USE OF STATE RESOURCES.....	32
4.1.5. ADMINISTRATIVE IRREGULARITIES	33
4.1.6. THE ELECTORAL COMMISSION	33
4.1.7. SHORT TERM FOR CAMPAIGNS	34
4.1.8. TECHNICAL ERRORS.....	35
4.1.9. DISENFRANCHISEMENT.....	35
4.2.1. INACCURACY IN COUNTING AND TALLYING	36
4.2.2. SECURITY FORCES	36
4.2.3. PUBLIC SERVANTS	37
CHAPTER FIVE.....	39
CONCLUSION AND RECOMMENDATION.....	39
5.1 CONCLUSION	39
5.2. RECOMMENDATION	40
BIBLIOGRAPHY	43

CHAPTER ONE

1.0. INTRODUCTION

The culture of periodic elections on termly basis of five years took root when NRM captured state power to usher in new leadership at national and local levels estimated to be at eighty percent¹. Election is perceived to be a tool to weigh the nature of democracy of a state and a vehicle through which power is either won or retained. Elections are very important especially for countries that are still developing as long as they reflect the free will of its citizens which propel a legitimate government into power².

In this era of democratization, elections in Uganda have been viewed as a way to democratic governance. Elections were successfully organized in 2006 which provided an opportunity to assess the election irregularities and its impact on democracy in Uganda under multi-party system.

Presidential elections in Uganda are regulated by the 1995 constitution, Electoral Commission Act, Presidential Elections (Election Petitions) Rules 2001 inter alia. The 2016 presidential elections was the third election held under multi-party system. After 31 years in power, President Museveni who represents NRM for his fifth consecutive term though he earned widespread recognition for bringing peace and stability into the country has seen his popularity and reputation being tarnished in recent years by growing concerns of dictatorship and autocratic practices.

¹ Kiyonga John Nsubuga 2009, http://www.austlii.edu.au/journals/com_jilloc_gov/2009/3

² Articles 1&2 of the 1995 of the Constitution of the Republic of Uganda

President Museveni was challenged by seven candidates including the usual suspect Dr. Kizza Basigye and the former prime minister and close ally Amama Mbabazi inter alia³. The right to stand is guaranteed by the constitution to every citizen having the right to participate in the affairs of the government, individually or through his/her representative in accordance with the law.

1.1. STATEMENT OF THE PROBLEM

The phenomena of elections has long been a salient feature in relation to constitutional and democratic process in Uganda. Its important to note that the ensuing electoral process has been distinctly an autochthonous one. There are forest of legislations that govern presidential elections in Uganda as noted but most of them have not been implemented or effectively implemented, the laws do not provide sufficient remedies and or punishment. Last year's presidential election was marred with a lot of irregularities and non-compliance of the provisions of the Constitution and Electoral laws which is a substantial ground to nullify the election but surprisingly, much as the non-compliance were proved in the affirmative the entire election wasn't nullified which reaves the Ugandan judiciary wanting in its independence.

To appreciate the problem at hand, it's necessary to consider both the legal and administrative regime. The laws governing elections appear good intentioned and fair, close scrutiny reveals that they go to great length to entrench the interest of the ruling government.

1.2. PURPOSE OF THE STUDY

To be able to tell whether the 2016 presidential election process was free, fair and in accordance with the presidential election legislations and comply with the international standards, the

³ Nelson Kasfir "No Party Democracy in Uganda". Journal of Democracy 14 (1998) 7

preconditions for electoral participation, the electoral process and electoral dispute resolutions.

Therefore, the broad purpose of this study are:-

- a) To know the various legislations governing the presidential elections in Uganda how effective they are before, during and after campaigns and elections.
- b) To review the 2016 presidential election petition whether it was in compliance with the law and the irregularities that marred the entire process whether human rights of the candidates especially the opposition were respected at all?
- c) Whether people's constitutional rights were upheld and provide recommendation where necessary to improve the same.

1.3. HYPOTHESIS

The following research questions will guide the study:-

- a) There is a pivotal link between election and democracy
- b) Electoral laws in Uganda are bias and beg for serious reforms
- c) Incumbency has been an obstacle in achieving free will of the people and democracy
- d) What is the impact of election irregularities on the final result?

The NRM government has tried its best to effect its ten point program, notably inter alia to attain democracy. In my view, these elections were a step towards democracy but the means or routes have been long, violent and inadequate.

1.4. SCOPE OF THE STUDY

This research shall go back as far as the pre-independence era, move to multi-party system up to last year's presidential elections that was held on the 18th day of February 2016 and of course taking note of the legislations that govern presidential elections in Uganda. The coverage of this

work will be a review on last year's presidential election petition taking into consideration the irregularities that featured in the entire process if any.

1.5. METHODOLOGY

The research will be based on literary or library research both primary and secondary materials will be used to obtain qualitative data. Much time will be spend looking through numerous text books, previous election petitions, commentaries in elections, any other incidental thereto and other internet materials. This method is more standardized and data collected is easy and fast builds confidence in me while discussing the research affairs with my supervisor.

1.6. LITERATURE REVIEW

In Western liberal democracies, elections are democratic traditions which is well entrenched as democratic right and the citizens have a say in public and feel they have power through their vote to influence the functioning of the government. However in Africa, this has not been the same and not even anywhere close.

According to Andrew Mwenda⁴, elections are a means to either retain or win power and that oppositions create incentives that lead to characteristic choices. In the western world, election competitors aim at eliminating greedy and corrupt politicians seeking to serve selfish motives in favour of public spirited candidates yet in Uganda and African at large, opposition is often the case why politics is distributional struggle as American scientist Harold Laswel quoted that, ' it deals with who gets what, when, and how.

⁴ Mwenda 2009 July-August-2009 at 9

Mutibwa gives an elaborate history of Uganda's political troubles beginning from pre-independence⁵. He examines the affairs transcending the various governments upto the beginning of NRM rule. He however displays clear bias for NRM as his work becomes tainted with zealous opposition to other government and obvious liking for NRM.

Sachikony pointed out that most African states have been dominated by a single party authoritarianism because African leaders argue that multiparty increases factionalism and endangers national interest. Here, single party system don't reign and military takes charge thus in both systems, elections have either been absent or manipulated to legitimize incumbent regimes⁶.

Dicky Nyai then MP for Ayivu county holds the view that Uganda's culture of respect for authority made the political slogan of "no change" a powerful one which galvanized many Ugandans and encouraged emotional attachment to the "ebbyaffe" (our thing) movement. In his view, NRM chose not to give electoral laws teeth in order to preserve the advantages of the members of the incumbency in passing the laws which handicapped the commission in independently carrying out its work and that there was need for a cadre of professional election officials of undoubted integrity and impartiality⁷.

Sekaggya (2010)⁸ in a study carried out on management of elections, she points out that the practical application of Uganda's electoral laws does not comply with legislative mandates with regard to media freedom, assembly, association and participation. The media representatives felt pressure when interviewed from various sources including politicians who own private media

⁵ P. Mutibwa 1992

⁶ Sachikony 1994 at 52

⁷ Evaluation seminar report 1996 elections

⁸ Margaret Sekaggya "Management of Elections in Uganda" study by AfriMAP and the open society initiative for Eastern Africa.31 (2010)<http://www.soros.org/initiatives/osiea>.retrieved on 27/01 2017

outlets and the perception of what type of information, stories the public want to hear or read. With regard to freedom of assembly⁹, many respondents especially those in rural areas reported intimidation of opposition politicians and supporters perpetrated largely by police and army personnel. This harassment and intimidation has always been present during election periods regardless of which party was a majority. Freedom of participation is also hindered by persistent problems with voter registration, gender discrimination entrenched in some cultural practices and norms and limited access to voting procedures for people with disabilities¹⁰.

While presenting a paper on political perspective on the 1996 election process, Minister Amama Mbabazi as he then was said that the 1996 elections were the consumption of the NRM program to restore the population sovereignty. The campaigns had satisfied the desires of the Ugandans for democracy and there was now a need for consolidation with a mechanism of self cleansing¹¹. All governments in Uganda entrench themselves in power a phenomena Joe Oloka referred to as “stayism” and so the NRM led the process of transition towards a democratic governance. It is now without calculation to ensure that the movement system stays in power until posterity knows them.

Due to the lacuna, we see that the 2001, 2006 and 2016 presidential elections were among the most controversial and contested elections in Uganda’s political history. The controversies surrounding the outcome of the 2001 and 2006 elections were challenged by Dr. Kizza Besigye and that of 2016 was challenged by Amama Mbabazi in court. The supreme court ruling on the same were that especially the 2001¹² and 2016 presidential elections questioned the ability of the

⁹ Article 29 of the 1995 of the Republic of Uganda as amended

¹⁰ This contravenes Article 21 of the constitution on equality and freedom from discrimination

¹¹ Evaluation report 1996

¹² Col, Dr. Kizza Besigye Vs Yoweri Kaguta Museveni & Electoral Commission Election Petition No. 1 2001 USC 3 (21 April 2001)

EC to administer elections in a competent and impartial manner. The judgments also concurred with the petitioners that the multiple voting occurred in various and several polling stations and that there was evidence of pre-ticked ballot papers and extensive harassment of the petitioners supporters. On the whole, Justice Odoki one of the trial judges observed, ' I find that EC did a very poor job in carrying out its responsibility under section 18 of the Act.

Gloppen¹³ in trying to analyze the relationship between court and presidential elections, he notes that for better and for worse, judicial officers played a huge role at every stage. Cases¹⁴ arose over election rules, nomination of candidates, campaign practices and election results. Election battles were fought in and through the courts with related battles over the loyalty and integrity of the courts themselves¹⁵. I argue that Ugandan court influence in four analytically distinct ways: - through electoral rule-making as evaluators of the legal framework's constitutionality, enforce electoral laws, became a campaign arena and serve as safety-valve diffusing tensions. I analyze how the role of the court come into play at various stages of the election seeking to understand the driving forces as well as the implications for the elections and broader process of building democratic institutions and the rule of law. I find the court's impact on the Ugandan election petition to be ambiguous.

The view of Dungu Ernest Wabwire is that in reality, the exploited and oppressed have tried time and again to use the electoral system as a means to liberate themselves and the citizens from military as well as subtle class of dictatorship. However, when this path is blocked by monitoring, the majority are left with no alternative but to resort to insurrection, the significance

¹³ Siri Gloppen, "Elections in court, judiciary and Uganda's 2006 presidential and parliamentary elections" 2006

¹⁴ Human Rights Watch, 2006: " In Hope and Fair Uganda's presidential and parliamentary polls"

<http://hrw.org/backgrounders/africa/uganda0206>. retrieved on 26/2/2017

¹⁵ see Article 128 of the 1995 constitution as amended

of elections and purpose of which they are designed hinges on the character of the state power at a given time hence with the emergence of presidential elections, the character and relevance to democracy depended on the level of development of social forces.

Carl W Dunda remarked that the confidence in electoral process is fundamental to democratic process if the control of the electoral process is under the government authority, it's likely that neither the opposition nor the public at large would feel confident that the electoral process would be conducted in all respects in a free and fair manner in any case it makes a good sense to remove from the government reach the easy access or temptation of easy access to the electoral management and the administration so that no unfair advantage can be gained by the ruling political party.¹⁶

Ssekaana and Ssekaana¹⁷ summarize the position of *amicus curiae* as understood by the legal fraternity in Uganda as follows: "in its ordinary use, the term implies a friendly intervention of counsel to remind court of some matter of law which has escaped its notice in regard of which it is in danger of going wrong. It seems that such a person is not a party to an action but one who calls the attention of the court to some decision or point of law which appears to have been overlooked... where the intervention will only serve to widen the case between the parties or introduce a new cause of action, the intervention should not be allowed. The right of an amicus to address court is purely discretionary and is dependent upon the consent of the parties to the proceedings".

Professor John C Musinguzi and Christopher Mbabazi, associate professor of law at Makerere University on the participation of *amicus curiae* in Uganda should be understood in context of

¹⁶ Dunda 1993 at 38

¹⁷ M. Ssekana and Ssekana, Civil procedure and practice in Uganda (2010) Law Africa at pg 50

the state of public interest litigations in the country. Election petitions are matters of great public interest and importance in such a way that they ought to be handled expeditiously. Courts are granted the mandate to hear them expeditiously and where the need arises to suspend the other matters before them.¹⁸

Grounds for setting aside presidential election are non-compliance with the provisions of the presidential Election Act¹⁹. The court has to be satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the result of the election in a substantial manner.

Principles that govern presidential elections are generally spread out in the entire act²⁰ as seen in the case of Amama Mbabazi V Yoweri Kaguta Museveni, election and Attorney General Election Petition²¹ as being the requirement that the entire electoral process must be conducted under the condition of freedom and fairness. In the above case, the respondent's actions were held to be in contravention of these principles. The Supreme Court held that the harassing of the petitioners agents, supporters and involvement of the presidential protection soldiers offended this principle which is considered to be one of the grounds for annulling the election process but the 9 judges rather opted for the funny provision of section 56 of the Presidential Election Act which provides for the result to be affected in a "substantial manner" not minding of how the results of the victory has been reached at.

¹⁸ Rule 12 (2) (a) of the Presidential Elections (Election Petition) Rules SI No. 13/2001

¹⁹ Section 56 (6) of the Presidential Election Act

²⁰ Article 60(1) (a) of the 1995 constitution as amended and Section 2 (1) of the Presidential Election Act

²¹ Presidential Election Petition No. 1 2016

Recommended reforms for free and fair presidential elections in the subsequent years²² the move made by 9 justices of the supreme court led by Chief Justice Bart Katureebe to hard press the government on these electoral reforms this time followed the push by a group of Makerere lecturers as *amici* for the same recommendation arguing that the previous ones had been brushed aside. The reforms include inter alia use of biometric voters machine to be backed by law and limited access to it, Attorney General to be included among the respondents in the presidential election petitions on grounds that there are certain issues that needed to be addressed by the Attorney General, amendment of Article 67(3) and section 24(1) of the Presidential Election Act to provide sanction against any state organ or officer who violates the constitutional duty of equal airtime and space on state owned media to present their programs.

The nullification of Kenya's presidential election by the Supreme Court of Kenya has left Uganda in serious limbo and so much to desire as far as judicial independence²³ is concerned yet the evidence adduced in regard to last years presidential election petition were all in contravention with the electoral laws hence the mega victory of Yoweri Kaguta Museveni which process ought to have been followed but not to rely solely on section 64 of PEA. If only the entire process was to be critically reviewed, Uganda's last year's presidential elections were clearly a nullity since it contravened the entire electoral process and that president Museveni is holding the sit illegally. Independence of the commission²⁴ is seriously interfered with by the executive body. Being the first arm of the government which always put it under tension and since the chairman electoral commission is elected by the president, the commission therefore

²² The judiciary insider August 2016-January 2017 at page 25

²³ Article 128 of the 1995 constitution as amended

²⁴ Article 62 of the 1995 as amended

ends up compromising the results especially in favor of the appointing authority (in case the appointing authority is a candidate) hence unfair elections which also has to be looked into.

CHAPTER TWO

ANALYSIS OF UGANDA'S ELECTORAL HISTORY

2.0 INTRODUCTION

Having had a chequered political history, Uganda's electoral history bears scars of sad political history. The history of Uganda reveals malpractices of such a scale that it only creates doubt on the democratic nature of the country. The history heavily infused with characteristics like ethnic, religious and class loyalties, heavy manipulation by the state and other parochial convenes indeed a very sad episode of Uganda's existence.

Therefore, the history of Uganda is long and complex. From cradle of civilization to present date. Uganda's electoral history has been both varied and fascinating. This chapter attempts to give chronicle accounts of Uganda's electoral history since 1958.

THE PRE-INDEPENDENCE PERIOD

2.1.THE 1958 ELECTIONS.

The colonial government had organized elections to the legislative council.²⁵ Uganda's constitutional conference was convened and structures formed to organize and conduct various elections leading to independence in 1962. The first electoral commission comprised of local elders and traditional leaders. Under this commission, several elections were conducted, the first one being the limited African franchise representation to the legislative council.²⁶

²⁵ Kabwegyere 199, at 38-39

²⁶ The year 1958 marks a milestone in the history of uganda 195,
[http://www.ec.ug/docs/history/%20development%20of 20 EC.pdf](http://www.ec.ug/docs/history/%20development%20of%2020%20EC.pdf).

The Legislative Council (Elections) Ordinance of 1957²⁷ laid down the detailed provisions relating to the direct elections of the legislative council and registration of voters. Initially, Buganda alone was to have the right to indirect election to fill its five slots of the legislative council. The rest of the country was allowed to hold direct elections²⁸. Cases of election irregularities were equally registered by Buganda who instituted a suit against the colonial government²⁹.

2.2. THE 1961 ELECTIONS

Following the 1958 boycott elections by Buganda, the Wild Constitutional Committee was set up in February 1960 to work out plans for the general elections on common roll of representative members to legislative council to be introduced and also detailed steps towards independence and recommends direct elections to the legislative council to be held in 1961³⁰.

The 1961 elections were however a doubt to representative democracy because in some areas in Buganda, candidates were returned with less than 1% of eligible voters. At the end of the exercise DP has 43 seats against UPC with 35 seats. This result came out due to the low turn up of the voters in Buganda. In this way DP was invited to constitute the first African government of Uganda headed by the chief minister Benedict Kiwanuka³¹.

2.3. THE 1962 ELECTIONS AND THE ROAD TO INDEPENDENCE

In June 1962, a conference was held at Marlborough House to work on Uganda's independence constitution. As its promulgation, many provisions were similar to those in the Self-government constitution. Among those that were changed was the power of the governor to appoint members

²⁷ Statutory Instrument No. 1528 of 1957, Legal Notice No, 174 of 1957.

²⁸ S.R Karugire 1980 at 1164

²⁹ Base 1958, [http://africanelection'.tripod.com/ug.html](http://africanelection.tripod.com/ug.html).

³⁰ supra

³¹ Supra 7

of the electoral commission. Although the governor retained this power, he could only exercise it on the advice of the prime Minister who in turn was required to consult the leader of the opposition before tendering the advice³². At the time of independence, Uganda had gone through three major electoral experiences, none of which augured well for democracy in this young nation.

2.4. THE 1979-1980 UNLF ADMINISTRATION

Elections were organized in 1979 which were not independently supervised but were conducted by the UNLF secretary. They were based on electoral colleges while candidates were shortlisted and screened by the UNLF committee. The electoral colleges consisted of the members nominated from each Gombolola³³. From this time, Uganda experienced another election which was supposed to return the country to normalcy after years of decay.

2.5. THE 1980 GENERAL ELECTIONS

In 1980, the NCC passed a resolution to conduct elections throughout the country. Citizens of the country were given opportunity to register their will as to who will govern them for the next five years. This has been called the most serious attempt at organizing elections since independence³⁴. The conditions during this period indicated constant arm twisting, intimidation and even questionable redrawing of the constituencies. Even in the face of all these troubles when the elections were announced, Ugandans faced them with determination to endure every obstacle so that peace, sanity and stability, democracy and security could return to Uganda. This is what many hoped would come out of the elections. The commonwealth observer group played a role in defeating democracy by stamping these elections free and fair yet they started their

³² Section 45, 1962 Constitution of Uganda

³³ A.K.Kivenjija 1995 at 242

³⁴ Makubuya 1993 at 560

observations in the mid November 1980 yet they knew that the elections were not in any way free and fair. The number of election petitions that arose after these elections were a clear testimony on how they were conducted.

2.6. THE 1989 ELECTIONS.

These 1989 elections under the RC system were said to have been prone to manipulation³⁵. They resulted into election complaints which were made to the electoral commission which had the power in deciding which complaint can be filled to the high court. In Z.C Ilukol Returning Officer and William Naburi³⁶. The petitioner challenged the elections being null and void on the grounds that the returning officer had refused to allow the RC (V) representatives to vote and that second respondent and his agents used money and other inducements to induce voter to vote for him.

2.7. THE CONSTITUENT ASSEMBLY ELECTIONS

For an election to be free and fair, what happens before the polling is often more important than the freeness exhibited during polling.

The examination of the composition, character and deliberation of the CA shows clearly predetermined win for NRM positions. It is against this back drop that Uganda embraced itself for premature elections in 1996. After the CA elections in March 1994, the CA was finally inaugurated to promulgate the new constitution that marked the beginning of democratization in Uganda³⁷.

³⁵ The Report of the Uganda Constitutional Commission para ten 86,p, 61-65

³⁶ Election Petition No. MM/1989

³⁷ Mukoli n.d at 56

2.8. THE 1996 PRESIDENTIAL ELECTIONS

In this election, the Slogan “no change” was used as battle cry for continued endorsement of the NRM regime which according to president Museveni had achieved its fundamental goal of change by introducing a lasting sense of peace and security. In the event that some might have forgotten this, the NRM used the image of the skulls from Luweero triangle and sounds of gun shots in its electoral campaigns advertising. The message was simply that a vote against Museveni was a reversion of chaos in the past³⁸. During this time, massive election fever gripped the country, people were generally anxious and a lot of political statements were made.

It should be noted that the 1996 elections were significant for variety of other reasons, not only were they first presidential elections but also test of the various experiment in governance that had been introduced by the NRM since 1986. Among the most significant of these experiment is the no party or movement system of government against the return of multi-party political systems that has swept the continent since the late 1980's.

2.9. THE 2001 ELECTIONS

The 2001 elections were elections that ushered in another opposition leader Dr. Kizza Besigye in the political struggle of Uganda with highly competitive campaign with competent opposition leaders of National Character unlike the 1996 elections. The significance of these election is seen in the area of constitutionalism, the ruling government showed respect for the constitutional provisions that elections shall be organized after five years (no longer applicable since term limit was removed) and that the power belongs to the people³⁹.

³⁸ <http://www.udaton.edu/-Rwanda/article/Uganda/html>.

³⁹ Articles 105 and 1 respectively of the 1995 constitution as amended

The results of these elections were disputed by the first runner up in the case of Kizza Besigye v Museveni and the Electoral Commission⁴⁰ where court did not only say the elections were rigged, what judges found out was that there was massive rigging. The issue before court was whether the 2001 elections should be nullified or not, on a split of 3-2 the judges declined to nullify the elections. Not forgetting the last year's election which was challenged by Amama Mbabazi v Y.K.Museveni and other⁴¹

2.9.1. THE MOVE TO MULTI-PARTY SYSTEM

The introduction of multi-party democracy created competition in the political struggle in 2006 hence big credit should go to the ruling government for successfully organizing these elections despite disputed results and the conduct of the entire process.

Uganda's electoral history therefore reveals patterns that can cause society to become disillusioned with the ideal of democracy from the first direct presidential elections held in 1996 to the just concluded one of last year. The conduct of these elections have been characterized with massive rigging by the ruling party, malpractices, bribery inter alia. The independence of the Electoral Commission has and is still a thorny issue because its composition has always been determined by the government of the day and it has always depended on the government for funding and directions to date.

⁴⁰ Presidential Election Petition No.1 of 2001 and 1 of 2006

⁴¹ Presidential Election Petition No. 1 2016

CHAPTER THREE

3.0 INTRODUCTION

Election is the means by which mistakes, wrong policies and abuse of power are checked⁴². Election petition are matters of great public interest and importance in such a way that they ought to be handled expeditiously. Courts are granted with the mandate to hear them expeditiously and where the need arises to suspend other pending matters before them⁴³. Presidential elections petitions in this regard allows any aggrieved presidential candidate to petition the Supreme Court for an order that a particular candidate declared by Electoral commission was not validly elected⁴⁴ which is supposed to be done within 10 days after the declaration of the results and the court is mandated to entertain and come up with its findings not less than 30days from the date of filling the petition.

Democracy is a word two Greek roots *Demos* meaning the people and *Kratein* meaning to rule meaning to rule. Democracy then is the rule by the people. Elections are therefore crucial in a democracy where power is entrusted to the rulers freely and voluntarily through an election process. Election must therefore be viewed as a necessary vehicle in achieving democracy.

Amicus curiae according to Corpus Juris Secundum⁴⁵ is a friend of court who is not a party but has a vital information that can guide court in dispensing justice in a matter before just as any stranger might give information for the assistance of the court on some matter of law which the court maybe doubtful or mistaken rather than one who gives a highly partisan account of the facts. A settled rule of practice of various courts in various jurisdictions is that for a person to be

⁴² R.David 1970 at 2

⁴³ Rule (2) (a) of the Presidential Election (Election Petition) Rules SI No. 13 2001

⁴⁴ Article 102 of the 1995 Constitution as amended

⁴⁵ P. Kamanatha Aiyar, The Law Lexicon, 2nd Edition, (Wadwah and Co, Nagpur 1997) at 102

admitted as *amicus*, he/she ought to possess a status of neutrality and impartiality because dispute resolution in common law jurisdictions is essentially adversarial in nature⁴⁶. The need for neutrality can also be justified by the principle that justice must not only be done but also seen to be done⁴⁷ and the matter must be of public interest and importance⁴⁸.

A CRITICAL REVIEW ON THE 2016 PRESIDENTIAL ELECTION VIDE AMAMA MBABAZI VS YOWERI KAGUTA MUSEVENI, ELECTORAL COMMISSION AND ATTORNEY GENERAL NO. 1 2016 AND ENFORCEMENT OF PRESIDENTIAL ELECTION LEGISLATIONS VISA VIS NATURE OF HUMAN RIGHTS

Accordingly, this petition was dismissed with no orders as to costs. Coram of nine Justices led by Chief Justice Bart Katureebe, Tumwesigye, Kisakye, Arach, Amok, Nshimye, Mwangusya, Opio-Aweri, Mwendha, and Tibatemwa-Ekirikubinza Justices of the Supreme Court unanimously gave the same reasoning. The major concept to be reviewed in the petition is the substantiality clause.

The petitioner who was one of the candidates in the presidential election that was held on the 18th 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 ordered that the election be nullified for non-compliance with the electoral laws. The 20th February, the 2nd respondent declared the election results as follows Abed Bwanika 86,075 (0.93%), Amama Mbabazi 132,574 (1.43%), Baryamureeba Venasius 51,086 (0.55%), Benon Buta Biraaro 24,675 (0.27%),

⁴⁶Professor Oloka Onyango & Ors Miscellaneous Application No. 2 2016

⁴⁷ *ibid*

⁴⁸ Foundation for Human Rights Initiative & Other Miscellaneous Application No. 3 2016

Kiiza Besigye Kifefe 3,270,290 (35.37%), Mabirizi Joseph 23762 (0.26%), Maureen Faith Kalya Waluube 40,598 (0.44%) and Yoweri Kaguta Museveni 5,617,503 (60.75%) which affected the results of the election in a substantial manner and for this, he faults the 2nd respondent. Among specific complaints against the 1st respondent are that several illegal practices and electoral offences were committed by either him personally or with his approval. The petitioner made no specific complaints against the 3rd respondent.

At the hearing, the petitioners were represented by learned counsel Mohamed Mbabazi, Micheal Akampurira, Asuman Basalirwa, Severino Twinobusingye and Jude Byabakama. The 1st respondent was represented by learned counsel Didas Nkurunziza, Ebert Byenkya, Kiryowa Kiwanuka, Joseph Matsiko, Edwin Karugire and 30 others. The 2nd respondent was represented by learned counsels Enos Tumusiime, McDosman Kabega, Elison Karuhanga, Okello Oryem, Enoch Barata, Eric Sabiti, Tom Magezi and Ivan Kyateka. The learned Deputy Attorney General Hon. Mwesigwa Rukutana lead by the team of learned counsel for the 3rd respondent which comprised the learned Solicitor General Francis Atoke and learned counsel Martin Mwambutsya, Philip Mwaka, George Karamera, Elisha Bafirawala, Patricia Mutesi and Jackie Amusugut.

The 1st respondent denied the petitioners' allegations of breach of the law. The 2nd respondent opposed the petition and contented that the election was held in compliance with the provisions of the electoral laws and asserted that if there was any non-compliance which was denied though, it did not affect the result of the elections in a substantial manner. The 3rd respondent opposed the petition and also contended that the Attorney General was improperly joined as a party to the petition. All the respondents sought the dismissal of the petition with costs.

Two applications were brought before court prior to the hearing of the petition for leave to intervene as amicus curiae in the petition. The 1st one, professor Oloka Onyango & Others⁴⁹ was brought by lecturers from Makerere University Law School jointly. The 2nd application, Foundation for Human Rights Initiative & Others⁵⁰ was brought by Civil Society Organisations. Court allowed Miscellaneous Applications No. 2 of 2016 and dismissed Miscellaneous Application No. 3 of 2016.

At the commencement of the hearing, the petitioner applied under Article 126 (2) (e)⁵¹, section 100⁵² and Rule 15⁵³ vide Miscellaneous Application No. 1 of 2016 to amend the petition. The application was allowed and the amended petition was filed on the 7th March 2016 and the respondents filed their reply to the same on the 9th of March 2016.

The hearing commenced on the 14th day of March 2016 and ended on the 19th March 2016. Article 104⁵⁴ and section 58⁵⁵ require that the petition must be inquired into and determined expeditiously and court must declare its finding not later than thirty days from the date the petition is filed.

At the pre-hearing (scheduling) conference, the parties agreed on the following facts:

1. That there was presidential election conducted by the 2nd respondent on the 18th day of February 2016.

⁴⁹ Miscellaneous Application No. 2 of 2016

⁵⁰ Miscellaneous Application No. 3 of 2016

⁵¹ 1995 Constitution as amended

⁵² Civil Procedure Act

⁵³ Presidential Elections (Election Petitions) Rules 2001

⁵⁴ 1995 Constitution as amended

⁵⁵ Presidential Elections Act

2. That on the 20th day of February 2016, the 1st respondent was declared a validly elected president with 5,617,503 votes representing 60.75% of the valid votes cast
3. That on the 20th February, the petitioner was declared by the 2nd respondent to have polled 132,574 votes representing 1, 43% of the valid votes cast.

The legal issues were (*fuctum probendi*):-

1. Whether there was non-compliance with the provisions of the Presidential Election Act and Electoral Commission Act in the conduct of the 2016 presidential election?
2. If issue 1 answered in the affirmative, such non-compliance with the said laws and principles affected the results of the elections in a substantial manner?
3. Whether the alleged illegal practices or electoral offences in the petition under the Presidential Elections Act were committed by the 1st respondent personally or by his agents with his consent, knowledge and approval.
4. Whether the 3rd respondent was correctly added as a respondent in the election petition?
5. Whether the petition is entitled to any relief sought?

In the petitioners amended petition, the petitioner made several allegations of non-compliance with the provisions of the PEA and ECA against the 2nd respondent some of which prior to the elections namely illegal nomination of the 1st respondent contrary to Sections 9 and 10⁵⁶, the 2nd respondent nominated the 1st respondent on the 1st of November 2015 when he had not yet been sponsored by the NRM on the ticket he purportedly contested for. The 1st and 2nd respondents denied the allegations and the 1st respondent relied on the affidavit of Kasule Lumumba, the General Secretary of the NRM party which confirmed that the 1st respondent was endorsed by the NRM Delegates on the

⁵⁶ Presidential Elections Act

2nd November 20016 as the presidential candidate for the NRM party in accordance with the Constitution.

Principles that guide presidential elections are provided for under Article 61⁵⁷ and section 2(1)⁵⁸ specifically but are generally found in the entire Act as in the case of Col. Rtd Dr. Kizza Besigye v Yoweri Kaguta Museveni & Another⁵⁹ and Amama Mbabazi v Yoweri Kaguta Museveni & 2 Others⁶⁰ as being the requirement that the entire electoral process must be conducted under the principles of fairness and justice. Held that the involvement of the presidential protection unit soldiers in harassing the petitioner's supporters and campaign agents offended the principle of fairness. The court also emphasized the fact that it is not enough to prove the non-compliance with the provisions of the electoral laws without going further to prove as a result, the petitioners lost so many votes or the respondent got those votes which he ought not to have gotten had it not been for non-compliance of the electoral laws which visibly affected the results substantially.

In the cases of Kiiza Besigye and Amama Mbabazi, the justices of the Supreme Court made a clarification in regards to issues as to whether there is need to prove that the electoral process affected the results substantially which is practically impossible in Uganda since the so called concrete evidence to prove the non-compliance are in the hands of the ruling government and he really cannot put his head in a gillotin to avail them to incriminate him hence Article 126 {2} (e) would come in hand to see justice being done in the last election petition rather than relying on technicalities.

⁵⁷ 1995 Constitution as amended

⁵⁸ Presidential Election Act

⁵⁹ Supreme Court Election Petitions No. 1(2001-2005)

⁶⁰ Supreme Court Election Petition No. 1 2016

The recently concluded presidential election petition in Kenya's Supreme Court was arguably the first presidential election petition to be heard on its merits. Previous elections were decided on technical or procedural matters such as improper service of court documents, failure to properly sign the pleadings⁶¹.

The annulment by the Supreme Court of the Kenyan Presidential Election Petition *vide* Raila Odinga & 5 others v Independent electoral & Boundaries Commission & 3 Others (2013) KLR has left Uganda look pretty ugly by coming out distinctly to hear the petition and determine it on its merits but not majoring in minor technicalities of substantial prove of evidence. The annulment shocked the entire world and left particularly the Ugandan Judicial system in a state of quagmire and shame.

Chapter four⁶² provides for quite a variety of rights which are supposed to be enjoyed by all the citizens of the country regardless of race, color, religion, sex, political affiliations of which some are derogable while others are non derogable. Being the supreme law of the land, its provisions ought to have been adhered to strictly and upheld by responsible institutions to see to it that they are respected and which include the following as far as presidential election are concerned.

3.1. PRESIDENTIAL ELECTION LEGISLATION AND HUMAN RIGHTS.

None of these legislations define human rights but can be defined as those rights inherent in people's nature without which they cannot leave as human beings. The touchstone of human

⁶¹ Comparative analysis of presidential election petitions in Kenya and other jurisdiction. May 2013

⁶² 1995 Constitution as amended

rights is therefore mankind's demand for a life in which inherent dignity and worth of every human being and should be received with due respect and protection.⁶³

3.1.1. THE RIGHT TO VOTE AND BE VOTED WITHOUT DISCRIMINATION

The promotion of public participation in the process of governmental decision, making is a significant feature of the 1995 Constitution as amended⁶⁴. As a matter of fact, there has been a lot of discrimination when it comes to presidential elections with the most affected being the opposition in as far as they are not given ample time and resources to enable them interact with the voters which is contrary to section 23 of PEA in as far as it provides for equal treatment of all candidates⁶⁵

3.1.2. VOTER ELIGIBILITY REQUIREMENTS

Article 59⁶⁶ as well as PEA are so instructive when it comes to requirements of voting. Every citizen of 18 years and above qualifies to register and is entitled to vote in public elections and referendums. The ECA further stipulates that eligible voters must be registered to vote either in parish or ward where the person resides or from where the person originates. The state shall take all necessary steps to ensure that all citizens qualify to vote and exercise their political right to vote. You find that names of voters from a particular place, residence and or voting polling station are taken to a different place as opposed to the provision of the ECA which is to the effect that registered voters are to vote from their areas of origins, parish, wards and or their place of

⁶³ Foley M. W. and Edwards B, "The Orthodox of Civil Society" Journal of Democracy 28 (1996):122

⁶⁴ Paragraph 11 (Democratic Principles) of the National Objectives and Directives Principles of State Policy

⁶⁵ Lano. Z.A, "The Struggle for the Protection of Human Rights in Uganda. A critical analysis of the work of Human Rights Organizations" in East African Journal of peace and Human Rights, Makerere University Human Rights and Peace Centre, 5 (Kampala, 2008)2

⁶⁶ 1995 Constitution as amended

residence. This in effect led to disenfranchisement of many eligible voters who could not locate their names.

3.1.3. REQUIREMENT TO RUN FOR POLITICAL OFFICE

The requirement for a presidential candidate to contest are laid down in the Constitution and the PEA that a candidate must be between the age of 35 to 75 years old which again has been amended in the just tabled bill for a person of 18 years and above to be eligible, must be a citizen by birth, the candidate must qualify to be a member of parliament a registered voter with a minimum academic qualification of A level or its equivalent. The aspect of educational qualification is taken seriously hence there has to be documented prove to that effect cause to the National Council for Higher Education. The penalty for forging academic documents for the purpose of qualifying for candidacy includes possible imprisonment of three years Article 15(7)⁶⁷.

3.2. FREEDOM OF ASSEMBLY, SPEECH, EXPRESSION AND ASSOCIATION

Article 29⁶⁸ which provides that every person has a right to freely assemble and demonstrate together with other peacefully and unarmed. The freedom to associate including the freedom to participate and form a political party which was vividly seen in the just concluded elections where 8 different parties participated in the general elections. However, much as they are supposed to be given equal treatment as far as the use of state resources are concerned, the question of equal utilization of state resources was answered in the negative since they were not given that chance except the incumbent candidate who was given ample airtime and space to campaign on the same. As far as freedom of association, expression and speech is concerned the

⁶⁷ supra

⁶⁸ supra

same was vehemently violated to its maximum with the implementation of a few sections in the POMA to contradict the same supreme provisions.⁶⁹ Oder JSC in Charles Onyango Obbo & Another v Attorney General defined freedom of expression as the right to express one's opinion by words of mouth, writing, printing and pictures or in any manner appropriate.

This was denied to the petitioners and other candidates for presidents save for a few, it therefore flows in my own point of view it's embarrassing and unethical for the judicial body that is primarily charged with the responsibility to protect the rights stated above not to address them but instead sweep their violation under the carpet of lacking substantiality (substantiality clause).

3.3. FUNDING OF POLITICAL PARTIES

Part V of the PEA provides that the EC shall offer each candidate a contribution amounting to one thousand currency points as a contribution to be used solely for the election in addition to other facilities as may be approved by parliament. The Political Parties and Organizations Act does not include provision to ensure equitable funding but rather merely outline rules that parties must follow in collecting and accounting for the campaigns raised. The Act also discriminates against small parties in there day to day operations in terms of funds given to each political party depending on the number of members in the party then the end justifies the means of survival. It thus becomes difficult indeed to establish and campaign with a mushrooming party.

3.4. FREEDOM OF MOVEMENT

Article 23⁷⁰ has been laid down for this cause in that every person is entitled to move freely where ever he/she deems fit as long as it does not infringe on the right of the other people

⁶⁹ Constitutional Appeal No. 2 of 2002

⁷⁰ 1995 Constitution as amended

regardless of political affiliations. False imprisonment is prohibited by the supreme law of the land but this right is violated on daily basis and the major culprits are the opposition leaders and members where they even are at most times not prosecuted. The arrest is always accompanied with serious infliction of pain and torture yet the perpetrators go scot free.

3.5. FREEDOM OF INFORMATION AND ACCESS TO MEDIA

During campaign periods, every public officer, authority and institution shall give equal treatment to all candidates and their agents⁷¹. It also states that every political candidate shall enjoy complete and unhindered freedom of expression and access to information in the exercise of their right to campaign⁷². The political and democratic climate in recent years has created some openings that have allowed citizens and media to criticize the political system and the political individuals without generalized fear of reprisals⁷³. Despite the constitutional guarantee of the freedom of press and enactment of legislation that expands this right, there are some laws that still restrict the freedom of the media.

3.6. GENERAL LIMITATION TO FUNDAMENTAL AND OTHER RIGHTS AND FREEDOMS

In the case of *Edmonton Journal v Alberta (1989) 45 CRRJ* which was cited in *Charles Onyango Obbo & Another v Attorney General*, the supreme court of Canada said: "it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democratic society cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The vital importance of

⁷¹ Section 23(1) Presidential Elections Act

⁷² Section 12(2) Presidential Elections Act

⁷³ Public Broadcasting in Africa Series: Uganda, OSIEA, Open Society Foundations Media Programme and AfriMAP, (2010) pg 29

the concept cannot be over emphasized. No doubt that is why the framers of the Charter set forth Section 2(b) to enshrine rights which should strictly be restricted in the clearest circumstances”.

The Charter is the equivalent of Chapter Four of our Constitution and Section 2(b) is equivalent of Article 29 (1) (a).

Article 43⁷⁴ provides that in the enjoyment of the rights and freedom, no person shall prejudice the fundamental principles or other human rights and freedoms of others or the public interest. In *Major General David Tinyefuza v Attorney General*⁷⁵, court noted that the freedom of expression protected by this article is not absolute, it is subject to the provisions of Article 43.

3.7. CONCLUSION

In summation, the Presidential Elections Legislations are in place and the purpose for which they were enacted has been achieved but on a small scale. Majorly, this is due to the fact that most of the rights that are involved in presidential election times are exhaustively violated and the perpetrators are not brought to book, we also appreciate the fact that the rights under Article 29 are limited under article 43 but this should be limited in justifiable circumstances but not to use the article as a scapegoat for disrespecting the rights of the voters as has been the case in the just concluded presidential election which birth to this petition.

⁷⁴ 1995 Constitution as amended

⁷⁵ Constitutional Petition No.1 1997 (SCU) unreported

CHAPTER FOUR

EFFECTS OF 2016 PRESIDENTIAL ELECTION IRREGULARITIES

4.0 INTRODUCTION

The petitioner who was one of the candidates in the presidential election that was held on the 18th 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 ordered that the election be nullified for non-compliance with the electoral laws.

4.1. THE IRREGULARITIES IN ELECTORAL LAWS DURING THE PRESIDENTIAL ELECTIONS

4.1.1. MULTIPLE VOTING AND BALLOT STAFFING

The principle of equal suffrage, transparency of the vote and secrecy of the ballot in the 2016 were undermined by multiple voting and ballot stuffing. Article 103⁷⁶ states that elections of the president shall be by universal adult suffrage through a secret ballot. Section 32⁷⁷ also stated that a person shall not vote or attempt to vote for more than once in an election which calls for one man one vote. This provision was to a smaller extent observed and respected but largely undermined hence the spirit of democracy being violated.

⁷⁶ *supra*

⁷⁷ Presidential Elections Act Cap 12

4.1.2. BRIBERY

Section 64⁷⁸ deals with bribery. We note that Section 64(7)⁷⁹ forbids candidates or their agents from carrying out fundraising or giving out donations during the period of campaigns. Under (8)⁸⁰ its an offence to violate (7). Its also taken into consideration that (9)⁸¹ a candidate may solicit for funds from within and without to organise for elections during the campaign period.

Mr Amama Mbabazi had raised the bribery allegation against president Museveni on allegation that the incumbent had bribed the electorates of West Nile with hand hoes in exchange for votes but the court didn't uphold the allegation on the grounds that that was a government program that started way back before campaigns and he was just fulfilling it which in my view didn't hold water as far as the timing is concerned.

4.1.3. INTIMIDATION AND VIOLENCE

There has been a general allegation of intimidation and violence in the 2016⁸² presidential election. The entire electoral process was marred with acts of intimidation, lack of freedom of speech, expression, movement, association⁸³ and transparency, violence, commission of numerous offences and illegal practices. It was also averred that the EC failed to take measures to ensure that the electoral process was conducted in a timid environment to ensure that the electorate's 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.

⁷⁸ supra

⁷⁹ supra

⁸⁰ supra

⁸¹ supra

⁸² Article 2(4)

⁸³ Article 29 of the 1995 Constitution as amended

The allegation of intimidation and violence were by far the most serious mal-practice which was proved by the Supreme Court to include assault, unnecessary or illegal arrests, detention and intimidation of opposition candidates and supporters by military and security personnel. Court observed that these incidents were clearly unfortunate and undesirable but did not have substantial effect on the final result of the elections⁸⁴ yet it was clearly provided that violation of electoral laws would automatically nullify the entire election which observation in my opinion was very vague.

4.1.4. USE OF STATE RESOURCES

Article 67(3)⁸⁵ and Section 24 (1) of the PEA provides that all presidential candidates shall be given equal airtime and space on state owned media to present their programs to the people which in the presidential elections of last year was violated by Uganda Broadcasting Corporation by giving little or no space at all for the opposition candidates to campaign in the media as was the opposite with the incumbent candidate.

It's my contention that this particular provision was aimed at crippling the opposition while at the same time boosting the incumbent. However, the Supreme Court recommends in last years election that the electoral laws should be amended to provide for sanctions against any state organ or officer who violates this Constitutional duty on order to set proper precedent for future elections.

⁸⁴ Amama Mbabazi v Yoweri Kaguta Museveni & Others Supreme Court Election Petition No.1 2016

⁸⁵ 1995 constitution as amended

4.1.5. ADMINISTRATIVE IRREGULARITIES

From the Supreme Courts decision by 9 unanimous justices led by Chief Justice Bart Katureebe in *Amama Mbabazi V Yoweri Kaguta Museveni & 2 Others*⁸⁶ where it was clearly observed that not only was the electoral laws overwhelmingly in favor of the incumbent but also irregularities defeated the spirit of democracy taking into account the appointment of the justices and the chairman of the Electoral Commission are made by the president though with the approval of parliament which either has little or no effect at all once the president has decided to compromise the entire process. Hence the saying that “you cannot bite the hands that feeds you” which was visibly witnessed in last year’s election petition where all the ground were available to nullify the elections but surprisingly, there was a unanimous judgment that though the laws were vehemently violated, it did not substantially affect the results which greatly defiles the provisions of the electoral laws hence leaving Uganda’s judicial system wanting.

4.1.6. THE ELECTORAL COMMISSION

The Constitution provides for EC to consist of a chairperson, deputy and five other members appointed by the president with approval of parliament⁸⁷. The EC is established to be independent and not subject to any authority in the performance of its functions⁸⁸. The functions of the commission includes to ensure regular, free and fair elections are held, organise and supervise elections, demarcate constituencies in accordance with the provision of the constitution and maintain voters registration forms inter alia⁸⁹. However, the critical analysis regarding the commission reveals that all those appointed are sympathisers and puppets of the rulling

⁸⁶ Supreme Court Election Petition No. 1 of 2016

⁸⁷ Article 60

⁸⁸ Article 62

⁸⁹ Article 61

government and this raises a number of question as to the impartiality and independence of the commission.

The EC is also mandated to provide the ballot pepers in time such that the voting process can end early to enable transparency in the counting process. But last years general election, the EC failed in this duty by delivering some of the ballot pepers very late in the after where voting ended at around 2pm yet originally, voting time was supposed to be at 4pm. During the cross-examination of the then EC boss Dr. Badru Kigundu in the supreme court, he confessed to have extended the period of nomination of presidential candidates because of the late amendment in the electoral laws that somehow disrupted their normal plans and flows.

4.1.7. SHORT TERM FOR CAMPAIGNS

Campaigns were controlled by the EC where candidates are to give their campaign schedules for security reasons. The time allowed for campaigns were so short which was a mop for Museveni but a beginning point for some candidates like Amama Mbabazi, Betty Kyalya, Biraro and Mabirizi who were contesting as presidential candidates for the first time, despite little time given for the candidates to campaigns, some rival candidates were kept busy with court cases like Dr. Kizza Besigye and illegal arrests and detentions by the mambas and the military.

Also abrupt change of campaign schedules of the opponents and a lot of restrictions by the EC on orders of the ruling government. There for the opposition candidates would only work clandestinely especially, few candidates did not reach most constituencies due to fear. The short periods for campaigns were witnessed with a lot of hostilities and no one prosecuted and delay in enactment of electoral laws.

4.1.8. TECHNICAL ERRORS

The introduction of Biometric voter Machine which is a positive step towards technical development which is to be encouraged in this evolving world, the biometric machines were faulty, in poor mechanical conditions, the personels using the same were not well trained and the system control was not under tight surveillance which was accessed by many people hence leaving it at a higher risk of tempering with the results. While technology in election process should be encouraged like how the EC introduced the use of the biometric voters machine in the February 18th general elections, the same should be backed by laws to regulate it.

4.1.9. DISENFRANCHISEMENT

The EC has the functions inter alia to compile, maintain, revise and update the voters register⁹⁰. Local council leaders were used to update the register which was a grave mistake because of the wooping powers and influence the Local council's wield over the communities and the fact that they know people in that area and their political inclinations. This was therefore a way of avoiding registration of anti-NRM voters and indeed on the pooling day in many places, names of the opposition voters were missing on the registers. A number of shortcomings were noted in last years general elections inter alia the fact that a number of voters in a number of districts were unable to exercise their constitutional right to vote just because their names were not in the register.

The voters still expressed their will to exercise their constitutional right to vote by adducing the national ID to no avail since their names were missing in the register hence making them disenfranchised. This fact was proved in the election petition brought in the Supreme Court by Amama Mababazi to challenge the results.

⁹⁰ Article 62 of the 1995 Constitution

The EC has a duty to ensure that all citizens qualifies to vote, register and exercise their right to vote. The entire process of cleaning the register should be fair and transparent and should be preceded by adequate voter education. The confusion and frustration of the voters who were unable to vote suggest lack of adequate civic education⁹¹.

4.2.1. INACCURACY IN COUNTING AND TALLYING

There was clearly non-compliance by the EC with the provisions of the Constitution, PEA and ECA in counting and tallying of results. It was alleged that the EC declared results from some districts without the return forms, report from returning officers and tally sheets. Court found that results were validly declared and that there had been no inaccuracies in counting and tallying of the results in some polling stations. A number of irregularities in respect of tally sheets obtained from EC, the tally sheets were prepared and signed by the returning officers after results were declared by the EC. To make it more heartbreaking, some of the results pronounced by the EC overwhelm the total number of the electorates in some districts .

It's a mandate that while reading out results, its supposed to be read form the form but in the last general elections, some forms were read singly from each polling station of the areas suspected to be dominated by the ruling government while the areas suspected to be ani-government were read generally which was a violation of the electoral laws.

4.2.2. SECURITY FORCES

The army plays a disappointing role in the general elections whereby they do not show signs of patriotism and nationalism at all but were servants of the incumbent candidate. Everything done by them was aimed at pleasing the commander in chief with the hope of getting better rank after

⁹¹ Judgment of Odoki JSC in Kizza Besigye v Museveni Election Petition No. 1 2006 Supreme Court

the elections. Massive deployment of UPDF in the eve of elections allegedly to keep peace and order but obviously the purpose of flexing military muscles was to intimidate the voters by reminding them of who had the military might in the country. Due to the presence of the military everywhere in these elections, the entire process was conducted under the atmosphere of intimidation, lack of freedom and transparency, unfairness, commission of numerous offences by the army why go scot free and hovering of the fighter jets during the election periods.

4.2.3. PUBLIC SERVANTS

In the March presidential election petition filed by Mr. Amama Mbabazi, one of the grounds that he raised to annul president Museveni's victory was the public participation of public officers like Jenifer Musisi the Executive Director of KCCA and Ms Kagina Allen the UNRA boss had campaigned for president⁹².

The EC is empowered to appoint returning officer for each electoral district. The returning officer is to appoint one presiding and two polling assistants for every polling station. As the appointment of the commissioner by the president has to be approved by the parliament that is dominated by the ruling party and has been nothing but a rubber stamp. Parliament has been ignored whenever it puts up some opposition and a clear example was the reappointment of the former chairperson Dr. Badru Kigundu and former Deputy Chief Justice Kavuma. The continued representation of members of the army in parliament has also undermined it as an institution capable of imposing the necessary checks and balances on the executive influence.

Its rather disappointing in my opinion to note that the 9 justices unanimously dwelled so much on the substantially clause not bothering to know how the results were arrived at despite the

⁹² The Judiciary insider August 2016-January 2017 at pg 25

vehement abuse of the electoral laws which is one of the major reasons to annul elections which the judiciary system more fragile and pretty ugly as far as the judgment of the Kenyan presidential election is concerned.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

5.1 CONCLUSION

This research attempts to briefly give Uganda's electoral history from pre-colonial to date in various levels. The major and key aspect of this research is to analyse and review the election petition filed by Mr. Amama Mbabazi to challenge the victory of president Museveni as was pronounced by the EC on 20th February 2016.

Although there was a clear margin of difference between Mr Amama Mbabazi and president Museveni , the question that begs is how the candidates arrived to the votes accumulated. Did the electoral process comply with the electoral laws? Were there irregularities witnessed? Did the EC exercise impartiality in performing its duties? How about the end result of the election, did the winner really deserve the victory or was he validly elected? what of the judiciary, did it exercise its duties judiciously without compromise by dismissing the petition? All the above questions in my view are answered in the negative.

The grounds to a null or set aside presidential election petitions is non-compliance with the electoral laws as provided for in the Constitution, PEA and ECA. If the entire process contravenes the principles laid out in those laws, then the court has to be satisfied that the non-compliance affected the results substantially. But unfortunately, although there was evidence of non-compliance in almost each complaint brought by the petitioner, the election cannot be annulled because there was no satisfactory evidence to prove the same. This is a technicality that could really be cured had the 1st respondent availed the petitioner with the substantial prove of the evidence since the same were under his custody. The nullification of Kenya's Election

Petition left Uganda look ugly since the same grounds were adduced by the petitioner and the judiciary acted independently to see into it that justice is administered without due regard to technicalities.

5.2. RECOMMENDATION

The move by the nine justices of the court led by Chief Justice Bart Katureebe to hard press the government on the electoral reforms, followed by the push by a group of Makerere Lecturers for the same recommendations. The lecturers had joined Mr. Amama Mbabazi's presidential election petition in which he was challenging president Museveni's February 18th victory with the court giving its full and reasoned judgment read out by Justice Jotham Tumwesigye on behalf of Chief Justice Bart Katureebe and core to these recommendations was that the ten days period within which to file presidential election petition and gather evidence to support it and thirty days period within which the Supreme Court is to determine the same petition is unrealistic. To that effect, the justices recommended that the laws should be amended to extend the filing and determining period to 60 days to enable the concerned parties and court to adequately prepare, present, hear and determine the petition while at the same time being mindful of the time within which the new president must be sworn in.

A recommendation if put into practice will also see a law enacted to bar public servant from meddling in elections which was witnessed by the involvement of the executive Director of KCCA Jenifer Musisi and UNRA boss Ms Allen Kagina campaigning for resident Museveni. The highest court that there should be no more fundraising or giving out of donations by presidential candidates including the president during the presidential campaigns. This followed the past presidential election petition where Mr. Amama Mbabazi had raised the bribery allegations against that the incumbent bribed the electorates with hand hoes in exchange for

votes. While technology in election process should be encouraged like the EC introduced the use of Biometric Voters Machines, the same should be backed by law for effective monitoring.

On the issue of equal opportunity being denied by the opposition candidates to market themselves to the electorates during the campaigns, laws should be amended to punish those media managers and houses who refuse to grant equal space to all presidential candidates. Article 67(3) and Section 24(1) of PEA provides that all presidential candidates shall be given equal airtime and space on state owned media to present their programs to the electorates. A recommendation on any amendments of the electoral laws should be undertaken within two years of the establishment of the new parliament in order to avoid last minute hastily enacted laws on elections which was witnessed in the last general elections where the PEA and ECA were amended as late as November 2015 which the chairman EC gave as an excuse to extend the date for nomination.

The justices also recommended that the laws should be amended to permit Attorney General to be one of the respondents in presidential election petitions on the ground that there are certain issues that need the response of the Attorney General like the offences committed by the security forces under the command of the government. As it is now, the electoral laws don't provide for the inclusion of the Attorney General as one of the respondents in elections petitions yet their illegal and unlawful acts during the entire electoral process go unprosecuted. The former premier had in his petition included the Attorney General as one of the respondents which was the first of its kind in the history of the presidential election petitions which is a very bold step to see into it that the security personnel's that commit illegal and unlawful acts though under the command from above should be brought to book and be prosecuted accordingly.

In order to see these recommendations are this time round being into action unlike those proposed and not acted upon in the two previous presidential elections, the same court has tasked the Attorney General who is the chief legal adviser of the government to keenly and closely up the recommendations and report back to court within two years on the progress of the same. The move by nine justices led by Chief Justice Bart Katureebe to hard press the government on these electoral reforms this time round followed the pressure by a group of Makerere Lecturers for the same recommendations arguing that the previous ones have been brushed off. The lecturers joined Mr. Amama Mbabazi in the last presidential elections in which he challenged the victory of the President Museveni. The Attorney General has been pointed to ensure that the above recommendations are put into practice for sanity, justice and fairness principles to be clearly seen to be done in the forth coming presidential elections.

The massive powers given to the executive to my view should be scrutinized and vehemently trimmed such that the principle of rule of law and separation of power can ably be applied. My humble recommendation.

Judicial activism

The judiciary must be bold enough to entertain election petitions without regard to technicalities. This is not to suggest that the technicalities are to be ignored. The technicalities should be observed as far as practicable apart from where such strict observance would result in unfairness. Election petition should be entertained on the substantive law basis but not on the extent to which the breach of the law affects the final results. Courts decisions should always reflect the democratic nature of the judiciary that instills more confidence in the candidates and the voters at large.

BIBLIOGRAPHY

- A.K. Kivenjija. *The Crisis of confidence*, Kampala: Uganda Publishing House, 1995.
- A.Wabwire, E. Dungu and *Electoral Mechanosm and Democratic Process*. Mamdani Centre of Research, 1989.
- Amaza, O.Ori. *Museveni's Long March From Guerilla to Statesman*. Kampala: Foundation Publishers, 1998.
- "B.J.Odoki." *East Africa Journal of Peace and Human Rights Makerere University, Human Rights and Peace Centre* 2 (1993):212
- Carothers T "The End of Transition Paradigm", *Journal of Democracy* 13 (2002) No. 1 pp 1-21
- Commission, Electoral. *Voter Education Instructional Manual for Referendum on choice of a Political System*. Kampala. Civil Education and Training Department, 1999.
- Comparative analysis of presidential election petitions in Kenya and other jurisdiction. May 2013
- D. Nohlen. *Election and Electoral Systems*. German: Friedrich Ebert Foundations, 1984.
- Dunda, Carl. "Common Wealth Secretariate." 1993.
- E. F. Sempebwa. "Fairness and Essence and Rules." *Onal Seminar Constitut*. 1990.
- Evaluation Report. 1996.
- Foley M. W. and Edwards B, "The Oaradox of Civil Society" *Journal of Democracy* 28 (1996):122
- G.S Ibingira. *Forging of African Nation*. Kampala. Uganda Publishing House, 1973.

Kabwegyere, Tarsis Bazana. *People's Choice, People's Power*. Kampala: NRM Secretariat, 1998.

Makubuya, Khiduu. "The Law and Preactise of Elections in Yganda." 1993.

Lano. Z.A, "The Struggle for the Protection of Human Rights in Uganda. A critical analysis of the work of Human Rights Organizations" in *East African Journal of peace and Human Rights*, Makerere University Human Rights and Peace Centre, 5 (Kampala, 2008)2

Dr. Mbazira. *Electoral Restructuring in Uganda 2008*.

Mbazira C "Public Interest Litigation and Judicial Activism in Uganda: Improving the Enforcement of Economic, Social and Cultural Rights, Human Rights and Peace Centre Working Paper No. 24 (2009).

Mwenda, Andrew. "Independent." July 31-August 6 2009:9.

Oloka, Joe. "Electoral Processes and Future of Democracy."Makerere Law Society. Kampala, 1998.

P. Kamanatha Aiyar, *The Law Lexicon*, 2nd Edition, (Wadwah and Co, Nagpur 1997) at 102

P. Mutibwa. *Uganda since Independence*. Kampala: Fountain Publishers, 1992.

Political Pluralism, Democratic Participation and Representation at Local Government. Kampala, 2006

Public Broadcasting in Africa Series:Uganda, OSIEA, Open Society Foundations Media

Programme and AfriMAP, (2010) pg 29

.S.R.Karugire. Political History of Uganda. London Nairobi: Heiman, 1980.

S. Makara (2006) “Administering Uganda’s 2006 Multi-party Elections”

[http://www.svt.ntnu.no/.../lise.rakner@isp.uib.nostatsvitkonf-27-uganda-](http://www.svt.ntnu.no/.../lise.rakner@isp.uib.nostatsvitkonf-27-uganda-Administering%20...)

Administering%20...retrieved on 28/02/2017

Sachikonge. Politics, Constitutionalism and Electroneering. Kampala, 1994.

Sam.S.Mutabazi. “The Performance of Civil Society and the Media in the Absence of Political Opposition.”

Ssekana.M.Ssekana S Civil Procedure and Practise in Uganda

The Judiciary insider August 2016-January 2017 at pg 25

The year 1958 marks a milestone in the history of uganda 195,

<http://www.ec.ug/docs/history/%20development%20of%20EC.pdf>.

Y.K.Museveni. What is Africa’s Problem. Kampala:NRM Publication, 1992.