

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO. 0048 OF 2016
(ARISING FROM ELECTION PETITION NO. 10 OF 2016)

HON. MULIMBA JOHN APPELLANT

VERSUS

- | | | |
|---|---|---------------------------------|
| <p>1. ONYANGO GIDEON</p> <p>2. THE ELECTORAL COMMISSION</p> <p>3. THE RETURNING OFFICER,
ELECTORAL COMMISSION</p> | } | <p>..... RESPONDENTS</p> |
|---|---|---------------------------------|

CORAM:

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

HON. JUSTICE BARISHAKI CHEBORION, JA

HON. JUSTICE PAUL. K. MUGAMBA, JA

JUDGMENT OF THE COURT

This appeal is against the Judgment of the High Court sitting at Mbale in Election Petition No. 0010 of 2016. It was presided over by Andrew Bashaija J.

Background

The appellant and the first respondent were among the five contestants for election for Member of Parliament for Samia Bugwe North Constituency. The elections were held on 18th February 2016. The 2nd respondent and the

3rd respondent declared Onyango Gideon, the 1st respondent, who had garnered 16,284 votes, the winner. Mulimba John, the appellant herein, was declared to be runner up with 15,757. For purposes of this ^A appeal, details of other contestants and their vote achievements on the occasion are of no immediate consequence. The appellant was not satisfied with the outcome of the election and proceeded to file the Election Petition aforesaid. The High Court heard the Petition and dismissed it in the end. Given that the results were gainless to him, the appellant proceeded to file this Appeal.

Grounds of appeal

Initially eight grounds were advanced and these were:

1. *The Learned trial Judge grossly erred in law and fact in his holding that there was no falsification of results for Samia Bugwe County North Constituency contrary to the cogent evidence of glaring falsification placed before him.*
2. *The learned trial Judge erred in law and fact in holding that the return of the 1st Respondent by the 3rd Respondent as Member of Parliament for Samia Bugwe County North Constituency was valid and unassailable.*
3. *The learned trial Judge erred in law and fact in failing to evaluate evidence relating to uttering false statements thereby coming to a wrong conclusion that the appellant had not proved commission of the said electoral offence by the 1st Respondent.*
4. *The learned trial Judge erred in law and fact in holding that the false statements admittedly made by the 1st Respondent do not fall within the ambit of section 73(1) of the Parliamentary Elections Act.*

5. *The learned trial Judge erred in law and fact in holding that the petitioner did not set out the defamatory words verbatim in the petition or at all.*
6. *The learned trial Judge erred in law and fact in his failure to declare the appellant winner of the Parliamentary seat for Samia Bugwe County North Constituency as the DR Forms adumbrated.*
7. *The learned trial Judge erred in law and fact in holding that the appellant did not prove offences of defacing of campaign posters and in holding the appellants evidence in this respect redundant averments.*
8. *The learned trial Judge erred in law and fact in holding that the falsification of 107 votes as he found could not affect the election substantially. (sic)*

Issues

At the hearing of this Appeal, the following issues were agreed:

1. *Whether there was falsification of results at the alleged 12 polling stations.*
2. *Whether if the above is so, the falsification affected the results of the election in a substantial manner.*
3. *Whether the 1st respondent's agents made false statements against the appellant during the campaign and if so whether it was with the knowledge, consent and approval of the 1st respondent.*

Issue 1 covers grounds 1 and 2 of the Memorandum of Appeal. Issue 2 covers grounds 6 and 8. Grounds 3, 4 and 5 of the Memorandum are to be resolved in issue 3. For the record, no mention was made of the location of ground 7, but it will be dealt with in issue 3.

Representation

Mr. Hassan Kamba and Mr. Musa Ssekaana represented the appellant. Mr. Okello Oryem appeared for the 1st respondent. Mr. Edmund Wakida was counsel for the 2nd and 3rd respondents.

We are alive to the provisions of Rule 30 of the Judicature (Court of Appeal Rules) Directions where it is ordained that on any appeal from a decision of the High Court acting in the exercise of its original jurisdiction this court may reappraise the evidence and draw inferences of fact. We are beholden also to the dicta of Oder JSC (RIP) in **Uganda Breweries Ltd Vs Uganda Railways Corporation, Supreme Court Civil Appeal No. 6 of 2001, [2002] 2 EA 624, 641** where he observed:

‘There is no set format to which a re-evaluation of evidence by a first Appellant court should conform. The extent and evaluation may be done depends on the manner in which the circumstances of each case and the style used by the first appellant court. In this regard, I shall refer to what this court said in two cases. In **SEMBUYA VS ALPORTS SERVICES UGANDA LIMITED [1999] LLR 109 (SCU)** Tsekooko JSC, said at page 11:-

“I would accept Mr. Byenkya’s submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first appellate Court is expected to scrutinize and make assessment of the evidence but this does not mean

that the Court of Appeal should write a Judgment similar to that of the (trial)" (Emphasis added).

In **ODONGO AND ANOTHER VS BONGE ...** Odoki, JSC (as he then was said:

“While the length of the analysis may be inclusive of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance.” I agree with the views expressed by the learned Justices of this Court in the two cases immediately referred above.’

The above besides, we are aware that after we have re-evaluated the evidence on record we are not to interfere with the findings of the trial court just because we would, had we tried the matter, have reached a different decision. It will be our place to interfere, however, if we find that the trial Judge erred in findings of fact.

Issue 1 was whether there was falsification of results at the alleged 12 polling stations. Counsel for the appellant disputed the results in several polling stations in the Samia Bugwe County North Constituency. The polling stations mentioned at the hearing of this Appeal were Buhobe 'A', Tabongo Trading Centre, Asinget Nursery/Primary School, Namungodi Trading Centre, Habuleke Primary School A-M, Nangulu Primary School N-Z, Lulonda West, Sidibile, Akobwait, Naikonta C.O.U, Okame Pr. School, Amongura, Onyunyuri and Buteba Baptist Primary School.

Counsel for the 1st respondent contested the inclusion in the argument of several of the polling stations which were neither related to, in the Petition

hearing, nor even mentioned in the Petition itself. He submitted that parties are bound by their pleadings and should not be allowed to depart from them. He cited the Civil Procedure Rules Order VI rule 7 to that effect.

We have looked at the proceedings in the lower court and at the Petition itself as well as the affidavit in support. In the Petition the stations mentioned are;

- Buhobe 'A'
- Tabongo Trading Centre
- Asinget Nursery/Primary School
- Nangulu Primary School N-Z
- Namungodi Trading Centre,
- Habuleke Primary School A-M.

We note that in his consideration of the Petition the learned trial Judge at no point considered those polling stations not included in the pleadings. Nevertheless in arguing this Appeal before us counsel for the appellant did include the several stations earlier mentioned which were not the subject of adjudication in the High Court. This Appeal is against the decision of the High Court on matters submitted to it and the Appeal therefrom must be in relation to that. In any case Order VI rule 7 of the Civil Procedure Rules provides:

'No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any



allegation of fact inconsistent with the previous pleadings of the party pleading that pleading.'

In this respect we have to bear in mind also the holding of Oder JSC, of good memory, in **Interfreight Forwarders (U) Limited vs East African Development Bank, Supreme Court Civil Appeal No. 33 of 1992**. He had this to say:

*'The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will governthe trial and which the court will have to determine at the trial. See **Bullen & Leake and Jacob's Precedents of Pleadings 12th Edition, page 3**. Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.*

.....'

Needless to say, there was no amendment and the impugned extra polling stations were never canvassed in the Judgment. The object of particulars is



in addition to prevent surprise at the trial by informing the opposite party what case he has to meet, to define and narrow the issues to be tried so as to save unnecessary expense. The opposite party should be told any and every particular which will enable him to properly prepare his case for the trial. See **Mulla on the Code of Civil Procedure, 12th Edition page 580.**

We shall steer clear of any invasive matter therefore and stick to what was adjudicated upon.

1. Buhobe A Polling station.

The controversy here came about following the production in evidence of two contesting declaration of results forms (DRF) by the appellant herein. Each of the two forms appeared to relate to the same matter but bore different results. There was the DRF at page 69 of the record of proceedings (MJ-2) which gave the appellant 496 votes against 83 of the 1st respondent. It gave the code for the polling station as 05. The other DRF presented by the appellant is at page 218 of the record of proceedings. It gave the appellant 296 votes against the 1st respondent's 283. The code for the polling station is indicated as 01. We should mention that the constituency is indicated as Samia Bugwe Country North on the form at page 69 of the proceedings but as Samia Bugwe County North on the DRF at page 218 of the proceedings.

We looked at the tally sheet on page 63 of the Record of Proceedings. Needless to say, it refers to elections and refers to Samia Bugwe County. Buhobe A is shown with code 01. Results show the appellant got 296 votes




against the 1st respondents' 283. We looked also at the DRF at page 239 of the Record of Proceedings received from Wesonga Joel, an agent for the 1st respondent as well as his affidavit at page 237 and 238 of the Record. The contents on it agree with those on the DRF at page 218 of the Proceedings. We are satisfied that of the two results in contest, the DRF at page 69 of the Record of Proceedings and that at page 218 of the Record of Proceedings the results contained in the latter DRF are the actual ones and those, the massaged figure on page 69 of the Record of Proceedings, are false. We agree with the trial court's decision on this matter.

2. Tabongo Trading Centre

The appellant produced two DR forms with differing results. There is the DRF at page 70 of the Record of Proceedings. It shows that the appellant got 273 votes at the polling station against 154 for the 1st respondent. It is remarkable that the result of the appellant shows uncharacteristic recording emphasis and the revised result is not countersigned. Then there is the DRF at page 214 of the Record of Proceedings. This gives the result for the appellant as 173 and that for the 1st respondent as 154. There must be something wrong somewhere causing the two documents not to agree on the results. The tally sheet at page 68 of the Record of Proceedings gives the result at the polling station as 173 for the appellant and 154 for the 1st respondent. This agrees with what is contained on the DRF at page 214 and shows the falsehood of the DRF at page 70. Here again we agree with the finding of the trial Court.

3. Asinget Nursery/Primary School.

There was no argument advanced contesting the findings of the High Court for this polling station.

4. Nangulu Primary School N-Z.

Here again no argument was advanced contesting the findings of the High Court for the polling station.

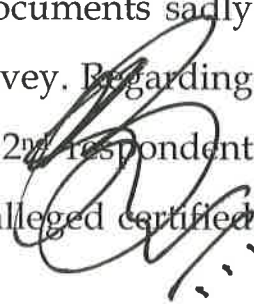
5. Namungodi Trading Centre.

No argument was advanced contesting the findings of the High Court for Namungodi Trading Centre save for unsupported aspersions relating to accountability of ballot papers.

6. Habuleke Primary School A-M

The appellant did not show that there was anything amiss with the results at Habuleke Primary School A-M.

We are cognizant of the various DR Forms which were not consistent in the results apparent on them. This, we agree is unfortunate but we recognize that all is not lost given that there is available referral points such as the tally sheets and the testimonies of the agents. Doctored documents sadly do not add value to the information they are created to convey. Regarding alleged certification, it was submitted by counsel for the 2nd respondent that no evidence exists of the appellant ever receiving the alleged certified copies from the 2nd respondent.



Our answer to this issue is in the negative. Those documents with the fabricated entries were never considered in tallying the results.

Issue 2 is whether if there was falsification the falsification affected the results of the election in a substantial manner.

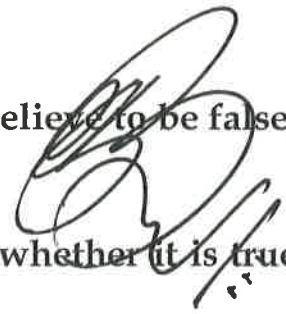
We have pronounced ourselves in the first issue that whatever falsification might have occurred did not affect the result in any of the impugned polling stations at all. Our answer therefore is in the negative

Issue 3 is whether the 1st respondent's agents made false statements against the appellant during the campaign and if so whether it was with his knowledge, consent and approval.

The appellant invoked S.73(1) of the Parliamentary Elections Act which states.

'(1) A person who, before or during an election for the purpose of effecting or preventing the election of a candidate, makes or publishes or causes to be made or published by words whether written or spoken, or by song in relation to the personal character of a candidate, a statement which is false-

- (a) which he or she knows or has reason to believe to be false;**
or
- (b) in respect of which he or she is reckless whether it is true or false**



commits an offence and is liable on conviction to a fine not exceeding twenty currency points or imprisonment not exceeding six months or both.

(2)

It was alleged by the appellant that the 1st respondent and the 1st respondent's agents defamed him particularly by referring to the appellant as academically challenged. It was contended on behalf of the appellant that his personal character was assailed. The exact words used were never brought to the attention of court as the trial court correctly found. Instead, in paragraph 11 (b) (i) there is a statement which, it confessed, is a loose translation. A loose translation is not necessarily a translation. Such a translation is not perfect or completely accurate. It is accuracy that is required to prove a false and defamatory statement. We should add for good measure that it was nowhere shown that the personal character of the appellant was ever under attack since even insinuation of one being academically challenged does not extend to personal character. We agree with the finding of the learned trial Judge on this aspect.

Similarly we cannot fault the learned Judge's finding that on the evidence available no nexus exists between those who might have defaced and torn the appellant's campaign posters and the 1st respondent and his agents.

We find no merit in this Appeal which we dismiss it with costs to the respondents in this court and that below.



Dated at Kampala this 28th day of Sept 2017

HON. JUSTICE S.B. K. KAVUMA,
DEPUTY CHIEF JUSTICE

HON. JUSTICE BARISHAKI CHEBORION
JUSTICE OF APPEAL

HON. JUSTICE PAUL K. MUGAMBA
JUSTICE OF APPEAL

28/9/2017
Sekaane for Appellant
Okello Oryem for 1st Respondent
1st Respondent present.
Ch' Judgment read in Court. Attole