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IN THE HIGH COURT OF UGANDA AT TORORO

IN THE MATTER OF THE LOCAL GOVERNMENT ACT CAP 243

AND

IN THE MATTER OF LOCAL COUNCIL CHAIRPERSON LCIII ELECTIONS

ELECTION PETITION NO.0027 OF 2011

AKILENG ABU MERIC.....PETITIONER

VERSUS

1. OLIRAH PETER MUSAO }

2. ELECTORAL COMMISSION }.....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The Electoral Commission the 2nd respondent herein organized elections for LCIII Chairpersons country wide and these were held on 7th March 2011. In Mella sub county of Tororo District, the petitioner and 1st respondent herein were the two of the candidates who contested the election for the post of LCIII Chairperson of the sub county. The 2nd respondent declared the 1st respondent as the winner of the said elections. The petitioner filed this petition against the respondents challenging the results of those elections.

At the hearing of the petition Mr. Songon Watuwa Mustafa appeared for the petitioner while Mr. Obiro Ekirapa Isaac represented the 1st respondent. Mr. Mwasu Jude for the 2nd respondent appeared only when the matter was in court for fixing the hearing date. He did not appear for the hearing of the petition thereafter, and court was not given any reasons for his absence. The petition therefore proceeded in the absence of the 2nd respondent and their Counsel.

During scheduling the following facts were agreed.

1. That the petitioner and the 1st respondent contested for LCIII elections in Mella sub county in Tororo District on 7th March 2011.
2. That the second respondent declared 1st respondent as winner of the said election with 1738 votes while the petitioner, the closest contender polled 1288 votes.
3. That the 2nd respondent gazetted the 1st respondent as winner of the said election on 29th April 2011.

The petitioner sought under section 138 of the Local Government Act to set aside this election. Allegations were that the 1st respondent was not validly elected due to malpractices which included vote rigging, violence, bribery, disfranchisement of votes, failure to count votes properly and failure to sign declaration forms. On the basis of those allegations, the following issues were framed for court's determination.

1. Whether the elections of Mella sub county were conducted in compliance with the Local Government Act and the principles there in.
2. If not whether such non compliance affected the results in a substantial manner.
3. Whether the 1st respondent personally or by his agents with his knowledge and consent or approval committed electoral offences or illegal practices.
4. The remedies available.

It is now settled that the burden of proof in election petitions lies on the petitioner. Odoki CJ stated in *Kizza Besigye v Yoweri Kaguta Museveni and anor* EP No.1 of 2001 that the "In my view the burden of proof of election petitions, as in other civil cases, is settled. It lies on the petitioner to prove its case to the satisfaction of court." Local government council elections like the one now under review are provided for under Part X of the Local Government Act. Section 172 of that Act applies the Parliamentary Elections Act to this part of this Act. Under S. 61(3) of the Parliamentary Elections Act, the standard of proof in election petitions is on a balance of probabilities.

Section 139 of the Local Government Act provides that the election of a candidate as a chairperson or a member of a council shall only be set aside on the following grounds if proved to the satisfaction of the court.

- (a) that there was failure to conduct the election in accordance with the provisions of this Part of the Act and that the non-compliance and failure affected the result of the election in a substantial manner.
- (b) that a person other than the one elected purportedly won that election.
- (c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval; or
- (d) that the candidate was at the time of his or her election not qualified or was disqualified from election.

NON COMPLIANCE WITH THE ELECTORAL LAWS

The petitioner outlined instances where he alleged that there was failure to conduct elections in accordance with the laws governing elections for local government councils. I will deal with each of these allegations, and the respective responses from the 1st respondent.

Kinyil Central Polling Station.

The petitioner in para 5 of his affidavit in support deposed that at Kinyil Central polling station the declaration of votes differed from the total number of votes cast, as evidenced in the Declaration of Results (DR) form which was annexed. The said annexure was exhibit P3. It showed that there were 5 candidates. The votes cast for each of them was as follows;

Akileng Abu Meric	148
Emodo Vincent	16
Olirah Peter Musao	83
Orukan James Peter	01

Oteba John Osilo

19

TOTAL VOTES CAST

267

There were 5 rejected votes and no spoiled vote according to exhibit P3, meaning therefore that the total votes cast were 272. But the total number of votes cast given on exhibit P3 was 278 and that was the complaint that the results on the DR form did not tally with the figures shown.

It is to be noted that the results shown on that form exhibit P3 against each candidate were not challenged at all. The only issue was in the addition. It is to be noted further that the form exhibit P3 was duly signed by the agents of each of the candidates including those of the petitioner. Lastly it is not disputed that this form was duly signed by the Presiding Officer as is required by the law.

The DR form which was exhibited by the 1st respondent exhibit D12, had corrections in the above maligned figures. The other figures and features on exhibit D12 were exactly the same as those in exhibit P3. It was stated in answer that the number complained of was in the addition, and the error did not have any effect on the petitioner as his full votes and those of all the other candidates were properly accounted for and so recorded.

I agree with the above. The error had no effect whatever on the results of the elections. Elections are conducted by human beings. Errors are bound to occur in the conduct of the same. What is important is that such errors should not affect and alter the will of the people's choice of who should lead them. That complaint was therefore to be dismissed.

Amoni Primary School Polling Station: Harassment and Violence

The allegation was from Dinah Amwanga who deposed in para 2 of her affidavit dated 13/5/2011 that she was the polling agent of the petitioner at the above polling station. She stated in para 4 that at 12.00 noon, the supporters of the 1st respondent whom she could not remember intimidated and threatened her. She however mentioned Ikileng and Arsenal as being in that group, and that these were known supporters of the 1st respondent. She further deposed that later that same polling day, the supporters of the 1st respondent swarmed the polling station with sticks and she fled for fear for her life. She reported these happenings to the police constable at the polling station, who was alone, could not therefore contain the rowdy mob.

The witness stated that she did not witness the counting of votes at that polling station, and did not therefore sign the DR form. She further deposed that to the best of her knowledge the Presiding Officer started counting votes at 4.30 pm, and that was when she left. The signature appearing on exhibit P6B is not hers, and can only be a forgery, for which she reported the same to the police vide SD43/11/03/2011.

There was another DR form for the same Amoni Primary School polling station exhibit P6A which had a blank in the space for signature against the name of Amwanga Dinah. Exhibit D2 which was tendered by the 1st respondent was similar to P6A. It did not have a signature against the name of Amwanga Dinah. But the 2nd agent of the petitioner Opara Geoffrey signed the DR form in P6 A, P6 B and also in D2.

Osire Paul was the election supervisor for the petitioner. On polling day, he visited a number of polling stations, including Amoni Primary School polling station. He evacuated Amwanga Dinah from this polling station at her request, 'from the rowdy supporters of the 1st respondent'. This witness did not state that the 2nd agent of the petitioner at this polling station Opara Geoffrey was under similar threat, or that he was also evacuated.

Osire Paul arrived at Amoni parish at 12.00 noon and he found Sande Arsenal and another supporter of the 1st respondent 'distributing money to supporters'. He left the parish and went to Amoni II COU polling station, where he found an agent of the petitioner, one Emorut Levi. From that point he proceeded to Amoni Primary School polling station, and that was when he met Amwanga Dinah. That must have been well beyond 12.00 noon.

But Amwanga Dinah deposed in her affidavit that Arsenal and another supporter of the 1st respondent threatened to beat her up at 12.00 noon at Amoni Primary school polling station. Surely Arsenal and company could not have been at Amoni Parish dishing out money at 12.00 noon, and at the same time, 12.00 noon also at Amoni Primary School polling station threatening to beat up Amwanga Dinah, even if these two places were near each other. Either Amwanga Dinah or Osire Paul was not telling the truth.

At this polling station the complaint revolves around Amwanga Dinah. She says she was threatened and she ran away. However the 2nd agent of the petitioner remained till the end of voting, and up to counting of votes. He eventually appended his signature on the DR form. There

was no evidence from this agent that the events at his polling station were other than normal. That was quite telling. It cast a lot of doubt in the testimony of Amwanga Dinah.

Ekapel Benjamin was an election supervisor for a candidate in another election but being held on the same day and place. He was at Amoni Primary School polling station at the time the vote counting started at 5.00pm. He knows Amwanga very well as an agent and wife of the petitioner. She was present at the time the votes were counted, and remained up to the end. He did not see anyone threatening or harassing her. This was an independent witness and his evidence is more reliable.

Opidi Richard Jerom also deposed similarly like Ekapel. He knows Amwanga very well as the wife of the petitioner. He was at the polling station all the time. Vote counting started at 5.00pm, and Amwanga Dinah was around. There was no threat or harassment of anyone at that polling station. Adima Sylvester also testified to the same effect.

She deposed that she left at about 4.30 pm, but also testified that that was the time vote counting started, and at the same time, she did not witness the vote counting exercise. Her testimony was contradictory. It was unreliable and court found it to be of little value to the petitioner.

From all the above court is inclined to believe that Amwanga Dinah was not threatened or harassed, and that she was present at the time of counting the votes. That she did not sign the DR form was her prerogative. However, she ought to have given reasons why she refused to sign. The complaint at Amoni primary school polling station is without merit and is to be dismissed.

The same would go for Amoni COU where Opuu Mohamed was the petitioners agent. He deposed that he was threatened and harassed. He did not state who did this. Omaid Paul was the Presiding Officer at this polling station. He testified that there was no threat to Opuu Mohamed. He knows Asea very well and did not allow him to vote twice as alleged.

Opuu Mohamed and another agent of the petitioner refused to sign the DR forms on advice from another agent of the petitioner who ferried them away. This witness noted the reasons on the DR forms as required under the law. That DR form was exhibited. This was another independent witness. His evidence appeared the more reliable. The complaint about Amoni COU polling station is to be dismissed as being without merit.

Failure to sign Declaration of Results Forms

The complaint was that there was a failure by the Presiding Officers to sign the DR forms. Section 136 of the Local Government Act provides for DR forms. Subsection 4 thereof provides that the DR form shall be signed by the presiding officer and the candidates or their agents present who wish to do so.

The petitioner annexed DR forms on his petition a total of 22 DR forms. Some forms were repeated like Amoni Primary School polling station where there were two forms, and Amalai Pentecostal polling station where he submitted 3 forms. All the forms so submitted by the petitioner were duly signed by the presiding officer, save only one form for Amalai Pentecostal polling station, exhibit P4A which was not signed by the presiding officer.

The 1st respondent also submitted DR forms from all the polling stations. Exhibit D1 was the DR form for Amalai polling station. It had all the details as in the form submitted by the petitioner exhibit P4B, save that this one exhibit D1 was duly signed by the presiding officer.

There was no contest about the results of the election at this polling station. Each of the candidates agents duly signed the DR form. None deposed an affidavit complaining that the results shown on the DR form were other than those which their respective candidates got at this polling station. There was no contest whatever in all the details on those DR forms. Indeed exhibit D1 was duly signed by the presiding officer. There was no intimation that the signature on that form was not genuine. I found that the complaint about non signing of the DR form without merit.

Failure to Indicate Time When Voting Ended.

The complaint in this regard was that the presiding officers ended the exercise earlier than the stipulated time of 5.00 pm, and thereby disenfranchised voters.

All the DR forms submitted by the petitioner had the time indicated. Most of them indicated 5.00 pm as the time voting ended, save for those already in the queue. Only DR form for Amagoro and Komolo polling stations exhibits P9 and P13 respectively did not have time indicated.

Olupot Imo the presiding officer at Check Point polling station deposed that they were told in training that voting ended at 5.00 pm. That was the time therefore they indicated, but whoever was in the line by the hour of 5.00 pm would be allowed to vote. Emorot John was at Omelia Primary School polling station. Emojong Robert was an agent of the petitioner at Amalai polling station. He deposed that the entire exercise at that polling station was peaceful. Voting ended at 5.00 pm, ^{and} ~~at~~ ⁵ vote counting started. There was no one in the queue after 5.00 pm. That evidence from the agent of the petitioner says a lot about the electoral process at that polling station.

Ekapel Benjamin and Opidi Richard, testified that voting ended at 5.00 pm, and nobody was stopped from casting his or her vote. I found the above evidence believable. There was no evidence from any person who was denied the right to cast their vote in this electoral exercise for Mella sub county Chairperson. The complaint that voters were disenfranchised was without merit.

Errors in Computation of Results.

The complaint in this respect was that the figures on the DR forms could not tally. Examples were given of the polling stations of Kakuye, Amalai Pentecostal, Apokor and Kinyil Central.

The complaint at Kakuye polling station was that the DR form exhibit P5 showed for the total number of ballot papers issued as either 550 or 650. The figures were superimposed on the others. The 1st respondent presented to court exhibit D3 also a DR form for Kakuye GC polling station. It showed the figures for total ballot papers issued as 600.

At Amalai Pentecostal polling station, the figures on the DR forms presented by both sides i.e. exhibits D1 and P4B for the 1st respondent and the petitioner respectively are similar. The only difference was that the form presented by the petitioner was not signed by the presiding officer while that presented by the 1st respondent was duly signed.

At Apokor polling station the figures on both sides' forms were similar. The complaint was that the addition of the total votes cast was wrong. It was given as 380 when it was 374.

At Kinyil Central polling station the complaint was that there were corrections in the figures when adding up. While a figure of spoiled votes was shown as 100, this was later rubbed out to show nil. The figure for total ballot papers was wrongly added as 278 but later corrected as 272.

The form which the petitioner presented exhibit P3 was not corrected, while the one presented by the 1st respondent was duly corrected.

It was submitted that there was a wrong computation of results. From all the above, I did not see any wrong computation as alleged. From all the polling stations complained of, the results of the votes cast for each candidate were not in the least impugned. There was no alteration or correction in the figures obtained by each candidate. Each of the protagonists had agents at each of these polling stations. There was no complaint from any of them of any wrong doing by the presiding officer or any person at these respective polling stations. The votes which each candidate obtained at these respective polling stations were the ones accredited to each of them. There was no evidence to the contrary, and indeed no complaint in that regard.

The additions of the total number of ballot papers supplied to the various polling stations was in some instances badly done. The additions were done by human beings. When mistakes were discovered, these were corrected. These mistakes however had absolutely no effect on the results of the candidates, as the votes cast for each candidate remained as written in the DR forms, and there was no complaint about them, or their addition at the polling stations, or at the tally centre.

The complaint that there was wrong computation of results was also without merit and it is to be dismissed.

Failure by Presiding Officers to State Why Some Agents Did not Sign DR Forms.

This was the last complaint in this issue. It was submitted that presiding officers did not indicate on the DR forms the reasons why some agents of candidates refused to sign them. This is an administrative rather than a legal requirement. Dinah Amwanga did not sign exhibit P6A. Exhibit P5 one of the agents of the petitioner did not sign. With respect to Amwanga Dinah her refusal to sign has already been dealt with. First of all she was an unreliable witness who told lies. Secondly there was evidence that she was present at the time of vote counting and declaration of results but she deliberately refused to sign. Lastly from the deposition on court record, she was ferried away by one of her fellow agents.

With regard to the 2nd agent who did not sign on P5, he stated that he refused as in his opinion the voting was not fair. The provision of the law is that only those agents who wish to sign do so.

The law envisaged that some agents especially of losing candidates could refuse to sign. The DR form provided by the 2nd respondent has room thereon where an agent who refuses to sign ought to state the reasons for not doing so. This was not done. The presiding officer also is required to give reasons on the DR form why those agents who do not sign so refused.

In *Kakooza John Baptist v. E.C. and Another* E.P. No. 11 of 2007 (SC), it was held that absence of a candidate's agent from signing a DR form does not, by itself, invalidate the results. The fact that the agents of the 2nd respondent in two polling stations did not assign reasons why the agents of the petitioner did not sign the DR forms was not fatal as it did not affect the results of the election in any significant way.

In the event I found that there was substantial compliance with the Local Government Act. That answers the 1st issue.

2nd Issue. Whether the non compliance affected the results in a substantial manner.

I found that the conduct of the elections was substantially in compliance with the laws governing the elections of Chairperson LCIII. However, I also found instances where the presiding officers failed to make the proper additions when it came to the numbers of the total votes cast, the spoiled one, those invalidated and the unused ones. These additions numbers came well after the results of the election were announced. The important thing was that the numbers of votes cast for each candidate were properly accounted for and accurately reflected on the DR forms. That was done as there was no complaint in that regard.

I noted that the petitioner had complaints in 15 of the 17 polling stations. I dealt with these complaints and found them to be without merit, and I dismissed them. The petitioner brought out all the minor details of errors and mistakes, but none of the complaints was substantive.

The case of *Betty Nambozo Bakireke v. Bakaluba Mukasa* was not helpful to the petitioner. In that case massive irregularities were proved to court, and the results of the election were annulled. In this case, I did not see any serious irregularity. The mistakes of the presiding officers were minor and did not affect the results of the election in a substantial manner. That answers the 2nd issue.

3rd Issue; Illegal practices or Electoral Offences

The election of a candidate will be set aside under section 139 (a) and (c) of the Local Government Act where the illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or by his or her agents with his or her knowledge and consent or approval.

Evidence had to be adduced to prove that the illegal practices were committed knowingly. There is need for the evidence to have some corroboration and other compelling circumstances for court to be satisfied with the truthfulness.

In Engineer Yorokamu Katwiremu Bategana v Elijah Mushemeza and 2 others E.P.No.1 of 1996, it was held that *“it is important to subject that evidence to serious scrutiny before the court acts upon it and that unless there exists compelling and aggravating circumstances, an allegation of a commission of an illegal practice or an election offence should not to be taken to have been proved by evidence of a single witness...”*

In the instant case there was no evidence that illegal practices were committed, or that they were committed by the agents of the 1st respondent with his knowledge, consent or approval. In Paddy Kabagambe v Wandera Bihande E. P. No.11 of 2006, it was held that the petition should set out the alleged illegal practices or election offences in distinct paragraphs detailing the allegations and the law alleged to have been violated...and where the allegations are not with the petition, affidavit evidence should not be relied on in court as the party would be departing from what he pleaded.

There was no incident of bribery alluded to in the petition. None was deposed to in the petitioner's affidavit in support. No bribery was shown or proved. Court disregarded the complaint in that regard.

There were allegations of intimidation and harassment of voters. These came from Dinah Amwanga and Opuu Mohamed. Dinah Amwanga in her affidavit stated that she was harassed. I have already dealt with the evidence of these two witness in regard to their allegations of harassment and violence. I did not find the allegations proved on a balance of probabilities. I also dealt with the evidence of Osire Paul, who deposed that he was in three different places at 12.00 noon on voting day. He was an unreliable witness.

The case of *Samwiri Masa v. Rose Acong* [1978] HCB 297 was cited where Ntabgoba J, (as he then was), held that where evidence is sworn proving certain facts, the burden to deny them is on the other party. If not they are presumed to be true. As a general principle of law, that is correct. However, when dealing with election petitions, one is always wary of the rule 15 of the Parliamentary Elections (Election Petition) Rules which provides in subrule (1) thereof that, 'subject to this rule, all evidence at the trial, in favour or against the petition shall be by way of affidavit read in open court'. An Affidavit in an election petition will not be taken as telling the gospel truth, whether or not there is evidence in rebuttal. In such a case, each affidavit will be treated cautiously and on its own merit, along with and in relation to all the other evidence and in consideration of all the circumstances of the case, before deciding whether or not to accept it as truthful.

There were irregularities like the unsigned declaration form which showed non compliance with the Local Government Act. It had to be proved that the commission of these irregularities and malpractices were made with the knowledge and consent of the 1st respondent.

The petitioner in his affidavit in support of the petition deposed that he got all the DR forms from the Returning Officer. Even the one which he had failed to get, he managed to secure it. He did not in his petition or in his affidavit in support or indeed in any of the affidavits deposed by his supporters show that his votes were cancelled, or wrongly added or tallied, or robbed. He stated that he compared the DR forms from the Returning Officer with those which he got from his agents. Nowhere did he show that upon such comparison, the results on the forms differed. On the contrary, from the evidence on record, all the results on the DR forms and especially the votes cast for each candidates, from the petitioner and the Returning Officer matched perfectly.

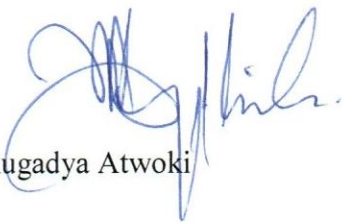
In *Kaija William & Another v. Byamukama James* E.P. No. 12 of 2006, the court observed that a candidate is free to appoint any number of agents to safeguard his or her interests. The petitioner did so in this case. The agents signed the DR forms. There was no allegation that they were compromised. They must then be taken to have signed for results which were a true reflection of the will of the people.

The 3rd runner up to these elections Emodo Vincent in his affidavit showed that the elections were free and fair and his agents at all polling stations did not report any kind of malpractice.

While ordinarily evidence of a party comes from supporters, where it comes from a co contestant, court will take it seriously, as this is seen as being more or less independent evidence. The petitioner majored on minor issues and failed to prove the electoral offences or illegal acts which affected the results in a substantial manner.

Section 139(a) of the Local Government Act stipulates that the election petition can be set aside if the non compliance affected the results in a substantial manner. I did not find that the non compliance affected the results in a substantial manner. The 3rd issue is accordingly dismissed.

The 4th issue was on remedies. In view of my findings in the three issues above, the petition is dismissed. The procedure is that costs follow the event, unless court for good cause directs otherwise. My finding was that the 2nd respondent did not live up to the mark in the conduct of this election, albeit in a not too significant manner. Nonetheless, as the body mandated to conduct elections in a free and transparent manner, they will be taken to task whenever there is any shortcoming in the elections, however minor. Engwau JA in Bakaluba Mukasa v. Betty Nambozo Bakireke (supra) on appeal confirmed that the law does not make room for electoral officials to make wrong returns. In the premises, I will not condemn the petitioner in costs. I will order that each party shall bear their own costs.



Rugadya Atwoki

Judge

28/07/2011.