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THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE

HCT-04-CV-EP-0021-2016

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WESWA DAVID.....PETITIONER

VERSUS

1. THE ELECTORAL COMMISSION

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2. MAKATU AUGUSTUS.....RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

20 WESWA DAVID (hereinafter referred to as the "Petitioner") filed this  
petition against the Independent *ELECTORAL COMMISSION* (IEC)  
*AND MAKATU AUGUSTUS* (hereinafter referred to as the "1<sup>st</sup>" and  
"2<sup>nd</sup>" Respondent" respectively) seeking a declaration that;

25 a) the election activities of voting, vote counting and  
announcement of results for the Local Council chairperson  
were invalidly carried out at Nakhamosi polling station and

that the results there from should have been accurately included in the total tally of results for Nalwanza sub-county.

b) the Petitioner other than the 2<sup>nd</sup> Respondent was validly  
30 elected chairperson for Nalwanza sub-county.

c) in the alternative, but without prejudice to the above, that the election of the 2<sup>nd</sup> Respondent as chairperson Nalwanza sub – county be set aside and a new one be held.

d) Costs of the petition be awarded to the Petitioner.

35 **Background:**

On 9<sup>th</sup> March, 2016 the 1<sup>st</sup> Respondent conducted elections for LC.III chairperson for Nalwanza sub-county. The Petitioner, the 2<sup>nd</sup> Respondent, and one Fungo Vincent, contested as candidates for the seat. The 1<sup>st</sup> Respondent declared the 2<sup>nd</sup> Respondent as winner  
40 and validly elected with 974 votes, the Petitioner with 881 votes, and Fungo Vincent with 27 votes.

The Nalwanza sub-county had a total of nine (9) polling stations, one of which was Nakhamosi polling station in which the Petitioner claims to have obtained 315 votes as against the 2<sup>nd</sup> Respondent's  
45 38 votes, and Fungo Vincent 05 votes. The 1<sup>st</sup> Respondent cancelled the results of the said polling station and did not include them in

the final tally of the results for Nalanza sub – county. The Petitioner contests the 1<sup>st</sup> Respondent’s decision to cancel results of the particular polling station. He further contends that there was non-compliance with the law for the conducting of free and fair elections and in particular that there was failure to include the votes for Nakhamosi polling station in the final tally which affected the result of election in a substantial manner.

At the scheduling conference the following issues were agreed for determination;

***(1) Whether the election was not conducted in accordance with the electoral laws.***

***(2) If so, whether the non-compliance affected the result in a substantial manner.***

***(3) What are the remedies available to the parties?***

Mr. Gyabi Charles James represented the Petitioner; Mr. Richard Latigo represented the 1<sup>st</sup> Respondent, and Mr. Tony Okwenye the 2<sup>nd</sup> Respondent. All the counsel opted not to cross-examine witnesses. They made submissions on the issues primarily based on the evidence on record. It was an agreed fact that the election results for Nakhamosi polling station were cancelled by the District

Returning Officer and not included in the final tally of result for Nalwanza sub – county. The only disagreement was on whether the cancellation was legally justified or not.

70 ***Issue No.1. Whether the election was not conducted in accordance with the electoral laws.***

There appears to be a less than subtle concession on all sides that to a large extent there was non-compliance with the electoral laws in as far as the activities of voting, counting and tallying of results  
75 for Nakhamosi polling station were concerned. This is easily discernable in submissions of all counsel on all sides choosing to argue only on the issue whether the non-compliance affected the result of the election in a substantial manner. I will also adopt the same stance and concentrate mainly on the issue as to whether the  
80 non compliance affected the results in a substantial manner.

***Issue No.2: if so, whether the non-compliance affected the result in a substantial manner.***

Mr. Gyabi Charles James counsel for the Petitioner submitted that the evidence of all parties shows that there were nine polling  
85 stations in Nalwanza sub-county. Further, that the 2<sup>nd</sup> Respondent got 974 votes and the Petitioner 881 votes of the total tallied votes

for seven polling stations, and that the margin between the  
Petitioner and 2<sup>nd</sup> Respondent was 93 votes.

Mr. Gyabi also submitted that the evidence of all the parties shows  
90 that the Petitioner got 315 votes and 2<sup>nd</sup> Respondent 38 votes at  
Nakhamosi polling station. Mr. Gyabi argued that on basis of these  
figures, had the Presiding Officer filled in the results in DR from,  
the result would have been completely different and the margin of  
93 votes would have disappeared if the votes had been tallied and  
95 the win of 2<sup>nd</sup> Respondent would have evaporated. That in that case  
the Petitioner would have won if the law had been followed. Mr.  
Gyabi submitted that given the statistics, it is clear that the non  
compliance with the electoral laws affected the result in a very  
substantial manner and that the court should find so.

100 In reply Mr. Richard Latigo, learned counsel for the 1<sup>st</sup> Respondent,  
agreed that indeed the tallying of results was for only seven polling  
stations out of the nine. Further, that on record there is the  
evidence of the 8<sup>th</sup> polling station of Namatotowa, and when its  
results are added the total would be 1165 votes for 2<sup>nd</sup> Respondent  
105 and 1006 votes for the Petitioner. Furthermore, that if results of  
Nakhamosi polling station were included, the Petitioner would have

got 1221 votes, and 2<sup>nd</sup> Respondent 1203 votes with a margin of only 18 votes in favour of the Petitioner. Mr. Latigo argued that since that was never the case, the court has to deal with evidence  
110 on record which can only be found in all the eight DR forms on court record showing that the 2<sup>nd</sup> Respondent got a count of 1165 votes and the Petitioner 1006 votes.

Mr. Latigo submitted that the evidence on court record further shows that the results of Namakhosi polling station were cancelled  
115 for the reasons which the 1<sup>st</sup> Respondent states. That in particular the ballots did not adding up. Counsel gave further background that that Police came to the said polling station after the counting was done and took all voting materials and the Returning Officer took the decision to cancel the results of Nakhamosi polling station.

120 Counsel submitted that this fact is corroborated by the affidavit of Nabwire Celemensia, at paragraphs 16 and 17, where she states that the cancellation affected results of all the other candidates for Nakhamosi polling station. Also, that Kamoti Peter in his affidavit, at paragraph 22, 24 and 26, states that if all ballots at Nakhamosi  
125 polling station were added, there would be an excess of eleven ballots.

Mr. Latigo further submitted that the import of free and fair elections is that any foul play should not in any way be allowed to stand, and that it was the reason for the cancellation. To buttress  
130 this argument, counsel cited the case of ***Kwijuka Godfrey vs. E.C. & Another HC EP No. 7 of 2011*** where there was cancellation of results of two polling stations, and the court was convinced that cancellation was necessary because the votes did not add up.

Mr. Latigo Richard argued that although in the instant case there is  
135 evidence that votes had been counted, which is different from ***Kwijuka Godfrey case (supra)***, that this court should nevertheless note that the Petitioner does not give a full picture of what happened at Nakhamosi polling station, and that it is the 1<sup>st</sup> Respondent who states there was excess ballots cast.

140 Mr. Latigo argued it was up to the Petitioner to show that he would have won without the incident of cancellation, and that since the evidence shows that the 2<sup>nd</sup> Respondent won with 159 votes, the court should not be led to speculate the result of Nakhamosi polling station. Counsel submitted that this is not case fitting for setting  
145 aside the election.

Mr. Okwenye Tony, learned counsel for the 2nd Respondent, submitted that the Petitioner failed to discharge the burden of proof upon him. That he ought to have adduced evidence of the ballot papers issued that day for Nakhamosi polling station, the number  
150 of persons who voted, the number of invalid votes, and the number of spoilt and the unused ballots. Counsel submitted that the Petitioner's affidavit, at paragraph 12, of the results obtained by each candidate did not cure the failure.

In addition, Mr. Okwnye submitted that the cancellation of results  
155 of Nakhamosi polling station was done in accordance with the law. That the 1<sup>st</sup> Respondent was discharging its duties under **Section 12 (1) (e) of the Electoral Commission Act** and that the reason for the cancellation of the votes was rightly done due to the excess votes that had been cast station which exceeded the total number of  
160 registered voters at Nakhamosi polling station.

Mr. Okwnye gave the total number of registered voters for Nakhamosi polling station based on the 2<sup>nd</sup> Respondent's affidavit, in paragraph 13, as 437 and the number of votes that were counted as 366 based on the affidavit of Bwayo David, at paragraph 19,  
165 which includes votes cast for all the candidates. Further based on



Wekolo Steven's affidavit at paragraph 19, that the unused ballots were 95. That according to Bwayo David's affidavit, at paragraph 6, the total ballots issued out were 450 ballots. Counsel pointed out that the fact of the eleven excess votes cast, according to the 2<sup>nd</sup> Respondent's affidavit, was confirmed by the 1<sup>st</sup> Respondent in its supplementary affidavit in "Annexure A", which is a Police Investigation Report that also stated the excess as 10 votes.

Counsel argued that there was an excess of votes that were cast; which led to the cancellation of Nakhamosi polling station results from the final tally, and that the effect of any discrepancy in an election leads to cancellation. For this proposition, counsel referred to the case of ***Achieng Sarah Opendi, and Another vs. Ochwo Nyakech Keziah, CA EPA No. 39 of 2011*** where it was held that the results of two polling stations were cancelled because the Respondent had failed to adduce evidence of how many of the registered voters had cast their votes. Mr. Okwnye argued that since the announcement of results per se does not show how many people voted, and the excess votes could not be explained. Counsel submitted that the Petitioner failed to discharge the burden on him and that the petition should be dismissed with costs.

**Opinion:**

It is an agreed fact by all the parties that results of the elections for Nakhamosi polling station were cancelled and not included in the final tally for Nalwanza sub - county for LCIII chairperson. The  
190 Petitioner specifically avers that the Presiding Officer failed to fill in and sign the DR form and nor did the respective candidates' agents sign for the said polling station. The Petitioner also avers that voting proceeded on very well and that there was no incident at all and it was successfully completed. That the counting and the announcing  
195 of the results was done. That just before the results could be filled in the DR form and signed by the Presiding Officer and respective candidates' agents; Police came and took away all the voting materials.

The Petitioner's evidence above is corroborated by other witnesses  
200 most of whom are polling officials of the 1<sup>st</sup> Respondent and agents of the 2<sup>nd</sup> Respondent the said polling station. They include Bwayo G, Nandutu Aida, Namusisi Jamila. They restate the fact that there was no violence or incident at the polling station. Their evidence is further buttressed by AIP Wekona David, a police officer who was at  
205 the polling station. He stated that he witnessed the counting and

announcing of the results, and that voting proceeded and ended peacefully without incident.

On part of the 1<sup>st</sup> Respondent, the Returning Officer swore an affidavit in support of the answer to the petition. In paragraph 9  
210 thereof he states that the DR form could not be filled in and signed owing to the evidence of malpractice at the polling station which rendered it unsafe to include the results in the final tally, and the results of Nakhamosi polling station were accordingly cancelled. In paragraph 10, he further states that he rightfully declined to  
215 consider the results for Nakhamosi polling station upon discovering that the number of ballots cast had exceeded the total number of registered voters at the polling station.

Further in his supplementary affidavit, at paragraph 2, he states that police investigated the violence and malpractice at Nakhamosi  
220 polling station and confirmed an excess of ten ballots in the ballot box compared to the number of people who voted on that day. He attached copy of the police report as "*Annexure A*".

The 2<sup>nd</sup> Respondent more or less restates the version that the results of the election were cancelled due to the excess votes in  
225 relation to the total number of registered voters at for Nakhamosi

polling station. The 2<sup>nd</sup> Respondent only takes it a step further and gives the total number of registered voters at the polling station

230 Nakhamosi polling station as 437 and the alleged excess ballots as eleven. This is slightly different number of excess as compared to ten given by the 1<sup>st</sup> Respondent, but principally they all state that there were excess ballots cast in relation to the total number of registered voters for Nakhamosi polling station.

**Section 12(e) and (f) of the Electoral Commission Act** empowers the 1<sup>st</sup> Respondent to take any measures for ensuring that the  
235 entire electoral process is conducted under conditions of freedom and fairness. This invariably includes cancellation of results if that would meet conditions of freedom and fairness. To do so, however, the measures taken must not be arbitrary or contrary to the law. They must be invoked upon judicious inquiry and based on sound  
240 reason and common sense. Most importantly, they should not disregard principles of fairness and natural justice.

After evaluating the entire evidence, I find <sup>no</sup> justifiable basis for  
cancellation of the results in issue by the Returning Officer. In his affidavit in support of the answer to the petition, at paragraph 9,  
245 the Returning Officer attempts half - heartedly to assign the reason

for the cancellation. He cites excess ballots in the ballot box having been cast in relation to the total number of registered voters. He does not even attempt to give the number of the excess votes that prompted him to cancel the results nor does he state as a matter of fact the total number of the registered voters he claims to have been exceeded.

In his supplementary affidavit filed long after the cancellation, and after this petition had been filed and set down for hearing, the Returning Officer does not help matters very much. In paragraph 2, thereof he states that the violence and malpractices at Nakhamosi was investigated by police who confirmed that there were 10 excess votes in the box for the LC.III Chairperson as compared to the number of persons who voted on that day. He attaches a police report as "*Annexure A*".

It is worthy of note that this is the first time the alleged incidence of violence at Nakamosi is being raised. None of the other prior deponents; including the 1<sup>st</sup> Respondents officials at Nakhamosi polling station, ever mentions of having witnessed any incident of violence. It would appear clearly that this was just an afterthought

265 by the Returning Officer to justify why the Nakhamosi polling station results were cancelled and excluded from the final tally.

It should be noted that in any case, there is no DR form for Nakhamosi polling station. This would have been the basis for the alleged total number of the registered voters, the total number of  
270 people who cast their votes that day, the total number of spoilt votes, the total number of ballots issued, and the alleged excess ballot cast, if any, which are the subject and the basis of the cancellation of the results by the Returning Officer.

There is hardly any credible evidence or justifiable cause that led  
275 the Returning Officer to exercise his power under the law to cancel the results. His evidence that Presiding Officer, whom he alleges told him; and the DPC whom he alleges informed him of the violence and the alleged malpractices is all hearsay and inadmissible. Neither the Presiding Officer nor the DPC swore any  
280 affidavit to confirm what the Returning Officer alleges they informed him about. On the contrary, the evidence of the candidate's agents including the police officer and officials of the 1<sup>st</sup> Respondent mentioned above, who were present during the voting is truthful as to what transpired at Nakhamosi polling station. They mention of

285 no any violence or having witnessed any malpractice. They state  
that voting and counting and announcing of results were done  
peacefully. That it was the police who interfered with the exercise  
after the counting and announcement of the winner had been done.  
This inevitably denied the Presiding Officer and candidates' agents  
290 of the opportunity to fill in and sign the DR form as required by law.  
The malpractices and violence alleged by the Returning Officer are  
not supported by any scintilla of evidence from any of the witnesses  
- either of the Petitioner or the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Therefore, there is no credible basis for the Returning Officer to  
295 have cancelled the results and not including them in the final tally.  
His evidence is quite unreliable and keeps shifting of positions. At  
one point, under paragraph 9 of his earlier affidavit, he states that  
the cancellation was due to the number of votes cast exceeding the  
total number of registered voters for the station. In his  
300 supplementary affidavit, he shifts and states that police investigated  
and found that there were 10 votes in excess of the number of  
people who cast their votes that day at Nakhamosi Polling Station.  
The question still remains; was the cancellation based on the excess  
ballots to the total number of registered voters (who he does not

305 state) or was it due to the ballots in excess of the voters who cast  
their votes that day (who he also does not mention)? Without DR  
form for Nakhamosi polling station, there would be no way of telling  
that there were excess ballots cast in relation either to the total  
number of registered voters or to voters who cast their votes that  
310 day.

Similarly, there would be no basis for the police to conclude in their  
investigations that ten votes exceeded the number of voters who  
cast their votes at the polling stations that day. At best, the ten or  
eleven excess ballots are merely speculative. Needless to state, that  
315 the failure to fill in and complete the DR form for Nakhamosi polling  
station amounted to non - compliance with the electoral law by the  
1<sup>st</sup> Respondent as rightly conceded earlier by all counsel.

The next question is whether the non - compliance affected the  
result in a substantial manner. This depends largely on the  
320 quantitative test. In other words, the numbers are of crucial  
importance. In ***Col (Rtd) Dr. Besigye Kiiza vs. Museveni Kaguta  
Yoweri & the Electoral Commission ((Election Petition No.1 of  
2001)) [2001] UGSC 3(21 April 2001)***, it was held that;



325 *“...the phrase “affected the result” means not only the result in a sense that a certain candidate won and another lost. The result must be said to be affected after making adjustments, the effect of proved irregularities the contest seems much closer than it appears to be when first determined. But when the winning majority is so*

330 *large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non compliance of the rules.”*

Applying the principle to the instant petition, all the parties in their  
335 evidence agree on what the result of the vote was for Nakhamosi polling station; despite the absence of DR form for the polling station since none was ever filled.

According to Kamoi Peter’s affidavit in support of the 2<sup>nd</sup> Respondent’s answer to the petition, at paragraph 22, he states that  
340 the unused ballots were 95, spoilt ballots 00, invalid ballots 08, Fungo Vincent obtained 05 votes, Makatu Augustine (2<sup>nd</sup> Respondent) 38 votes, and Weswa David (Petitioner) 315 votes. Similarly, Namakoye Anent, the agent of the Petitioner at the said

polling station, in her affidavit at paragraph 12, gives the same  
345 figures. Kutosi Caprieel a voter at the same polling station in his  
affidavit in support of the petition, at paragraph 13, restates the  
same figures. A woman candidate for Councilor for Buwakiya Parish  
one Nabwire Celemensia who voted from the same polling station,  
at paragraph 10 of her affidavit, also gives the same figures. Komeyi  
350 Godfrey a Polling Assistant of 1<sup>st</sup> Respondent at Nakhamosi polling  
station in his affidavit, at paragraph 10, confirms the same figures  
having been the results of the election. Also the 2<sup>nd</sup> Respondent at  
paragraph 22 gives the same figures. It is therefore, in no doubt as  
to the number of votes each of the candidates obtained at  
355 Nakhamosi polling station.

The next step would be what each of the candidates obtained as  
total votes in the eight uncontested polling stations. It is the  
common position in the evidence of all the parties and submissions  
of their respective counsel that the total number cast in the eight  
360 polling stations was 1165 votes for 2<sup>nd</sup> Respondent and 1006 votes  
for the Petitioner, and 27 votes for Fungo Vincent. There is therefore  
a margin of 159 votes in favour of the 1<sup>st</sup> Respondent as against the  
Petitioner.

When the results of Nakhamosi polling station that were unlawfully  
365 cancelled are considered, the Petitioner gets 1221 votes and 2<sup>nd</sup>  
Respondent 1203 votes; with a margin of 18 votes in favour of the  
Petitioner. This should have made the Petitioner winner of the  
elections under **Section 135(1) of the Local Governments Act**,  
which provides that the candidate with the largest number of votes  
370 is the candidate declared winner of the elections.

Given the size of the final results of Nakhamosi polling station that  
were unjustifiably cancelled and unlawfully excluded from the final  
tally, which amounted to non - compliance with the electoral laws,  
there is no doubt that the non - compliance affected the result in a  
375 substantial manner. It had the overall effect of the 1<sup>st</sup> Respondent  
declaring the 2<sup>nd</sup> Respondent as winner of elections for Nalwanza  
LC111 chairperson other than the Petitioner who would have  
obtained the majority votes had the results been included in the  
final tally. Issue No.2 is answered in the affirmative.

380 **Issue No.3: What are the remedies available to the parties?**

Having found as above, it is declared that;

- 1. there was non-compliance with the electoral laws in vote  
counting and announcement of results for Nakhamosi**

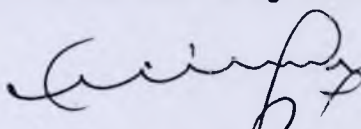
*385 Polling Station for the LC 111 Chairperson Nalwanza sub  
- county.*

*2. the results of Nakhamosi Polling Station should have  
been accurately included in the total tally of results for  
Nalwanza sub-county.*

*390 3. the election of the 2<sup>nd</sup> Respondent as LC 111 chairperson  
Nalwanza sub - county is hereby nullified.*

*395 4. It is ordered that a new election be held for Nakhamosi  
polling station and the results be included in the final  
tally with the rest of the election results in the eight  
polling stations already tallied for Nalwanza sub -  
county.*

*5. The Petitioner is awarded costs of this petition.*

  
**BASHAIJA K. ANDREW**  
**JUDGE**  
**15/07/2016**

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