



## J U D G M E N T:

OUNDO SOWEDI (*hereinafter referred to as "Petitioner"*) filed the petition against OUMA ADEA, and the Independent Electoral Commission (*hereinafter referred to as the "1<sup>st</sup>" and "2<sup>nd</sup>" Respondent" respectively*) seeking declaration that the 1<sup>st</sup> Respondent was at the time of nomination not qualified for election as LCV chairman Busia District; that the election of the 1<sup>st</sup> Respondent be annulled and fresh elections be conducted; and that the Respondents pays costs of the petition.

40 In yet another petition filed by Hasubi Deogratiuous Njoki (*hereinafter also referred to as "Petitioner"*) against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively, the Petitioner seeks declaration that the 1<sup>st</sup> Respondent was not qualified to be nominated and elected as District Chairman Busia District; that the election of the 1<sup>st</sup> Respondent was null and invalid; that the Petitioner having been returned second with margin difference of only 29 votes be declared the winner and validly elected LCV Chairman, Busia District, that in the alternative, the election be set aside and a new one be held for the Chairman, Busia District, and that the Respondents pay  
50 costs of the petition.

The first petition was registered as No. 18 of 2016 and the later as No. 19 of 2016. The two petitions were consolidated by order of court pursuant to Order 11 r.2 of the Civil Procedure Rules, and so were the respective applications arising there from, which were  
55 all argued and disposed of altogether.

**Background:**

In 2011, the 1<sup>st</sup> Respondent was charged with the offence of corruptly soliciting and receiving gratification contrary to **section 2(1)** and abuse of Office contrary to **section 11 of the Anti**  
60 **Corruption Act**. He was found guilty on both offences by Magistrate Grade 1 Court and convicted and sentenced to a prison term of one year or to pay a fine of Shs.2,000,000/-.He opted to pay the fine, but subsequently appealed against both conviction and sentence to the High Court.

65 On 8<sup>th</sup> April, 2014, the High Court dismissed the appeal and upheld both conviction and sentence. The 1<sup>st</sup> Respondent appealed against the decision of the High Court in the Court of Appeal which, on 9<sup>th</sup> February, 2016 also dismissed the appeal and upheld the conviction and sentence.

70 On 15<sup>th</sup> February, 2016, the 1<sup>st</sup> Respondent lodged a Notice of  
Appeal in the Court of Appeal Registry against the  
judgment/decision of the Court of Appeal seeking to appeal to the  
Supreme Court. The appeal in the Court of Appeal being on a  
second appeal was the final appeal in the matter and the 1<sup>st</sup>  
75 Respondent could only appeal to the Supreme Court after applying  
and obtaining a certificate of importance in the Court of Appeal  
showing that the intended appeal concerns a matter of law of great  
or general importance, which he never did or obtained. In other  
words; the 1<sup>st</sup> Respondent had no automatic right of appeal to the  
80 Supreme Court from the decision of the Court of Appeal.

*Appeal*

The consolidated petitions were fixed for hearing on 28<sup>th</sup> June,  
2016. On the date, however, the 1<sup>st</sup> Respondent applied for leave to  
file his answer to the respective petitions out of time. He contended  
that he was never served with the petitions, which were served by  
85 substituted service through news papers. Leave was granted for the  
1<sup>st</sup> Respondent to file his answer on or by 30<sup>th</sup> June, 2016, and the  
hearing of the consolidated petitions was fixed for 1<sup>st</sup> July, 2016.

*Service*

On 30<sup>th</sup> June, 2016, the 1<sup>st</sup> Respondent filed Miscellaneous  
Application No.82 of 2016 in the Court of Appeal seeking a

90 certificate of importance to appeal to the Supreme Court. No date was fixed for its hearing. Worthy of note is that the said application was filed just two days after the adjournment of the instant petitions to enable the 1<sup>st</sup> Respondent file his answer on or by 30<sup>th</sup> June, 2016 and the hearing to proceed on 1<sup>st</sup> July 2016.

95 On 1<sup>st</sup> July, 2016 the actual date of the hearing of the consolidated petitions, counsel for the 1<sup>st</sup> Respondent, Mr. Jude Byamukama, filed the respective answers to the petitions. He attached a copy of the Miscellaneous Application No.82 of 2016 which he filed in the Court of Appeal the previous day seeking certificate.

100 I have labored to set out these facts in detail; particularly including Miscellaneous Application 82 of 2016 in the Court of Appeal, because it is essentially the mainstay of the 1<sup>st</sup> Respondent's case. He contends that the application is evidence that he has not exhausted his rights of appeal against his conviction under the  
105 appellate system. That as such any decision to bar him from contesting or holding a public office on account of his conviction and sentence before his rights have been finally and conclusively pronounced up by the highest and final appellate court in the land would be violation of his constitutional rights.

110 A scheduling conference was conducted and the following were the admitted facts;

(i) That on 28<sup>th</sup> March, 2013, the 1<sup>st</sup> Respondent was convicted of contrary to **section 2(a)** and abuse of office contrary to **section 26 of the Anti Corruption Act, 2009** (as amended).

115 (ii) That as a consequence the 1<sup>st</sup> Respondent was sentenced to one year imprisonment or to pay a fine of Shs. 2 million, and he paid the fine.

(iii) That he subsequently he appealed against the conviction and sentence on 8<sup>th</sup> April, 2014 to the High Court which dismissed  
120 the appeal and upheld the sentence and conviction.

(iv) That the 1<sup>st</sup> Respondent appealed to the court of Appeal on 9<sup>th</sup> February, 2016 which dismissed the appeal and upheld the conviction and sentence.

(v) That on 24<sup>th</sup> February, 2016, the 1<sup>st</sup> Respondent contested  
125 with both Petitioners, Namulanda Bernard Wafula, Wandera Geoffrey, Wasswa Simon, and Estone Wanyama Oundo, as candidates for LCV Chairman, Busia District.

(vi) That the 2<sup>nd</sup> Respondent declared the 1<sup>st</sup> Respondent winner and validly elected LCV chairperson Busia.

130 Two issues were framed for determination as follows;

***(1) Whether at the time of the elections and nomination the***

***1<sup>st</sup> Respondent was not qualified for election as LCV  
Chairperson for Busia District.***

***(2) What remedies are available to the petitioners?***

135 The Petitioner in No. 18 of 2016 was represented by Mr. Andrew  
Lumonya. The 2<sup>nd</sup> Respondent in Petition No. 18 of 2016 who is the  
same in No. 19 of 2016 was represented by Mr. Kyazze Joseph and  
Mr. Richard Latigo respectively. Mr. Jude Byamukama represented  
the 1<sup>st</sup> Respondent in both consolidated petitions. All learned  
140 counsel made submissions and supplied authorities; for which I am  
thankful to them. Issue No.1 being purely an issue of law, all  
counsel for the parties opted to make submissions on the particular  
issue and not to call witness for cross-examination.

***Issue No. 1: Whether at the time of the elections and  
145 nomination the 1<sup>st</sup> Respondent was not qualified for election  
as LCV Chairperson for Busia District.***

At the centre of the issue is the contention of the Petitioners that  
the 1<sup>st</sup> Respondent was at the time of nominations and elections  
legally disqualified from contesting as candidate for the office of

150 LCV chairperson having been convicted and sentenced by a competent court of law for the offences of corruptly soliciting and receiving gratification contrary to **section 2(a)** and abuse of office contrary to **section 26 of the Anti Corruption Act (supra)**.

Further, that under **section 46 (supra)**, a person convicted and  
155 sentenced of the offence under **section 2(a)** of the Act, among the other offences listed there under, is automatically disqualified from holding a public office for a period for ten years from the date of conviction. Mr. Andrew Lumonya in particular argued that the office of the LCV chairperson of district is a public office, and that the  
160 conviction of the 1<sup>st</sup> Respondent by court of the specified offences under the **Anti Corruption Act (supra)** automatically barred him from contesting or holding the public office.

In their respective submissions, counsel for the Petitioners further faulted the 2<sup>nd</sup> Respondent for having allowed the nomination and  
165 election of the 1<sup>st</sup> Respondent despite being variously notified of the court decision and made aware of the conviction and sentence of the 1<sup>st</sup> Respondent which disqualified him from nomination for election as LCV chairman.

In reply Mr. Jude Byamukama, counsel for the 1<sup>st</sup> Respondent,  
170 cited the case of ***Mugisha Gregory vs. Uganda Criminal Ref: No. 179 of 2011*** in which the Court of Appeal held that the right of appeal to a convicted person is rooted in the Constitution which also recognises the right of an appellant in appealable cases to appeal, where applicable, to the highest appellate court of the land.

175 Mr. Byamukama vehemently argued that in this case the 1<sup>st</sup> Respondent was still actively pursuing his right of appeal under the appellate system, and that it is not until the final appellate court has pronounced itself on the conviction and sentence that the 1<sup>st</sup> Respondent's constitutional right to the presumption of innocence  
180 is completely extinguished. Further, that since that presumption of innocence still prevails, any decision that has the effect of barring the 1<sup>st</sup> Respondent from the contesting or holding of a public office would be a violation of his constitutional rights.

Mr. Byamukama advanced the view that ***Section 46 (supra)*** can  
185 only be invoked as a bar to holding a public office only after the individual in question has fully exhausted his rights within the appellate system. That there must be a definite final judgment upholding a conviction from which no appeal has preferred or steps

190 taken to challenge the said decision. Further, that the  
determination based on the fact that the 1<sup>st</sup> Respondent is a  
convict; which does not take into account the fact that the has  
taken definite steps to challenge his conviction will be a violation of  
**Article 28(3)** of the **Constitution** as was stated in the **Mugisha  
Gregory case** (supra). Counsel argued that the said issue of law  
195 under determination is quite premature and cannot be relied upon  
to entirely dispose of the instant consolidated petitions, and that it  
should be dismissed with costs.

Mr. Latigo Richard and Mr. Kyazze Joseph counsel for the  
2<sup>nd</sup> Respondent in Petition No. 18 of 2016, and No.19 of 2016  
200 respectively, submitted primarily that the 2<sup>nd</sup> Respondent cannot be  
faulted for having allowed the nomination and election of the 1<sup>st</sup>  
Respondent. They argued that the issue of the 1<sup>st</sup> Respondent's  
conviction and sentence was not in the 2<sup>nd</sup> Respondent's knowledge,  
as it was never brought to its attention. That for this reason the 2<sup>nd</sup>  
205 Respondent could not take steps to disqualify the 1<sup>st</sup> Respondent  
from nomination without the 2<sup>nd</sup> Respondent having been served  
with copies of the 1<sup>st</sup> Respondent's conviction and sentence. They

submitted that the respective petitions against the 2<sup>nd</sup> Respondent should therefore be dismissed with costs.

210 **Opinion:**

The main contention of the respective Petitioners is that the 1<sup>st</sup> Respondent was at the time of nomination legally disqualified to stand for election as LCV Chairman, Busia District. As can be discerned from the pleadings and supporting affidavits, the  
215 Petitioners do not contest the 1<sup>st</sup> Respondent as not being qualified in the academic sense or in the context of the required qualification under **Section 111(3) and (4) of the Local Governments Act (supra)**. Rather, they premise the issue on the stand point of the statutory bar which curtails the 1<sup>st</sup> Respondent's nomination and  
220 election to the seat of LCV chairman for Busia District.

It is an admitted fact that the 1<sup>st</sup> Respondent was convicted of the offences of corruptly receiving gratification contrary to **Section 2(a)** and abuse of office contrary to **Section 26 of the Anti Corruption Act (supra)**. He was sentenced to one year imprisonment or to pay  
225 a fine of Shs.2 million. He opted for a fine and paid, but subsequently appealed to the High Court, which upheld both

conviction and sentence. In his second and final appeal to the court of Appeal, the conviction and sentence were also upheld.

**Section 46 of the Anti – corruption Act (supra)** provides that;

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**“A person who is convicted of an offence under Section 2, 3, 4, 5, 6,..... 25 shall be disqualified from holding a public office for a period of ten years from his or her conviction.”**

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The provision is mandatory by the choice of the use of the term “shall”. Under **Section 1(d) (supra)**, a district council local council and any committee of any such council are defined as “public body”. The district council being a “public body” means the office of the LCV is recognised as a public office under the law. This being the position of the law, it means that the 1<sup>st</sup> Respondent’s conviction and sentence by court automatically barred him from holding a public office for a period of ten years from the date of his conviction. Logically, it inevitably rendered him legally not qualified for nomination for election as LCV chairman, Busia District.

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Mr. Judge Byamukama strenuously argued that despite the conviction and sentence, the 1<sup>st</sup> Respondent still has his right of appeal protected under the Constitution, and that until he exhausts

all the appellate avenues available to him, his right to the presumption of innocence still prevails, and that he cannot be barred from holding a public office on account of the conviction and sentence against which he is actively pursuing an appeal. He relied on the case of *Mugisha Gregory (supra)*.

With due respect to Mr. Byamukama, the case he cited enunciated an important principle of law which, however, does not support his argument. Their Lordships in the cited case unequivocally stated that once a person is convicted of a criminal offence, his or her status is changed with its implications on his right to the presumption of innocence. In other words; a convicted person can no longer enjoy the same rights to presumption of innocence as when he was charged simply because he has been found and pronounced guilty by a competent court of law. In the cited case their Lordships were considering the right of a convicted person to apply for bail pending appeal. They recognized an appeal as a constitutional right, where it is available to a convict in appealable cases; and where applicable, to the highest appellate court in the land. Their Lordship guardedly held that to a certain extent the appellant's right to presumption of innocence is not completely

extinguished and it remains until the final appellate court in the matter has conclusively determined the appeal. They concluded that point as follows;

270 ***“In our view, any prior conviction of the appellant before  
his or her appeal is finally determined only suspends  
his/her right to presumption of innocence.”***

I entirely agree that the case set the correct principle of the law, which is also binding on this court. I must, however, emphasize  
275 that the case made a clear distinction of rights of a convicted person and rights of an appellant. One must necessarily be an appellant against a conviction to enjoy the “suspended” right to the presumption of innocence. The principle presupposes the existence of a substantive appeal against conviction for a convicted person to  
280 be recognized under the law as an appellant and to be availed of the rights due of an appellant. Until that is done, the convicted person legally remains in the domain of a convict, and cannot by any stretch of imagination be presumed to be innocent or entitled to the right of presumption of innocence. The right to the presumption of  
285 innocence only accrues after he or she has availed himself or herself of that right by filing a substantive appeal against his or her

conviction. This finding is more poignant in cases of bail pending appeal where the primary consideration is whether there is a pending appeal. See: **Arvind Patel vs. Uganda, S C Crim.**

290 **Application No.1 of 2003** per Oder JSC (R.I.P.). No appellate court would grant bail pending appeal when there is no substantive appeal filed. This extends even to cases where a convict has an automatic right of appeal. The appellate court would not risk speculating as to whether the convicted person will pursue his  
295 rights of appeal or not.

The other point to note is that the right to appeal is generally a creature of statute except in a few instances where an appeal is as of right. Otherwise, appeals are with the leave of court. See: **Shah vs. Attorney General [1970] EA 543**. The right to appeal does not  
300 accrue until the person has availed himself that right through the due process of the law establishing the right. That is primarily what their Lordships in **Mugisha Gregory case** (supra) meant when they stated (at page 12 of the judgment) that the supreme law recognizes the right of an appellant "in appealable cases" to appeal to, where  
305 applicable; to the highest appellate court in the country. By

necessary implications, it means that some appeals lie as of right to the highest court in the land and others do not.

The case of the 1<sup>st</sup> Respondent's conviction is not one of such cases where the law recognises the automatic right of appeal to the highest court in the land. By virtue of **Section 6(2) Judicature Act (Cap.13)** and **Section 73 of the Civil Procedure Act (Cap.72)** the 1<sup>st</sup> Respondent's second appeal was to the Court of Appeal which was the final appellate court in the matter. At that point all avenues of appeal were legally curtailed and the right to presumption of innocence was also completely extinguished and it would remain so until the 1<sup>st</sup> Respondent obtained the certificate of importance from the Court of Appeal, which he has not got up to now. Hurriedly filing an application for a certificate just after the petitions challenging his qualification for a public office are set for hearing does not amount to "actively pursuing rights of appeal" as argued by Mr. Byamukama. If anything, it demonstrates bad faith on part of the 1<sup>st</sup> Respondent and a vain pre - emptive measure to forestall the hearing of the petitions against him.

It is in no doubt that the 1<sup>st</sup> Respondent cannot be considered as an appellant within the meaning of the law to be entitled to the right to

the presumption of innocence within the context of the *Mugisha Gregory case* (supra). He is purely and simply a convict for the offences stated, and the provisions of **Section 46** (supra) apply with full force.

330 Needles to emphasise, that in enacting **Section 46(supra)**, the Legislature was acutely alive to the procedure and rights of appeal of a convicted person, but they choose only to state as follows;

***“A person who is convicted on an offence under section 2, 3,4,..... shall be disqualified from holding a public office for a period of ten years ...”***

335 The Legislature only considered conviction at the time it is rendered, and not whether a convict has appealed or might appeal or not. The question whether a convict might or might not appeal the conviction to enforce his rights of appeal is a matter of the convict to determine, but the intention of the Legislative was not to speculate on the course of action a convict might take.

340 Indeed, also the courts of law cannot be left to speculate what a convicted person might or might not do as regards his constitutional right of appeal after conviction. The constitutional rights of an appellant would not accrue to the 1<sup>st</sup> Respondent until

he has filed a substantive appeal. Until then, his the status remains that of a convict not of an appellant. Merely filing an application seeking for a certificate in the Court of Appeal does not bestow on him the rights of an appellant. He remains purely a convict.

350 As earlier observed the said application for a certificate of importance has no date fixed for its hearing. To that end, I would tend to agree with Mr. Andrew Lumonya that it was actually filed in bad faith. It was fled only on 30<sup>th</sup> June, 2016 after the case was adjourned on 28<sup>th</sup> June, 2016 to enable the 1<sup>st</sup> Respondent file his  
355 answer to the petitions and the hearing was on 1<sup>st</sup> July 2016. It is apparently clear that the filing of the application was intended merely to bolster the 1<sup>st</sup> Respondent's argument that he is actively pursuing his rights of appeal. This court is, nevertheless, very alert to the maneuver and acutely recognises that there is no substantive  
360 appeal lodged that lies to the Supreme Court. This court therefore cannot speculate whether or not the 1<sup>st</sup> Respondent will pursue the application or not. I find that the issue under consideration is not premature. The net effect is that the 1<sup>st</sup> Respondent was not qualified for nomination at the time of election as LCV Chairman, Busia District. This renders his election null and void.  
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Regarding the 2<sup>nd</sup> Respondent, I am not persuaded by argument that it was never notified of the conviction and sentence of the 1<sup>st</sup> Respondent to take necessary steps to disqualify him from nomination for elections. In the first place, the record is awash with several correspondences; *Annexure I and J* to the affidavit of Ms. Irene Mulyagonja Kakooza, the Inspector General of Government. She clearly brought out all the facts bearing on the 1<sup>st</sup> Respondent's conviction and sentence to the attention of the Chairman Electoral Commission who acknowledged receipt of the same on 12<sup>th</sup> February 2016. This is as regards Petition No. 19 of 2016.

Under Petition No. 18 of 2016, *Annexure F* to the affidavit in support of the petition of the Oundo Sowedu shows that the Chairman Electoral Commission was aware of the complaint by IGG about nomination of the 1<sup>st</sup> Respondent. The Chairman Electoral Commission even wrote to the Returning Officer Busia Electoral District over the same issue asking for a response to the concerns raised by IGG, and also indicated in the same letter that the EC would sit on 17<sup>th</sup> February 2016 at 12:00 noon to determine the same issue. The "received" stamp shows the Returning Officer acknowledged receipt of the same. *Annexure D* to the same affidavit

is a letter dated 2<sup>nd</sup> February, 2016, also written by the Chairman Electoral Commission to one Kivumbi Mary N. who had also written to the EC complaining and bringing to its attention facts challenging the nomination of the 1<sup>st</sup> Respondent. The Chairman EC informed Kivumbi that at its special meeting held on 27<sup>th</sup> January, 2016, the EC upheld the Returning Officer's decision to nominate candidate the 1<sup>st</sup> Respondent. The Chairman claimed that the 1<sup>st</sup> Respondent had complied with the statutory nomination requirements under **Section 111 of the Local Government's Act** (*supra*).

There is also the evidence in *Annexure "F"* to the affidavit of Ms. Irene Mulyagonja in Petition No. 18 of 2016. It is a copy of letter dated 6<sup>th</sup> October, 2014 written by the Chief Administrative Officer, Busia District to the EC Chairman, who received it on 15<sup>th</sup> October, 2014. It confirmed to the Chairman EC that the 1<sup>st</sup> Respondent had vacated office upon being convicted and sentenced. In fact in *Annexure "B"* to the affidavit of Hasubi Deogratiuous Njoki in Petition No. 19 of 2016 dated 5<sup>th</sup> November, 2014, it shows that a by-election was conducted by 2<sup>nd</sup> Respondent to fill the vacant seat of Busia LCV chairman after the 1<sup>st</sup> Respondent had vacated it

upon conviction by court of the above stated offences. Also to note is that the EC of the NRM Party refused to nominate the 1<sup>st</sup> Respondent as its flag bear after heeding the warning of the IGG. This prompted the 1<sup>st</sup> Respondent to seek nomination on an independent ticket; all of which the 2<sup>nd</sup> Respondent was acutely aware of.

Therefore, the argument that the 2<sup>nd</sup> Respondent was not informed or not aware of the 1<sup>st</sup> Respondent's disqualifying factors is simply not true. The 2<sup>nd</sup> Respondent was well informed and very much aware, but instead went ahead to allow the nomination and election of the 1<sup>st</sup> Respondent. This was against the warning especially issued by IGG that such an act would cost the Government money. I cannot agree more. The 2<sup>nd</sup> Respondent being a well legally advised institution ought to have known better; even without the IGG's warning that allowing the nomination and election of the 1<sup>st</sup> Respondent against conviction as a criminal would cause financial loss to the tax payers. It did and the 2<sup>nd</sup> Respondent cannot escape the blame. I find that the 2<sup>nd</sup> Respondent was aware but went on to nominate the 1<sup>st</sup> Respondent. It acted illegally and in contravention

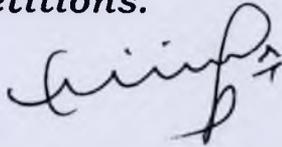
425 of the principles governing the elections. It is accordingly declared  
and ordered as follows;

(1) *The 1<sup>st</sup> Respondent was disqualified from contesting  
and holding a public office at the time of nomination  
for election as LCV Chairman Busia District.*

430 (2) *The election of the 1<sup>st</sup> Respondent is hereby nullified.*

(3) *A fresh election for LCV chairman Busia District be  
conducted.*

(4) *The 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall pay costs of the  
consolidated petitions.*

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**ANDREW K. BASHAIJA  
JUDGE**

**14<sup>th</sup> July, 2016**