

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
ELECTION PETITION NO. 13 OF 2016

MUSOKE EMMANUELPETITIONER

VS

1. KYABAGGU RICHARD

2. ELECTORAL COMMISSION.RESPONDENTS

CS

BEFORE CIDUDU J

JUDGMENT

The petitioner was a candidate in the LCV elections held in Kalungu district on 24th February 2016. The second respondent declared the first respondent as winner with **12920** votes. The petitioner was second with **12581** votes. Six other candidates in the race trailed.

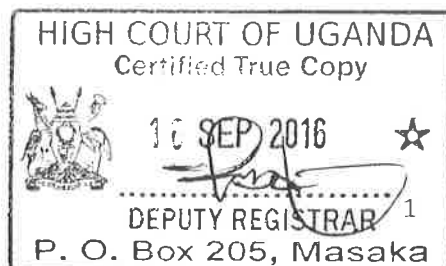
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The petitioner complains that he was robbed of victory when the 2nd respondent declared the 1st respondent as winner whereas the petitioner had garnered **12782** votes as opposed to the 1st respondent who got **12725** votes. It was his case that he beat the 1st respondent with **57** votes.

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He complained that the 2nd respondent changed the results of four polling stations in favour of the 1st respondent to deny him of victory.

Namely:



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- a) At Bugomola T/C "A," the 1st respondent got 144 votes on DR form 0001703 but was declared to have got 202 votes on DR form 0031939 earning an extra 58 votes
- b) At Kalumaga kitawuluzi, the 1st respondent got 136 votes on DR form 0001707 but was declared to have got 175 votes on DR form 0031917 earning an extra 39 votes.
- c) At Yesu Akwagala church, the 1st respondent got 84 votes on DR form 0002190 but was declared to have got 139 votes on DR form 0031916 earning an extra 55 votes
- d) At Namasavu "A", the 1st respondent got 103 votes on DR form 0001745 but was declared to have got 304 votes on DR form 0031938 earning an extra 201 votes

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In total the extra votes were 353. The results for the rest of the candidates did not change on the two different sets of DR forms. Only the numbers of votes cast and the unused ballots changed.

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It was the petitioner's complaint that this change in results and change in DR forms was facilitated by the returning Officer when she refused to read the results of each polling station before entering the data in the computer. According to the petitioner, if this had been done, he would have objected and the two DR forms would have been compared and discrepancies in the serial numbers would have been noticed.

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The petitioner sought the following orders:

- a) The 1st respondent was not validly elected as the LCV Chairperson for Kalungu district.
- b) The petitioner is declared as the validly elected winner of the said election.
- c) The respondents pay the costs of the petition.
- d) Such other reliefs as the court may deem fit.

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The respondents denied the allegations of changing results. They both contended that the results were read out one polling station after another and there was no complaint from the petitioner who was present at the tally center.

The respondents also alleged their knowledge of the DR forms 0001703, 0001707, 0002190, and 0001745 which the petitioner annexed to his petition. () 5

The second respondent contends that those DR forms are forged while the petitioner contends that the DR forms used by the 2nd respondent at those four polling stations in dispute are also forged.

The respondents prayed that the petition be dismissed with costs.

Issues

1. Whether the petitioner other than the 1st respondent won the election.
2. Remedies available

The petitioner has the burden to prove the complaint to the satisfaction of the court.

Issue no. 1

Mr Ssegona, learned counsel for the petitioner submitted that the petitioner had proved to the satisfaction of the court that he was robbed of victory by the returning officer during the tally of results at the tally center when she chose to tally results without reading the votes for each candidate at each polling station. This he contended was in spite of protests from the petitioner who was present and wanted to verify the figures with the DR forms from his agents who had obtained copies at each polling station.

He conceded that the biometric machine complained of was not relevant at the tally center.

He argued that the election was manipulated by changing the results at the four polling stations of **Bugomola T/C "A"**, **Kalumaga Kitawuluzi**, **Yesu Akwagala Church** and **Namasavu "A"**.

He asked me to find that the DR forms used at the ~~three~~ ~~polling~~ ~~stations~~ results were forged by the returning officer because they are not in tandem with the serial numbers for the rest of the polling stations. Out of 155 polling stations in the district only ~~three~~ ~~four~~ had serial numbers that were unique to the other 151 polling stations and the returning officer did not explain why only those four were unique and the source of complaint.

He also asked me to consider that when they were observed in court, they were found to be of poor quality paper without water shed security marks like the rest of the DR forms and attempts to sample copies from other uncontested stations revealed that there were missing in the black boxes. He concluded that they were deliberately removed to avoid being compared with the ones the petitioner had which were the genuine copies.

Mr. Ssegona also referred to the results of ~~Katungu~~ ~~T/C~~ polling station where the petitioner got 90 votes but the same were not tallied in his favour. This fact or error was conceded to by the returning officer in cross examination. He submitted that this was evidence that the petitioner's victory was denied of him.

He attacked the answer of the 1st respondent for lacking DR forms to support his victory. He criticized the 1st respondent's testimony in cross examination that he lost all his DR forms during celebrations of his victory calling it a lie.

He also criticized the returning officer for claiming that serial numbers are not important on DR forms yet they are used to track the electoral materials in case of a dispute and for accountability.

His view is that the DR forms for the four contested polling stations were ordinary A4 size paper without security features which were printed locally to perpetuate the fraud.

On the source of the petitioner's DR forms, he referred to the testimony of the petitioner that he deployed 155 agents at all polling stations and got them through his DP district chairman, Hon Ssewungu at the DP tally center. These DR forms

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are the same as those produced by the returning officer except the four in dispute which differ and which are the cause of this petition.

He also asked court to find that even other candidates in the race like PW1, ~~.....~~ and ~~.....~~ also had same serialized forms like that of the petitioner and wondered where the returning officer who testified as RW1 got her copies. PW1 disputed the results of **Namasavu polling station** saying he was the winner at that station with 112 votes while the 1st respondent got 103 and the petitioner got 71. He testified that the figure of 304 votes attributed to the 1st respondent was fraudulent. (15)

He invited court to note that the DR form for **Kalumaga Kitawuluzi polling station** produced by the returning officer was not signed by the presiding officer contrary to **section 50 of the PEA** which applies to LCV elections by virtue of **section 172 of the Local Government Act cap 243**. He invited court to disregard ~~.....~~ submitting signing of a DR form by the presiding officer is mandatory. He relied on the case of **Joy Kafura Kabatsi V Anifa Kawooya Bangirana and EC, Election Petition no. 25 of 2007(SC)** for that proposition. (10)

He asked court to consider the role of the RDC and chairperson ~~.....~~ who visited the tally center that night and were given VIP treatment by the returning officer as the opportunity that was used to change the results. The petitioner testified that these officials retreated to a meeting with the returning officer in her office before she came out to announce the winner. As it turned out the 1st respondent who was the NRM candidate won the election. (20)

Finally, he asked me to consider that the petitioner was given a nil vote at **Kitemi polling station** yet he scored 99 votes. The sum total of these malpractices rendered the 1st respondent's victory fraudulent and instead, the petitioner be declared the winner with a margin of 211 votes over the 1st respondent. (25)

In reply, M/S John Isabirye and Geoffrey Kandebe made a joint submission on behalf of respondent 1 contesting evidence about the falsification of DR forms which they said lacked proof.

It was their view that the petitioner failed to adduce independent evidence from his agents about the authenticity of his DR forms. He could not depone to ~~.....~~ matters not (30)

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known to him. They cited the holding in **Col(rtd) Dr. Kiiza Besigye V Museveni Kaguta Yoweri and the EC , EP no. 1 of 2001** for this proposition.

It was their submission that the petitioner failed to adduce independent evidence to

They dismissed the complaint in regard to **Bugomola T/C "A" polling station** because **RW3, Emitu Charles** denied signing the petitioners DR forms and stated that he signed the one produced by **RW1**, the returning officer. 25

In regard to **Kalumaga Kitawuluzi polling station**, both counsel submitted that one **Kalangabusa** an agent of the petitioner deposed an affidavit supporting the DR form produced by the returning officer as the genuine one because of his genuine signature on it. **Kalangabusa** testified as **RW4**. They distinguished the case of **Joy Kafura Kabatsi (supra)** on grounds that in that case the ballot boxes were not opened at court yet in this petition, the boxes for stations in contention were called and opened. 10

As regards **Namasavu "A" polling station**, both counsel submitted that **Namasavu Ruth**, **RW3** confirmed her signature on the DR form presented by the returning officer. 15

For **Yesu Akwagala Church polling station**, there was no evidence to challenge the DR form presented by the returning officer since the presiding officer called by the petitioner did not show up for cross examination to dispute it. 20

At the tally center, it was submitted for that the results were being read polling station after polling station and that is why there were some corrections done in respect of some polling station results such as **Kabungo, Kanika and Kikukumbi**.

On the issue of the **RDC and NRM chairman** having a meeting with the returning officer, court was invited to dismiss this as there was no evidence of a separate meeting. They are said to have been present as other people and that they arrived late in the night which could not cause any malpractice. 25

Both counsel asked court to ignore the issue of the different set of serial numbers on DR forms at the disputed polling stations on grounds that no evidence was adduced to prove those serial numbers were not for genuine DR forms. 30

Finally non remedies, I was asked to treat the DR forms presented by the petitioner as inadmissible because they were not certified by the EC. They contended that even the petitioner got his 90 votes for Kateera polling station and the 1st respondent lost the 175 votes for Kamulag Kitawuluza polling station because of the unsigned DR form presented by ... still win with a margin of 151 votes and remain chairperson LCV.

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They asked me to dismiss the petition with costs.

For the 2nd respondent, M/S Niinye and Kangye made lengthy submissions focusing on the affidavit evidence supporting the petition which they described as full of falsehoods

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They made reference to the complaint about use of a biometric machine to tally results which was not possible. This allegation was abandoned by the petitioner's counsel

Both counsel asked court to find that no law was breached in the tally of results because results were announced in compliance with section 135(1) of the Local Government Act. That provision does not require a returning officer to read out loudly the results but requires that the returning officer declares the elected candidate who has obtained the largest number of votes by completing the return in the prescribed form.

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On the involvement of the RDC and NRM chairman in manipulating results, counsel submitted that affidavits of Kiwanuka Mark and Luyombo David did not mention the presence of these two at the tally center so it is doubtful if the two were present. With respect, I believe that in view of the testimony of the returning officer and the exhibit of the attendance register (R3) renders this submission futile. The two officials attended and signed the attendance register at the tally center.

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Both counsel invited court to believe the evidence of the returning officer that she was not influenced by the two officials to rig results in favour of the 1st respondent. In their view, there was no proof that the returning officer met them privately in her office to scheme for the victory of the 1st respondent.

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As regards the issue of the contested DR forms for the four polling stations of **Bugomola T/C"A"**, **Kalumaga Kitawuluzi**, **Yesu Akwagala Church and Namasavu"A"**, both counsel in their joint submissions stated that the petitioner failed to adduce evidence of who changed those results. They referred to failure of **Kivamuka Mark**, **Katende Ali** and **Kabogoza Edward** to turn up for cross examination as proof that they had lied in their affidavits in support of the petition.

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They asked me to believe the testimony of the returning officer that she received the DR forms for the four stations from the field and relied on them just like she did with others. Her evidence is supported by **Charles Emitu (RW3)** the returning officer for **Bugomola T/C"A"** who stated that he signed the DR form presented by the returning officer and not the one presented by the petitioner.

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On the issue of the difference in the features on the DR forms of the petitioner and those by the returning officer for the four contested stations, court was asked to treat it as speculation because there was no evidence that the type presented by the returning officer was not used elsewhere in Uganda.

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It was their submission that this court should not dismiss the certified DR forms to rely on the uncertified Dr Forms of the petitioner. They sighted the Supreme Court decision in **Kakooza John Baptist v EC and Anthony Yiga, Election Petition Appeal 11 of 2007** for that proposition. The rest of the submissions were repetitions of what they had stated earlier laced with too much case law.

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I have reviewed the evidence adduced during the inquiry into this election dispute and perused the submissions of all counsel. The petition turns on the complaint regarding the four polling stations of **Bugomola T/C"A"**, **Kalumaga Kitawuluzi**, **Yesu Akwagala Church and Namasavu"A"**.

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Two sets of DR forms were presented to court; one by the petitioner and the other by the returning officer. According to the petitioner, the 1st respondent was gifted with additional votes from these stations which denied him victory.

On the other hand the 2nd respondent refers to the DR forms presented by the petitioner as forged because they were not used by the EC to declare results at those polling stations.

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From the evidence adduced, the election was largely peaceful. The petitioner who stood on the DP party ticket deployed agents at all the 155 polling stations and had a tally center of the party where results were tallied. He went to the EC tally center confident of victory having scored highest votes. He was also assisted by his agents.

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The 1st respondent who stood on the NRM party ticket also had a tally center in the same location as the petitioners. The 1st respondent did not go to the EC tally center. He just went home after his NRM party tally center exercise.

The petitioner seeks to be declared winner on the basis of his DR forms. I should point out that the petitioner's DR forms are not certified. His evidence is that the EC refused to give him certified copies. However the EC attached certified copies on its answer to the petition. The DR forms by the EC are the same as those in possession of the petitioner except for the four polling stations of Bugomera "A", Kakumaga Kikawuluzi, Yesu Akwagala Church and Namasavu "A".

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The law is that documents must be proved by primary evidence except as provided in section 64 of the Evidence Act, Cap 6. (See Sec 65 of the same Act). A party wishing to rely on an uncertified document is required to give notice to the party in possession of the original pursuant to the provisions of Sec. 64(1) and Sec 65 of the evidence Act.

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Since DR forms are public documents, a party wishing to rely on them in court is required to have them certified as provided for in sections 75 and 76 of the Evidence Act. Without certification such documents would not prove any fact they seek to prove. **Kakooza John Baptist v EC and Anthony yiga, Election petition appeal no. 11 of 2007(SC) and Mutamboh Matthew V Mayusi Yusuf Election petition Appeal no.45 of 2011(COA)** followed.

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On the basis of the law in the above paragraph I would dismiss the petitioner's claim but there is an issue peculiar to this petition that did not arise in the above cited cases that calls for my determination.

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The EC presented DR forms that not only had different results but had different serial numbers. This being an inquiry, I decided to call for the ballot boxes for the contested polling stations to establish the truth of the matter. Three of the

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boxes had copies of the DR forms presented by the returning officer namely, **Kalumaga Kitawuluzi, Yesu Akwagala Church and Namasavu"A"**. The copy for **Bugomola T/C"A"**, was missing in the box.

My examination of the copies available revealed the following.

- I. **Kalumaga Kitawuluzi DR form serial number 00319117**
- II. **Yesu Akwagala Church DR form serial number 0031916**
- III. **Namasavu"A" DR form serial number 0031938**
- IV. **Bugomola T/C"A" DR form missing.**

The petitioner presented DR forms for the above polling stations with the following serial numbers.

- I. **Kalumaga Kitawuluzi DR form serial number 0001787**
- II. **Yesu Akwagala Church DR form serial number 0002190**
- III. **Namasavu"A" DR form serial number 0001745**
- IV. **Bugomola T/C"A" DR form serial number 0001703**

OBSERVATIONS

The copies of DR forms found in the ballot boxes were lighter in texture, had no water shed or security mark, were ordinary paper, they appear to be from a different set or ream of papers. Their serial numbers are far different from the rest of the DR forms presented by both parties. Whereas the other 151 DR forms have similar serial numbers starting with three zeros, the four presented by the returning officer start with two zeros followed by digits 319.. Which stands out cleared as being different from the set from which the DR forms for LCV Kalungu district were supplied from.

RW1, the returning officer, had no explanation for this scenario. She stated that it is the EC that packs the materials and sends them to the returning officer for distribution. She did not know why this particular set was different. She conceded it was from a different ream. They had no security features.

Strangely, it is these different DR forms that are the reason for this petition. Is it a coincidence that the unique DR forms are the source of dispute?

Learned counsel for the 2nd respondent asked court to treat them as genuine because they are certified by the EC and that it is a minor detail to have different serial numbers. The returning officer also testified that serial numbers are not important but later conceded serial numbers are important for accountability and tracking.

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I directed that some two undisputed ballot boxes be produced for my inspection. They were sampled randomly by the petitioner's agents. **Buwunga** polling station and **Kyamulibwa** polling stations were produced but both did not have copies DR forms. I was, therefore, unable to compare the texture and features of the undisputed copies. The absence of copies of these DR forms only added to the suspicion about the source of the disputed DR forms. It is worth noting that the boxes were picked randomly by the petitioner's agents. If DR forms were missing in them it implies that copies of the undisputed DR forms do not exist in the other boxes (at least during the time the petition was in court to avoid comparison)

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Importance of serial numbers.

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Serial numbers are unique identifier codes assigned incrementally or sequentially to items especially those produced in large volumes. They ease the distribution and location of items. They determine quantities and authenticity of products and sources of such products. They are the basis for inventory audits and tracking stock. They are used to identify missing documents. They are the basis of stock control and accountability. Inventory management is achieved through tracking or tracing serial numbers. Serial numbers are coded in a computerized environment to identify and authenticate products. Without them, anybody would manufacture ballots, seals, boxes, DR forms, registers etc and compromise an election.

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I am not persuaded by the respondents' submissions and the testimony of the returning officer that as long as the EC has certified a document, it should not be questioned by court. This inquiry has led me to believe that the four DR forms used to tally results were not in the original batch of DR forms issued for Kalungu district. The EC did not provide the dispatch register which captured the serial numbers of DR forms despite the order I issued for to that effect.

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I can only conclude that it would have revealed the contrary. It is not a coincidence that where the strange DR forms were used, results are disputed.

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My observations were that the paper on which they were made was not from the same source as those used to tally results in the other 151 polling stations where there was no dispute. The returning officer, RW1 admitted that they had no security marks. They were just ordinary papers which could not have been part of the EC stock of DR forms procured for an important event like the national LCV chairperson elections

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I was asked to consider that no evidence was used adduced to show that they were not part of the EC stock. I would ask, why would they be inserted in DR forms that are of different species and as it turns out whatever was written on them became a dispute?

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I am persuaded by the petitioner's evidence that in this largely peaceful election for LCV chairperson for Kalungu district, he was able to get all his DR forms which he attached on the petition. 151 of these tallied in serial numbers with those produced by the returning officer. This proves that the petitioner obtained all his DR forms from the EC at each polling station through his agents. Similar DR forms like those of the petitioner were presented by Uuyombo who was also a candidate. They have the same numbers like those of the petitioner. Was this a coincidence? I would say no. These two did not appear to me to be persons who had manufactured DR forms similar to the ones used by the EC in the rest of the polling stations. On the contrary, I am persuaded that the returning officer manufactured the disputed DR forms to alter results.

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Strangely, the 1st respondent testified that he lost all his despite his victory. After the tally at his NRM center, he just went home as if to signify he had lost the election. He did not go to the EC tally center to savour his victory. How strange!

I was asked to consider that there was no proof that the returning officer changed the results on the disputed DR forms. It is said she just used what was in the tamper proof envelope as they came from the field. It is not necessary to know who changed the DR forms, what is obvious is that the disputed DR forms do not belong to the set that was used in the rest of the district. They were purposefully invented to alter results.

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If this had been the case, the anomaly would have been detected if the results were read out one by one for each polling station. The petitioner testified that he

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objected to the omnibus tallying of results without first announcing the return for each station while the returning officer denied it. The petitioner was present at the EC tally center until morning. His evidence is that the returning officer said she would announce the results and if there were any disputes, they would be handled later. He seems to have been under the influence that he had won anyway only to be shocked with the outcome.

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He immediately protested and the returning officer went absent from the tally center. Efforts to get the certified copies of the DR forms for comparison failed. Letters by his advocate to have certified copies of DR forms were ignored until the EC filed its answer to the petition where it attached certified copies of DR forms.

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I am persuaded to believe that the returning officer betrayed the principle of transparency on the altar of expedience. It may have been expedient to just tally results without announcing returns from polling stations to save on time but it breeds the kind of dispute that arose. Announcing results per polling station though not in the law as learned counsel for A2 submitted is anchored in the principle of transparency which demands that elections are conducted in full view and scrutiny of the public and candidates so that the outcome is credible. Transparency involves open and accountable procedures. Announcing results per polling station before tallying is part of transparency. This is what free and fair elections mean. The provisions of section 137 of the local government Act regarding declaration of results must pass the transparency test. It is not an arbitrary power to announce results as the returning officer deems fit.

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Section 75 of the Evidence Act commands all public officers to provide certified copies of public documents at a fee. The petitioner appeared to me to be vigilant in seeking these copies but the returning officer was quick to dispatch them to the EC headquarters. These actions by the returning officer raise suspicion that she did not want to reveal her strange DR forms for the four polling stations.

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Under section 113 of the Evidence Act, court is mandated to presume the existence of any fact likely to have happened regard being had to the common course of natural events, human conduct, and public and private business in relation to the facts of the particular case. In this case, I presume that the EC would not dispatch DR forms for 151 polling stations but include four strange or different

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ones which by coincidence are the cause of this dispute. The four DR forms must be known to only the returning officer. Incrementally or sequentially, the four disputed DR forms presented by the returning officer are different and fraudulent. Even if they are certified by the EC it did not make them authentic. A fraudulent document cannot become authentic by mere certification.

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Attempts by witnesses such as Charles Emitu, RW3, Kalangabusa, RW4 and Nansamba Ruth, RW5 to claim to have signed the disputed DR forms did not satisfy me. They were not familiar with the documents. Their signatures were just hazy. They were simply partisan. In election petitions courts are confronted with these kind of witnesses who try to justify illegalities for the overall political victory of their candidate. They lacked objectivity in the witness box. It was also clear during the inquiry that witnesses were being influence to switch sides or avoid court. This is a common feature in election trials.

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Although the DR forms presented by the petitioner and another candidate David Luyombo are not certified, they are of the same generic species as those for the undesignated 151 polling stations. My inquiry reveals they were genuine. The petitioner was denied a victory he had scored through the manipulation of DR forms by the returning officer. Can the court declare the petitioner a duly elected candidate on the basis of my analysis above? My answer to this question lies in my holding under remedies.

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Remedies.

The petitioner sought the following orders.

- a) **The 1st respondent was not validly elected as the LCV Chairperson for Kalungu district.**
- b) **The petitioner is declared as the validly elected winner of the said election.**
- c) **The respondents pay the costs of the petition.**
- d) **Such other reliefs as the court may deem fit.**

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On the other hand the respondents asked court to dismiss the petition.

In view of the provisions section 63, 64, 65, 75 and 76 of the Evidence Act and the decision of the Supreme Court in **Kakooza John Baptist** (Supra), it is not

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possible to declare a candidate validly elected in an election basing on uncertified DR forms. If the petitioner had given notice demanding certified copies as he did per annexure "E" to his affidavit and the EC failed to do so up to the trial, his DR forms could have been a basis for granting him victory.

But the EC presented certified copies in its answer to the petition which are forged as I have established above, rendered the application of sections 64(1) and 65 of the evidence Act irrelevant. Those provisions apply where the opposite party in possession of the original refuses or fails to produce it. In this petition, the opposite party has provided a different version. This scenario is not covered by the evidence Act. It is my conclusion that the integrity of results announced for **Rugomoh T/C "A", Kalumaga Kitawuluzi, Yesu Akwagala Church and Namasavu "A"** is fraudulent. The results there in are forgeries. The first respondent was gifted with 353 votes he did not earn.

The margin between the petitioner and the 1st respondent was so small that it required a little tilting to tip the scales. It has been proved to the satisfaction of this court that the illegal change by the returning officer affected the results in a substantial manner. The poll was too close to call and any slight tampering tilted the scales. A margin of 57 votes was ease to change the winner.

The petitioner has proved to the satisfaction of court that he was the validly elected candidate. The returning officer mismanaged the tally process by secretly introducing illegal DR forms by which he gifted the first respondent with free votes. This amounted to non compliance with the provisions that require that only a candidate with the highest number of votes cast in his or her favour should be declared winner.

On technical grounds which I have explained above, I cannot declare the petitioner a validly elected as provided in section 142(3)(b) of the Local Government Act, Cap243. I can also not order for a repeat of elections only in those four polling stations because it will be easy to "fix" the result or outcome in such a narrow area. The use of strange DR forms stained the entire outcome. A sample of ballot boxes revealed that copies of DR forms were missing. This was planned to avoid comparison of the texture and security features with those in



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possession of the petitioner. The election was rigged at the tally center. It has to be repeated to restore the integrity of the electoral process.

I am constrained to set aside the election as I hereby do and order fresh elections for LCV chairman, Kalungu district

The petitioner shall have the costs.

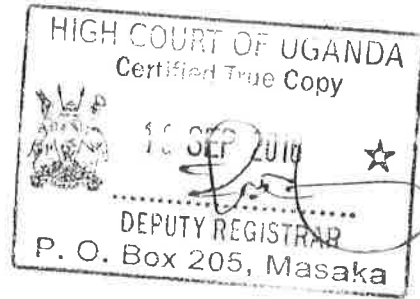
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LAWRENCE GIDUDU

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