THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT 2005

ELECTION PETITIONS NO.002 OF 2021

MUHEIRWE DANIEL MPAMIZO---------- PETITIONER

VERSUS

1. **TWINOMUJUNI FRANCIS KAZINI**
2. **ELECTORAL COMMISSION ----------RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The petitioner filed an election petition challenging the election of Twinomujuni Francis Kazini for the position of Member of Parliament representing Buhaguzi County Constituency in Kikuube District.

The petitioner-Muheirwe Daniel Mpamizo and the respondent Twinomujuni Francis Kazini and Kato Herbert contested in the election for Buhaguzi County Constituency for Directly Elected Member of Parliament held on 14th January 2021 and obtained the following votes in their favour; Twinomujuni Francis Kazini -(NRM) (20,761), Muheirwe Daniel Mpamizo -(Independent) (18,788), Kato Herbert (ANT) (1,065) and which results were duly gazetted on 17th February 2021.

The petitioner contends that there was non-compliance with provisions of Parliamentary Elections Act by both the 1st and 2nd respondents while the 1st respondent was being nominated by the 2nd respondent. The 1st respondent was not validly nominated as a Member of Parliament for Buhaguzi Constituency because he lacked the requisite academic papers as required by law. The Uganda Certificate of Education (UCE) and Uganda Advanced Certificate of Education presented for nomination do not belong to the 1st respondent.

The petitioner contends further that the 1st respondent's original names are Francis Kazini not Twinomujuni Francis as claimed in his nomination papers. The 1st respondent purported to use the gazette to adopt academic papers of Twinomujuni Francis purporting to be one and the same person. The 1st respondent was illegally nominated in disregard to the law.

The 1st respondent in his Answer to the petition contended that he was validly nominated and elected as a Member of Parliament for Buhaguzi County Constituency and at the time of his election he had the requisite academic qualifications of a minimum formal education of advanced level standard in accordance with the law.

The 1st respondent contends that he was born by the late Venasio Kazini and Mrs. Tumushabe Topista Kazini in 1982, who named him Twinomujuni Francis. In 1997 he started senior one at Kitara Senior Secondary School where he completed his Ordinary Level Education and he got his Uganda Certificate of Education in 2000 in his names Twinomujuni Francis. He continued for his advanced education in the same school and in 2002 he obtained Uganda Advanced Certificate of Education in his names Twinomujuni Francis.

The 1st respondent was also known as Kazini which was a family name or belonged to his father. During the mass registration of persons in Uganda for National Identification Cards, the 1st respondent was registered for his National Identity Card with National Identity Registration Authority (NIRA) which issued him with a National Identity card in the names Twinomujuni Francis Kazini.

When the 1st respondent was issued with a National Identity card by NIRA he realized that they had made a mistake in his date of birth which indicated 1987 instead of 1982. He made a complaint to NIRA and he was informed that that they would rectify the problem, but the rectification process has taken so long.

The 1st respondent upon adding his father's name "Kazini" on 18th June 2020, made a deed poll adopting the name Kazini as his official name even though it was not his academic papers.

The 2nd respondent in their Answer to the petition contended that the entire electoral process and/or elections were conducted in compliance with the provisions and principles laid down in the Electoral laws of Uganda. The 1st respondent legally adopted the names of Twinomujuni Francis Kazini in accordance with the law.

The parties during scheduling of the case agreed to the following facts and issues for court's determination;

Points of Agreement:

1. The petitioner and 1st respondent were candidates of Buhaguzi County Constituency Parliamentary elections Kikuube district where they contested with another candidate Kato Herbert.

2. The Election was held on 14th January 2021 when the Returning Officer of the 2nd respondent returned the 1st respondent as validly elected.

3. The 1st respondent was returned by the 2nd respondent as validly elected with 20,761 votes while the petitioner was a runner-up with 18,788 votes.

4. The Petitioner is aggrieved by the outcome of the Elections and has petitioned court contending that the 1st respondent was not validly elected and that the election of Buhaguzi County was not conducted in accordance with the principles of the law.

Agreed Issues:

1. *Whether the 1st Respondent was validly nominated to contest in the election of Buhaguzi Constituency- Kikuube District?*

2. *What remedies are available to the parties?*

The 1st petitioner was represented by *Mr. Mujurizi Jamil* and *Mr. Tumwesigye Humphrey* while the 1st respondent was represented by *Mr. Thomas Ocaya*, *Mr. Usaama Ssebufu* and *Mr. Esau Isingoma*, the 2nd respondent-Electoral Commission was represented by Ms *Kanyiginya Angella*.

At the hearing, the affidavits of the parties were deemed read and the annextures thereto were admitted in evidence. The petitioner was cross examined by 1st respondent's counsel while the petitioner's counsel cross-examined 1st respondent and all the 1st respondent's witnesses (deponents). Thereafter, the respective counsel were directed to file written submissions which they have filed and I have perused considered the same in this judgment.

BURDEN AND STANDARD OF PROOF

S.61 (1) of the Parliamentary Elections Act provides that:

The Election of a Member of Parliament can only be set aside on any of the following grounds if proved to the satisfaction of the Court ……

Odoki CJ(as he then was) in his elaborate reasons for the Supreme Court Judgment in the **Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2001** Supreme Court has the following to say on this important point;

> *"In my view, the burden of proof in an Election Petition as in other Civil Cases is settled. It lies on the Petitioner to prove to the satisfaction of Court ……."* at Pg 16 of the Reasons.

The same principles have been reiterated in the case of ***Col. (RTD) Dr. Besigye Kizza v Museveni Yoweri Kaguta and the Electoral Commission Election Petition No. 1 of 2006*** *citing* ***Election Petition No.1 of 2001***

Odoki, CJ(as he then was) in his Judgment cited with approval the following observation of Lord Denning in the English case of *Blyth -vs- Blyth [1966] AC 643*:

> *"My Lords, the word "satisfied" is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it; nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a*

judge or juror would in fact be "satisfied" if he was in a state of reasonable doubt……."

Having quoted the above, Odoki, C.J. goes on to state:

"I entirely agree with those observations by Lord Denning. The standard of proof required in this petition is proof to the satisfaction of the court. It is true court may not be satisfied if it entertains a reasonable doubt but the decision will depend on the gravity of the matter to be proved….since the legislature chose to use the words "proved to the satisfaction of the court", it is my view that that is the standard of proof required in an election petition of this kind. It is a standard of proof that is very high because the subject matter of the petition is of critical importance to the welfare of the people of Uganda and their democratic governance."

In this petition, therefore like in all Election Petitions, it is the petitioner who bears the burden of proving his allegations to the satisfaction of Court. It is only after the Court is duly satisfied that the grounds raised have been proved to its satisfaction that it will invoke its powers under Subsection (1) of Section 61, read together with Subsection 4 (c) of S. 63 of the Parliamentary Election Act of 2005

S.62 (3) of the Parliamentary Elections Act *provides that any ground specified in Subsection (1) should be proved on the basis of <u>a balance of probabilities.</u>*

The only crucial aspect of this issue which this Court must emphasize and bear in mind throughout the trial of an Election Petition, is the degree of a probability which must be attained before the Court can regard itself as satisfied that the ground or allegation is proved under S. 61 (1) and S. 61 (3) of the Parliamentary Election Act of 2005.

In the Case of **<u>Karokora Katono Zedekia vs Electoral Commission Kagonyera Mondo HC-05-CV-EP 002 – 2001</u>** Justice V.F. Musoke-Kibuuka (RIP) noted at Pg 6;

"It is quite critical to emphasize and bear in mind the crucial fact that, setting aside an election of a Member of Parliament is, indeed, a very grave subject matter. The decision carries with it much weight and serious implications. It is a matter of both individual and national importance. The removal of the elected Member of Parliament renders the affected Constituency to remain without a voice in Parliament for some time.

Parliament will continue to carry out is legislative function on matters of public national importance without any representation of the Constituency affected. When the election is set aside, the Member of Parliament affected suffers both serious personal remorse as well as adverse financial effects…… Thus, the crucial need for Courts to act in matters of this nature only in instances where the grounds of the Petition are proved at a very high degree of probability".[Emphasis mine]

In order to merit an order setting aside the election of a Member of Parliament the evidence produced by the Petitioner must be such as would, in the circumstances, compel the Court to act upon it.

Although the standard of proof is on the balance of probability, it must be slightly higher than in ordinary cases. The authority for this observation is **Election Petition No. 9 of 2002 Masiko Winfred Komuhangi vs Babihuga J. Winnie.** This is because an election is of a great importance both to the individuals concerned and the nation at large.

Similarly in the case of **Sarah Bireete and Another vs Bernadette Bigirwa and Electoral Commission. Election Petition Appeal No. 13 of 2002** (unreported) it was noted by the court of Appeal *"A Petitioner has a duty to adduce credible evidence or cogent evidence to prove his/her allegation at the required standard of proof"*

The respondent carries no burden to discharge as long as the petitioner has not produced sufficient evidence required to show the truth of the allegations is highly probable. In other words the burden of proof on the petitioner is high and it does not shift. See ***Akurut Violet Adome v Emurut Simon Peter EPA No. 40 of 2016***

This court has a duty to look at the affidavits in support of the Petition and evaluate the same against the respondents answer and supporting affidavits in order to satisfy itself of the allegations made in the petition.

With regards to numerical strength, the general rule is that no number of witnesses shall be required for proof of any act. Evidence is to be weighed but not counted. The direct evidence of one witness if believed by the Court is sufficient

proof of a fact but a line of hearsay evidence cannot be sufficient to prove any fact.

Sarkars' Law of Evidence 14th Edition 1993 Reprint 1997 at pg. 87. States according to Wigmore, the common law in repudiating the numerical system lays down 4 general principles;

1. *Credibility, does not depend on number of witnesses.*
2. *In general, the testimony of a single witness, no matter what the issue or who the person may legally suffice as evidence upon which the Jury may find a verdict.*
3. *The mere assertion of any witness does not of itself need not be believed even though he is unimpeached in any manner, because to require such belief would be to give qualitative and impersonal measure to testimony.*
4. *All rules requiring two witnesses or combination of one witness are exceptions to the general rule.*

It is trite law that the decision of Court should be based on the cogency of evidence adduced by a party who seeks judgment in his/her favour. It must be that kind of evidence that is free from contradictions, truthful so as to convince reasonable tribunal to give judgment in a party's favour. ***Paul Mwiru v Hon Igeme Nathan Samson Nabeta & 2 others EPA No. 6 of 2011 & Mukasa Anthony v Bayigga Lulume SCEPA No. 14 of 2006***

In addition, it is incumbent upon the petitioner to prove or to produce cogent evidence to prove the allegations and not to rely on the weakness of the respondent's case. See ***Odo Tayebwa v Bassajjabalaba Nasser & Electoral Commission Election Petition Appeal No.013 of 2021***

Determination of Issues

Whether the 1st Respondent was validly nominated to contest in the election of Buhaguzi Constituency- Kikuube District?

The petitioners counsel submitted that the 1st respondent did not have the minimum academic qualifications allowed to get him nominated to participate in

election and having known so the 1st respondent decided to use the documents of a one Twinomujuni Francis adopting them as his through the gazette.

The petitioner contends that the nomination papers filed by the 1st respondent in support of his nomination as attached on the petition show a lot of discrepancies and have dubious inconsistencies in the 1st respondent's date of birth, name of the 1st respondent and academic papers. The 1st respondent fraudulently acquired academic documents of Twinomujuni Francis through a gazette yet the documents are much older than the 1st respondent in order to procure nomination.

The deed poll of 18th June, 2020 is where he acquired the name Twinomujuni Francis Kazini officially yet he was already using it officially was also another lie and did not any way comply with the provisions of Section 36 of the Registration of Persons Act, 2015. He was not changing anything since he was already officially known as Twinomujuni Francis Kazini. Counsel relied on the following authorities, ***Muyanja Mbabali vs Birekewo Mathias Nsubuga Election Petition Appeal No.36 of 2011*** *and* ***Wakayima Musoke Nsereko & Electoral Commission vs Kasule Robert Sebunya Election Petition Appeal No.50 and 004 of 2016***

The 1st respondent's counsel submitted that the 1st Respondent had the requisite academic qualifications of minimum formal education of advanced level standard or its equivalent to stand as Member of Parliament and as such the 1st Respondent was validly nominated and elected as Member of Parliament for Buhaguzi Constituency.

The 1st Respondent presented valid copies of his academic documents to the 2nd Respondent. These have not been disputed nor has their authenticity been questioned. The Petitioner only alleges that the 1st Respondent is not the same person as *"Twinomujuni Francis***"** whose documents were presented to the 2nd Respondent but has not queried the authenticity of the documents themselves.

Whereas the Petitioner contends that the 1st Respondent was not the owner of the academic documents presented and that a different person was indeed the valid owner, the Petitioner has not adduced any scintilla of evidence to that effect.

The Petitioner has not produced in court another person or details of another person going by the names of 'Twinomujuni Francis' who is the alleged true owner of the academic documents as alleged by the Petitioner. Upon cross examination on this point, he conceded that ***"I have not brought any evidence of any other person…"***

Upon inquiry by court, he again testified that ***"I do not know of any other person out there by the 1st Respondents name"***

Additionally, the 1st Respondent adduced evidence of people he went to school with at Kitara Senior Secondary School, that is, Mr. Aheebwa Stephen, Mr. Leonard Ocaya and Mr. Byaruhanga Fred who all stated in their affidavits that they went to school with the Petitioner at Kitara Senior Secondary School in 1997. The 1st Respondent also adduced the evidence of his teachers, that is, Mr. Byagira Charles and Mr. Jongo Silver Julius who deponed that they taught the 1st Respondent, and he was known and registered as Twinomujuni Francis.

The burden of proof as set out at the outset above clearly lies on the Petitioner to prove his allegations to the satisfaction of court on a balance of probabilities. The Petitioner has not discharged its burden of proof as set out under the law. In election petitions where a Petitioner queries the Respondent's ownership of its academic documents, the law demands that the Petitioner produces the person or details of the person it alleges owns the academic documents. This was not done. Counsel relied upon the following authorities in support of his submission; ***Ongole James Michael v Electoral Commission and Another (Election Petition No.0008 of 2006), Mulindwa Issac Ssozi v Lugudde Katwe Elizabeth Election Petition Appeal No. 14 of 2016, Magombe Vincent v The Electoral Commission & Another Election Petition Appeal No.88 of 2016, Namujju Dionizia and Electoral Commission V Martin Kizito Sserwanga, Election Appeal No. 62 of 2016, Tinka Noreen v Bigirwenka Beatrice Election Civil Appeal Petition No. 007 of 2011***

The 1st respondent's counsel further submitted on the alleged age discrepancy has equally been explained by the 1st Respondent in his affidavit that when National Identity Card was issued to him, the date of birth recorded therein was wrong. The 1st Respondent states that whereas the National Identity Card stated his date of

birth as 10th October, 1987, his true date of birth was 10th October, 1982. The 1st Respondent equally stated that he had sought rectification of the error from the National Identification and Registration Authority (hereinafter 'NIRA') but the error is yet to be rectified. This position was re-echoed during cross examination.

In response to the Petitioner's contention that the 1st Respondent lied on oath due to stating his age on his nomination paper as 33 years instead of stating his true age as 38 years as he rightly asserts. It was submitted that the 1st Respondent accepted that he had stated his age as 33 years as opposed to 38 years due to the fact that the former appeared on his National Identity Card which is the one of the official documents for identification in Uganda. Due to the fact that the process as mandated under S.51 of the Registration of Persons Act, 2015 as amended had not been completed, the 1st Respondent was bound by the particulars appearing under his National Identity Card.

Analysis

The petitioner's case is that the 1st respondent does not have minimum academic papers since there are discrepancies in names and age and this is ground enough to infer that the documents do not belong him.

The petitioner has a duty adduce evidence to prove their allegation of the 1st respondent lacking the minimum academic qualification and it is not enough to critically analyse the said documents in order to become believable in their assertions. Even if the discrepancies in the names or age are not explained in a reply to the petition or even if the respondent does not file a reply to the allegations or never made any specific response to the allegation, the petitioner was under a duty to prove their case on balance of probabilities. In addition, it is incumbent upon the petitioner to prove or to produce cogent evidence to prove the allegations and not to rely on the weakness of the respondent's case. Therefore, an election petition cannot be permitted to derive strength from the weakness, if any, of the other side. See ***Odo Tayebwa v Bassajjabalaba Nasser & Electoral Commission Election Petition Appeal No.013 of 2021;Jeet Mohinder Singh v Harminder Singh Jassi, AIR [2000]AIR SC 256***

The petitioner makes a strong assertion that the academic papers do not belong to the 1st respondent since they are in names he believes do not belong to the 1st respondent. During the cross-examination, the petitioner was categorical in his answer that; *"There is another person called Twinomujuni Francis Kazini and not the 1st respondent. I have not brought the National Identity card for Twinomujuni. I have not brought the person in this court*."

Further, upon examination by court he stated thus; *I do not know any person called Kazini Francis Twinomujuni but there is an age difference between the owner of the national ID and the person presenting it"*

The petitioner has no iota of evidence but merely relies on critical analysis or desk review of the 1st respondent's nomination papers/academic documents in order to make a case against the 1st respondent academic qualifications due to discrepancy in names and age. The courts have set standard for disputing academic papers presented by a person and it is argued that it is not merely enough to allege that the academic papers do not belong to the person but cogent evidence must be presented in court. The argument of the petitioner's counsel that the 1st respondent never presented baptism cards to prove his case would amount to shifting the burden or trying derive strength from the weakness, if any, from the other side. See ***Jeet Mohinder Singh v Harminder Singh Jassi, AIR [2000]AIR SC 256***

The petitioner did not present any evidence to the contrary or to prove the academic papers do not belong to the 1st respondent; In the case of ***Hashim Sulaiman vs. Onega Herbert; EPP/Civil Appeal No. 001 of 2021***, the Court of Appeal was faced with a decision where the High Court had held that the Appellant required a deed poll or a statutory declaration to explain that *Hashim Sulaiman, Hashim Salaiman or Okethwengu Achim* were one and the same person or a deed poll in the case of change of name. The Learned Justices of Appeal framed the relevant question as: *Whether the certificates in the various names were that of the Appellant.* After re-evaluating all the evidence on record of the Appellant's certificates and all affidavit evidence court found that the Appellant had used different names in his academic life.

"Failure to do a deed poll and subsequently have the register amended would not change of the person.

Using different names in different academic papers does not change the identity of anybody but only causes doubt as to whether the person who presents the papers is the same person named in the academic papers. Evidence can be led to prove that such a person is the same person as named in the academic papers or otherwise. Failure to do a deed poll would not nullify the academic papers or qualification, as this can be established. The evidence of a deed poll or statutory declaration is therefore not the only evidence that can be used to prove that the person who sat for the academic qualification of A-level and whose names are stated in the certificate of education for the Advanced standard is the same person who is nominated. It is simply a question of fact." (Emphasis mine).

The 2nd respondent has adduced evidence of his old students and teachers to explain that he is one and the same person obtained the said qualifications. The 1st Respondent adduced evidence of Mr. Aheebwa Stephen, Mr. Leonard Ocaya and Mr. Byaruhanga Fred who all stated in their affidavits that they went to school with the Petitioner at Kitara Senior Secondary School in 1997. There is further, evidence of his former teachers, Mr. Byagira Charles and Mr. Jongo Silver Julius who deponed that they taught the 1st Respondent, and he was known and registered as Twinomujuni Francis.

The petitioner's counsel further argued that the age difference between the academic papers and the person presenting it is also an indication that the documents do not belong to the 1st respondent. The 1st respondent has explained the discrepancy in age as a mistake that was made by NIRA and that the same was sought to be corrected. The 1st Respondent states that whereas the National Identity Card stated his date of birth as 10th October, 1987, his true date of birth was 10th October, 1982. The 1st Respondent equally stated that he had sought rectification of the error from the National Identification and Registration Authority (hereinafter 'NIRA') but the error is yet to be rectified.

The strong evidence produced in court by the 1st respondent over the allegations made by the petitioner leaves this court satisfied that the evidential burden has not been discharged. In the case of ***Ongole James Michael v Electoral Commission and Ebukalin Sam High Court at Soroti-Election Petition No.0008 of 2006*** Justice Stephen Musota (as he then was) stated that;

"*I agree with Mr. Twarehireho that the petitioner had, in some respects, genuine concerns especially as regards the discrepancy in the names describing the second respondent. However, the burden remained on the petitioner to prove to the required standard that indeed the challenged identity belong to someone else. After studying the evidence adduced by the petitioner, it is apparent he has not discharged this burden."*

The requirement above was reiterated in the case of ***Mulindwa Issac Ssozi vs Lugudde Katwe Elizabeth Election Petition Appeal No. 14 of 2016,*** where the Court of Appeal stated that a Petitioner that had not adduced the alleged owner of the academic qualifications, they challenge had not discarded their duty of proving their assertion. Court held that;

"The Respondent failed to produce the owner of the academic qualification. It is her who made the assertion. She had the evidential burden in law to prove what she challenged in her petition. She failed to do so. Her petition would not succeed on the basis of assertions she failed to prove." See also ***Magombe Vincent v The Electoral Commission & Another Election Petition Appeal No.88 of 2016; Okello Charles Engola & Electoral Commission vs Ayena Odongo Election Petition Appeal No.26 & 94 of 2016; Ninsima Grace vs Azairwe Dorothy & Electoral Commission EPA 05 of 2016.***

The sum effect of the above decisions is that the petitioner had a duty to prove his case with more cogent evidence rather than making mere assertions and this would in some circumstances have required the petitioner to produce the owner of the alleged academic documents. This would save the court from relying on guesswork and conjecture in determining whether the 1st respondent was duly qualified or possessed the requisite minimum academic qualifications and that the academic papers presented at nomination belonged to him.

The petitioner's counsel also challenged the 1st respondent for using the names Twinomujuni Francis Kazini for over 6 years without a deed poll and according to counsel this was contrary to section 36 of Registration of Persons Act, 2015. By making a deed poll on 18th June 2020 he was not changing anything since he was officially known as Twinomujuni Francis Kazini.

It has been clarified in several court decisions that prior to the enactment of the Registration of Persons Act, 2015, the requirement of making a deed poll was strictly to persons whose birth had been registered under Registration of Births and Deaths Act, cap 309. In ***Namujju Dionizia and Electoral Commission v Martin Kizito Sserwanga, Election Appeal No. 62 of 2016,*** while considering a similar case to the current case that involved change of names, The Court of Appeal stated'

> *" From the above provisions, we accept that the 1st Appellant would be liable if she had made changes to her name after she had been duly registered with the Registrar of Births. However, in the 1st Appellant's case, she had never been registered until 2015 after the Births and Deaths Registration Act had been repealed and replaced with the Registration of Person's Act, 2015 which came into effect on 25th March, 2015. Requiring the 1st Appellant to fulfill the requirements of a repealed law is untenable. Therefore, a deed poll was not necessary to explain the change in names." See also* ***Sembatya Edward Ndawula v Alfred Muwanga Election Petition Appeal No. 34 of 2016****.*

Therefore, a deed poll is only necessary and a requirement of the current law of Registration of Persons Act for persons who got registered under the new legal regime in 2015 and thereafter wish to change their names. All persons who changed their names during the registration exercise under the Registration of Persons Act did not require a deed poll especially those persons whose birth had not been registered under the old legislation which was repealed by the Registration of Persons Act, 2015. Those who decided to make deed polls after they had been registered under the Registration of Persons Act only did so out of caution and not as a requirement of the law. Any person who did not make a deed

poll after the registration exercise in 2015 never breached any provisions of the law. See ***Greenway-Stanley v Paterson [1977] 2 All ER 663***

What remedies are available to the parties?

The petitioner's counsel prayed that this court finds the 1st respondent was not validly nominated for Member of Parliament Buhaguzi County. Therefore the election of the 1st respondent of the 1st respondent be set aside and the petitioner be declared winner for Buhaguzi County as provided under section 63(4)(b) and the case of ***Wakayima Musoke Nsereko & EC v Kasule Robert Ssebunya Election Petition Appeal No. 050 & No. 004 of 2016*** contending that it is on all fours with the present case***.***

The 1st respondent counsel submitted that the election was conducted in compliance with the provisions and principles of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act and he was validly nominated and elected in accordance with the law and he won with a margin of 1,973.

Analysis

This court doesnot agree with the submission of the petitioner's counsel that the cited case of *Wakayima Musoke Nsereko & EC v Kasule Robert Ssebunya supra* is on all fours. The facts are very peculiar and the principle of law espoused therein was different from the present case. The main issue upon which it was decided was ***whether Wakayima Musoke Nsereko was a registered voter*** and the absence of his surname on the academic documents. A person whose is not a registered voter in an election is like a *'ghost'* and is deemed non-existing in such an election.

The court in the case of *Wakayima Musoke Nsereko & EC v Kasule Robert Ssebunya* was guided by the doctrine of *'thrown away votes'* and this was premised on his name not being in the register. The doctrine of *'thrown away votes'* is based on the principle of a fair inference of wilful perverseness on the part of voters voting for a disqualified candidate. A voter who votes for a disqualified candidate with knowledge either of disqualification or of facts creating the disqualification throws away his vote.

It should be noted that, it is not in every disqualification that the question would arise of *'thrown away votes'* even where the votes are cast with notice or knowledge of the disqualification or of the facts creating it. It arises only where the disqualification is founded on some positive and definite fact existing or established at the time of the poll.

Therefore, it is not in every case of disqualification of a candidate that the losing candidate can be declared. The disqualification will automatically lead to setting aside an election but the seat cannot be given to the defeated candidate on ground that after ignoring the votes of the successful candidate, he gains the majority. Whenever the disqualification is not certain and depends upon a novel question or is doubtful or difficult, it cannot be said that the voters for such a candidate voted with wilful perverseness. See ***Cox v Ambrose 7 Times L.R 59***

It is for the petitioner to prove by adducing positive and reliable evidence that either on account of disqualification the voters were aware of the noncompliance with the Constitution and other Electoral laws. The voters must have requisite knowledge of ineligibility or disqualification or by notice before the court deems their votes as thrown away votes in order to declare a defeated candidate. See ***Hobbs v Morey [1904] I KB 74***

The petitioner in this case had no basis of seeking to be declared winner and did not set out any justification for what he sought court from court. In addition, the petitioner has failed to satisfy the court that the 1st respondent was not validly nominated.

The success of a winning candidate at an election cannot be lightly interfered with or taken away without any justification rooted in law.

Conclusion

It is basic to the law of elections and election petitions that in a democracy, the mandate of the people as expressed at the polls must prevail and be respected by the courts, which is why the election of a successful candidate is not to be set aside lightly. See ***R.P Moidutty v P.T Kunju Mohammad [2000] AIR SC 388***

An election once held, is not to be treated in a light-hearted manner and defeated candidates or disgruntled voters should not get away with it by filing election petitions on unsubstantial grounds or irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of an official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election that has already been held unless clear and cogent evidence is presented in court.

Therefore, the 1st respondent was validly nominated to participate in Elections for Member of Parliament for Buhaguzi County in Kikuube District and therefore was duly elected. This petition fails and is dismissed with costs to the respondents.

I so order

SSEKAANA MUSA
JUDGE
28th/09/2021