

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA.

CORAM: Hon Justice G. M Okello, JA Hon
Justice S.G. Engwau, JA Hon
Justice C. N.B Kitumba, JA

ELECTION PETITION APPEALS NOs. 3 AND 4 OF 2007.

BETWEEN

- (1) **ANIFA KAWOOYA F ANCIRANA:.....APPELLANTS**
(2) **ELECTORAL COMMISSION**

AND

JOY KABATSI KAFUR A :..... RESPONDENT

An appeal from the judgment and order of the High Court (Mukiibi. J) at Masaka dated 24/1/2007 in Election Petition No. 1 of 2Q06

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court (Mukiibi. J) Dated 24th January, 2007 at Masaka in Election Petition No. 1 of 2006.

BACKGROUND FACTS

The 1st appellant, the respondent and two other women namely, Namukasa Justine Mukiibi and Nakiganda Irene Josephine had contested for the seat of Woman Member of Parliament for Sembabule District in the General Election that were held in the country on 23-2-2006. At the close of poll, the 2nd appellant declared the 1st appellant the winner. She had polled 29398 votes against the respondent's 28199 votes. Namukasa Justine Mukiibi polled 1649 votes while Nakiganda Irene Josephine got 789 votes. The 1st appellant was later sworn in as a Woman Member of Parliament for Sembabule

District and took her seat in Parliament.

The respondent was not satisfied with the manner in which the elections were conducted. She accordingly petitioned the High Court at Masaka vide Election Petition No.1 of 2006 seeking an order nullifying the 1st appellant's election.

GROUND OF THE PETITION

The petition was based on the grounds firstly that there was non-compliance with provisions of the Constitution, the Parliamentary Elections Act 17 of 2005, (PEA) and the Electoral Commission Act (ECA) relating to the conduct of the said election' and the principles laid down in the said Acts, and that the non-compliance and failure affected the result of the elections in a substantial manner.

Secondly, that the 1st appellant was, at the time of her election not qualified for elections as a member of Parliament contrary to section 4(1)(c) of the Parliamentary Elections Act.

Thirdly, that the 1st appellant committed illegal practices contrary to sections 68 and 72 of the Parliamentary Elections Act in connection with the said Election personally, or by her agents with her knowledge and consent or approval.

The appellants who were then the respondents in the petition filed their answers in which they denied all the above allegations. The 2nd appellant contended that there was no non-compliance but that if there was any non-compliance, it did not affect the result of the election in a substantial manner.

ISSUES FOR DETERMINATION BY THE TRIAL COURT.

At the inter-parties scheduling conference that preceded the hearing of the petition, the following issues were framed for determination of the trial court:-

- (1) *Whether the election of the 1st respondent as a woman member of Parliament for Sembabule District was conducted in compliance with the provisions of the Constitution, the Parliamentary Elections Act 17 of 2005, and the Electoral Commission Act, and in accordance with the principles laid down in Hume laws.*
- (2) *If the answer to issue No. 1 ,above is in the negative, whether the non-compliance affected the result of the election in a substantial manner*

(3) *Whether the 1st respondent committed illegal practices C/ss 68 and 72 of the Parliamentary Elections Act in connection with the election.*

(4) *Whether the 1st respondent at the time of the election possessed the prescribed minimum academic qualification for the election as a member of Parliament.*

(5) *Whether the parties are entitled to the remedies sought.*

Findings of the trial court.

Mukiibi J , heard the petition. He started his consideration of the above issues with issue No. 4 which he answered in the affirmative. He found that the 1st appellant at the time of her election possessed a degree Certificate from Nkumba University, a qualification which is higher than the prescribed minimum academic qualification for election as a member of Parliament. He later found that issue No. 3 above had not been proved to the satisfaction of the court.

He, however found on issue No. 1 above that there was noncompliance and answered the issue in the negative.

On issue No. 2 above, which is about the effect of the non-compliance on the result of the election, the learned trial judge found that non-compliance affected the result of the elections in a substantial manner. He then proceeded to annul the election of the 1st appellant under Section 61(1)(a) of the Parliamentary Elections Act and declared the seat for the Woman Member of Parliament for Sembabule District vacant under section 63(6) (c) of the Parliamentary Elections Act. He finally ordered fresh elections for Woman Member of Parliament for Sembabule District in terms of sections 63 (4) (c) and 61(2) of the Parliamentary Elections Act. He also ordered the 2nd appellant alone, to pay the petitioner's costs of the petition.

Appeal

It was from those decisions and orders that the appellants appealed to this court. The appellants filed separate appeals as No's 3 and 4 of 2007 respectively.

ISSUES FOR DETERMINATION ON APPEAL.

At the inter-parties scheduling conference that preceded the hearing, the two appeals were consolidated and the following issues were framed for determination of this court:-

(1) *Whether or not the learned trial judge properly evaluated the evidence led before*

him by the appellants (this covers grounds 1-5 of the 1st appellant and grounds 1,5 and 7 of the 2nd appellant"

- (2) Whether or not the 1st appellant (Kawooya) was entitled to costs against the respondent.
- (3) Whether the learned trial judge's finding that there was noncompliance with electoral laws which affected the result of the election in a substantial manner was justified or not. (This covers (grounds 2 and 4 of the 2nd appellant).
- (4) Whether or not the learned trial judge properly evaluated the effect of the candidate's memorandum of understanding (M.O.U) on the election. (This covers grounds 3 of the 2nd appellant).
- (5) Whether the removal and appointment of the election officers was valid or not and if not, whether it affected the result of the election in a substantial manner. (This covers grounds 6 of the 2nd appellant).

REPRESENTATIONS

At the hearing of this consolidated appeal, Mr. Kenneth Kakuru appeared for the 1st appellant while Mr. Okello-Oryem, Senior State Attorney represented the 2nd appellant. The respondent was represented by Mr. Nester Byamugisha. Mr. Okello-Oryem who started the presentation argued issues NO 3, 4, and 5. He started with issue No. 5 then argued issues No. 3 and 4 together.

CONSIDERATION OF THE ISSUES.

We propose to consider counsel's arguments in the order adopted by 15 Mr. Okello-Oryem starting with issue No. 5.

For ease of reference, we repeat the issue thus:-

*"Whether the removal and appointment of the election officers was valid or not and whether it affected the result **of the election in a substantial manner.**"*

This issue is derived from ground 6 of the 2nd appellant. This ground is couched as follows:-

"The learned trail judge erred in law and fact when he found that Mr. Ibrahim Kakembo, returning officer for Sembabule District and other election officers in Sembabule District were not lawfully appointed and or removed in accordance

with the law, which affected the results in a substantial manner. "

In his general remarks, Mr. Okello-Oryem stated that the grounds for setting aside an election of a Member of Parliament are set out in section 61(l) (a-d) of the Parliamentary Elections Act 17 of 2005. He pointed out that in the instant case, the trial judge found, and that the ground set out in section 61(l) (a) of the Parliamentary Elections Act had been proved. Learned counsel pointed out that it is now settled that the burden of proof in election petition is always on the petitioner. The standard of that proof is higher than that required in ordinary civil suit. For that proposition, Mr. Okello-Oryem relied on Winnie Matsiko VS Winnie Babihuga and Electoral Commission. Parliamentary Election Appeal No. 9 of 2002.

On the principles behind section 61(l) (a) of the Parliamentary Elections Act 17 of 2005, learned counsel stated that though they are not specifically spelt out in the Act itself, the principles are well known. They have been articulated by our courts. The principles are known to be that elections must be free and fair, there must be transparency in the conduct of any public elections. The elections must be conducted in accordance with the laws and the results must be based on the majority of votes. For the above propositions, learned counsel relied on Dr. Besigye Kiiza Vs Museveni Yoweri Kaguta. Presidential Election Petition NO. 1 of 2001 which was cited with approval in Amama Mbabazi and Electoral commission Vs Musinguzi Garuga James, Parliamentary Election Appeal No. 12 of 2002. (C.A.)

Turning to issue No. 5 itself, learned counsel stated that the gist of the complaint in that issue was that the trial judge erred in law and in fact when he found that the appointment of Ibrahim Kakembo as a Returning Officer and of other polling officials for Sembabule District was not done in accordance with the law. He pointed out that the trial judge's findings were to the effect

- (1) *That Ibrahim Kakembo was not lawfully appointed returning officer to replace Muwya Tibakuno who was removed as the returning officer in contravention of section 30(1-4) of the Electoral Commission Act.*
- (2) *That the 2nd appellant gravely compromised its powers to independently, freely and impartially appoint presiding officers and other polling assistants and*
- (3) *That the elections in Sembabule District were not freely and fairly conducted by polling officials who were nominated by the candidates themselves and or by*

their campaign agents. The polling officials were partisan, partial, biased and untrained.

Learned counsel contended that the learned trial judge misdirected himself in law and fact in reaching the above conclusions. The reasons advanced by counsel were firstly that the trial judge failed to appreciate the fact that the 2nd appellant could not be divorced from its officials wherever they might be in the discharge of its constitutional and statutory duties. Whatever was done by a returning officer in the course of his or her duties, for instance, was in fact and in law done by the 2nd appellant itself in terms of section 14(3) of the Electoral Commission Act.

Secondly, that the learned trial judge did not appreciate that section 50 of the Electoral Commission Act allows the 2nd appellant, in unforeseen circumstances, to make modifications of any law relating to the election, to such extent as it considers necessary, to meet the exigencies of the situation to achieve the fulfillment of the law.

Learned counsel pointed out that in the instant case, the 2nd appellant was faced with a problem in Sembabule District. There was disagreement among the candidates over election officials. The disagreement had divided the candidates in the District into two groups of non-NRM and NRM supporters. The disagreement raised tensions, which posed a serious threat to the unity and peace in the District. The tensions also threatened not only the holding of free and fair elections but also the very conduct of the elections in the District as scheduled.

When the problem was brought to its attention, the 2nd appellant was enjoined by Article 61(1) (f) of the Constitution and section 15(1) of the Electoral Commission Act to resolve the dispute. In exercising its duty under those provisions, the 2nd appellant called a meeting with all the candidates from Sembabule District in its Head office on 20-22006. The meeting culminated in the candidates signing a memorandum of understanding (M.O.U). The 2nd appellant was not signatory to the memorandum of understanding. The memorandum of understanding provided;

- (1) That there shall be two presiding officers at a polling station,**
- (2) That each side shall nominate a person to be appointed presiding officer;**
- (3) Each side shall also nominate a person to be appointed polling assistant at each table;**

- (4) ***The list of the names nominated was to be given to the returning officer for appointment;***
- (5) ***If there was any further dispute, it was to be brought to the 2nd appellant whose decision would be appealable to the High Court.***

According to Mr. Okello-Oryem the purpose of the memorandum of understanding was to calm the tensions that were brought by the disagreement among the candidates from the District. The intention was to enable the conduct of free and fair elections in the District as scheduled.

Learned counsel contended that though the 2nd appellant did not sign the memorandum of understanding, there was nothing unusual or illegal about the memorandum of understanding. For this proposition, counsel relied on Ngoma Ngime VS The Electoral Commission and Hon. Winnie Byanyima. Parliamentary election appeal No. 11 of 2002. He concluded that in the instant case, the respondent did not adduce evidence firstly, to show that the memorandum of understanding was implemented by the 2nd appellant. Secondly, that the persons appointed election officers were persons whose names appeared on the list of persons nominated by the candidates. Thirdly, that the election officials in Sembabule District were teased, partisan, partial and untrained.

Mr. Byamugisha, learned counsel for the respondent submitted that there were also other incidents of non-compliance which the trial judge found proved. These were not challenged in this appeal.

Regarding the complaint about the appointment of Ibrahim Kakembo as the returning officer, to replace Muwaya Tibakuno and the appointment of other election officials in Sembabule District, Mr. Byamugisha contended that it must be borne in mind that the Electoral Commission was set up or established under Article 60 of the Constitution to promote the principles of free and fair public elections. Its independence was provided for in Article 62 of the Constitution to reinforce the promotion of those principles. He conceded that the Electoral Commission acts through its employees, assignees or even through any other authorised persons. He, however, submitted that in whatever capacity it operates, the cardinal principle that should govern the operation of the Electoral Commission is the promotion of its independence in the execution of its constitutional and or statutory duties.

Mr. Byamugisha referred us to paragraph 7 of the affidavit evidence of Herman

Ssentongo Vol 3 page 22 RA, paragraphs 2 and 3 of the affidavit evidence of Turyatamba Fred Bashabe (Vol 2 p 729 RA), paragraph 3 of the affidavit evidence of Theodore Ssekikubo (Vol 3 BP 197 RA) and paragraph 7(c) (i) and (ii) of the affidavit of the respondent (Vol 2 page 629 RA). He submitted that these were pieces of evidence of the unlawful removal of Tibakuno and unlawful appointment of Ibrahim Kakembo as returning officer for Sembabule District to replace Tibakuno by Hon Sam Kuteesa at a meeting at Sembabule District Headquarters on 17.2.2006. Learned counsel stated that the learned trial judge considered the above evidence against the affidavit evidence of Benon Barooro (Vol 3 A p 86 RA), of Dr. Jenny Okello and Ibrahim Tibakuno of which were filed in support of the appellant's case.

After consideration of those pieces of evidence, the trial judge, rightly is found firstly that the removal of Tibakuno and replacing him with Ibrahim Kakembo as returning officer for Sembabule District was unlawful. Secondly, that the Electoral Commission compromised itself by allowing itself to be communicated to on telephone by Hon Sam Kuteesa and to fix a meeting with all the candidates from Sembabule District at its Head office on 20.2.2006. Thirdly that at the meeting, the list prepared by Tibakuno of persons election officials in Sembabule was rejected. The Electoral Commission compromised its authority by allowing candidates to nominate persons for appointment as presiding officers and polling assistants by the returning officers. Fourthly that the election officials in Sembabule District were not appointed by the Electoral Commission as it ought to be but were chosen by candidates.

On the removal of Mr. Muwaya Tibakuno as returning officer for Sembabule, Electoral District and the appointment of Ibrahim Kakembo to replace him, the trial judge said,

"In the circumstances, I agree with the submission of Mr. Byamugisha that the 2nd respondent, acting on the influence from the external forces illegally removed Mr. Muwaya Tibakuno as returning officer of Sembabule Electoral District and unlawfully appointed Mr. Ibrahim Kakembo to replace him and the 2nd respondent thereby contravened the provisions of section 30 (1) (2) (3) (4) of the Electoral Commission Act".

The law governing the appointment of returning officers is section 30(1) of the Electoral Commission Act. It provides that the Electoral Commission shall, by notice

in the Gazette, appoint a returning officer for each Electoral District.

Section 30(3) on the other hand provides the mode and the circumstances in which the Commission may remove a returning officer thus:-

*"The Commission may, by notice in the Gazette, remove from office
Any returning officer where the returning officer;*

- (a) Is appointed by virtue of a public office and the person appointed returning officer ceases to hold public office*
- (b) Ceases to be ordinarily resident in the District of which he or she is appointed returning officer;*
- (c) Is incapable, by reason of illness or physical or mental infirmity, of satisfactorily performing his or her duties as returning officer:*
- (d) Is incompetent;*
- (e) Has been proved to be partial in the performance of his or her duties or*
- (f) Has since his or her appointment, behaved in a corrupt manner in relation to his or her duties as returning officer".*

It is clear from section 30(1) above that for an appointment of a returning officer of any electoral District to be lawful, it must be "by Notice in the Gazette". The removal of a returning officer to be lawful however, may be by notice in the Gazette for one of the reasons spelt out in section 30(3) above. It was submitted for the appellants that there was no evidence that the removal of Mr. Tibakuno as returning officer for Sembabule Electoral District and the appointment of Ibrahim Kakembo to replace him contravened the above provision to justify the trial judge's findings. For the respondent, it was answered that the burden to prove these facts is on the 2nd appellant because these are facts within its special knowledge.

Section 106 of the Evidence Act (EA) cap 6 of laws of Uganda provides thus;

"In civil proceedings, when any fact is specially within the knowledge of any person, the burden of proving that fact is upon that person. "

The facts as to the mode of the removal of Mr. Tibakuno as a returning officer for Sembabule Electoral District and the mode of appointment of Ibrahim Kakembo to replace him are specially within the knowledge of the 2nd appellant. The respondent has prima-facie shown that Mr. Tibakuno had been removed as returning officer for Sembabule Electoral District other than in accordance with the law and that Ibrahim Kakembo had similarly been appointed to replace him. The burden is, in terms of section 106 of the EA, supra, upon the 2nd appellant to adduce evidence to show that the removal, and the appointment were in compliance with section 30(1) and (3) of the Electoral Commission Act above.

Neither a copy of the Gazette in which the notice of the appointment of Ibrahim Kakembo replacing Mr. Tibakuno as returning officer of Sembabule district nor a copy of a letter of approval of Mr. Tibakuno was made available to Court.

Mr. Okello-Oryem submitted that the trial judge did not appreciate the power given to the Electoral Commission by section 50 of the Electoral Commission Act to modify the provision of any UN, except the Constitution, relating to election to meet the exigencies of the situation to achieve the purposes of the election.

His argument, as we understand it, is that there were serious tensions which threatened not only unity and peace in Sembabule District but also the holding of the elections as scheduled. This was due to the disagreement among candidates over electoral officials. That in those circumstances, the Electoral Commission under section 50(1) of the Electoral Commission Act, made the removal of Tibakuno and the appointment of Ibrahim Kakembo, to replace him as returning officer of Sembabule District dispensing with the requirement of notice in the gazette stated in section 30(1) and (3) of the Electoral Commission Act to accord with the exigencies of the situation in order to hold the elections as scheduled.

Section 50(1) of the Electoral Commission Act provides thus,

"Where, during, the course of an election, it appears to the Commission that by reason of any mistake, miscalculations, emergency or unusual or unforeseen circumstances any of the provisions of this Act or any law relating to the election, other than the Constitution, does not accord with the exigencies of the situation, the Commission may, by particular or general instruction, extend the time for doing any act, increase the number of election officers or polling

stations or otherwise adapt any of those provisions as may be required to achieve the purpose of this Act or that law to such extent as the commission consider necessary to meet the exigencies of the situation.

(2) For the avoidance of doubt, this section applies to the whole electoral process including all steps taken for the purposes of the election and includes nomination."

The Electoral Commission may by particular or general instruction invoke the above section;

The purpose of section 30(1) and (3) of the Electoral Commission Act in our view is to provide information to the public about any appointment and or removal of a returning officer of an electoral district. This shows the importance of the office of a returning officer in an electoral process.

In the instant case, there is evidence that Electoral Commission convened a meeting with all the candidates from Sembabule district at its Head office on 20-2-2006. At the meeting, the Deputy Chairperson of the Electoral Commission confirmed to the candidates the removal of Mr. Tibakuno and the appointment of Ibrahim Kakembo, to replace Mr. Tibakuno as returning officer for Sembabule district. In our view, the requirement of a notice in the gazette in section 30(1) and (3) of the Electoral Commission Act is curved under section 50(1) of the Electoral Commission Act by the oral information given by the deputy chairperson of the Electoral Commission to the candidates about the removal and appointment of new returning officer for Sembabule district. We, therefore, accept Mr. Okello - Oryem's submission that the trial judge did not appreciate the provision of section 50(1) of the Electoral Commission Act.

On the appointment of the presiding officers and polling assistants in Sembabule District the trial judge found that;

"The 2nd appellant gravely compromised its powers to independently, freely, and impartially appoint presiding officers and polling assistants..."

It is clear that under Article 67 of the Constitution, the Electoral Commission must be independent and not be subject to the direction or control of any person or authority in the performance of its constitutional or Statutory functions. Article 67 of the

Constitution provides as follows:-

Subject to the provisions of this Constitution, the Commission shall be independent and shall in performance of its functions, not be subject to the direction or control of any person or authority".

The above provision is echoed in section 13 of the Electoral Commission Act as follows:-

"Subject to the Constitution, the Commission shall be independent and shall, in the performance of its functions not be subject to the direction or control of any person or authority. "

Appointment of presiding officers and polling assistants is clearly one of the statutory functions of the Electoral Commission. Section 34(1) provides:-

"Each returning officer,

- (a) Shall appoint one presiding officer and not more than three polling assistants for each polling station;*
- (b) May, for good cause, at any time before polling day replace any presiding officer or polling assistant;".*

The above functions, like any other functions of the Electoral Commission, must be performed by the Electoral Commission, whether directly or through its officials, independently without any direction or control of any person or authority.

In the instant case, the evidence shows that there were tensions that threatened not only the unity and peace in Sembabule District but also the holding of the elections in the District as scheduled. The tensions were brought about by disagreement among candidates over electoral officials. Some candidates rejected the list of electoral officials prepared by Mr Tibakuno under section 18(3) of the Parliamentary Elections Act.

When the matter was brought to its attention, the 2nd appellant convened a meeting with all the candidates from Sembabule district on 20.2.2006. The purpose of the meeting was to find a solution to the dispute in order to enable the elections to proceed in the District as scheduled. At the close of the meeting, the candidates signed a memorandum of understanding (M.O.U). In the memorandum of understanding, the candidates agreed as follows:-

- (1) That the elections were to proceed in the District as scheduled.
- (2) That there was to be two presiding officers at each Polling Station;
- (3) Each side to the dispute **was to** nominate one person to be appointed presiding officer;
- (4) Each side to the dispute was to nominate one person to be appointed polling assistant at each table;
- (5) The list of persons nominated by each side to the dispute was to be passed over to the returning officer.

The trial judge found that the Electoral Commission directed the returning officer to implement the memorandum of understanding. According to the trial judge, that direction unleashed on Sembabule District polling officials who were partisan, partial, biased and untrained. In his view, this amounted to noncompliance with the provision of section 18(3) Parliamentary Elections Act.

With respect, we do not agree with the above finding. We accept the submission of counsel for the appellants that there no evidence to show that the direction to implement the memorandum of understanding was carried out by the returning officer and thereby unleashed on Sembabule District electoral officials who were partisan, partial, biased and untrained. There is a list of Electoral Officials that was prepared and published by Mr. Tibakuno under section 18(3) of the Parliamentary Elections Act. The list appears in Vol 3 B of the RA from page 25 to 78. This is the list said to have been rejected by Hon Sam Kuteesa and his side to the dispute.

There is also a list of names stated to have been prepared by Hon Sam Kuteesa under the M.O.U for appointment as presiding officers and polling assistants. The list appears in Vol 3 B. RA from page 79 to 103. There is however no evidence to show that the returning officer who still retained the power to appoint the electoral officials appointed only those persons whose names appeared on the list prepared by Hon Sam Kuteesa or nominated by candidates and ignored the list prepared by Mr. Tibakuno.

It is accepted that there were 177 polling stations in Sembabule District. The fact whether or not the list prepared by Mr, Tibakuno was ignored or that the memorandum of understanding was implemented by the returning officer could have been proved by the production of the declaration of result forms from all the 177 polling stations. From those declarations of the result forms, the names of the presiding officers and polling

assistants appearing thereon could have been checked against the list prepared by Tibakuno as well as against the list prepared by Hon .Sam Kuteesa to show which list was adopted. Unfortunately only 48 Declaration of Result Forms were attached to the respondent's affidavit dated 26th September 2006, as sample to show that they are invalid. They were collectively marked PR2B. These declarations of result forms were not intended to prove implementation of the memorandum of understanding. There is therefore, no evidence to show that the returning officer did not use the list prepared and published by Mr. Tibakuno or that he implemented the memorandum of understanding.

For the reasons, we find that the trial judge erred in finding, without supporting evidence, that the appointment of the presiding officers and polling assistants in Sembabule District was influenced by the candidates, and that it did not comply with section 18(3) of the Parliamentary Election Act.

On the effect of the appointment of the presiding officers and polling assistants on the result of the appellant's election, the trial judge said,

The experience in Sembabule District was unique. The election of woman member of Parliament was conducted by polling officials who were nominated by the candidates themselves, their own campaign agents who were partisan, partial, biased and untrained. It would be difficult to defend the result of an election left in the hands of such people. To compound the problem the returning officer also was not even a week old in Sembabule District. So who was in control of the election?

So, in answer to the 2nd issue, I hold that the none compliance affected the result of the election in a substantial manner. " (emphasis added).

Section 61 of the Parliamentary Elections Act sets out the grounds for setting aside the election of a Member of Parliament. Subsection (1) (a) of that section provides thus.

" (1) The election of a candidate as a member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of the court:-

(a) Non-compliance with the provisions of this Act relating to elections, if the court is satisfied that there has been failure to conduct the election in accordance with the principles laid down in those provisions and that the noncompliance and the failure affected the result of the election in

a substantial manner."

It is clear from the above provision that to set aside the election of a Member of Parliament on the ground of non-compliance the court must,

- (1) *Be satisfied that there was failure to conduct the election in accordance with the principles laid down in those provisions; and*
- (2) *That the non-compliance and failure affected the result of the elections in a substantial manner.*

In the instant case, we do not agree with the trial judge that the removal of Mr. Tibakuno and the appointment of Ibrahim Kakembo to replace Mr. Tibakuno as returning officer was not in accordance with section 30(1) and (3) of the Electoral Commission Act. As we pointed out earlier in this judgment, the requirement of a notice in the Gazette in section 30(1) and (3) above was cured under section 50(1) of the Electoral Commission Act by the oral notification of the candidates by the Deputy chairperson of the Electoral Commission of the removal of Mr. Tibakuno and the appointment of Ibrahim Kakembo to replace him as returning officer. Even if the removal and the appointment had been contrary to that section or influenced by external forces, it would have amounted to only non-compliance. There would still be a need to prove the effect and the extent of the non-compliance on the result of the appellant's election.

The trial judge stated in the above underlined quotation to the effect that the returning officer was hardly a week-old in Sembabule district thereby leaving no one in control of the election exercise. He then found that the failure affected the result of the election in a substantial manner.

With respect, we are unable to agree with that finding. There is no evaluation of the effect and extent of that non-compliance on the result to the appellant's election as the law requires. There is no evidence to show for instance, the effect and extent of the wrongful removal of Mr. Tibakuno as returning officer or on the result of the appellant's election. There is also no evidence to show the effect and the extent of the wrongful appointment of Ibrahim Kakembo to replace Mr. Tibakuno as returning officer on the result of the appellant's election.

As pointed out earlier in this judgment, Mr. Tibakuno was removed after he had already prepared and published a list of presiding officers and polling assistants for Sembabule

District in terms of section 18(3) of the Parliamentary Elections, Act. It was this list that caused the disagreement among candidates in the district sparking off tensions which led to the signing of the memorandum of understanding by the candidates.

There is no evidence that this list prepared and published by Mr. Tibakuno was not implemented by the returning officer. Even if he had implemented the list prepared by Hon Sam Kuteesa and the names nominated by other candidates, or employed two sets of electoral officials as stated in Tibakuno's and Lubowa's report-, that would have amounted only to non-compliance. There would still have been need for evidence to show the effect and the extent of the non-compliance on the result of the appellant's election. To show, for instance, that these officers mismanaged the elections and the effect and extent of the mismanagement, on the result of the election of the appellant. On the contrary, the reports Kakembo and Lubowa show that the Presidential, Parliamentary, women and some L.C. elections were conducted on the same day by the same officials and save for this petition, there is no evidence that the rest were not well managed.

Mr. Byamugisha Nester referred us to the report of Mr. Lubowa, an official of the Electoral Commission in the office of the Registrar, Sembabule District, to prove that those election officials mismanaged the election. The report reads in part thus:

***“....at the polling by the polling officials, unlike other Districts, we used two sets of polling officials at each table in Presidential, Parliamentary and Local Council V elections because of the short notice many of them did not get enough training and as a result caused confusion at some polling stations leading to late delivery of results, missing declaration of results forms.*”**

The above passage from the report of the official of the 2nd appellant acknowledged two weaknesses namely;

- (1) Deployment of two sets of election officials and***
- (2) Confusion at some polling stations caused by untrained election officials leading to late delivery of results, missing declaration of result forms.***

No. (1) above is evidence of non-compliance but does not prove the effect and its extent on the result of the 1st appellant's election.

No.(2) above is also evidence of non-compliance but does not state the effect and its extent on the 1st appellant's election.

In the result, we do not agree with the trial judge that the removal of Mr. Tibakuno and the appointment of Mr. Ibrahim Kakembo to replace Tibakuno as returning officer was unlawful. We also find no evidence to prove that the noncompliance, If any, affected the result of the appellant's election in a substantial manner.

After all, all the candidates were affected the same way. On the unsigned declaration of result forms, the trial judge said:-

"I have noted in this case the unsigned declaration of result forms produced by the petitioner were dully certified and stamped by officers of the 2nd respondent. I must take that to be the official position; that the 2nd respondent received and keeps unsigned declaration of result forms in respect of the affected polling stations.

Counsel Kakuru submitted that if the unsigned declaration of result Forms were to invalidate the results then there could be a substantial effect. I hold that unsigned declaration of forms invalidate the results of the affected polling stations. In the instant case, I do agree with counsel Kakuru that there was a substantial effect on the results of the election"

The above finding attracted a strong criticism from the appellants on two grounds namely:-

(1) *That mere failure to sign the declaration of result forms by the presiding officer cannot disenfranchise the citizens from their right to choose their leader.*

(2) *The declaration of result forms tendered in court was only samples they cannot prove the quality of the election. The decision of the Deputy Chief Justice in Komuhansi VS Babhirza, Election Petition Appeal NO 9 2002 relied on.*

Mr. Byamugisha supported the finding of the trial judge that the unsigned declaration of result forms affected the result of the appellant's election in a substantial manner. In his view, the presence of the unsigned declaration of result forms coupler] with the reports of Ibrahim Kakembo and Lubowa showed clearly that the qualitative 10 test had been discharged. That the elections were so marred by irregularities as to affect the result of

the elections in a substantial manner.

Qualitative test is a value judgment approach to determine the quality of any public elections. We had pointed out earlier in this judgment that the declaration of result forms that were tendered in evidence were merely samples. Samples are used in predictions. In a live case, like the instant one, evidence is required to prove either qualitatively or quantitatively the extent of the effect of the non-compliance on the result of the election. We agree with the statement of the **Deputy Chief Justice in Masiko Winfred Komuhangi VS Babiluga J. Winnie, Election Petition Appeal NO. 9 of 2002 that, "In any case even if it was true there was random sampling as believed by the learned judge, that approach, in my view would be speculative. In courts of law we rely on evidence and law. "**

In the instant case, it is not clear how many of the 177 declaration of result forms were not signed. In that way it is not possible to determine the extent of the non-compliance. Even if more than half of that number had not been signed, they would rightly have affected the result of the election in a substantial manner. The reason is that failure to sign the declaration of result forms *per se* does not affect the quality of the elections. Declaration of result forms are filled or completed after the poll is closed and the votes are counted in a polling station. If there are failures in the correct filling or signing of the declaration of result forms in many polling stations that could be a ground to justify recount. They do not affect the result of the election because such a failure does not invalidate the votes otherwise properly cast.

The reports of Kakembo and Lubowa merely acknowledged that the elections had not been perfect. We agree that there had been confusion in some polling stations resulting in the late delivery of the results and missing declaration of result forms. However, the reports do not state how widespread the confusion had been nor the effect on the result of the election. Such a piece of evidence cannot prove either the qualitative or quantitative effect of the noncompliance on the result of the election. Any such irregularities affected both sides equally.

In our view, this disposes off the appeal which we allow. We set aside the trial judge's order nullifying the 1st appellant's election and in its place, we substitute an order dismissing the petition.

We award costs of this appeal against the respondent here and in the court below in

favour of the appellants as the successful party.

Dated at Kampala this.....5th.....day of.....October,.....2007.

G.M. OKELLO

JUSTICE OF APPEAL

S.G. ENGWAU

JUSTICE OF APPEAL

C.N.B. KITUMBA

JUSTICE OF APPEAL