

THE REPUBLIC OF UGANDA
IN COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.08 OF 2011

5 **CORAM :** **HON. JUSTICE S.B.K.KAVUMA, JA;**
 HON. JUSTICE M.S.ARACH AMOKO, JA;
 HON. JUSTICE REMMY KASULE, JA;

OKEYOH PETER ===== APPELLANT

VS

10 **ABBOT GEORGE OUMA =====RESPONDENT**

[An appeal from the judgment of Hon. Lady Justice Monica K. Mugenyi dated 30th June 2011 in the High Court of Uganda Sitting at Jinja in Election Petition No.005 of 2011]

15 **JUDGEMENT OF M. S. ARACH AMOKO, JA**

INTRODUCTION:

20 This appeal arises from the decision of the High Court sitting at Jinja (Hon. Lady Justice Monica K. Mugenyi), dated 30th June 2011 in election petition No. 005 of 2011.

FACTS:

25 On the 18th February 2011, Parliamentary elections were held countrywide. Both the appellant and the respondent contested for the Bukholi Island constituency. After the polls, the appellant was declared winner having obtained 2,742 votes against the respondent's 2,715 votes.

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The respondent challenged the election vide Election Petition No. 005 of 2011 in Jinja High Court. The learned trial Judge nullified the election on the ground that the appellant was not legally nominated since he:

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- (i) Resigned to a wrong office and
- (ii) Did not give notice of his resignation.

Being dissatisfied with the judgment, he filed the instant appeal against that part of the judgment on the grounds that:

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“1. The learned trial Judge erred in law when she held that the appellant resigned to the wrong office.

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2. The learned trial Judge erred in law and fact when she held that the Appellant did not give notice of resignation and left office prior to receiving formal approval of his resignation.

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3. The learned trial Judge erred in law when she held that the Appellant was not qualified for nomination.”

The only issue according to the joint conferencing memorandum filed in court on the 20th October 2011 is:

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“Whether or not the Appellant was duly nominated as a candidate for Bukholi Island constituency.”

Submissions by Sekaana Musa, counsel for the appellant

Mr. Sekaana contended that the appellant was duly nominated as a
5 candidate for Bukoli Island constituency, since he resigned from his
post 90 days before nomination and thus his resignation was
effective. He gave the following reasons:

10 (i) The case for the Respondent was that the letter from Public
Service accepting the appellant's resignation was a forgery,
but there was no evidence to back the allegation of forgery
since the authors of the letter were not called to testify denying
its authenticity.

15 (ii) Resignation to a wrong office was never an issue before Court.
It is an accepted fact that the appellant resigned in accordance
with the law, namely, clause 16 of the Standing Orders which is
applicable to the appellant by virtue of section 29 of the
Education Service Act, 2002. The learned trial Judge rightly
20 applied the provisions of the Standing Orders but then ended
up misinterpreting the term "Responsible Permanent Secretary"
to mean the Permanent Secretary of the Ministry of Education,
in the case of the appellant.

25 The Standing Orders define "**Responsible Permanent
Secretary**" to mean the Permanent Secretary responsible for
Public Service.

The notice envisaged under the Standing Orders is actually the letter of resignation, not a separate one.

5 The learned trial Judge therefore erred when she held that the appellant had resigned to the wrong office and had not given notice.

10 Lastly, Mr. Sekaana invited Court to take judicial notice of other similar cases which have been decided by the High Court where teachers had tendered their resignation through the same procedure, namely:

15 (i) **Patrick Mulindwa -Vs- Electoral Commission, Misc. Cause No. 30 of 2011**

(ii) **Kasibo Joshua – Vs- Mbogo Kezekia & Electoral Commission, Election Petition No. 4 of 2011.**

Submissions by Mr. Geoffrey Komakech, Counsel for the Respondent:

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Mr. Komakech disagreed. He contended that the trial Judge rightly applied the requisite laws to the facts of the case in the absence of any evidence to help her resolve the issue at hand. The laws are very clear. **Article 80 (4)** of the Constitution which is the same as
25 Section 4 (4) (a) of the Parliamentary Elections Act provides that any person holding a public office must resign at least 90 days before

nomination. The issue is, to whom should he or she apply for resignation? According to **Article 252** of the Constitution referred to by the learned trial Judge, a public servant shall tender his/her resignation to the person who employed him/her.

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Article 167 and **168** of the Constitution create the Education Service Commission whose duties are, among others, to appoint and remove persons from office. According to Mr. Komakech, the learned trial Judge correctly came to the conclusion that the appellant was employed by the Ministry of Education whose employees are vetted by the Education Service Commission. The appellant should have therefore resigned through the Education Service Commission, not the Public Service Commission. He gave the example of a Magistrate who is employed by the Judicial Service Commission and asked whether it would be an effective resignation if he/she applied to the Public Service Commission instead of the Judicial Service Commission. His answer, he said, would be “no”.

He referred to the letter from Public Service (Annexure ‘B’ to the Petition) and insisted that the letter was not genuine; it was backdated to fit in the prevailing situation. He also attacked the letter written by the appellant purportedly to hand over to someone. According to him, even if the learned trial Judge had only looked at this together with the other evidence which indicated that the appellant continued working but also earned salaries, she would still have come to the conclusion that the appellant did not resign. The learned trial Judge was therefore right, in the circumstances, to hold

that the purported nomination was a nullity. He prayed that Court agrees with the learned trial Judge and dismiss as the appeal with costs to the respondent here and in the Court below.

5 **Reply by Mr. Sekaana:**

Mr. Sekaana made a brief reply reiterating his earlier position. His response to the issue of the letter from Public Service referred to by Mr. Komakech was that it originated from Public Service, not from the
10 appellant. The mistake could not therefore be visited on the appellant. He insisted that the respondent had no evidence that the said letter was a forgery without any evidence from its authors.

Regarding the salary, Mr. Sekaana argued that the appellant had no
15 control over money that was wired from the Consolidated Fund. That even then, the salary was stopped in November 2010. In any case, he argued, wiring money does not mean that the appellant was still in service.

20 **Determination of the issue by Court**

The main complaint in this appeal is that the trial Judge misapplied the law applicable to resignation of teachers in Public Service when the learned Judge held at page 8 of the judgment that:

25 ***“In the present case, not only did the 2nd respondent apply to the wrong officer, he did not give notice of resignation and left office prior to receiving formal approval of his***

resignation. This was in contravention of the provisions of the Standing Orders.”

The resignation letter is dated 1/7/2010. It was addressed to the
5 Permanent Secretary, Ministry of Public Service, P.O Box, Kampala,
and was routed through the Permanent Secretary, Ministry of
Education and Sports through the Commissioner Secondary
Education, P.O Box 7063 Kampala. It reads:

10 **“Dear Sir,**

RE: RESIGNATION FROM SERVICE:

**I hereby tender in my resignation letter, seeking leave from
service to join active politics in the forthcoming
parliamentary elections.**

15

**I am a substantive deputy head teacher ‘O’ Level day
Secondary School, and has been in service for 19 years.**

20

**I am currently a caretaking head teacher in Sigulu
Secondary School Namayingo District. Let me pray that
my request will be considered to enable me serve my
people and nation.**

Yours faithfully, (sic)

25

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OKEYOH PETER

UTS/0/4667
V/91/3093, GT/99/1734”

The response from the Ministry of Public Service was dated 9/9/2010.

5 It was addressed to the appellant and was routed through the Head teacher, Sigulu Secondary School, P.O Box 37 Bugiri and the Permanent Secretary Ministry of Education and Sports. It reads:

“Dear Sir,

10 **RESIGNATION FROM THE PUBLIC SERVICE**

I acknowledge receipt of your letter, dated 1st July, 2010 on the above subject.

15 **This is to inform you that your request to resign from the Public Service has been accepted with regret and it takes effect from 20th June, 2010.**

20 **In accordance with Chapter 1 Section – A – t of the Uganda Government Standing Orders, on resignation, you forfeit all the rights and benefits attached to the post.**

Yours faithfully,

25 **Signed**

.....

Adha K. Muwanga (Mrs)

For: PERMANENT SECRETARY

**CC. Auditor General
Audit Department
Kampala.”**

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The endorsements on the annexure show that both the Permanent Secretary Ministry of Education and the Head teacher Kigulu SS okayed the resignation. This fact was not in dispute.

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Two questions arise from the foregoing:

1. Was the resignation addressed to the right office?

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This is a question of law. Section (A – n) entitled “**LEAVING THE PUBLIC SERVICE**” provides in paragraph 1(h) that:

“1. The public officer may leave the Public Service or cease to be in the Public Service in one of the following ways, on:-

(a)...

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(b)...

(c)...

(d)...

(e)...

(f)...

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(g)...

(h) resignation;...”

Under Section (A – n) paragraph 16:

5 **“16. The authorities to accept resignations on behalf of Government are:-**

(a)...

(b) Responsible Permanent Secretary for all pensionable officers below the level of Permanent Secretary in Ministries and Departments;”

10 **(c)...**

(d)...

(e)...” (Underlining is for emphasis).

In the definition section of the Standing Orders, **“Responsible Permanent Secretary”**:

“means Permanent Secretary of the Ministry responsible for the Public Service.”

20 The Standing Orders apply to teachers by virtue of Section 28 of Education Service Commission Act No. 6 of 2002 which reads as follows:

“28 Standing Orders.

25 **(1) The commission may make standing orders providing for the administration and conduct of, and the terms and conditions of service of public officers in the**

education service as required by article 168(1)(c) of the Constitution.

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(2) Until the commission makes standing orders under this Act, any standing orders in force in the public service immediately before the coming into force of this Act shall, with the necessary modification, continue to apply to the education service as if made under this section.

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(3) For the avoidance of doubt the standing orders continuing to apply under subsection (2) may be amended or revoked by the commission under this section.”

15

No evidence was availed to court that this section was amended or revoked by the Education Service Commission. Hence, the appellant and others of his category continue to fall under (b) since they are pensionable officers. The appellant therefore resigned to the right authority under the Uganda Public Service Standing Orders, namely, the Permanent Secretary, Ministry of Public Service.

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Regarding notice, paragraph 11 of the same Section of the Standing Orders states that:

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“A Public Officer who wishes to resign from a Public Office shall apply to the Government by giving notice of thirty (30) days. The officer shall not leave office until his or her

application to resign has been approved in writing indicating the date the officer may leave.”

5 However, as Mr. Sekaana rightly pointed out, this was never an issue before court and the court’s finding was not based on any evidence before it.

10 Even if it were so, the notice envisaged is a letter informing the Responsible Officer 30 days prior to resignation of the intention to resign. The evidence on record is that the appellant did so in his letter of resignation.

15 The issue of the salary cannot be a ground for nullifying the appellant’s election. It is up to the Auditor General to put in process the recovery of the monies paid to the appellant after resignation.

In the result, I would allow the appeal, and set aside the judgment and orders of the High Court.

20 I would declare and order that the appellant, Okeyoh Peter, was qualified for nomination and was subsequently validly elected as Member of Parliament for Bukholi Island Constituency on 18th February 2011.

25 I would award costs to the appellant in this court and in the High Court.

Dated at Kampala this.....13th ...day of...February...2012

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HON. JUSTICE M.S.ARACH AMOKO
JUSTICE OF APPEAL

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JUDGEMENT OF S.B.K KAVUMA, JA

I have read, in draft, the judgment prepared by the Hon. Lady Justice M.S.Arach Amoko JA. I agree that this appeal should succeed for the reasons she has given.

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Since Justice Remmy Kasule also agrees the appeal is, therefore allowed and the judgment and orders of the High Court are accordingly set aside.

I also totally agree with the declaration and orders proposed by Lady Justice M.S.Arach Amoko and agreed to by Justice Remmy Kasule.

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It is, therefore, so declared and ordered.

Dated at Kampala this...13th ... day of...February...2012

S.B.K Kavuma
Justice of Appeal

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JUDGMENT OF REMMY K. KASULE, JA

I have had the advantage of reading in draft the judgment of my Senior, Honourable Lady Justice M.S. Arach Amoko, JA.

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I entirely agree with the conclusions and the orders she has proposed. I have nothing useful to add.

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Dated at Kampala this ...13th ...day ofFebruary.....2012.

Hon. Remmy K. Kasule
JUSTICE OF APPEAL.

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