

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA  
ELECTION PETITION APPEAL NO. 45 OF 2011  
(Arising out of Election Petition Appeal No. 0026 of 2011 at  
Tororo High Court)**

**Mutamboh Mathew.....APPELLANT**

**VERSUS**

**Mayusi Yusufu.....RESPONDENT**

**Hon.Justice CK Byamugisha J.A**

**Hon.Justice MS Arach Amoko.JA**

**Hon.Justice Remmy Kasule.JA**

**JUDGMENT OF THE COURT**  
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This is an election appeal from the decision and orders of the High Court at Tororo (Rugadya Atwooki, J) dated 4<sup>th</sup> October, 2011 in Electoral Petition No. 026 of 2011. In the petition, the respondent was the petitioner and the Electoral Commission was 1<sup>st</sup> respondent while the appellant was 2<sup>nd</sup> respondent.

The undisputed background and facts of the appeal may be summarized as follows: the appellant and the respondent were candidates in the Local Government council elections held on the 7<sup>th</sup> March, 2011, for the post of LCIII Chairperson of Buwagogo Sub-County in Manafwa District.

At the end of the voting exercise, the Electoral Commission declared the appellant as the winning candidate with 1418 votes while the respondent is said to have polled 1387 votes.

The respondent was aggrieved by the results and petitioned the High Court at Tororo seeking an order nullifying the election of the appellant on the grounds that he was not validly elected. The petition was premised on alleged noncompliance with electoral laws in conduct of the said election by electoral commission which affected the results in a substantial manner.

It was also based on alleged commission of electoral offences by the appellant and or his agents with his knowledge, consent or approval.

Both the appellant and the Electoral Commission denied the allegations listed in the petition and prayed for its dismissal with costs.

The agreed issues for determination by the High court were:

1. Whether there was non-compliance with electoral laws during the conduct of the elections in Buwagogo Sub-County.
2. Whether such non-compliance and failure, if any, affected the results of the election in a substantial manner.
3. Whether the 2<sup>nd</sup> respondent committed any illegal practices or electoral offence personally or by his agents with his knowledge and consent or approval.
4. The remedies available to the parties.

After hearing the petition, the trial judge, Mr. Justice Rugadya - Atwooki of the High Court decided the petition in favour of the respondent, set aside the election of the appellant, ordered that a fresh election be held, and awarded costs of the petition to the petitioner payable by the 1<sup>st</sup> respondent.

The appellant was dissatisfied with the judgment and orders of the judge and appealed to this court on the grounds that:

1. The learned trial judge erred in law and fact when he failed to evaluate the evidence on record as a whole and thereby reached an erroneous decision.
2. The learned trial judge erred in law and fact when he held that the petitioner had proved non-compliance with the law and that the same affected the results in a substantial manner.

3. The learned trial judge erred in law and fact when he relied on the forged and uncertified copies of the declaration of results forms produced by the respondent and ignored the certified copies produced by the appellant.
4. The learned trial judge erred in law and fact when he held that the petitioner/respondent had applied for the declarations of results forms and tally sheet to the Secretary for Electoral commission and the same were not availed to him.
5. The learned trial judge erred in law and fact when he relied on the purported affidavits of Walimbwa Patrick and Maloba Fred which were not part of the evidence on record.
6. At the hearing of the appeal before us, the issues raised in above grounds were condensed into one, namely: “Whether the learned trial judge properly evaluated the evidence laid before court and whether he came to the right decision.”

Mr. Yusuf Mutembuli, learned counsel for the appellant contended that the trial judge did not properly evaluate the evidence on record and thereby came to the wrong decision.

Therefore, the issue should be answered in the affirmative. He proceeded to give the, basis of his submissions as follows:

Firstly, regarding the alleged noncompliance with electoral laws, the Supreme Court decided in *Con. Rtd. Kiiza Besigye - vs. - Museven Yoweri Kaguta & Anor, SC Election Petition No. 1/2001; and Kakooza John Baptist vs. Electoral Commission and Yiga Anthony, SC Election Petition Appeal No. 11 of 2007*), that, in Election Petitions, the onus to prove whether there was non-compliance affected the results of given election in a substantial manner, lies upon the petitioner.

**Further, in Kakooza John Baptist vs. The Electoral Commission and Yiga Anthony, (supra), Kanyehamba JSC, as he then was, held at page 10 that, “to vitiate the results, the appellant needs to prove that the phenomenon he complains of had extended beyond one polling station and affected more than one ballot box or was such nature as to affect the results substantially in the constituency.**

**In the Besigye petition (supra), Odoki CJ defined the phrase “substantial manner” as follows:**

**“...The effect must be calculated to really influence the results in a substantial manner. In order to assess the effect, the Court has to evaluate the whole process of the election to determine how it affected the result and then assess the degree of the effect. In this process**

**of evaluation, it cannot be said that numbers are (not important, just as the conditions which produced those numbers. Numbers are useful in making adjustments for the irregularities. The crucial point is that there must be cogent evidence not only to the effect of noncompliance or irregularities but to satisfy the Court that the effect was substantial.”**

The three controversial polling stations, where allegations were made by the respondent of falsification of results were Rurwa, Mwikaya and Shamukungu.

Mwikaya polling Station was not included in this appeal because the learned judge rightly rejected the copies of declaration of Results form in respect of the said polling station attached to the affidavits of the respondent and his agent since they were not signed by the Presiding Officer and were uncertified.

However, the learned trial judge did not apply the same yardstick in dealing with the uncertified Declaration of Results forms for Rurwa and Shamukungu Polling Stations.

This was an error as the Supreme Court has settled the law on admissibility of uncertified documents in the case of *Kakooza John Baptist* (Supra) where Kanyeihamba JSC, as he then was, held that Declaration of Results Forms must be certified if they are to be presented as valid, authentic documents in evidence. That the only two exceptions are where the person intending to rely on the documents applied to the Electoral Commission through court and the Electoral Commission failed to produce the same.

According to Counsel, the learned judge should have thus rejected the Declaration of Result forms presented in evidence by the respondent from the other two polling stations as well since they too were not certified by the Electoral Commission.

The learned trial judge should have instead considered the certified Declaration of Results forms adduced in evidence by the Appellant which actually corresponded with the results on the Tally Sheet. Had he done so, he would not have arrived at the erroneous conclusion he did in his judgment.

Secondly, concerning the alleged intimidation at Shamukunga polling station, Mr. Mutembuli submitted that there was no evidence adduced in proof of this allegation as none of the person allegedly intimidated and harassed reported to the police or to any authority. In addition, apart from one Wamanda David, no other person who was allegedly harassed had sworn an affidavit to that effect.

Lastly, Counsel Mutambuli invited court to re-evaluate the evidence in light of the foregoing evidence and the law, set aside the judgment of the High Court and declare the appellant the validly elected LCIII Chairperson of Buwagogo Sub-county. He also prayed that the costs of the appeal be borne by the respondent.

In his reply, Mr. Gyabi, learned Counsel for the respondent supported the (findings and decisions of the trial judge and invited us to scrutinize the evidence on record and come to a similar conclusion.

He submitted that the respondent had raised two complaints; firstly, that there was non-compliance with electoral laws in that the results of the elections were falsified which had affected the results in a substantial manner; and secondly, that there was voter harassment and intimidation at the polling station in issue. The respondent had adduced credible evidence prove noncompliance with election laws.

The learned judge clearly evaluated the evidence regarding each of the allegations of non-compliance and made his finding correctly after addressing his mind to the law and the evidence on record and made specific findings in his judgment. With respect to voter intimidation, the learned judge found that some of the allegations did not constitute intimidation or harassment such as the one concerning Mwikaye polling station and he rejected it. But he rightly found that the allegations at Shamukunga polling station had been proved.

The learned trial judge however, found that there were falsification of results at both Rurwa and Shamukungu Polling Stations.

The judge rightly, after considering the effect of the falsification, intimidation and harassment, came to the conclusion that the noncompliance had affected the results in a substantial manner. The winning margin was only 31 votes. However, falsification of results at Rurwa and Shamukunga Polling Stations had denied the respondent over 150 votes, making him a clear winner.

In the premises, Mr. Gyabi submitted that the appeal lacks merits and should be dismissed with costs to the respondent and the High Court decision be upheld.

We have subjected the evidence before the trial court to a fresh Scrutiny and carefully considered

to submissions of both counsel as well as the law.

We find, and indeed the record shows that it is not in dispute that the respondent's complaints were in respect of three polling stations:

1. Mwikaye
2. Rurwa
3. Shamukungu

The election at Mwikaye is not in issue. The learned judge rightly found that the Declaration of Result form which the respondent presented to court was not signed by the Presiding Officer and he rejected it. We shall not dwell on it. This narrows the dispute to Rurwa and Shamukunga Polling Stations only.

Regarding **R u r w a** and **S h a m u k u n g a**, we find that the main contention revolves around the admission of uncertified Declaration of Results forms in evidence by the learned trial judge.

*The law on uncertified Declaration of Results forms was settled by the Supreme Court in Kakooza John Baptist electoral Commission and Yiga AnChoby (supra), Kanyeihamba JSC, stated the following in his lead judgment at page 13: "A DR form is a public document within the meaning of section 73(a) (ii) of the evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence. Consequently, I agree with Okello, JA where in his lead judgment he opines that rule 15 of the Parliamentary Election (Election Petitions) Rules, 1996, does not prohibit or indeed conflict with section 76 of the Evidence Act which provides that the contents of public documents or parts thereof are to be proved by certified copies. I also agree with the learned Justice of Appeal when he opines that the appellant could have provided the uncertified copies of the DR Forms if he had given notice to the Electoral Commission to produce copies of all the declarations forms from the sub-county but it failed to do so. There is no evidence that the appellant had given such notice to the Electoral Commission nor applied through court for the Electoral Commission to produce at the trial the DR Forms for all the polling stations in Kyamulibwa sub-county.*

*In my opinion therefore, the courts below cannot be faulted for holding that the uncertified copies of DR Forms annexed to the affidavit of the appellant were inadmissible as evidence and*

***In the same appeal the judgment of Katureebe JSC which was supported by Odoki, CJ, Mulenga JSC, (as he then was) as well as Tsekooko JSC is also to the effect that uncertified declaration of Results forms can be relied on only as secondary evidence, if there is proof that the person tendering them requested for certified copies and the one who is in possession refused to avail them to him. In order to benefit from this exception, however, there must be proof of notice.***

From the foregoing guideline given by the Supreme Court, it follows therefore, that, in the instant case, the respondent should have applied for certified copies of the Declaration of Results forms from the Electoral Commission, if he intended to rely on them as evidence in support of his petition.

If the Commission refused or failed to comply with his request, the respondent had every right to apply through court for the same. Instead, we note that in both of the letters written to the Electoral Commission by the respondent's counsel, counsel was not requesting for declaration of Results forms, but was requesting for the "***Original tally sheet and the result sheet***" in respect of the disputed polling stations. None of the letters mentioned certified "Declaration of Results Forms". There is also no evidence that the respondent applied to court to direct the Electoral Commission to avail to him copies of the said Declaration of Results forms.

The Electoral Commission could not in the circumstances be faulted for failing or refusing to availing the respondent with certified copies of Declaration of Results forms-when he never asked for the same.

In our considered opinion, therefore the trial judge had no basis for admitting such evidence.

In the premises, we agree with counsel for the appellant that the trial judge erred when he relied on uncertified Declaration of Results Forms adduced in evidence by the respondent's witnesses, in reaching his decision.

We also find that the evidence adduced by the respondent in support of his allegation of harassment and intimidation at Shamukungu insufficient. It required corroboration such as a report from the police or some other relevant authority. Consequently, the learned judge also erred when he found that the allegation of voter intimidation and harassment was proved at the said polling station.

In conclusion, we are persuaded by the arguments of learned counsel for the Appellant that the appellant has made out a case to justify our interference with the trial judge's orders.

The appeal is accordingly allowed.

We hold that the appellant MUTAMBOH MATHEW is the validly elected Chairperson of Buwagogo LC 111 Local Government Council Manafwa District. The order of the high court for a fresh election is set aside and the costs here and the high court are awarded to the appellant as against the respondent.

Date at Kampala this 13<sup>th</sup> day of August 2012.

**C. K. B YAMUGISH A**

**JUSTICE OF APPEAL**

**M. S. ARACH AMOKO**

**JUSTICE OF APPEAL**

**REMMY KASULE**

**JUSTICE OF APPEAL**