THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 19 OF 2016

1. **HON. ACHIRO LUCY OTIM**
2. **ELECTORAL COMMISSION::APPELLANTS**

VERSUS

KIDEGA NABINSON JAMES:: RESPONDENT

AND

COURT OF APPEAL ELECTION PETITION

APPLICATION N0.0050 OF 2016

KIDEGA NABINSON JAMES::APPLICANT

VERSUS

1. **ACIRO LUCY OTIM**
2. **ELECTORAL COMMISSION::RESPONDENTS CORAM: HON. MR. JUSTICE RICHARD BUTEERA, JA**

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

JUDGMENT

This is an Election Appeal arising from the decision of Matovu, J given on the 14th day of June 2016 in which he set aside the election of the 1st appellant as

a Member of Parliament for Aruu North Constituency, ordered the 2nd appellant to conduct fresh elections for the directly elected Member of Parliament for the constituency and for the 2nd appellant to pay 50% of the costs of the Petition. The brief facts giving rise to this Appeal are that the 1st appellant and the respondent participated in the General Elections held on the 18th day of February 2016 with three others, contesting for the position of member

of parliament for Aruu North Constituency in Pader District. The 1st appellant was declared winner with 8599 votes and the respondent was runner up with 8597 votes with a difference of only two (2) votes. On the 22nd of February 2016, the respondent applied to the Chief Magistrate's Court of Kitgum for a vote recount and the order was granted on the 25th day of February 2016 for the recount to be carried out on the same day.

On the date set for the recount, the election materials and the ballot boxes were destroyed by a mob and thus the recount was frustrated. The respondent then petitioned the High Court for nullification of the elections.

On the 14th day of June, Matovu J allowed the Petition and issued the orders stated above.

The appellants were dissatisfied with the decision of the trial Judge hence this appeal. The grounds of appeal as they appear in the Memorandum of Appeal are:

1. The learned trial Judge erred in law and fact when he failed to add the 60 votes got by the 1st appellant at Wiakado Primary School to the national tally sheet.

2. The learned trial Judge erred in law and fact when he found that noncompliance by the 2nd appellant affected the results retrospectively.

3. The learned trial Judge erred in law and fact when he failed to fairly, justly and properly evaluate all evidence on record thereby coming to the wrong conclusion.

Before the appeal was heard, the respondent filed Election Petition Application No. 0050 of 2016 to strike out the Election Petition Appeal No. 19 of 2016 on grounds that the respondents/appellants failed to take an essential step to prosecute the appeal within the prescribed time. This appeal and the Application were fixed on the same day and by consent of the parties, the application was heard as an issue in the appeal.

At the hearing of the appeal, Mr. Kamba Hassan appeared for the appellants/respondents while Mr. Ogiki Jude together with Mr. Patrick Lubwama appeared for the respondent/applicant.

On ground 1 of the appeal, counsel for the appellants submitted that according to the Result Transmission Form, the 1st appellant purportedly obtained 8599 votes as against the respondent's 8597 votes. He invited Court to look at paragraph 13 of the 1st appellant's answer to the Petition where she deponed that the results of Wia akado primary school polling station, Ngotto Parish, Atanga sub county Aruu, North County, Pader district which were signed by all the candidates' agents were entered in error by the 2nd appellant to the effect that the 1st appellant's votes were reduced from 168 votes as in the Declaration of Results Form to 108 votes denying the 1st appellant 60 votes.

Counsel conceded that the learned trial Judge rightly held that a mandatory recount could not be conducted because the application for a recount had been made late after the results had been transmitted to the Headquarters by the Returning officer. However, Counsel contended that the trial Judge having held as above erroneously considered that failure to conduct a recount was a noncompliance under the electoral laws.

Counsel submitted that the trial Judge in his judgment at page 15 stated that "the election process involves a series of activities from registration of voters, updating the voter register, nomination of candidates, actual polling, counting of votes, verification of results, recounting of votes, gazzeting of winners, election petitions and election appeals". The trial Judge went further to hold that the failure to conduct a recount as ordered by the chief magistrate was noncompliance with, the Electoral laws. Counsel further submitted that the trial Judge erred in holding that recounting of votes is part of the election process. He argued that a recount is a different stage of an election which cannot spill into the election petition stage unless there is an appeal and that the trial Judge erroneously held that the failure to hold a recount affected the election and hence there was noncompliance with the Electoral laws. He relied o*n* the cases of Bagole john Ngobi V Kyobe Ruka Nyensiko Miscellaneous *Cause No. 6 of 2016, Opitz V Wrzesnewskyj* (2012) 3 S.C.R (Supreme Court of Canada) to support his submission.

Counsel further faulted the trial Judge for declaring that failure to conduct a recount amounted to noncompliance of electoral laws yet the same was not prayed for in the petition.

In reply, counsel for the respondent/ applicant submitted that the Appeal was incompetent under rules 82 and 88 of the rules of this Court. He submitted that Rule 88 of the rules requires the appellant before or within 7 days after lodging the Memorandum of Appeal and Record of Appeal in the registry to serve copies of the same on each respondent who has complied with the

requirements of Rule 80 of the Rules of this Court. In the instant application, the respondents/appellants filed the Record of Appeal on the 28th of July 2016 and the same was served to only one counsel of the applicant on the 31st of October 2016. Counsel argued that failure by the respondents/appellants to serve the Record of Appeal on the applicant/respondent within the stipulated timelines rendered the Appeal a nullity. He relied on *Andrew Maviri V Jomayi Property Consultants Ltd, Civil Application No.274 of 2014, David Etuket V Okonye Mustafa and Okiria Ibrahim Civil Application No. 170 of 2009 and Nyendwoha Bigirwa Norah V The Returning Officer, Buliisa District and Anor Civil Application No.23 of 2011* to support his submission.

On the main appeal, counsel submitted that a vote recount is part of the election process. If one finds the difference is 50 votes and below as was in the instant appeal, he or she is free to seek for a mandatory vote recount. He supported the trial Judge's finding that the failure to carry out a vote recount was a noncompliance with the law. He relied on *Okumu O. Robert V Alenyo Ezrom William and Anor Court Of Appeal Election Petition No. 0001 of 2012*

In rejoinder, counsel for the appellant submitted that die filing of the Record of Appeal is governed by Rule 31 of the Parliamentary Elections (Interim Provisions) Rules and the rule requires the appellant to lodge the Record of Appeal with the registrar within 30 days after filing the Memorandum of Appeal. He further argued that there is no fixed timeline within which the Record of Appeal should be served unlike Rules 29 and 30 of the Parliamentary Elections (Interim Provisions) Rules which set the timeline within which the Notice of Appeal and Memorandum of Appeal should be filed. Counsel contended that if time were to be of essence in filing the Record of Appeal then the same should have been expressly stated by the law. He relied, on *Rule 36 of the Parliamentary Elections (Interim Provisions) Rules* to support his submission.

Counsel prayed for the Appeal to be allowed, for the decision of the High Court of Gulu vide Election Petition No. 003 of 2016 to be set aside and for the costs of the appeal and in the lower Court to be awarded to the appellants.

We find it relevant to first resolve the issue of the competence of the appeal as raised in Election Petition Application No.0050 of 2016 because if resolved in the affirmative, it would dispose of the appeal.

Rule 31 of the Parliamentary Elections (Election Petition) Rules, provides that:

The appellant shall lodge with the registrar the record of appeal within thirty days after the filing by him or her of the Memorandum of Appeal.

The case of the applicant/respondent is that the appellant had not exercised due diligence in the prosecution of the intended appeal. Counsel contended that Rule 88 of the rules of this Court requires the appellant before or within 15 days after lodging the Memorandum of Appeal and Record of Appeal in the registry to serve copies of the same on each respondent who has complied with the requirements of Rule 80 of the Rules of this Court. The respondents/appellants filed the Record of Appeal on the 28th of July 2016 and the same was served to only one counsel of the applicant on the 31st of October 2016. Counsel submitted that the failure of the respondents/appellants to serve the record of appeal on the applicant/respondent) within the stipulated timelines renders the appeal a nullity.

The 1st respondent/1st appellant conceded in her affidavit in reply in Election Petition Application No.0050 of 2016 to having not served the Record of Appeal on the applicant. Of particular interest are paragraphs 14 to 16 of her affidavit which we reproduce here under;

14.That I duly instructed my previous advocates M/s Odonga & Co. Advocates to duly institute the appeal and all along I had been believing that they duly served the record on the applicants.

15. That if my former advocates did not serve the record then I cannot be punished for their omission.

16. That I have instructed my new advocates M/s Turinawe, Kamba & Co. Advocates to avail the record of appeal to the applicant's advocates in Gulu.

We accept the contention of counsel for the applicant that an intending appellant ought to actively take the necessary steps to prosecute his / her intended appeal. The Record of Appeal was filed on the 28th of July 2016 and the same was only served to one counsel of the applicant on the 31st of october 2016.

We are of the considered view that as much as it would have been prudent for counsel for the appellants to have served both advocates representing the applicant/respondent, failure to serve one of them was not so fatal as to warrant dismissal of the entire appeal. In any case ***0.3 R*** *4 of the Civil Procedure Rules SI 71-1* is to the effect

that service of process on an advocate representing a party to a suit shall be as effectual for all purposes as if the process had been given to or served on the party in person.

We therefore find no merit in the applicant's application and dismiss it accordingly.

The duty of this Court as a first appellate court is to re-evaluate evidence and come up with its own conclusion as enunciated in Rule 30(1) of the Court of Appeal Rules.

In a first appeal such as this one, the Court is in law enjoined to revisit the facts as presented in the (trial Court, analyze the same, evaluate it and arrive at its own independent conclusion but always aware that the trial Court had the

advantage of hearing the parties fully on the facts and giving allowance for

that. ***See*** *Selle and another V Associated Motor Boat Company Ltd and*

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Others (1968) EA 123 and see also Supreme Court decision of *Kifamunte Henry V Uganda SCCA No 10 of 1997*where it was held that;

The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

We have considered the Record of Proceedings, submissions of counsel for all parties and the Judgment of the lower Court.

The law on mandatory and Court ordered vote recount is enunciated under sections 54 and 55 of the Parliamentary Elections Act which provide thus;

"54 Cases of mandatory recount

(1) Where, after the official addition of the votes –

(a)There is an equality of votes between two or more candidates obtaining the highest number of votes or,

(b)The number of votes separating the candidate receiving the highest number of votes and any other candidate is less than fifty, the Returning Officer shall, if requested in writing by a candidate, a candidate's agent or a voter registered to vote in the Constituency, in the presence of a Senior Police

Officer recount the votes after giving a written notice of the intention to recount to all interested parties."

"55 Application to Chief Magistrate for a recount

1. *Within seven days after the date on which a returning officer has, in accordance with section 58, declared as elected the candidate who has obtained the highest number of votes, any candidate may apply to the chief magistrate for a recount.*
2. *The chief magistrate shall appoint the time to recount the votes which time shall be within four days after receipt of the application under subsection*

   (1) and the recount shall be conducted in accordance with the directions of the chief magistrate.

3. *A candidate who requests a recount under this section shall deposit with the chief magistrate a security for costs of thirty currency points.*

The respondent deponed in his affidavit in support of the petition under paragraph 4 that after he had realized that the vote difference between the 1st appellant and himself was two votes, he demanded for a recount in writing which he submitted through his agent at the tally center, Unyergiu Richard. That he waited for the response from the returning officer in vain until the next day when Mr. Omona Joseph informed him and his agent that he had consulted the Electoral Commission headquarters who had informed him that the respondent should apply to the Chief Magistrate for the recount as the returning officer had no powers to carry out the recount on his own without a court order.

In paragraph 6 of the same affidavit, the respondent states that he then applied to the Chief Magistrate of Kitgum on Monday 22nd February 2016 for a vote recount as required by law and on the same day, Court issued a notice for a vote recount which was duly served on the appellants together with the application.

In reply, the 1st appellant deponed under paragraph 4 of her answer to the petition that the respondent submitted a request for the mandatory recount to the Returning Officer two days after the declaration of the final results. The 1st appellant further deponed under paragraph 13 that the results of Wia Akado primary school polling station, Ngotto Parish, Alanga sub county Aruu, North County, Pader district which were signed by all the candidates' agents **were** entered in error by the 2nd appellant to the effect that the 1st appellant's votes were reduced from 168

votes appearing in the Declaration of Results Form to 108 votes denying the 1st appellant 60 votes and that meant the difference should have been 62 votes.

We have looked at the Return Form for Transmission of Results attached to the affidavit of the respondent in support of the petition and admitted as Exhibit PI (a). The form was signed by the returning officer Omona Joseph and it clearly shows that the 1st appellant obtained 8599 (Eight Thousand Five Hundred Ninety Nine votes) against the respondent's 8597 (Eight Thousand Five Hundred Ninety Seven votes). It is not in dispute that the number of votes separating the 1st appellant and the respondent was 2 (two) votes thus falling under the ambit of section 54(1) (b) of the Parliamentary Elections Act,

The respondent wrote a letter requesting for a recount on the 19th day of February 2016 marked as Exhibit P2 (C) and the same was served on the returning officer on the 20th day of February 2016. The Return Form for transmission of results for Aruu North Constituency marked Exhibit P2 (b) shows that it was transmitted by the Returning Officer of Pader District on the 19th day of February 2016 at 9:50 am.

We agree with the trial Judge's finding that the request for a mandatory recount made by the respondent was received late and the process could not be stopped at that stage.

From the Record of Appeal, it is clear that the respondent applied for a recount in the Chief Magistrate's Court of Kitgum vide Miscellaneous Application No. 001 of 2016 as shown in Exhibit PI (b). The order was granted on the 25th day of February 2016 and the recount was due to take place on the same day. The vote recount did not take off on that day as Counsel for the 1st appellant went ahead to raise issues about tampering with the ballot boxes and the Chief Magistrate fixed the vote recount for the 28th of February 2016 at 9:00am. On the said day, the recount also never took place as it was frustrated by an angry, mob which destroyed the ballot boxes and the election materials. The events that took place on the 28th day of February 2016 which frustrated the vote recount were well explained by Omona Joseph the Returning Officer of Pader District and of particular interest are paragraphs 3 to 8 which state as follows;

2. that while at the police, I together with the DPC had loaded some ballot boxes onto the pickup of Electoral Commission for onward transmission to the Court but before we could complete the loading of more ballot boxes, ACHIRO LUCY OTIM, the 1st respondent herein, came and stormed us in the company of 4 of her supporters and Hon. Odonga Otto, while several others were within the police station compound.

"4. that upon reaching where we were, the 1st respondent and her group forcefully grabbed some of the ballot boxes from the pickup truck and threw them on the ground and destroyed them. The ballot boxes were flung open and. ballot papers were scattered on the ground.

5. that 4 ballot boxes were destroyed in the process and the ballot papers were scattered all over the compound some of them were picked and torn by them.

6. that upon doing this, the 1st respondent and the 4 persons who are unknown to me then fled the scene in jubilation and left the police station while running towards Pader Town Centre.

7. that my plea to policemen at the police station was not responded to and the process happened so quickly and the 1st respondent and the 4 men fled the scene without being apprehended.

8. that the 4 ballot boxes and the ballot papers are no longer in the condition that we submitted them to the police station for safe custody because the 1st respondent and. her supporters have since tampered with them by destroying them.

The trial Judge in his judgment at page 16 stated that *"what transpired at the Magistrate's Court at Pader on the 29th day of February and at Pader police station did not conform to the electoral laws of Uganda. The ballot boxes were destroyed and the Chief Magistrate was not able to conduct a recount as he had ordered. Similarly, this Court cannot expect to have a vote recount particularly at the polling stations of Atanga primary school, Wiakado primary school and Lapoya Okwe Te atika polling stations, which could perhaps have resolved this electoral dispute as provided for in S. 52 (1) of the PEA."*

Under the law where margins are very narrow that is 50 or below and in the present case only 2, justice will be done and seen to be done if a vote recount is ordered and carried out right from the word go. In this case a recount was ordered but before it could be effected rowdy people stormed the police premises where the voting materials were kept, opened the boxes, scattered and destroyed some of the ballot boxes and ballot papers rendering the entire exercise futile.

Parliament seems not to have envisaged a situation where the vote recount is frustrated because there is no provision in the law as to what happens when a recount ordered by Court is disrupted. This however cannot leave a litigant without a remedy. The Court can certainly invoke its inherent powers to make such orders as are necessary for the ends of justice to be met or to prevent abuse of process of Court. The petitioner, and rightly so, did not in the trial court seek a recount of votes, as this was not possible since election materials which would be used had been destroyed.

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