THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

ELECTION PETITION APPEAL NO. 73 OF 2016

(Arising from the Decision of the High Court of Uganda at Mbale before His Lordship Hon. Justice Bashaija K. Andrew dated 15.07.2016)

Makatu Augustus :: Applicant

VERSUS

1. Weswa David
2. The Electoral Commission :::::::::::::::::::::::::::::: Respondents

Coram: Hon. Justice Remmy K. Kasule, JA
Hon. Justice F.M.S. Egonda-Ntende,JA
Hon. Justice Hellen Obura, JA

JUDGMENT OF HON. JUSTICE REMMY KASULE, JUSTICE OF APPEL

I have had the benefit of reading in draft the Judgment of my brother Honourable F.M.S. Egonda-Ntende and sister Honourable Lady Justice Hellen Obura, Justices of Appeal.

I too agree with the decision of Their Lordships that there is no merit in the appeal and that the same stands dismissed. I also agree with the orders they have made as to costs.

I however take the opportunity to express myself further on the applicability of **Section 172** of the **Local Governments Act** to Election Petitions of Local Governments.

Section 172 provides:

> ***"172. Application of laws relating to Presidential and Parliamentary elections.***
>
> ***For any issue not provided for under this part of the Act, the Presidential Elections Act and the Parliamentary Elections Act in force shall apply to the elections of Local Councils with such modifications as may be deemed necessary by the Electoral Commission."***

The applicability of this Section has caused, and will continue to cause confusion, unless the legislature takes quick action to clarify the situation specifically with regard to this Section but also generally, as will be shown later on in this Judgment, as regards the whole regime of standard of proof in Election Petitions in Uganda.

First, it is difficult to see a situation where the **Presidential Elections Act [16 of 2005],** where the whole Uganda is one Constituency for a presidential candidate, can have any applicability to local council elections with a multiplicity of

constituencies spread all over the local governments throughout Uganda.

Second, **part X of the Local Governments Act, Cap. 243** deals with Local Government Council Elections. It covers the Electoral Commission and its staff, voter's registers, notices of elections, demarcation of electoral areas, election of chairpersons, election of local councils, voting and announcement of results, trial of election petitions, and illegal practices and offences.

Inspite of the above stated wide categories of subjects and activities covered under **part X of the Act**, that involve so many other stakeholders, apart from the Electoral Commission, such as the Courts of law that determine local council elections, **Section 172** vests only in the Electoral Commission the power to make such modifications as may be deemed necessary when it comes to applying the **Presidential Elections Act** and the **Parliamentary Elections Act** to elections of the Local Councils. It is unexplained how and under what circumstances the Electoral Commission can make modifications as regards application of the **Presidential** or the **Parliamentary Elections Act** to the trial in Courts of law of Local Council Election Petitions, which is the preserve of only those Courts. Yet they are not at all empowered by the said Section to make any modifications in the applicability of the said two Acts.

A specific example of the practical dilemma that **Section 172** brings about is the issue of standard of proof. **Section 139** of the **Local Governments Act** provides that the standard of proof to be applied by the Court of law in the trial of a local council

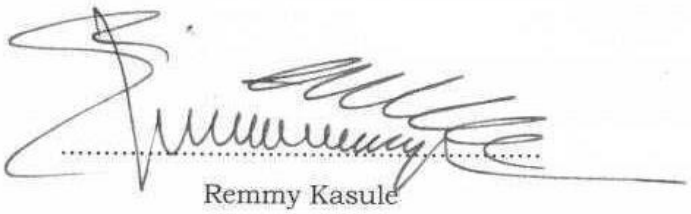
election petition is to the satisfaction of the Court. This standard is similar to that in the **Presidential Elections Act (S. 59(6).** This means Court must be satisfied to the extent that the Court is without being left in any state of reasonable doubt. See: **Blyth –vs- Blyth [1966] AC 643** applied by the Uganda Supreme Court in **Besigye vs Museveni Supreme Court Presidential Electoral Petition No. 1 of 2001**.

Yet under the **Parliamentary Elections Act**, the standard of proof is "proved to the satisfaction of the Court" S.61(1) but on "the basis of a balance of probabilities" S.61(3), which is contradictory in terms. A Court cannot be "satisfied" if there is any reasonable doubt. But the standard of proof on the balance of probabilities the Court takes that as proved which is more probable. If the evidence is such that the Court can come to the conclusion that it is more probable than not, then the burden is discharged. But if the probabilities are equal, then the burden is not discharged. See: **Miller –v- Minister of Pensions [1947] 2 ALL ER 372.**

With Section 172 vesting all powers to make modifications only in the Electoral Commission, then the Courts of law trying Local Council Election Petitions cannot take advantage of that Section to apply either the Presidential or the Parliamentary Elections Act to determine the standard of proof applicable in local council elections. This is made worse when the two said Acts appear to be in contradictory terms as regards the issue of standard of proof. So none of the two Acts can be applied whole sale on the issue of burden of proof without any modifications.

The unclarity as to the exact import, effect and applicability of the said Section 172 of the Local Governments Act as well as the apparent confusion the Section further creates as to the applicable standard of proof in Local Council Election Petitions calls for the legislature to take immediate legislative remedial action of not only amending this Section but also other relevant legislations so as to come out with clear comprehensive, non contradictory legislations as to the laws applicable to trials by Courts of law of election petitions at the different layers of elections, local council elections inclusive.

Dated at Kampala this.....17th..... day **of August, 2017**.



Remmy Kasule

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL N0.73 OF 2016

MAKATU AUGUSTUS:: APPELLANT

VERSUS

1. WESWA DAVID
2. THE ELECTORAL COMMISSION:::::::::::::::::::::: RESPONDENTS

(Arising from the decision of the High Court of Uganda at Mbale before His Lordship Hon. Justice Bashaija K. Andrew dated 15.07. 2016)

(Coram: Remmy Kasule; F.M.S. Egonda-Ntende and Hellen Obura, JJJA)

JUDGMENT OF EGONDA-NTENDE & OBURA, JJA

Introduction

This is an appeal against the decision of His Lordship Bashaija K Andrew delivered on 15th July, 2016, in which he gave judgment in favor of the 1st respondent, Weswa David who was the petitioner in the matter.

Background Facts

The facts as found by the trial Judge were that on 9th March, 2016 the 2nd respondent conducted elections for LCIII Chairperson for Nalwanza Sub-county, Bududa District. The appellant, the 1st respondent and a one Fungo Abed Vincent, contested as candidates for the seat. The 2nd respondent declared the appellant as winner and validly elected with 974

respondent declared the appellant as winner and validly elected with 974 votes, the 1st respondent with 881 votes and Fungo with 27 votes.

Nalwanza Sub-county had a total of nine (9) Polling Stations, one of which was Nakhamosi Polling Station in which the 1st respondent claimed to have obtained 315 votes as against the appellant's 38 votes, and Fungo got 05 votes. The 2nd respondent cancelled the results of Nakhamosi Polling Station and did not include them in the final tally of the results for Nalwanza Sub-county. The 1st respondent contested the 2nd respondent's decision to cancel results of that Polling Station. He further contended that there was non-compliance with the law for the conducting of free and fair elections and in particular that there was failure to include the votes for Nakhamosi Polling Station in the final tally which affected the results of the election in a substantial manner. The learned trial Judge considered the matter on its own merits and found in favour of the 1st respondent. In his judgment he made declarations that:

1. *"There was non-compliance with the electoral laws in vote counting and announcement of results for Nakhamosi Polling Station for the LCIII Chairperson Nalwanza Sub-county.*

2. *The results of Nakhamosi Polling Station should have been accurately included in the total tally of results for Nalwanza Sub-county.*

3. *The election of the 2nd respondent (appellant) as LCIII Chairperson Nalwanza Sub-county is hereby nullified.*

4. *It is ordered that a new election be held for Nakhamosi Polling Station*

and the results be included in the final tally with the rest of the election results in the eight Polling Stations already tallied for Nalwanza Sub-county.

5. The petitioner (1st respondent) is awarded costs of the petition."

Being dissatisfied with this decision, the appellant appealed to this Court on the following grounds:

1. *The learned trial Judge erred in law and fact when he overlooked the contradictions in the evidence of the petitioner hence occasioning a miscarriage of justice.*

2. *The learned trial Judge erred in law and fact when he failed to evaluate evidence on record as a whole thereby occasioning a miscarriage of justice.*

3. *The learned trial Judge erred in law and fact when he ignored to consider the police report of malpractice at Nakhamosi Polling Station hence causing a miscarriage of justice.*

4. *The learned trial court erred in law and fact when it failed to carry out its role to investigate the petitioner's allegations hence occasioning a miscarriage of justice.*

5. *The learned trial Judge erred in law and fact when he awarded Weswa David one hundred (100) votes without any justification hence occasioning a miscarriage of justice.*

Application to strike out the Appeal

The 1st respondent filed an application No. 47 of 2016 as against the appellant seeking for an order to strike out the appeal for the reason that the memorandum of appeal was filed out of time. That application was cause-listed together with this appeal and it was called on for hearing first.

Representation

At the hearing, Mr. Martin Mututa appeared for the appellant, Mr. Gyabi James appeared for the 1st respondent while Mr. Richard Latigo appeared for the 2nd respondent.

Consideration of the Application

We heard the submissions of both counsel and delivered a ruling dismissing the application and we reserved our reasons to be given in this judgment. We now proceed to give the reasons for our decision to dismiss the application.

The application was brought under the provisions of rules 28 and 30 (b) of the *Parliamentary Elections (Interim Provisions) Rules* which formed the grounds of the application and the basis of counsel for the applicant's arguments.

Counsel for the applicant argued that the appeal was filed out of the time line provided under rules 28 and 30 (b) of the *Parliamentary Elections (Interim Provisions) Rules* which he contended are the applicable law by

virtue of section 172 of the *Local Governments Act* (LGA).

Conversely, counsel for the respondent argued that the appeal was filed in time under the *Judicature (Court of Appeal Rules) Directions* which according to him is the applicable law. He submitted that the *Parliamentary Elections (Interim Provisions) Rules* are only applicable to parliamentary elections and not to local council elections like in the instant case.

Section 172 of the LGA provides thus;

> *"For any issue not provided for under this part of the Act, the Presidential Elections Act and the Parliamentary Elections Act in force* ***shall apply to the elections of local councils with such modifications as may be deemed necessary by the Electoral commission".*** [Emphasis added].

We carefully scrutinised the above quoted provision, particularly the part in bold, and we came to the conclusion that it applies to Part X of the Act which relates to conduct by the Electoral Commission of elections of local councils and not to the trial of appeals arising from those elections. That explains why the Electoral Commission is given the liberty to modify it as it deems necessary for purposes of conducting the elections.

It was therefore our finding that this appeal arose from a local council election to which the *Parliamentary Elections Act* and the *Parliamentary Elections (Interim Provisions) Rules* do not apply and as such the time lines provided under rules 28 and 30 (b) of those Rules are not applicable

in this case.

In the absence of specific rules of procedure for filing election petition appeals arising from local council elections, it was and is still our considered view that the applicable law would be the *Judicature (Court of Appeal Rules) Directions*. It was therefore our finding that the respondent who is the appellant in the appeal was required to comply with the time lines provided under the *Judicature (Court of Appeal Rules) Directions* and not rules 28 and 30 (b) of *Parliamentary Elections (Interim Provisions) Rules*. Rule 83 (1) of the *Judicature (Court of Appeal Rules) Directions* requires an appeal to be instituted within sixty (60) days after the date when the notice of appeal is lodged.

It was the applicant's evidence in paragraphs 7 and 10 of his affidavit in support of the notice of motion, that the 1st respondent filed the notice of appeal on 22nd July, 2016 and served it on the applicant on 28th July, 2016. The record of appeal was filed on 25th August, 2016 and served on the applicant on 30th August, 2016. We did find that both the notice of appeal and the record of appeal were filed and served within the 60 days prescribed under rule 83 (1) of the *Judicature (Court of Appeal Rules) Directions*.

In the premises, we found that the application was misconceived and we dismissed it for lacking merit.

Having given our reasons for dismissing the application, we now proceed to determine the appeal before this Court.

Appellant's Case

Counsel for the appellant, merged grounds 1, 2, 3 and 4 of the appeal into one ground which reads as follows;

"The trial court erred in law and fact when it failed to properly evaluate the evidence before it."

He submitted that there were contradictions in the 1st respondent's evidence as contained in the affidavit of Namusisi Babirye Jamila where she stated in paragraph 8 that she called for re-enforcement when a one Wakhola was disturbing the voting process and yet she also claimed in paragraph 18 of the same affidavit that the petitioner's agent protested but she was threatened with an arrest. Counsel argued that the protest by the petitioner was evidence of violence so the entire voting process could not be said to have been smooth. Counsel contended that there was a failure by the trial Judge to consider material evidence especially that of CIID Officer Bududa Police Station, Akera Henry who carried out the investigation.

Counsel submitted further that the trial Judge also failed to evaluate the evidence on record as a whole. He contended that the affidavit of Bwayo David showed the number of ballots issued at the Polling Station, the number of votes cast and the 11 excess cast ballots that were discovered. Counsel conceded that there was no evidence to show the number of unused ballots that could be used to determine the number of excess cast ballots. He, however, contended that the Returning Officer was right in not including the results of that Polling Station in the final results and in declaring the appellant the winner.

Counsel also submitted that it would not be proper for this Court to declare re-election in all the other Polling Stations that were not in issue.

On ground 5, counsel submitted that the trial court was presented with the Declaration of Results Forms (DRF) from 8 Polling Stations that were not in dispute which if added together, shows that the 1st respondent obtained a total of 906 votes. He contended that had the trial Judge addressed his mind to them, he would not have found that the 1st respondent had obtained 1,006 votes from those 8 Polling Stations. He thus submitted that the trial Judge erred by awarding the 1st respondent 100 extra votes and prayed that the appeal be allowed on the above grounds.

1st Respondent's Case

Counsel for the 1st respondent opposed the appeal. He submitted that the trial Judge properly evaluated the evidence on record. Further, that the affidavit of Namusisi Babirye Jamila does not at all allude to any violence at the Polling Station. She only referred to disturbance by a one Wekhola of the otherwise peaceful voting process. He further submitted that the trial Judge addressed himself to the issue of violence and found that no evidence was adduced to that effect. It would therefore be wrong to fault the trial Judge for not properly addressing himself to the evidence.

On the alleged contradictions, counsel submitted that if at all there was any, then it was in the evidence of the appellant. He submitted further that the trial Judge looked at the evidence on record and concluded that there was no evidence to show that there was excess cast ballot papers that justified taking the ballot box to the police station and cancelling of the results. The trial Judge also stated that without the DRF it was difficult to

determine the number of ballots cast and the balance of uncast ballots. As such, it was merely speculative to state that there were excess ballots. Counsel cited the case of ***Col. (Rtd) Dr. Besigye Kiiza vs Museveni Yoweri Kaguta and anor Election Petition No. 1 of 2001*** to support his submission. In that case, Mulenga, JSC stated;

> *"I assume he determined the number of those who voted by counting from the roll, the registered names which were ticked. That however, is not full. The difference of 94 votes could be a result of illegal ballot staffing, just as it could result from omission to tick names of 94 persons who voted. The more reliable way to ascertain the cause of the discrepancy, would have been to examine whether or not the serial numbers of the ballot papers officially issued to the Polling Station had been suggested by the petitioner in his affidavit. The opportunity was lost."*

Counsel contended that without filled DRF there would be no basis to conclude that there were excessive ballots. He submitted that it was right for the trial Judge to find that denying over 300 votes that had been obtained by the respondent was contrary to the law and therefore an order for re-election was justified.

On ground 5, counsel submitted that this was merely an arithmetical error since the trial Judge later correctly stated at page 19 lines 1-6 of his judgment that; *"when the results of Nakhamosi Polling Station that were unlawfully cancelled are considered the petitioner gets 1221 votes and 2nd respondent 1203 votes, with a margin of 18 votes in favour of the petitioner..."*

Counsel urged this Court to ignore that error since it did not affect the final results that the trial Judge found. He prayed that the appeal be dismissed with costs.

2nd Respondent's Case

Counsel for the 2nd respondent submitted that his client is not concerned about the other orders of the lower court except the 4th one where the trial Judge ordered a re-election in Nakhamosi Polling Station. Counsel urged this Court to re-evaluate the evidence on record and if it agrees with the trial court's 2nd order that the results of Nakhamosi Polling Station should have been included, then it should proceed to include the results and declare the winner.

Court's Findings and Decision

This Court has a duty, as the first appellate court, under rule 30(1) (a) of the Rules of this Court to re-appraise the evidence and come up with its own conclusion. See also ***Kifamunte Henry vs Uganda; SCCA No. 10 of 1997***.

We shall consider the grounds of the appeal in the order set out by counsel for the appellant. In the consolidated ground 1 of the appeal, the appellant faults the trial Judge for failing to properly evaluate the evidence before him.

It was submitted for the appellant that there was contradictions in the evidence of the 1st respondent which the trial Judge overlooked and on the whole there was a failure to evaluate all the evidence on record thereby

leading to a wrong decision. It was counsel's contention that the Returning Officer was justified not to include the results of Nakhamosi Polling Station in the final results and to declare the appellant the winner because there was evidence to prove that there were excess ballots. Counsel however, conceded that the affidavit of Bwayo David shows the number of ballots supplied, the ballots cast and those in excess as being 11 but there was no evidence of unused ballots.

Conversely, counsel for the 1st respondent submitted that there was no contradiction in the evidence of the 1st respondent as Namusisi did not mention any violence in her affidavit. He submitted further that the trial Judge looked at the evidence before him and rightly concluded that there was no evidence of excess ballots cast that justified the police intervention which led to cancellation of the results at Nakhamosi Polling Station. The trial Judge rightfully found that without the DRF it was difficult to determine the number of ballots cast and the balance of uncast ballots.

In his judgment at page 181 of the record of appeal, the trial Judge stated;

"It should be noted that in any case, there is no DR form for Nakhamosi Polling Station. This would have been the basis for the alleged total number of the registered voters, the total number of people who cast their votes that day, the total number of spoilt votes, the total number of ballots issued, and the alleged excess ballot cast, if any, which are the subject and the basis of the cancellation of the results by the Returning Officer.

There is hardly any credible evidence or justifiable cause that led the Returning Officer to exercise his power under the law to cancel the results. His evidence that Presiding Officer, whom he alleges told him;

and the DPC whom he alleges informed him of the violence and the alleged malpractices is all hearsay and inadmissible.....on the contrary the evidence of the candidate's agents including the Police Officer and officials of the 1st respondent mentioned above, who were present during the voting is truthful as to what transpired at Nakhamosi Polling Station. They mention of no any violence or having witnessed any malpractice. They state that voting and counting and announcing of results were done peacefully....Therefore, there is no credible basis for the Returning Officer to have cancelled the results and not including them in the final tally.

Similarly, there would be no basis for the police to conclude in their investigations that ten votes exceed the number of voters who cast their votes at the Polling Stations that day. At best, the ten or eleven excess ballots are merely speculative."

Our re-evaluation of the evidence on record brings us to the same conclusion made by the trial Judge that there was no basis for the police intervention and the subsequent cancellation of the election results at Nakhamosi Polling Station.

We agree with the 1st respondent that there were no contradictions in the evidence of Namusisi in so far as she stated in paragraph 5 of her affidavit that voting proceeded on well and peacefully until it officially closed at 4.00pm and in paragraph 18 that the petitioner's agent protested the decision to enter the election results of Nakhamosi Polling Station in the DRF from the Sub-county headquarters but she was threatened with an arrest. We do not agree with the appellant's argument that the two paragraphs of Namusisi's affidavit are contradictory allegedly because

paragraph 5 shows that the exercise was peaceful yet paragraph 18 is evidence of violence at the Polling Station which is an indication that the election was not peaceful.

To our minds, what Namusisi stated in paragraphs 5 & 8 of her affidavit is that the electoral process was peaceful save for disturbance by one person. Similarly, she also stated in paragraph 18 that there was protest against the police decision by an agent of the 1st respondent who was threatened with an arrest. In our view, first of all, there is no contradiction in the contents of the three paragraphs of the affidavit. Secondly, disturbance by one person in the course of the election and protest by another person in separate incidents cannot be said to amount to violence and election malpractice of the whole election. In any event, even if there was massive protests against the decision not to fill in the DRF at the Polling Station, it could not be said to be the cause for failure to follow the law in the electoral process because the protest was to oppose the very decision that had been taken in contravention of the law.

It is noteworthy that several other witnesses as shall be shortly analysed below corroborated Namusis's evidence of peaceful voting process. We therefore do not find any contradiction in Namusisi's evidence.

Generally, we have not found any credible evidence of election malpractices on record apart from the alleged disturbance by Wekhola, the 3rd candidate's agent as stated in the affidavit of Namusisi. Nandutu Irene Aidah, a Polling Assistant also stated that she was deeply disturbed by the decision of the District Returning Officer not to tally the votes of Nakhamosi Polling Station because the voters duly cast their votes which were counted

and votes cast in favour of each candidate ascertained. According to her, the allegations of electoral malpractices were false.

Nandutu averred that election ended at 4.00 pm, the votes were counted and the scores ascertained but as they prepared to fill in the results in the DRF, she heard one Wekhola Stephen talk on phone that there was discrepancy between the people who voted for the chairperson for the Sub-county and the councilors. Immediately Wekhola finished talking, the police arrived at the Polling Station and directed them to park election materials inside the ballot box, load them on the pick up and go to the Sub-county headquarters from where they would fill the necessary forms. At the Sub-county headquarters, the results were not filled in the DRF, instead the DPC appeared and ordered for the arrest of the Presiding Officer and one Komeyi Godfrey (a Polling Assistant). They were arrested and taken to Bududa Police Station together with the ballot box.

AIP Wekona David, a Police Officer who came later in the course of the voting to beef up security at the Polling Station when the Polling Constable called for additional security, stated that the voting proceeded on normally save for a report that a one Wekhola Stephen wanted to disrupt the process. He further stated that voting ended at 4.00 pm, the votes were counted and results were announced and declared publicly in a transparent manner.

We have also noted that other witnesses who were present at the Polling Station on that material day including a one Kutosi Caprieel, Komeyi Godfrey a Polling Assistant, Bwayo Godfrey a Polling Assistant, Nabwire Celemesia a candidate for woman councilor, Wakooba Stephen a Polling

Agent and Komeyi Martin, a voter at Nakhamosi Polling Station among others deposed that the voting process ended well at 4.00 pm, the votes were counted and the results declared in a transparent manner but the police came and took away the ballot box with all the cast votes before the DRF was filled by the Returning Officer. They all fault the Police Officers for their action which caused the results of Nakhamosi Polling Station to be cancelled.

Another witness called Namono Mangrat, also averred that she went to Nakhamosi Polling Station at around 2.00 pm to cast her vote and she found voting was very peaceful and proceeding well. She remained at the Polling Station until 4.00 pm when voting ended. None of the above witnesses alluded to election malpractices at the Polling Station.

The appellant's case that there was malpractice at Nakhamosi Polling Station is based on the evidence of Bwayo David, Wekhola Stephen and Kamoti Peter who averred that at around noon they saw a one George Natsambwa, a well-known supporter of the 1st respondent putting a bundle of cast votes in the ballot box. They got him but the supporters of the 1st respondent who were the majority at that Polling Station overpowered them and allowed Natsambwa to escape. They called their candidates and informed them and they, in turn called the police patrol that rushed to the Polling Station to beef up security, then voting resumed and continued normally. Wekhola also stated in paragraph 9 of his affidavit that he had seen the Polling Assistant giving Natsambwa one ballot paper but when he was putting his vote in the ballot box they saw a bundle of them.

We must observe that the only witnesses who testified about the incident involving Natsambwa is the appellant (whose evidence is based on what his agent told him and thus hearsay) and his above named four witnesses, one of whom is Fungo who happened to be a candidate and was not present at the Polling Station. He relied on what he was told by his agent Wekhola, who on the other hand is alleged to have caused disturbance at the Polling Station which necessitated calling for additional security. None of the would be neutral witnesses such as the Polling Assistants (Komeyi Godfrey, Bwayo Godfrey and Nandutu Irene Idah) and Namusis Babirye Jamilah, the Polling Constable as well as AIP Wekono David, the Police Officer who came to beef up security talked of any incident involving Natsambwa let alone any malpractices.

We note that on the contrary, the Polling Constable who was in charge of security at the Polling Station averred in paragraph 8 of her affidavit that at around 2.00pm she called for reinforcement because the number of voters was big and a one Wekhola was disturbing the voting. AIP Wekono David corroborates this evidence in paragraphs 4-6 of his affidavit where he stated that at around 2.00 pm he received a phone call from an election constable called Babirye who was at Nakhamosi Polling Station and needed more manpower. Further that when he went with other Police Officers to beef up security at the Polling Station, he noticed that voting was proceeding on normally save for a report he got that a one Wekhola Stephen wanted to disrupt the voting.

The above evidence of the security personnel who were deployed to man the Polling Station and the evidence of the 3 Polling Assistants who were officials of the 2nd respondent and therefore believed to be neutral,

contradicts the evidence of Bwayo, Wekhola and Kamoti, the appointed candidates' agents who are partisan by virtue of their appointments.

Wekhola and Bwayo stated that upon seeing Natsambwa casting a bundle of votes in the ballot box and having failed to apprehend him, they called their respective candidates who in turn informed the police about the incident. According to Wekhola, when the police patrol arrived at the Polling Station, he addressed them about what had happened at the Polling Station and they said that they would prove the allegations at the counting and balancing of the votes after the exercise had ended.

However, this evidence is not supported by the evidence of AIP Wekono who came to beef up security at the Polling Station. Contrary to what Wekhola stated, AIP Wekono said that when he got at the Polling Station he received a report that a one Wekhola Stephen wanted to disrupt the voting. He did not mention anything about vote staffing by Natsambwa yet Wekhola said he addressed the Police Officers who came to beef up security and AIP Wekono stated that he was one of them.

We have also failed to find the basis for the alleged excess votes which the appellant relied on as evidence of election malpractices at Nakhamosi Polling Station to justify the police intervention and the subsequent cancellation of the results at that Polling Station. From the evidence on record, all the witnesses and the parties to this appeal agree that at Nakhamosi Polling Station, the appellant obtained 38 votes, the 1st respondent obtained 315 votes and the 3rd candidate Fungo obtained 05 votes.

The appellant and his witnesses, namely; Bwayo (appellant's agent), Wekhola (3rd candidate's agent), Kamoti (3rd candidate's agent) and Fungo, the 3rd candidate himself all averred that there were no spoilt votes but the invalid votes were 08. According to them, a total of 450 ballot papers were supplied at Nakhamosi Polling Station and all of them, apart from Bwayo, stated that after the voting exercise, there were a total of 95 unused ballot papers. They all alleged that after balancing the ballots cast and the unused ballots, 11 excess votes were discovered.

Another witness who came close to testifying about the ballot papers supplied was Bwayo Godfrey, a Polling Assistant who stated in paragraph 6 of his affidavit that the Presiding Officer briefed the voters and counted the ballot papers provided for the various posts being contested for and then directed the people to line up ready to vote. He neither mentioned the actual number of ballot papers supplied nor the number of unused ballots after the exercise.

The trial court could not therefore rely on the evidence of the appellant's agent and those of Fungo to conclude that there were excess ballots in the absence of the tally sheet for Nakhamosi Polling Station as there would be no basis This is more so because Wekhola who testified to the excess votes did not have clean hands as he was alleged to have disturbed the voting process. His credibility was therefore in issue and so his evidence needed to be treated with suspicion.

It is also noteworthy that D/ASP Akera Henry, the District CID Officer Bududa who prepared the report of the alleged malpractices indicated in his report that according to Mukoya Martin the Presiding Officer at

Nakhamosi Polling Station there were 10 excess ballot papers. It is curious that the number in that report contradicts the evidence of the 3 agents who stated that there were 11 excess ballots. Numerically the difference between 10 and 11 seems negligible but in an election exercise and for purposes of determining an election dispute that difference is significant. To our minds there appears to be more than meets the eye.

It leaves us wondering if this report was informed by an impartial investigative process because if it were so, the author who is a CID Officer at the rank of D/ASP, ought not to have relied only on what the Presiding Officer stated. He would, after taking steps that would ensure transparency to all concerned, have opened the ballot box, which according to his report was returned to the Police Station and therefore accessible to him, and verified the number of ballots cast, the number of unused ballot papers and the excess number if any. His report would have been more useful to the trial court and to this Court if it had that information. Otherwise, by the CID Officer merely quoting the information he got from the Presiding Officer his evidence becomes hearsay which is inadmissible under section 58 of the Evidence Act. The trial Judge was therefore right to ignore that evidence.

In any event, it was the petitioner who alleged that there were excess ballots and so it was incumbent upon him, pursuant to section 101 (1) of the Evidence Act, to prove the allegation of excess ballots by providing cogent evidence. To that end, there ought to have been evidence including the relevant documents to show the number of ballot papers supplied, the number of ballots cast and the number of unused ballot papers for court's analysis. This was not done and as such the trial court could not have

ascertained whether or not there were any excess ballots in the absence of that critical evidence.

We are aware that ***Section 12 (e) and (f)*** of the ***Electoral Commission Act, Cap 140*** empowers the 2nd respondent to take any measures for ensuring that the entire electoral process is conducted under conditions of freedom and fairness and to take steps to ensure that there are secure conditions necessary for the conduct of any election in accordance with the Act or any other law. Section 15 of the same Act also empowers the Electoral Commission to examine and decide complaints of irregularity with any aspect of the electoral process at any stage, submitted to it in writing and where the irregularity is confirmed, the Commission is empowered to take necessary action to correct the irregularity and any effects it may have caused.

In our opinion, the power under the above sections includes the power to cancel results when there is evidence of electoral malpractice and the cancellation is deemed necessary.

Be that as it may, in the instant case, there is no evidence of any complaint made to the Electoral Commission. It was the police that was allegedly informed on phone by two of the candidates and their agents and they rushed in to impound the voting materials before the Electoral Commission official completed the electoral process by entering the declared results into the DRF. The Electoral Commission did not receive and examine any complaint of electoral malpractices. In effect, the police took over the role of the Electoral Commission and acted high handedly without any basis.

Based on the evidence on record which we have carefully subjected to a fresh scrutiny, we find no justification for the police intervention and the ultimate cancellation of the election results for LCIII chairperson for Nakhamosi Polling Station. This case is a classic example of a poorly managed electoral process where security forces, in this case the Uganda police, are used by some candidates to disrupt an otherwise peaceful, free and fair election simply because the final result may not favour them.

In the circumstances of this case, we find that the trial Judge properly evaluated all the material evidence on record and came to the correct conclusion that there was no proof of excess ballots and election malpractice. We ourselves have come to the same conclusion after re-evaluating the evidence.

In the result, the 1st consolidated ground of appeal has no merit and it must fail.

Regarding ground 5 on the alleged extra 100 votes awarded to the 1st respondent by the trial Judge, we agree with counsel for the 1st respondent that this was an arithmetical error on the part of the trial Judge. We also note that the trial Judge at page 19 of his judgment paragraphs 365-366 rightly stated the total number of votes that each candidate would have obtained had the results of Nakhamosi Polling Station been included as 1221 votes for the 1st respondent and 1203 votes for the appellant. We therefore believe that the trial Judge's indication of 1006 votes for the 8 Polling Stations instead of 906 votes in favour of the 1st respondent was an arithmetical error which did not affect the final results.

We wish to clearly state that, going by the declared results at Nakhamosi Polling Station, we find that the final tally of the appellant's results is 1203 votes and that of the 1st respondent is 1221 votes, as rightly stated by the trial Judge at page 19 of his judgment (page186 of the record of appeal).

In the premises, this ground of appeal succeeds in part in so far as the trial Judge erred by stating the 1st respondent's total votes less the results at Nakhamosi Polling Station as 1006 as opposed to the correct figure of 906. Those 100 extra votes were added in error but it did not affect the final result found by the trial Judge.

In conclusion, this ground of appeal also fails save for our finding on the arithmetical error.

On the whole, both grounds of appeal fail for lack of merits. Consequently, we uphold the decision of the trial court in regard to the following orders:

1. There was non-compliance with the electoral laws in vote counting and announcement of results for Nakhamosi Polling Station for the LCIII Chairperson Nalwanza Sub-county.
2. The results of Nakhamosi Polling Station should have been accurately included in the total tally of results for Nalwanza Sub-county.
3. The election of the 2nd respondent (appellant) as LCIII Chairperson Nalwanza Sub-county is hereby nullified.

5. The petitioner (1st respondent) is awarded costs of the petition.

However, we are of a different opinion on the 4th order regarding holding re-election for Nakhamosi Polling Station. It is our considered view that basing on the evidence on record that the votes at this Polling Station were counted and the results declared as per the figures agreed to by all the parties, there was no need to order a re-election after the finding of the trial court that there was no basis for cancelling the results. The trial Judge should have proceeded to add the results for Nakhamosi Polling Station and that of Namatotowa that was left out for unexplained reasons and declared the final results and announced the validly elected candidate.

We, in exercise of our appellate duty hereby do set aside the order of the trial Judge for holding re-election at Nakhamosi Polling Station and in substitution thereof we declare that the final results of election for LCIII Chairperson Nalwanza Sub-county, Bududa District from all the 9 Polling Stations show that the 1st respondent Mr. Weswa David polled 1,221 votes, the Petitioner Mr. Makatu Agustus polled 1,203 votes and the 3rd candidate Mr. Fungo Abed Vincent polled 32 votes. The candidate with the highest number of votes is therefore Mr. Weswa David whom we declare as the one validly elected for the post of LCIII Chairperson, Nalwanza Sub-county, Bududa District.

In the premises, we do not find any merit in this appeal and we dismiss it with costs to the 1st respondent to be paid by the appellant alone who is responsible for pursuing this appeal, even though without merit. Costs in the High Court shall be jointly and/or severally paid by the appellant and the 2nd respondent to the 1st respondent.

We so order.

Dated at **Kampala** this 17th day of August 2017

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Hon. Justice F.M.S Egonda-Ntende

JUSTICE OF APPEAL

.....

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL