

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: Egonda-Ntende, Mugamba & Owiny-Dollo, JJA]

ELECTION PETITION APPEAL NO. 0064 OF 2016

BETWEEN

KINTU ALEX BRANDON=====APPELLANT

AND

1.ELECTORAL COMMISSION=====RESPONDENTS
2.WALYOMU MOSES

(Appeal from the decision of the High Court of Uganda at Jinja (Namundi, J.,)
in Election Petition No. 004 of 2016 dated 17th June 2016.)

JUDGMENT OF THE COURT

INTRODUCTION

1. The Appellant together with the 2nd Respondent and others not before this court were candidates in the election of the Member of Parliament for Kagoma County, Jinja District conducted on the 18th February 2016 by the 1st Respondent. The returning officer, for the 1st Respondent declared,

the 2nd Respondent as the winner having polled 16,391 votes as against 14,254 for the Appellant.

2. The Appellant was dissatisfied with that outcome and challenged the same in an election petition before the High Court of Uganda. He lost that challenge and has now appealed to this court. He advanced 3 grounds of appeal which we set out below:-

‘1. That the learned judge erred in law and fact in finding that the 2nd Respondent did not commit any illegal practices and offences or his agents with his knowledge or approval.

2. That the learned trial judge failed to properly evaluate the evidence on record and thus came to a wrong conclusion.

3. The learned trial judge erred in law and fact by not relying evidence of recanting witnesses who explained the circumstances under which they recanted their evidence.’

3. The Respondents opposed the appeal.

4. The Appellant was represented by Mr Galisonga and Mr Luganda while Mr. Seekana appeared for the 1st Respondent and Mr Tebyasa together with Mr. Ochieng appeared for the 2nd Respondent.

Submissions of Counsel

5. Mr Galisonga submitted on ground 3. He stated that several witnesses swore affidavits in support of the petition and subsequently swore other affidavits in support of the answer to the petition, recanting their earlier evidence. One of these witnesses, Mr Kapere swore a third affidavit, explaining that the second affidavit, in support of the answer to the petition, had been obtained by intimidation. The second respondent and his agents allegedly threatened the witness that they would be prosecuted for the contents of the first affidavits sworn in support of the petition for being co participants in the crimes alleged.

6. Mr Galisonga further submitted that in dealing with this evidence the learned trial judge held that the affidavits of those witnesses which clarified how they came to swear affidavits in support of the answer to the petition were crafted to fit the decision of the Supreme Court in Bakaluba Peter Mukasa v Nambooze Betty Bakireke Supreme Court Election Petition Appeal No. of 2009 (unreported). He stated that there was no evidence to support this assertion by the judge and that it just came from the blue. He noted that the witnesses in question were never cross examined on their third affidavits to test the veracity of their evidence and it ought to have been believed by the trial court.

7. Mr Galisonga urged us to follow Bakaluba Peter Mukasa v Nambooze Betty Bakireke Election Petition (supra) and re-evaluate the evidence on the record. He submitted that the court should believe the testimony of the recanting witnesses who explained that they had been intimidated by the respondent no.2 and his agents to retract their evidence.

8. Mr Luganda submitted on ground no.1 and 2. He attacked the finding of the trial judge that the petitioner had not proved who exactly received the money from the 2nd Respondent at the Mosque in Mawoito Village. He submitted that the witnesses clearly stated that the money was given to Mosque leaders and Magino Juma the Imam of the Mosque corroborated this testimony. He added that what happened at Mawoito was not the bribery of one person but bribery of a group. He submitted that in this regard this court should follow the case of Bakaluba Peter Mukasa v Nambooze Betty Bakireke (supra) and find that this act of bribery had been committed. It was his contention that this was an illegal practice contrary to Section 68 of the Parliamentary Elections Act and that the trial judge erred in law and fact when he failed to find that this illegal practice had been committed.

9. Mr Luganda submitted that with regard to the fund raising at Light Academy on 31st January 2016 it is not in dispute that the 2nd Respondent

was at the event at which it is contended that he contributed Shs.50,000.00 as fund raising for a new school building. What was in issue was whether or not he made the contribution. Though the 2nd respondent denied the allegation there was evidence from Kasimba Mohamed and others to show that he had made the contribution, counsel observed.

10. Counsel noted also that given the imminence of the election it was logical to believe that this money was given with a view to influencing the outcome of elections, an act that was prohibited. Mr Luganda submitted that we should follow Odo Tayebwa v Basajjabalaba Nasser and Another, Court of Appeal, Election Petition Appeal No. 013 of 2011 [unreported].

11. Mr Luganda prayed that the trial court's judgment be set aside, allow the appeal and relief sought, with costs in this court and below.

12. Mr Tebyasa for the 2nd Respondent submitted that this appeal has basically 2 grounds; one in relation to recanting witnesses and the other was the evaluation of the evidence in relation to the bribery incident at the Mosque in Mawoito and the fund raising at Light Academy. Mr Tebyasa supported the decision of the trial judge in relation to the recanting witnesses. He said the trial judge rightly found these witnesses

to be unreliable with 2 different faces. Mr Ali Kapere in his final affidavit does not demonstrate at all the alleged intimidation. He does not indicate at the hearing the outcome of his complaint to the Police.

13. Mr Tebyasa further submitted that there is an affidavit on record by Ndaada which disputes the averments of Kapere Ali and shows that Kapere Ali went willingly to Jinja town to swear the second affidavit without intimidation.

14. Mr Tebyasa further submitted that the trial judge was right to conclude that the affidavits explaining why they recanted the evidence were made to fit into facts in the decision of the Supreme Court in Bakaluba Peter Mukasa v Nambooze Betty Bakireke (supra) as they are similar word for word to what happened in that case. Asked why the 2nd Respondent's advocates had to get in contact with the witnesses for the adverse party, breaching an ethical rule not to do so, Mr Tebyasa stated,

'Your lordship you see in election matters so many things are bound to happen. There is likelihood of evidence being cooked up and also someone to find out why the situation is like that.'

15. Mr Tebyasa continued to submit that notwithstanding the recanted evidence the affidavits relied on by the appellant did not establish any act of bribery by the 2nd respondent. The affidavits are so general without

indicating that person who was given the money, he argued. There was also the evidence of Abdul Balikowa who stated that the 2nd respondent did not give out any money at the Mosque.

16. Mr Ochieng for the 2nd Respondent addressed the issue of fund raising at the Light Academy. Firstly he submitted that this had not been pleaded in the appellant's pleadings and ought not to have been entertained. He noted that there were two affidavits that dealt with the same issue but were not supporting any part of the petition. He submitted that the trial judge was right in rejecting this evidence and not considering the allegations in relation to Light Academy. Notwithstanding the foregoing the 2nd respondent produced the affidavit of Ntende Luwangula the Head Teacher of Light Academy which denied that there was any fund raising at the school or that the 2nd Respondent had made any contribution as alleged.

17. He prayed that this appeal be dismissed.

Analysis

18. We shall start with the issue of recanting witnesses. The learned trial judge dealt with the issue of recanting witnesses in the following excerpt from his judgment.

‘Refractory witnesses Kapere Ali, Erima Joshua, Kaliro Samuel, Magino Juma, Mulondo Rashid, Kanakulya Swaibu and Ziraba Paul all swore affidavits for both the petitioner and the respondent.

Reference was made to the case of Ourumu Okiror Sam Vrs. Electoral Commission & Another – EP.8/2011. In that case, the trial judge rejected the evidence of recanting witnesses.

It was submitted for the Petitioner in Rejoinder that the lack of rejoinders to the replies of the 2nd Respondent and his witnesses is immaterial as the denials never introduced new issues that required clarifying.

Regarding the refractory / recanting witnesses, the case of Bakaluba Mukasa Vrs. Nambooze Bakileke [Supreme Court] should be relied on. In that case there was a third affidavit, where the witness explained the circumstances leading to the swearing of the second affidavit. That accordingly the affidavits of Erima Joshua, Kaliro Samuel, Mulondo Rashi and Ziraba Paul are recanting witnesses whose evidence should be evaluated with caution. That the others i.e. Magino Juma, Kanakula Swaibu should be accepted.

It is noteworthy that the affidavits in question all tried to pin the 2nd Respondent on the allegations of bribery. The affidavits of Magino Juma and Kanakulya Swaibu as they try to explain the circumstances of how the 2 affidavits were made, have nothing to support the claims of coercion or intimidation. It appears to me that the said affidavits were made to fit the holding in the Nambooze case, rather than an honest explanation of the circumstances as they claim.

I accordingly decline to rely on the evidence of witnesses who have different faces to suit different situations without any shame.’

19. Mr Magino Juma in his third affidavit stated in part in paragraphs 4 and 5

that:

‘4. That the truth of the matter is that the 1st respondent (Hon. Walyomu Moses) personally invited me to Jinja town where he told me that the leaders of our mosque shall be arrested and imprisoned for receiving a bribe because the petitioner was directly complaining against us; and that we should cooperate to overcome the problem.

5. That I verily believed Hon. Walyomu Moses (1st Respondent) that I and our mosque leaders were in danger since I had actually been one of the persons who had got involved over that money and I was aware that that the petitioner had complained.’

20. Mr Kanakulya Swaibu stated in part in his third affidavit that,

‘3. The real fact is that the 2nd respondent called me Jinja town as muslim leaders in Mawaito village, Kagoma county wherein he emphasised to us that our mosque leaders were in danger for having received a bribe from him on the 3rd day of January 2016 since the 1st Petitioner had made a complaint about it. Hence that we should cooperate to overcome the problem as it was likely to cost our entire mosque problems.

4. That due to what the 2nd Respondent (Walyomu Moses) told me, I got scared as I was one of the people involved over the money worth Ushs.50,000.00 which the 2nd respondent had given to us at our mosque as a way of soliciting for votes during the campaign period.’

21. It is clear that from the 2 foregoing excerpts from the affidavits of

Magino Juma and Kanakulya Swaibu that they were approached by the 2nd respondent who told them that they were going to suffer arrest and prosecution for bribery unless they cooperated and recanted their earlier testimony. This was intimidation or inducement for purposes of getting the witnesses change their testimonies which they did with the swearing

of second affidavits, recanting their earlier affidavits and in support of the answer to the petition. We part company with the learned trial judge who asserted that there was no evidence of intimidation.

22. We wish to point out that the actions of the 2nd Respondent and his legal team in approaching the witnesses of the petitioner and obtaining further affidavits from them was contrary to Rule 19 of the Advocates (Professional Conduct) Regulations SI267/2 which not only renders counsel involved open to disciplinary proceedings for professional misconduct, but ought to have been sufficient ground for rejecting or striking out those affidavits for violating the tenets of a fair trial. Our rules would have required that the challenge to such evidence would only be by way of cross examination to test the veracity of their evidence. An adverse side is prohibited from approaching witnesses for the other party with a view to inducing them to testify against that other party.

23. Rule 19 states,

'19. Advocates not to hinder witness, etc.

An advocate shall not, in order to benefit his or her client's case in any way, intimidate or otherwise induce a witness who he or she knows has been or is likely to be called by the opposite party or cause such a witness to be so intimidated or induced from departing from the truth or abstaining from giving evidence.'

24. The only venue that was open to the 2nd respondent and his legal team to challenge the testimony or affidavits of the petitioner's witnesses was in court, during cross examination and not at Sandy Hotel or other diverse places. This brazen and egregious breach of the rules by both the 2nd respondent and his legal team, who ought to have known better, was an outrageous attempt to destroy the evidence that pointed directly to the 2nd respondent's commission of an illegal practice during the campaigns. The motivation is clear. The 2nd respondent knew that what was alleged he had done was true and, in concert with his legal team, set out, by hook or crook, to neutralise the same. The venue was Sandy Hotel and diverse other places where the 2nd respondent sought out these witnesses and procured them to recant their earlier affidavits.

25. The learned trial judge took the view that the final affidavits sworn by recanting witnesses were made to fit the holding in Bakaluba Peter Mukasa v Nambooze Betty Bakireke (supra). We do not agree. What would bring the facts of this case within the case of Bakaluba Peter Mukasa v Nambooze Betty Bakireke (supra) is simply the conduct of the 2nd respondent, and his advocates, who procured the petitioner's witnesses, contrary to law, to swear new affidavits, recanting their previous testimony. The third affidavits explained how witnesses were intimidated by the 2nd respondent to withdraw their earlier affidavits

which they now confirmed as truthful and correct. It is on a review of all the evidence on record including these last affidavits that a court can reach a conclusion as to what really took place with regard to the contested facts. The refusal by the learned trial judge to consider this evidence before reaching a final decision in this matter was erroneous.

26. In Bakaluba Peter Mukasa v Nambooze Betty Bakireke (supra) the

Supreme Court considered the issue of a witness in an election petition who had sworn an affidavit denying the allegation of having received money from the candidate or candidate's agent and then subsequently swore a second affidavit in which he admitted receipt of that money and explained that he was misled by the candidate to sign the first affidavit. The trial judge in her review of the evidence considered all the evidence including this second affidavit and concluded that the alleged payment of a sum of money to the witness had indeed been made to the witness. On a second appeal the Supreme Court found no fault with the approach to evaluation of evidence that the trial judge had taken including believing this second affidavit on finding it satisfactorily explained why the witness had recanted the earlier affidavit.

27. It is not in dispute that the 2nd Respondent attended the opening of the Mosque at Mawoito on the 3rd January 2016, about 6 weeks away from

the Parliamentary elections. Both the evidence for the appellant and for the 2nd respondent place the 2nd Respondent at the function. It is not in dispute that he was given an opportunity to address the people present. What is in dispute is whether or not he paid Shs.50,000.00 as his contribution to the outstanding issues at the mosque as alleged by the appellant and denied by the 2nd respondent.

28. What is remarkable in this case is that neither side opted to cross examine any witness or party on the opposite side. We have largely untested affidavits from either side, that is, oath against oath. We are drawn to the words of Katutsi, J., in Uganda v Moses Ndifuna, High Court Criminal Case No.004 of 2009, [2009]UGHC 83, where he stated,

‘The state says it was. The defence says it was not. Accused gave his evidence on oath. So it is an oath against oath. The duty of the Court now is to try and penetrate the patina of the oath to see which side is really truthful and which side is trying to hide under the patina of the oath.’

29. There are affidavits of Kanakulya Swaibu, Magino Juma, Mulondo Rashid, Isabirye Ayasi and Charles Buyinza filed in support of the petition which contend that the 2nd Respondent paid Shs.50,000.00 to the mosque leaders on 3rd of January 2016 as his contribution to the things that had remained to be done at the mosque after addressing the congregation.

30. For the 2nd Respondent, in addition to his own affidavit there are affidavits of Kanakulya Swaibu, Hamba Hussein, Mulondo Rashid, Balikowa Abdu Maliki and Magino Juma in support of the contention that though the 2nd Respondent attended the occasion in question he did not pay the alleged Shs.50,000.00. The affidavits of Kanakulya Swaibu and Magino Juma retract what is contained in their affidavits for the Petitioner. However, these two subsequently swore a third affidavit in support of the petitioner alleging intimidation by the 2nd Respondent to change their first affidavits and swear new ones favourable to the 2nd Respondent. These allegations have not been countered by the 2nd Respondent.

31. What tips the scales to one side is the outrageous conduct of the 2nd Respondent, and his legal team, to extinguish the evidence pointing to the illegal practice. We are satisfied that the 2nd respondent need not have undertaken such conduct unless he believed such evidence to be true, hence the need to douse that evidence. We are satisfied that the 2nd Respondent intimidated Magino Juma and Kanakulya Swaibu that unless they cooperated with him they would be arrested and prosecuted for accepting a bribe. Believing him the two agreed to swear second affidavits asserting that no money had been paid to the mosque leaders on that particular occasion.

32. Counsel for the 2nd Respondent attacked this evidence submitting that even if it was accepted it fell short of naming the person who received the money. And therefore it should not be believed. Magino Juma is the Imam of the mosque in question and he has accepted that this sum was paid to them, the leaders of the mosque, and the purpose for which it was paid. We are satisfied that this money, in the sum of Shs.50,000.00 was paid to the leaders of the mosque who included Magino Juma.

33. Section 68(1) of the Parliamentary Elections Act, 2005, provides,

‘(1) ‘A person who, either before or during an election with intent, either directly or indirectly to influence another person to vote or refrain from voting for any candidate, gives or provides or causes to be given or provided any money, gift, or other consideration to that other person, commits the offence of bribery and is liable on conviction to a fine not exceeding ninety currency points or imprisonment not exceeding three years or both.’

34. We are satisfied that the 2nd Respondent on the 3rd January 2017 committed the illegal practice and or crime of bribery at Mawoitto Village after the opening of the Mosque following his address to the congregation urging those present to vote for him by paying to the mosque leaders the sum of Shs.50,000.00. This was contrary to Section 68(1) of the Parliamentary Elections Act.

35. Section 61(1)(c) of the Parliamentary Elections Act provides,

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

(a)

(b).....

(c) that an illegal practice or any other offence under this Act was committed in connection with the election by the candidate personally or with his or her knowledge and consent or approval;

or

(d).....’

36. In the result we accept that on the evidence before us it has been

established that the 2nd respondent committed the illegal practice/offence of bribery of a community of voters by his donation of Shs.50,000.00 to the leaders of the Mosque at Mawoitto in Kagoma County.

37. With regard to the fund raising alleged to have taken place at the Light

Academy on 31st January 2016 there are affidavits for the Petitioner that allege that 2nd Respondent contributed Shs.50,000.00 as fund raising to the school on the occasion of celebrating the good performance of the school in primary leaving examinations. These affidavits were two in number. One by Mr Kasimba Mohamed, who was retained as the Master of Ceremonies on the occasion. And the other affidavit was sworn by Mr Bakaki Joseph, a teacher at the school, who was present on the occasion.

38. There are affidavits for the 2nd Respondent that deny that there was no fund raising on the occasion and that the 2nd Respondent did not contribute Shs.50,000.00 as alleged. The 2nd Respondent has sworn to that effect, together with the affidavit of Mr Ntende Ivan Luwangula the headmaster of the school.

39. Mr Ntende Ivan Luwangula suggested in his affidavit that Mr Bakaki Joseph was a known supporter of the appellant and that may explain why he claimed that the 2nd Respondent had made a fund raising contribution of Shs.50,000.00, presumably to 'pull him down', whereas there had been no fund raising on that occasion. However, he did not explain why Kasimba Mohamed who was the Master of Ceremonies on the occasion should have lied. It would not be unusual that on such occasions of celebration, especially for a private school, that fund raising would take place.

40. Neither side opted to subject the witnesses of the other to cross examination to determine the veracity of their evidence. Cross examination is one tool to contest the evidence of the other side. For the 1st Petitioner this was a missed opportunity to penetrate the 'patina' of the oath and discover the truth.

41. It is the duty of the petitioner to establish the case to sustain the petition.

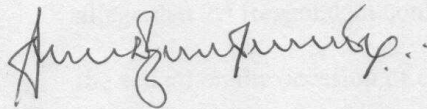
With regard to the allegations of fund raising at Light Academy therefore we are satisfied that the appellant did not cross the threshold.

Decision

42. We allow this appeal with costs here and below. We nullify the election of the 2nd Respondent as Member of Parliament for Kagoma County. We direct the 1st Respondent to hold a bye election in respect thereof.

43. We direct the Registrar of this court to supply a copy of this judgment to the Law Council.

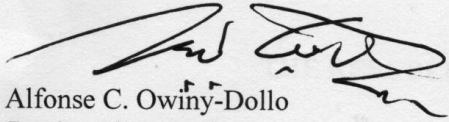
Dated, signed and delivered this 9th day of March 2017



FMS Egonda-Ntende
Justice of Appeal



Paul Mugamba
Justice of Appeal



Alfonse C. Owiny-Dollo
Justice of Appeal