

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**ELECTION PETITION APPEAL NO 0058 OF 2016**

**ARISING FROM ELECTION PETITION NO 005 OF 2016**

5 **ACHEN CHRISTINE AYO:.....:APPELLANT**

**VS.**

**ABONGO O. ELIZABETH:.....:RESPONDENT**

**CORAM: HON. MR. JUSTICE S.B. K KAVUMA, DCJ**

**HON. MR. JUSTICE BARISHAKI CHEBORION, JA**

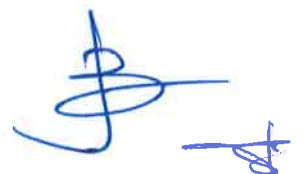
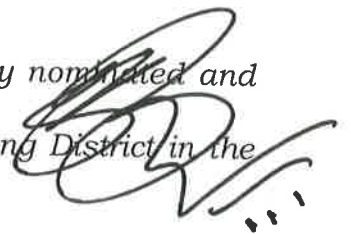
10 **HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA**

**JUDGMENT**

**Introduction**

This is an Election Petition Appeal arising out of the Judgment of Jessica Naiga Ayebare, J, delivered on the 27<sup>th</sup> day of July, 2016 in which she nullified the  
15 election of the appellant as Woman Member of Parliament for Alebtong District and made the following orders;

1. *The 1<sup>st</sup> respondent, Christine Achen Ayo, was not validly nominated and duly elected as Woman Member of Parliament for Alebtong District in the*



*general elections held on the 18<sup>th</sup> February, 2016 due to lack of the requisite academic qualifications. The said election is as a result declared null and void, and accordingly set aside.*

2. *The seat for the Woman Member of Parliament for Alebtong District currently held by the 1<sup>st</sup> respondent is declared vacant*

3. *A by-election or fresh elections for the Woman Member of Parliament for Alebtong District is hereby ordered.*

4. *The respondents shall both pay costs of the petition in equal proportions but shall only pay 75% of the costs considering that some of the issues in this petition were decided in favor of the Respondents.*

### **Background**

The facts giving rise to this Appeal are that on the 18<sup>th</sup> day of February, 2016, elections for Alebtong District Woman Member of Parliament were held. Christine Achen Ayo (now the appellant), Abongo.O.Elizabeth (now respondent) Acen Docus, Akullu Emily Omacara and Aol Sarah contested for the said position. The appellant emerged winner with 31,581 votes while the respondent came second with 18,932. The appellant was declared winner by the Electoral Commission (which was the 2<sup>nd</sup> respondent in the Petition). She was eventually sworn in and started her duties as a Member of Parliament.


The respondent filed **Election Petition No 005 of 2016** in the High Court of Uganda at Lira challenging the manner in which the Electoral Commission conducted the election. She alleged that the elections were conducted in noncompliance with the provisions of the Parliamentary Elections Act and  
5 other laws. She claimed this affected the results of the elections in a substantial manner. She alleged that the Commission failed to conduct a free and fair election. The respondent added that the appellant was not qualified for election as Member of Parliament, that she committed illegal practices and offences both personally and through her agents with her knowledge, consent  
10 and approval.

The appellant and the Electoral Commission denied any wrong doing on their part and maintained that the elections were conducted in a free and fair environment and in accordance with the electoral laws. The appellant averred that she was qualified for election as a Member of Parliament.

15 Judgment was given in favor of the respondent as indicated earlier. Being dissatisfied with the outcome, the appellant appealed to this Court.

### **Grounds of Appeal**

The grounds of appeal as agreed after consolidation of the two initial Appeals are as follows;

- 20 1. *That the learned trial Judge erred in law and fact when she held that the Appellant did not possess the minimum academic qualifications to be*

*nominated and elected as Woman Representative to Parliament for Alebtong District.*

2. *That the learned trial Judge erred in law and fact when she shifted the burden of proof on the Appellant without legal basis to do so.*
- 5 3. *That the learned trial Judge erred in law and fact when she relied on expunged evidence of DPC Mary Nkakyessimira to determine that the Appellant did not possess academic qualifications for election as a Member of Parliament.*
- 10 4. *That the learned trial Judge erred in law and fact when she held that all the academic qualifications of the Appellant were fake and invalid and when she declared them null and void*
5. *That the learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and thereby reached the wrong conclusions on all issues framed for determination.*

15 During the hearing of the Appeal, the five grounds of Appeal were reduced to two issues namely;

1. *Whether the appellant was at the time of her election qualified for election as MP*
- 20 2. *Whether the learned trial judge erred when she shifted the burden of proof on to the appellant without a legal basis to do so.*



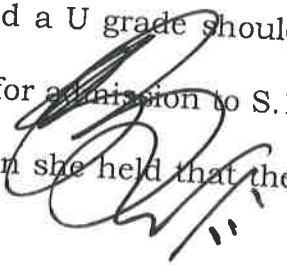
## Representation

During the hearing of the Appeal, the appellant was represented by Messrs Okello Oryem Alfred and Kenneth Engoru while the respondent was  
5 represented by Mr. Mike Agwang Otim.

## Submissions of counsel for the appellant

Counsel submitted that the Petition in the lower Court was hinged on the ground that the appellant did not pass her Primary Leaving Examination (PLE)  
10 and was thus ineligible to be admitted to secondary school. Counsel contended that it is not a legal requirement for one to possess a PLE certificate in order to join 'O' level. He argued that one was required to complete, not pass PLE. He relied on **Waligo Aisha Nuluyati v Sekindi Aisha and Electoral Commission EPA No.29 of 2016** and **Butime Tom v Muhumuza David and Electoral  
15 Commission EPA No.11 of 2011** to support his submissions.

Counsel submitted that the fact that the respondent scored a U grade should not have led the trial Judge to rule that she did not qualify for admission to S.1 at Faith Academy. Counsel added that the Judge erred when she held that the admission was unlawful and invalid.



Regarding the discrepancy in the name Achen Christine and Acen Christine, counsel submitted that the appellant had sworn a Statutory Declaration in verification of her name in 2002.

Referring to **National Council for Higher Education v Anifa Kawooya SCCA**

5 **No.4 of 2011**, counsel submitted that it is improper for Courts of law to usurp the powers that are explicitly set out for an institution in an Act of Parliament. Counsel argued that if an institution has issued a certificate and has not recalled it, the Courts should not investigate its existence, its authenticity except if there is a recall and right to be heard has been flouted. Counsel  
10 submitted that the appellant's certificates (A diploma issued by Nsamizi Institute of Social Development, UCE certificate issued by UNEB and PLE certificate issued by Ambalal) that were presented for nomination were never recalled by those institutions and thus, the appellant was qualified for election as an MP.

15 Concerning issue No.2, counsel submitted that the burden of proof in election matters is on the petitioner and only shifts when her academic qualification is challenged. He relied on **Mashate Magomu v Electoral Commission EPA**  
20 **No.47 of 2016** to support his submissions. Counsel argued that the appellant did not fall within the exception to the general rule on the burden of proof because the issue in contention was not authenticity but rather that the appellant did not pass PLE. He submitted that the trial Judge erred to have considered the appellant's academic qualifications as being challenged for

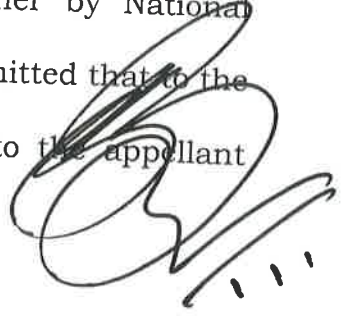
being forged and invalid. Counsel argued that as a result of the said error and misdirection, the trial Judge's evaluation of the evidence and all the certificates was not proper.

He prayed that the Appeal be allowed, judgment and decree of the lower Court be set aside and that the appellant be awarded costs in this Court and the Court below.

### **Submissions of counsel for the respondent**

Counsel supported the finding of the trial Judge. He submitted that the crux of the Appeal was on general qualifications of the appellant, not PLE in particular. He argued that the trial Judge established the basis of the appellant's academic qualification that she presented for nomination which is in tandem with **Anifa Kawooya** (supra).

Counsel submitted that the appellant failed to discharge the burden of proving that her academic qualifications were genuine or authentic. He argued that the appellant mentioned a certificate of equivalent issued to her by National Council for Higher Education (NCHE) which was false. He submitted that to the contrary, NCHE refused to issue a certificate of equivalent to the appellant because she claimed that she already had a Diploma.





Counsel challenged the appellant's diploma from Nsamizi. He submitted that in **Butime** (supra), the law required one to have passed their PLE and O'level which the appellant did not and therefore did not qualify to join Nsamizi. Counsel argued that the appellant had 3 credits in her O'level instead of 5 as  
5 required by the Universities and Other Tertiary Institutions Equating of Degrees, Diplomas and Certificates Regulations.

Counsel submitted that the equating of the appellant's diploma was improper because NCHE had refused to equate it but the appellant found a way to do so. Secondly, counsel contended that the letter equating the appellant's diploma  
10 from UNEB was suspect because it was not clear on whether it was her diploma in Public Administration obtained in 2011 or the diploma in education obtained in 2013 or the diploma in development studies. Counsel submitted that the issue of the alleged forgery is still under investigation by Police.

Regarding the discrepancy in the appellant's name, counsel submitted that the  
15 Statutory Declaration that she relied on was wanting and the same had been challenged in the lower court because the appellant failed to produce the original copy yet she had a certified copy. Counsel argued that despite the fact that the trial Judge did not make a specific finding on the said issue, this Court has jurisdiction to look into the matter.

20 Counsel submitted that the appellant was discovered not to have ever attended or sat for PLE at Ambalal Primary School in 1996.



He added that there were grave inconsistencies and discrepancies in the appellant's nomination documents when she stood for elections in 2011 and when she contested again in 2016 though she denied contesting in 2011.

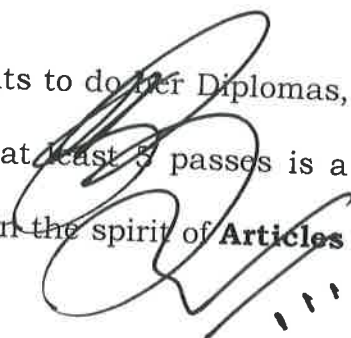
Counsel prayed that the Appeal be dismissed, that the orders of the lower  
5 Court be upheld and that costs be awarded to the respondent.

### **Submissions in rejoinder**

Counsel for the appellant submitted that NCHE did not reject the appellant's diploma but accepted and noted that it did not need to be equated because it  
10 was higher than the qualifications equivalent to UACE as provided under Section 4 (13) of the PEA.

Counsel submitted that NCHE consulted UNEB as provided for under S.4 (6) of the PEA. He submitted that UNEB's position was that the appellant's certificate in Public Administration in 2011 and Diploma in Education in 2013 from  
15 Nsamizi were equivalent to UACE.

Counsel argued that the appellant used her UACE results to do her Diplomas, not UCE. He contended that the requirement to have at least 5 passes is a guideline, not law and failure to follow them is not fatal in the spirit of **Articles**  
**29 and 80** of the Constitution.



Counsel contended that the appellant's documents were all admitted in evidence in the lower Court and there was no evidence of investigation on criminality by the Court.

Counsel submitted that there was evidence on record to show that the  
5 appellant attended Ambalal Primary School.

He reiterated his earlier prayers

### **Court's decision**

We have studied the Record of Appeal and considered the submissions of  
10 counsel for both parties. We have also taken into account the authorities that were availed to Court, for which we are grateful.

This being a first Appeal, we find it necessary to remind ourselves of our duty under Rule 30 (1) (a) of the Court of the Appeal Rules which provides thus:

#### **30. Power to reappraise evidence and to take additional evidence.**

15 (1) *On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*

*(a) reappraise the evidence and draw inferences of fact.....*

In **Kifamunte Henry v Uganda, SCCA NO. 10 of 1997**, it was held that:

20 *"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 shall bear the above principle in mind while resolving this Appeal. We intend to resolve the Appeal in the order in which the issues were argued.

5 **Issue No.1**

***Whether the appellant was at the time of her election qualified for election as MP***

Section 4(1) of the PEA is in *pari materia* with **Article 80(1)** of the Constitution and provides;

10 "A person is qualified to be a Member of Parliament if that person;

a) Is a citizen of Uganda;

b) Is a registered voter; and

c) Has completed minimum formal education of Advanced Level Standard or its equivalent."

15 What is applicable to the resolution of this issue is **Article 80(1) (c)**. The gist of counsel for the appellant's submission was that by the time the appellant sat for PLE, it was not necessary for one to pass in order to join a secondary school and yet the trial Judge relied on it to nullify her other academic qualifications.

The trial Judge's decision was informed by clauses 6.2 (c) and 6.8.1 of the  
20 UNEB Corporate Profile which provide that one has to pass in division four or better in PLE in order to register for UCE. It is not disputed that the appellant



failed her PLE having obtained aggregate 35 which falls under division "U" ie. Ungraded. The trial Judge opined that the appellant should not have joined a secondary school. She held that *"In my considered opinion, since the 1<sup>st</sup> respondent did not pass PLE as it is indicated in E54 and R1E14 (because she scored a "U" Grade), she was not qualified to join Faith Academy for Senior one (secondary school) and her admission in the school was therefore unlawful and invalid. The school should not have registered her for UCE because she did not have the required pass mark or grade to join secondary education"*

Counsel for the respondent conceded to this submission.

10 The trial Judge equally found that the appellant's other qualifications from Nsamizi were null and void. She held that *"It is not contested in this petition that the UCE Certificate and Certificate from Nsamizi in Public Administration and Management were used by the 1<sup>st</sup> Respondent to get admitted in Nsamizi for the Diploma Certificate. Given that the UCE Certificate and the Certificate from*

15 *Nsamizi have been found to be invalid, the Diploma Certificate is also invalid because the admission to Nsamizi for the Diploma course was based on the two unlawful certificates. The tainted and contaminated UCE certificate and certificate from Nsamizi (sic) damaged and impaired the credibility and integrity of any other subsequent qualifications resulting from an admission based on the*

20 *above two qualifications. The admission for the Diploma course in Development Studies having been based on such admission was invalid and therefore null*

*and void and cannot therefore be regarded as an academic qualification at all.”*  
(sic)

Counsel for the respondent conceded, rightly in our view, that there was no  
5 legal requirement that one had to pass PLE before joining a secondary school.

In **Butime Tom v Muhumuza David Electoral Commission CAEPA No.11 of  
2011**, Justice Remmy Kasule in his lead judgment held that:

10 *“I agree with the learned trial Judge that while policy proposals were in  
place since 1963, there was no law that required one to undergo a course  
of study in a structured manner until when the Education (Pre-Primary,  
Primary and Post Primary) Act, No.13 of 2008, was enacted with specific  
legislation as to what “formal education” is”*

15 He further held that *“There was no evidence adduced that in Uganda for one to  
have attained the academic qualifications of “O” and/or “A” levels, when one  
had not pursued primary leaving education beginning from class one to end was  
regarded as abnormal and/or immoral in 1997 when the 1<sup>st</sup> respondent  
completed the Uganda Certificate of Education i.e. “O” level”*

We are persuaded by the above authority and adopt the reasoning thereunder.

20 From the Record of Appeal, the verification letter from UNEB (exhibit R1E14)  
shows that the appellant sat for PLE from Ambalal Primary School under index  
number 10/033/161 in 1996 and sat for O’level from Kabale Trinity Colloge  
under index number U1017/001 in 2001. The period between 1996 and 2001

was before the enactment of the Education (Pre-Primary, Primary and Post Primary) Act, No.13 of 2008. There was no legal requirement for one to pass PLE in order to join a secondary school. Yet we find that the trial Judge held thus;

5 "I think it is misleading for the 1<sup>st</sup> respondent to state that at the time she joined secondary school (1996/1997), it was not a preliquisite (sic) for a student to have a PLE Certificate or to have passed PLE before registering for UCE and that PLE results were irrelevant before one registered for UCE or joined secondary school...In primary seven, pupils sit their major national examination popularly  
10 known as the Primary Leaving Examination (PLE) which is a promotional or transitional examination to secondary school. Pupils must pass PLE to join secondary school."

Respectively it follows that the trial Judge erred when she nullified the appellant's UCE results and her diplomas from Nsamizi.

15

We also accept counsel for the appellant's submission that there was sufficient evidence to prove that the appellant attended Ambalal Primary School. The trial Judge held;

20 "That the 1<sup>st</sup> Respondent went to Ambalal Primary School is also attested to by both the former headmaster and former deputy headmaster of the school in their respective affidavits in support of the 1<sup>st</sup> Respondent admitted as R1E2 and R1E3 respectively. To both affidavits is attached a verification statement to the



*effect that Achen Christine sat for her PLE in Ambalal Primary School in 1996".*  
We are therefore satisfied that the appellant attended Ambalal Primary School.

Regarding the discrepancy in the appellant's name, counsel submitted that the  
5 Statutory Declaration in verification was wanting because the original was not  
produced. At page 448 of the Record of Appeal, the appellant explained that the  
original was lost and at page 449, she conceded that the signature on the  
declaration was different from the one in the Petition. Her explanation for the  
difference was that she started using the signature in the Answer (to the  
10 petition) a long time ago and that she continues to use it.

Counsel for the respondent raised concern about NCHE refusing to equate the  
appellant's diplomas in its letter dated 23<sup>rd</sup> November, 2015. However, upon  
perusal of the said letter, we find that it was a letter of verification, not  
equation. We are of the considered view that NCHE was justified to reject  
15 verification of the appellant's academic qualifications. We say so because the  
diplomas were higher qualifications than UACE and it was not necessary to  
verify them given that S.4 (13) of the PEA provides;

*"For avoidance of doubt, if a candidate has an advanced level certificate  
obtained in Uganda or qualifications higher than the prescribed  
20 qualification obtained in Uganda or obtained from the former University of  
East Africa or any of its constituent colleges, then, there shall be no need*



*for the verification of his or her qualification by the National Council for Higher Education”*

Counsel for the appellant submitted that it is improper for Courts of law to  
5 usurp the powers that are explicitly set out for an institution in an Act of  
Parliament. He therefore contended that since the appellant’s qualifications  
have not been withdrawn, Court should not interfere with them.

In **Anifa Kawooya** (supra), it was held that;

10 *“Clearly, it would be improper for courts of law to usurp the powers that  
are explicitly set out for an institution in an Act of Parliament. Courts can  
only intervene if the appellant in exercise of its powers fails to observe the  
correct procedures...”*

In **Abdul Balingira Nakendo v Patrick Mwondah, Supreme Court Election  
15 Petition Appeal No. 9 of 2006**, Katureebe JSC (as he then was), held;

*“...If the High Court on evidence that the decisions of an administrative  
body, like NCHE, were irrationally made or were not based on proper  
diligence, the Court can, and should, so declare.” (Sic)*

20 In **Gole Nicholas Davis v Loi Kagani Kiryapawo, Supreme Court EPA No.19  
of 2008**, Justice Mulenga held;



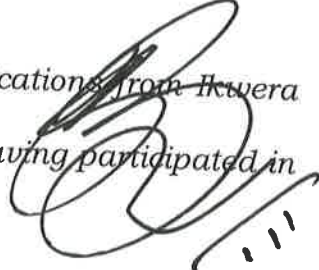
5       *"The power to hear and determine any question whether a person has been validly elected a member of Parliament, including whether the person is qualified to be elected is vested in the High Court, and is not in any way modified or qualified by the power of NCHE to determine equivalence of qualifications...In investigating the alleged illegitimacy therefore, the court is not usurping the function of NCHE."*

10       In light of the above authorities, we are of the considered view that courts can investigate the decisions of administrative bodies even if their powers are explicitly provided by an Act of Parliament. This does not imply however that courts are usurping the powers of such bodies.

      Regarding participation of the appellant in the 2011 elections, the trial Judge held;

15       *"There is a set of documents contained in Exhibit P10 (E11-E28 to the petition) which shows that Achen Christine participated in the nomination of 2011. The documents used in the nomination of 2011 by the 1<sup>st</sup> respondent were also verified by the Electoral Commission before they were handed over to the Petitioner and they are on record."*

20       Later, she held that *"Why did she use the academic qualifications from Ikwera Girls S.S for her UCE? Why does the 1<sup>st</sup> Respondent deny having participated in the nominations of 2011 when she actually she did so?"* (sic)



Counsel for the respondent informed Court that the issue regarding the appellant's alleged forgery of academic documents was under Police investigation although counsel for the appellant that being the case. However, upon perusal of the Record of Appeal and the judgment, we are satisfied that the matter was under investigation when the Petition was heard and that it has not been concluded yet. The trial Judge noted in her judgment;

*"There is also a supplementary affidavit of No.58451 Detective Constable Nkakyesimira wherein it is indicated that the 1<sup>st</sup> Respondent is being investigated over forged papers and attached to the affidavit are also some of the academic qualifications and nomination papers the 1<sup>st</sup> Respondent presented for nomination in 2011 and they include the UCE results of Ikwera Girls S.S." (Sic)*

S.5 (1) (b) of the PEA provides for forgery of certificate of academic qualification. It states that *"A person who forges any academic certificate, commits an offence and is liable on conviction to a fine not exceeding two hundred and forty currency points or imprisonment not exceeding ten years or both"*.

From the above provision of the law, forgery of academic documents is criminal in nature and the standard of proof is beyond reasonable doubt, which is a higher standard than that in election Petitions.

We are of the considered view that in the absence of conclusive Police findings into the matter and proof of the same as required by law, it cannot be said that the high standard of proof stated above was attained.

On ground 3 of the Appeal, counsel for the appellant contended that Nkakyesimira's affidavit had been expunged and the trial Judge should not have relied on it. However, we have received no evidence to support the above submission. Reading from the Record of Appeal at page 419, we find counsel for the appellant (Makmot) informed court that two supplementary affidavits had been filed by counsel for the petitioner and he had prayed for leave to file a reply to them. We therefore find no merit in the said submission.

Consequently issue 1 of the Appeal is answered in the affirmative.

**Issue No.2**

***Whether the learned trial judge erred when she shifted the burden of proof on to the appellant without a legal basis to do so***

Counsel for the appellant argued that the authenticity of the appellant's academic documents was not in issue. He said what was in issue was that she did not pass PLE. Counsel for the respondent did not make any specific reply to the said issue which would imply that he conceded to counsel for the appellant's submissions. However, we find it relevant to resolve the said issue on its merit.

The trial Judge held thus:

*"The academic qualifications being challenged belong to the 1st respondent. She is the only one who can tell court what kind of papers she*



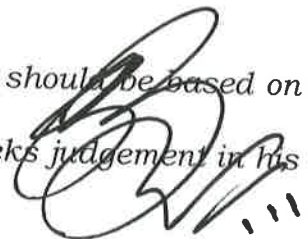
owns. She therefore bears the burden under section 106 of the Evidence Act, Article 80(1)(c) of the Constitution and section 4(1)(c) of the Parliamentary Elections Act to prove to the satisfaction of Court that she had the necessary academic qualifications and that they are genuine and valid. She must also prove that her papers satisfy the requirements of the law for purposes of Parliamentary elections. **(See also section 61(1) of the Parliamentary Elections Act)**” (sic)

She further held:

“Since the academic papers being challenged are in possession of the 1<sup>st</sup> Respondent and she is only one who knows whether they are valid or not, the Petitioner only needs to throw reasonable doubt on them and that would mean that the Petitioner has established a prima facie case which makes the burden shift to the 1<sup>st</sup> Respondent. This has been accomplished by the petitioner.” (sic)

The general position of the law in Election Petitions is that the petitioner must adduce cogent evidence to prove their case to satisfy the court. In **Masiko Winifred Komuhangi v Babihuga J. Winnie Election Petition Appeal No.9 of 2002**, Justice Mukasa-Kikonyogo DCJ, (as she then was) held in her lead judgment:

“As I have already stated above, the decision of Court should be based on the cogency of evidence adduced by the party who seeks judgement in his





or her favor. It must be that kind of evidence that is free from contradictions, truthful so as to convince a reasonable tribunal to give judgment in a party's favor."

An exception to the general rule above is when the authenticity of the respondent's academic credentials is questioned. The jurisprudence in this respect has established that the burden of proving the authenticity of impugned academic qualifications or documents rests with the one who relies on them. This position was settled in **Nakendo** (supra) where Katureebe JSC as he then was, in his lead judgement authoritatively pointed out that:

10        *"the duty to produce valid certificates to the Electoral Authorities lies with the intending candidate for elections. Where the authenticity of those certificates is questioned, it can only be his burden to show that he has authentic certificates."*

15        Election Petition evidence being by way of affidavit, we shall refer to the affidavit evidence in the Record of Appeal. In Paragraph 10 of her Affidavit in support of the Petition, the respondent/petitioner averred that;

20        *"That the 1<sup>st</sup> Respondent also committed several election offences ranging from forging academic papers, uttering false documents, using academic documents that belong to another person to gain qualification to be nominated for campaigns for the seat of District Woman Representative to Parliament thereby creating unfair campaign ground for campaigns to the prejudice of the petitioner"*

From the above, we are of the considered view that the authenticity of the appellant's academic papers was challenged and the trial Judge was right to have shifted the burden to the appellant to prove that they were genuine.

5 Therefore, issue No.2 is answered in the negative.

In conclusion, based on our finding on issue No.1 the Appeal substantially succeeds. The judgment and orders of the lower Court are quashed and set aside. We make the following orders;

10 1. The appellant is the validly elected Woman Member of Parliament for Alebtong District.

2. Costs are awarded to the appellant here and in the Court below.

**We so order.**

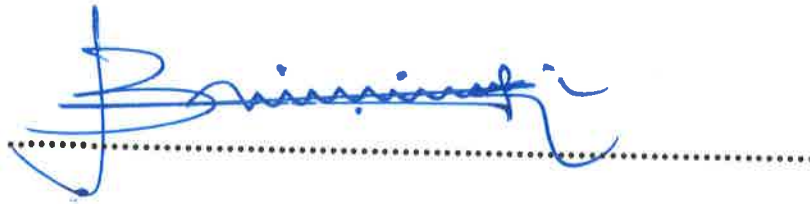
Dated this.....29<sup>th</sup>.....day of.....August.....2017

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.....  
**HON. MR. JUSTICE S.B. K. KAVUMA**

**DEPUTY CHIEF JUSTICE**





**HON. MR. JUSTICE. BARISHAKI CHEBORION**

**JUSTICE OF APPEAL**

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**HON. MR. JUSTICE. PAUL KAHAIBALE MUGAMBA,**

**JUSTICE OF APPEAL**

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