

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**ELECTION PETITION APPEAL NO. 0071 OF 2016**

*[Appeal from the judgment of His Lordship the Hon. Justice Albert Rugadya Atwooki dated 18<sup>th</sup> August 2016 in High Court Electoral Petition No.28 of 2016]*

**NSEGUMIRE MUHAMMAD SEMATA KIBEDI:::::::::::::APPELLANT**

**VS**

- 1. THE RETURNING OFFICER,  
ELECTORAL COMMISSION, KAMPALA:::RESPONDENTS**
- 2. THE ELECTORAL COMMISSION**
- 3. SERUNJOGI CHARLES MUSOKE**

**CORAM: HON. MR. JUSTICE REMMY KASULE, JA**  
**HON. MR. JUSTICE RICHARD BUTEERA, JA**  
**HON. LADY. JUSTICE HELLEN OBURA, JA**

**THE JUDGMENT OF THE COURT**

**Background**

The appellant and the 3<sup>rd</sup> respondent together with two others contested for the position of Chairperson Kampala Central Division in the Local Council Elections held on 2<sup>nd</sup> March 2016. The 1<sup>st</sup> respondent declared the 3<sup>rd</sup> respondent the winner of the said elections, having got 13,717 votes, followed by the appellant with 10,153 votes. The appellant filed a Petition in the High Court and challenged the election results. Hon. Justice Albert Rugadya Atwooki heard the Petition which he determined in favour of the 3<sup>rd</sup> respondent.

The appellant being dissatisfied with the Judgment and Orders of Hon. Justice Albert Rugadya Atwooki dated 18<sup>th</sup> August 2016

appealed to this court on the following grounds as per the Memorandum of Appeal;

- 1. The learned trial Judge erred in law and fact in his failure to subject the evidence on record to a thorough scrutiny thus coming to an erroneous conclusion on the 4<sup>th</sup> issue that the 3<sup>rd</sup> respondent did not commit the electoral offence of uttering false defamatory statements against the appellant contrary to Section 123(3) of the Local Governments Act.**
- 2. The learned trial Judge erred in law and fact in holding that the dispositions in respect of the alleged defamatory utterances did not satisfy the legal precepts for proof of the offence under S. 123(3) of the Local Governments Act.**
- 3. The learned trial Judge erred in law and fact in holding that there was no chaos at the tally centre and that the petitioner was not chased away from the tally centre, disregarding credible evidence availed to him in that respect.**
- 4. The learned trial Judge erred in law and fact in allowing the expert evidence filed as an additional evidence when the appellant had no time to rebut or controvert the same.**
- 5. The learned trial Judge erred in law and fact in allowing the 3<sup>rd</sup> respondent to dispute his own election by challenging eleven of the certified DR Forms without any cross-petition filed or capable of being filed.**
- 6. The learned trial Judge erred in law and fact in cherry picking 8 of the 11 uncertified DR Forms disputed by the 3<sup>rd</sup> respondent and disregarding certified DR Forms in that respect.**
- 7. The learned trial Judge erred in law and fact in his failure to evaluate evidence relating to the 11 inconsistent DR**

**Forms presented by the 3<sup>rd</sup> respondent thus erroneously failing to conclude that the 3<sup>rd</sup> respondent and his witness had a disposition to and did falsify the 11 DR Forms as the evidence in PID – 1 and cross-examination of the 3<sup>rd</sup> respondents witnesses relayed.**

- 8. The learned trial Judge erred in law and fact to in effect allow the 1<sup>st</sup> and 3<sup>rd</sup> respondents to depart from their pleadings in relation to DR Forms presented by the petitioner with the petition which conformed to the certified DR Forms.**
- 9. The learned trial Judge erred in law and fact in holding as he did that falsification of results in at least three polling stations as he found did not affect the results in a substantial way yet more than 1,200 votes would add onto the appellant's obtained votes.**
- 10. The learned trial Judge erred in law and fact in disregarding certified DR Forms which tallied with the petitioner's DR Forms and showing that the petitioner actually won the elections.**
- 11. The learned trial Judge erred in law and fact in relying on expert opinion and unreliable evidence to offset certified DR Forms brought to court by order of court on the 3<sup>rd</sup> respondents application.**
- 12. The learned trial Judge erred in law and fact having found some of the eleven DR Forms relied upon by the 3<sup>rd</sup> respondent to be incapable of dislodging the certified DR Forms and yet allow a bunch of them as being the correct version instead of the certified DR Forms.**
- 13. The learned trial Judge erred in law and fact when he relied on the results in the Tally sheet which did not rhyme or tally with the certified DR Forms.**

- 14. The learned trial Judge erred in law and fact when after finding falsification in three DR Forms presented by the 3<sup>rd</sup> respondent in challenge of certified DR Forms went ahead to declare the 3<sup>rd</sup> respondent's election valid.**
- 15. The learned trial Judge erred in law and fact when he generally failed to evaluate evidence relating to falsification of results thus coming to a glaringly erroneous decision that the 3<sup>rd</sup> respondent validly won the election.**
- 16. The learned trial Judge erred in law and fact on relying on the contradictory evidence of the Returning Officer as relating to the certified DR Forms presented by the appellant which tallied with the certified DR Forms as held by the learned trial Judge himself.**

The appellant PROPOSED to ask this honourable court to:

- (a) Allow the appeal with costs here and in the lower court.**
- (b) Set aside judgement and orders of the lower court Judge dismissing the petition and replace the same with an order allowing the petition.**
- (c) Declare that the appellant validly won the election for Kampala Central Division Chairperson as the certified DR Forms demonstrated.**
- (d) Alternatively, annul the election of the 3<sup>rd</sup> respondent as Chairperson Kampala Central Division and order for fresh elections.**
- (e) The court grants any further and better relief that it may deem fit and just.**

## **Representation**

At the hearing of this appeal, the appellant was represented by learned counsel, Mr. Kamba Hassan.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by learned counsel, Mr. Francis Niinye.

The 3<sup>rd</sup> respondent was represented by learned counsels, Bautu Robert and Nyegenye Henry.

Counsel for all the parties agreed on the following issues for determination by Court:-

- 1. Whether the learned trial judge rightly assailed or interdicted the 11 certified Declaration of Results Forms out of the 110 Declaration of Results Forms produced by the Electoral Commission.**
- 2. Whether the learned trial Judge rightly upheld the 3<sup>rd</sup> Respondents election as LC III Chairperson Kampala Central.**
- 3. Whether the learned trial judge erred in holding that the Appellant had not proved the electoral offence of defamation against the third respondent.**
- 4. What reliefs are available to the parties?**

The 16 grounds of appeal were argued under the 4 agreed upon issues as indicated below:-

### Issue 1

Grounds of appeal Numbers, 6, 9 and 10.

### Issue 2

Grounds of appeal Numbers, 4,5,7,8,11,12,13,14,15 and16.

### Issue 3

Grounds of appeal Numbers 1 and 2.

#### Issue 4

This issue was on reliefs.

Ground of appeal No.3 was abandoned by the appellant.

#### **ISSUE 3 FROM GROUNDS 1 AND 2**

**Whether the learned trial judge erred in holding that the appellant had not proved the electoral offence of defamation against the 3<sup>rd</sup> Respondent.**

#### **Submissions of counsel for the appellant**

Counsel for the appellant submitted on grounds 1 and 2 that the learned trial Judge erred in holding that the appellant/petitioner had not proved the offence of defamation against the 3<sup>rd</sup> respondent. That during the concluded election, whenever the appellant went out to canvass for votes at various places such as Katamanyangamba village, Kagugube parish, Yowana Maria zone in Mengo parish and several other places, the 3<sup>rd</sup> respondent went on rampage with defamatory remarks, disparaging the appellant by telling voters that he is a thief who stole a plot of land for Kampala central youth at Bombo road. That the appellant heard the same story from several places during campaigns.

Counsel further submitted that the appellant adduced sufficient evidence to court that the 3<sup>rd</sup> respondent had defamed him in contravention of section **123 (3)** of the **Local Governments Act, CAP.243 (LGA)** and that the trial Judge should have found that the electoral offence of defamation was committed by the 3<sup>rd</sup> respondent.

#### **Submissions of counsel for the 3<sup>rd</sup> respondent**

Counsel for the 3<sup>rd</sup> respondent submitted on grounds 1 and 2 that the 3<sup>rd</sup> respondent did not utter the alleged defamatory words. Counsel argued that the appellant relied on his affidavit and the affidavits of Kigga Micheal, Kasule Geoffrey Musisi, Kasoma Fred, Namusoke Mariam, Sekandi Musa and Kagimu Hamza who were all his strong supporters. Counsel submitted that the evidence as

adduced in the affidavit of the appellant and those of his supporters should be treated with caution, since it is evidence of partisan witnesses who were bent on telling lies to paint a rosy picture for their candidate.

He contended that the appellant must prove beyond reasonable doubt that the 3<sup>rd</sup> respondent uttered the defamatory statements during the campaigns. The deponents in the instant case, merely stated that the 3<sup>rd</sup> respondent uttered false statements but none of the people who, it is claimed were swayed by the alleged defamatory words was brought to testify that they heard the words and they actually voted against the appellant by reason thereof.

Counsel further contended that there were contradictions in the appellant's pleadings. He claimed to have obtained majority votes but he also states in his pleadings that he was defamed and very many youths promised never to support him again. It would defeat common sense for one to be unpopular and "allegedly" obtain majority votes.

#### **ISSUES 1 AND 2 FROM GROUNDS 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 AND 16**

- 1. Whether the learned trial Judge rightly assailed or interdicted the 11 certified Declaration of Results Forms out of the 110 DR Forms produced by the 2<sup>nd</sup> respondent by order of court.**
- 2. Whether the learned trial Judge rightly upheld the 3<sup>rd</sup> respondent's election as LC III Chairperson Kampala Central.**

#### **Submissions of counsel for the appellant**

Counsel for the appellant submitted on grounds 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 that 11 Declaration of Results Forms (DR Forms) were assailed on account of a challenge by counsel for the 3<sup>rd</sup> respondent on the assertion that they were fraudulent. He submitted further that the learned trial Judge erred in finding that

8 of the 11 DR Forms contested by the 3<sup>rd</sup> respondent were irregular. That no sound reason was given for that holding. Counsel contended that the results shown on the 3 DR Forms for KCC Water Tap, Kibwa Church and Old Catholic Church (M-NAK) which the trial Judge chose to save out of the 11 contested by the 3<sup>rd</sup> respondent, did not conform to the tally sheet yet he rejected the 8 DR Forms out of the 11 contested by the 3<sup>rd</sup> respondent on the same account of not conforming to the tally sheet.

Counsel relied on ***Kakooza John Baptist vs. Electoral Commission and another, SCEPA No.11 of 2007*** for the contention that it is only certified DR Forms which court had to consider to determine the winner. He submitted that only the 110 certified DR Forms produced by the Electoral Commission, which is the only body constitutionally mandated to process and keep electoral rolls and declare results, should have been considered. According to counsel, the tally sheet is simply a secondary document and not a primary source of election results and the trial Judge should not have relied upon it.

Counsel submitted that the general rule is that a court of law is not entitled to interdict result forms produced by the Electoral Commission in favour of anything else. He relied on the Indian Supreme court case of ***Anna Dravida Munnetra Kazhagam vs. Chief Election Commissioner, Case No. 4(a) (CC 2824 and 2825 of 2001)***. Counsel argued that the learned trial judge erred in allowing the 3<sup>rd</sup> respondent to dispute his own election by challenging eleven of the certified DR Forms without filing a cross-petition.

He submitted that the reliance of the learned trial Judge on the Returning Officer's vetting of DR Forms produced by the electoral body to disregard such 8 DR Forms was erroneous.

Counsel contended that the instant case sets a very dangerous precedent by giving a returning officer leeway to assail results as in the DR Forms without the returning officer producing any contrary DR Forms upon which the election was concluded.

Counsel submitted that the learned trial Judge's reliance on the evidence of the hand writing expert without connecting the same to the veracity of a specific piece of evidence was erroneous. He



referred to ***Kwanza Estate vs. Dubai Bank Ltd of Kenya Limited, [2015] eKLR*** which was held relying on the Kenyan Court of Appeal case of ***Asira vs. Republic, [1986] KLR 227*** on the courts duty to examine handwriting expert opinion and not to blindly accept it.

He further submitted that the trial Judge erred in assailing the DR Forms presented by the Electoral Commission and then holding that such had no substantial effect on the election. He contended that, it is unimaginable, that the court can find 8 DR Forms produced by the Electoral Commission not genuine and disallow them yet they had 6,701 votes cast for the candidates in an election where the Electoral Commission failed to produce DR Forms which had over 3,700 votes and then hold that such an election was valid. According to counsel, the election was not conducted in compliance with the law and ought to have been annulled.

#### **Submissions of counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent's**

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted on grounds 4,6,7,8,9,10,11,12,13,14,15 and 16 that the 3<sup>rd</sup> respondent disputed the correctness of 11 of the 110 certified DR Forms brought by the Electoral Commission. The 3<sup>rd</sup> respondent relied on the testimony of the returning officer, the hand writing expert, the tally sheets, the DR Forms in possession of the 3<sup>rd</sup> respondent and witness testimonies to come to the conclusion that the said certified DR Forms were questionable, suspect, forgeries and therefore should be disregarded. Once they were removed from the record, the 3<sup>rd</sup> respondent remained the winner and the petition was dismissed for lacking merit.

He submitted that the gist of the appellant's argument seems to be that once the DR Forms were certified, the court had no authority to question them. Counsel contended that counsel for the appellant held an erroneous view that certification of a public document immunizes it against any scrutiny by the courts. Counsel submitted further that counsel for the appellant had misconstrued **section 76** of the **Evidence Act** and the Supreme Court judgement in ***Kakooza John Baptist vs. Electoral Commission & anor, Election Petition Appeal No.11 of 2007***

especially the judgement of Hon. Justice Kanyeihamba JSC, as he then was. The Supreme Court was dealing with admissibility into evidence of public documents as provided by the Evidence Act. Their Lordships did not say that a certified document cannot be investigated or interrogated by the court if it is a subject of the contention. To read such an application in their Lordships judgement would be scandalous and would be open to abuse.

He cited **Section 78 (1)** of the **Evidence Act** which provides for a presumption of genuineness to certified copies of a document which is by law declared to be admissible as evidence of any particular fact.

Black's Law dictionary 6<sup>th</sup> Edition defines '**presumption**' as "**a rule of law, statutory or judicial by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted**". Further that "**a presumption is a legal advice which operates in the absence of other proof to require that certain inferences be drawn from the available evidence.**"

Counsel contended that the learned trial Judge did not disregard the certified DR Forms as stated in ground 6 of the appeal. On the contrary, he ordered that they be brought and admitted in evidence. The majority of them were found to be genuine. Others, upon scrutiny and on the basis of other evidence were found unreliable as evidence of the results of the election. According to counsel, the trial Judge was acting within the law. The presumption of genuineness provided under **section 78** of the **Evidence Act** was successfully rebutted by the evidence tendered by the 3<sup>rd</sup> respondent.

He submitted that the learned trial Judge correctly applied the judgment of the Supreme court in **Kakooza John Baptist** (*supra*) when he stated that:-

***"However, a reading of the judgement of Mulenga JSC and Katureebe JSC...shows that the Court of Appeal and High Court ought to have considered the other material factors before rejecting the uncertified copies of DR Forms."***

Counsel submitted that the trial Judge further stated that certified documents can still be questioned regarding the contents and that the burden would be on the party disputing the authenticity of the content. It is not enough to brush aside allegations of fraud just because such allegation is said to be contained in a certified public document. Certification does not make the documents authentic.

Counsel further submitted that the tally sheet that the trial Judge relied on is an official document and a tool for managing an election. The information therein is extracted from the DR Forms submitted by the various presiding officers to the tally centre and according to counsel, it is admissible in evidence.

### **Submissions of counsel for the 3<sup>rd</sup> respondent**

Counsel for the 3<sup>rd</sup> respondent submitted that he disagrees with the appellant's argument that the production of certified copies of DR Forms is conclusive and irrebutable evidence as to their authenticity. Counsel contended that the impugned DR Forms were never certified as required by law and they cannot form the basis or qualify to be called public documents.

He cited **Section 75** of the **Evidence Act** and argued that the import of the provisions of this Act is that it is only the officer who is empowered under the law to have custody of the public document who can provide a certified copy of it.

Counsel cited **section 52** of the **Parliamentary Elections Act (PEA)**, which he contended is applicable by virtue of **section 172** of the **LGA**. In the instant case, the Returning Officer of the district is the custodian of election materials and records until they are destroyed. Counsel cited the decision of **John Baptist Kakooza vs. Electoral Commission and Anor** (supra), to support his submission.

Counsel contended that the allegedly certified 11 DR Forms which formed the basis of contestation and investigation in the court, were attached to the petition as certified by and in the custody of the Secretary to Electoral Commission. They were not copies of public documents in accordance with the law as they failed the test of authentication. According to counsel, they offended section 52

of the Parliamentary Elections Act as the Secretary to the Electoral Commission is not empowered to certify and authenticate copies of electoral documents under the law.

He contended that the court is empowered to investigate where there is an allegation of fraud. He relied on *Makula International Limited vs. His Eminence Cardinal Wamala*, [1982] HCB 58 where the court stated that; a court of law cannot sanction what is illegal and illegality once brought to the attention of the court, overrides all questions of pleadings, including any admissions made thereon.

Counsel further submitted that despite the fact that there was some irregularity, both numerical and entry errors were highlighted, according to counsel, these were satisfactorily explained by the Returning Officer using the tally sheet and the Judge found that they cannot substantially affect the outcome of the election as the will of the majority of the people in Kampala Central was ascertained and exercised in accordance with the Constitution. Counsel supported the judgment and orders of the trial Judge.

## **RESOLUTION BY COURT**

We shall handle and resolve the grounds of appeal under the agreed upon issues in the order in which they were argued by counsel for all the parties.

We have considered the Record of Appeal, the Judgment of the lower Court, submissions of counsel for all parties and the authorities availed to court for which we are grateful to all counsel.

This court has the power to re-evaluate the evidence and come up with its own conclusion as provided in **Rule 30(1)** of the **Judicature (Court of Appeal Rules) Directions**.

This duty of the Court, as the first appellate court, was restarted by the Supreme Court in *Kifamunte Henry v. Uganda SCCA No 10 of 1997* when it held:-

***“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 find it appropriate to state the law on the grounds for setting aside the election of a chairperson or member of a council as this will be the basis for our resolution of the issues in controversy.

**Section 139** of the **LGA** provides the grounds upon which the election of a candidate as a chairperson or a member of a council can be set aside. The section provides:-

**“139. Grounds for setting aside election**

**The election of a candidate as a chairperson or a member of a council shall only be set aside on any of the following grounds if proved to the satisfaction of the court—**

- (a) that there was failure to conduct the election in accordance with the provisions of this Part of the Act and that the noncompliance and failure affected the result of the election in a substantial manner;**
- (b) that a person other than the one elected purportedly won the election;**
- (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) that the candidate was at the time of his or her election not qualified or was disqualified from election.”**

**Burden of Proof**

For a petitioner to succeed in having an election set aside on any of the above grounds, he/she has the obligation to prove such grounds on the standard set by **section 139** of the **LGA** to **the satisfaction of the court.**

The Supreme Court had occasion to state what **“to the satisfaction of Court”** means in ***Col.(RTD) DR. Besigye Kiiza vs.***

**Museveni Yoweri Kaguta and the Electoral Commission, Electoral Petition No.1 of 2001, UGSC 4.** Odoki J.B JSC as he then was, stated and the whole Court agreed that:-

**“in my view, the burden of proof in election petitions as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the court.”**

His Lordship went further to explain the standard of proof required;

**“The difference of opinion on the standard of proof in election petitions springs from the interpretation given to the decision of the Court of Appeal in *Bater v Bater* (1950) 2 All ER 456...”**

His Lordship noted that ***Bater v Bater*** (supra) was followed in the Tanzanian High Court case of ***Mbowe v Elinfoo* (1967) EA 240**. ***Barter*** (supra) was a divorce case while ***Mbowe*** (supra) was an election petition. Both cases dealt with the burden and standard of proof required. His Lordship cited ***Mbowe*** (supra):-

**“In *Mbowe v Eliufoo* (supra) Georges, CJ said; “And the standard of proof is one which involves proof to the satisfaction of the court. In my view these words in fact mean the same thing as satisfying the court. There have been some authorities on this matter and in particular there is the case of *Bater v Bater* (supra). That case dealt not with election petitions, but with divorce, but the statutory provisions are similar i.e the court had to be satisfied that one or more of the grounds set out in s.99 (2) (a) has been established. There Denning, CJ in his judgment took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exist then it is impossible to say that one is satisfied and with that view I quite respectfully agree and say that the standard of proof in his case must be such that one has no reasonable doubt that one or more of the grounds set out in s.99 have been established.”**

His Lordship further noted that:-

***“Georges, CJ carefully avoided holding that the standard of proof was beyond reasonable doubt. On a subsequent English case, Blyth v Blyth (1966) AC 643, the House of Lords in a divorce case based on adultery by a wife...Lord Denning who was among the majority had this to say, “My Lords, the word “satisfied” is a clear and simple one and one that is well understood. I would hope that interpretation or explanation of the word would be unnecessary. It needs no addition. From it there should be no subtraction. The courts must not strengthen it: nor must they weaken it. Nor would I think it desirable that any kind of gloss should be put upon it. When parliament has ordained that a court must be satisfied only parliament can prescribe a lesser requirement. No one whether he be a judge or juror, would in fact be “satisfied” if he was in a state of reasonable doubt. It may be however that in some sets of circumstances and in regard to some issues the state of being satisfied (and so eliminating reasonable doubt) is much more easily reached than in others. The measure of what is a reasonable doubt will vary with the circumstance. But the standard of proof has been laid down by parliament when it directs that a court must be satisfied.”***

His Lordship entirely agreed with Lord Denning’s observations in and concluded that;

***“The standard of proof required in this petition is proof to the satisfaction of the court. It is true that a court may not be satisfied if it entertains a reasonable doubt, but the degree of the proof will depend on the gravity of the matter to be proved.***

***An election petition is not a criminal proceeding. Section 58 (7) of the presidential Elections Act provides that nothing in this section confers upon the Supreme Court when hearing an election petition power to convict a person for a criminal offence. The high standard of proof in criminal cases is intended to protect the liberty of the citizen. If the legislature intended to provide that***

*the standard of proof in an election petition shall be beyond reasonable doubt, it would have said so. Since the Legislature chose to use words "proved to the satisfaction of the court", it is my view that that is the standard of proof required in an election petition of this kind."*

We shall now proceed to resolve issue 3 which covers grounds Numbers 1 and 2 of the appeal;

### **Resolution of issue 3**

The 3<sup>rd</sup> respondent is alleged to have uttered the following defamatory words:- *"Nsegumire Mohamed Kibedi is a thief. He stole land meant for youths at Bombo Road while he was a youth councillor for Kampala Central where he constructed his building. Don't vote for a thief."*

Counsel for the appellant/petitioner averred that the words were false and derogatory. He relied on affidavits from the appellant's strong supporters, Kasoma Fred, Namusoke Mariam, Kagimu Hamzah and Ssekandi Musa. They all deponed that the 3<sup>rd</sup> respondent called the appellant a thief and a crowd of a particular group of 'youth' promised never to support the appellant again.

Counsel for the 3<sup>rd</sup> respondent denied the said allegations.

**Section 139** of the **LGA** which we have reproduced above provides the grounds upon which the election of a candidate as a chairperson can be set aside.

The 3<sup>rd</sup> respondent is alleged to have committed the electoral offence of defamation under **section 123 (3) and (4)** of the **LGA** which is a ground for setting aside an election of a candidate as a Chairperson according to **section 139** of the **LGA**.

**Section 123 (3) and (4)** provides:-

**"123. Equal treatment of candidates;**



(1) .....

(2) .....

(3) **No person shall, while campaigning, use or publish defamatory words or words which are insulting or which constitute incitement of public disorder, insurrection, hatred, violence or which threaten war.**

(4) **A person who contravenes subsection (3) commits an offence and is liable on conviction to a fine not exceeding ten currency points or a term of imprisonment not exceeding two years or both and shall be disqualified as candidate.”**

It was the appellant’s burden to adduce evidence to prove to court that the 3<sup>rd</sup> respondent personally or his agents with his knowledge and consent or approval in fact uttered the alleged defamatory words. The evidence had to satisfy court on the balance of probabilities that the alleged offence was committed.

None of the mentioned “youths” to whom the statements were uttered swore any affidavit in support of the petition to confirm this allegation. The “youths” who, the appellant claims to have been swayed by the alleged defamatory statements should have given evidence in court in order to corroborate these allegations. Additionally, the bodaboda men who were alleged to have plucked off the Appellant’s posters from the electric pole next to their stage should have deponed affidavits to affirm these allegations.

This court in the case of **Fred Badda vs. Prof. Muyanda Mutebi, Election Appeal No. 25 of 2006** held:-

**“...the mischief is to have the voters swayed away by such statements. The Respondent had to show how they affected his voters. Merely showing that they were not true is hardly sufficient in an election petition. All the deponents aforementioned who claim to have heard them did not go further to indicate whether they were**

***thereby discouraged and decided to vote for somebody else”***

In the instant case, the deponents themselves did not testify that they heard the statements and as such they did not go further to testify to the court that they were in fact swayed by the alleged statements and by reason thereof decided not to vote the petitioner. None of the people who, it was claimed, were swayed by the alleged defamatory words was brought to testify that they actually heard the words and they, as a result, voted against the appellant.

The 3<sup>rd</sup> respondent denied having uttered the alleged defamatory statements. We find that there was no adequate evidence to controvert his denial. The particular group of “youths” that is continuously mentioned by all the deponents of the affidavits in support of the petition are a mystery. None of them swore an affidavit to corroborate the appellant’s averments.

The people who swore affidavits testifying about the defamatory statements were the appellant’s supporters. The evidence of such witnesses has to be taken with caution. This court had occasion to consider the handling of evidence from partisan witnesses in the case of ***Ocheing Sarah Opendi and the Electoral Commission vs. Ochwo Nyakecho Keziah, Election Petition Appeal No.39 of 2011*** and it held:-

***“In election matters, partisan witnesses have a tendency to exaggerate claims about what might have happened during elections. In such situations, it is necessary to look for ‘other’ evidence to confirm whether a particular witness is telling the truth.”***

An election of a candidate should not be set aside on mere allegations of partisan supporters whose evidence should be taken with caution. It was the appellant’s burden to prove that the 3<sup>rd</sup> respondent uttered the defamatory statements during the campaigns. We find that he did not discharge that burden.

The depositions in respect of the alleged defamatory utterances did not satisfy court. Therefore, this issue fails. Grounds 1 and 2 of the Appeal stand dismissed. Issue 3 is resolved to the effect that

the learned trial Judge did not err when he held that the appellant had not proved the electoral offence of defamation against the 3<sup>rd</sup> respondent.

We shall now proceed to resolve issues 1 and 2 which cover grounds 4,6,7,8,9,10,11,12,13,14,15 and 16 of the appeal;

### **Resolution of issues 1 and 2**

There were 117 polling stations arranged for the Local council elections of the Chairperson Kampala Central Division. There was contestation as to whether the results for all the 117 polling stations were received and declared by the Returning Officer. The appellant in his petition asserted that he was the overall winner. He attached DR Forms from each of the 117 polling stations. He also attached certified DR Forms from the 2<sup>nd</sup> respondent in respect of 110 polling stations.

The 3<sup>rd</sup> respondent disputed the genuineness of the source of the DR Forms which the petitioner/appellant presented in court. He contested 11 of the DR Forms that the appellant had attached to his affidavit as fraudulent and illegal. Learned counsel for the 3<sup>rd</sup> respondent then applied to court for the 2<sup>nd</sup> respondent to produce or bring certified DR Forms to court. Court ordered the 2<sup>nd</sup> respondent to produce in court DR Forms for 117 polling stations upon which the declaration of the 3<sup>rd</sup> respondent as a duly elected candidate was based.

In response to the Court order, the 2<sup>nd</sup> respondent presented copies of DR Forms which were from only 110 polling stations because DR Forms from 7 polling stations were missing. 11 of the 110 certified DR Forms presented by the Electoral Commission contained discrepancies and irregularities and were disputed by the 3<sup>rd</sup> respondent because they differed from those which his agents obtained and also because they fundamentally differed from those in the tally sheet from which the 3<sup>rd</sup> respondent was declared the winner of the election by the Returning Officer. The 1<sup>st</sup> respondent who was the Returning Officer was called to court for cross-examination. During cross-examination he testified that the primary source of the tallying process was from the Presiding

Officers. He explained to court that the disputed DR Forms presented by the petitioner/appellant were false and emphasised that the true results were those shown on the tally sheet.

The disputed polling stations were;

1. Hoima Road Flats
2. Kalina
3. KCC Water Tap
4. Kibwa Church
5. Old Catholic Church (M-Nak)
6. Namalwa 1
7. Peoples Plaza
8. Management Institute
9. Two-way Nursery School
10. Catholic Church (K-L)
11. St. Balikudembe

The Learned trial Judge allowed the results from KCC Water Tap, Kibwa Church and Old Church (M-Nak) polling stations because according to the trial Judge, there was no evidence to assail the results in those DR Forms. He disallowed the rest.

Counsel for the appellant submitted that the basis of results in elections under the electoral laws is a certified DR Form. Counsel faulted the learned trial Judge for allowing counsel for the 3<sup>rd</sup> respondent to challenge the DR Forms produced by the Electoral Commission when the Electoral Commission had certified them. According to the appellant's counsel, a respondent who is an elected candidate cannot challenge the very election whereby he/she claims to have been a successful candidate. He submitted that by court entertaining the challenge of the certified DR Forms produced by the Electoral Commission, court was allowing the 3<sup>rd</sup> respondent to challenge an election he had won and that was wrong. He sought support for his position from the decision of this court in ***Election Petition Appeal No.11 of 2002, Ngoma Ngime vs. Electoral Commission and Winnie Byanyima.***

We agree with counsel for the 3<sup>rd</sup> respondent that the case of ***Ngoma Ngime vs. Electoral Commission and another*** (supra) is distinguishable from the instant case. In ***Ngoma Ngime*** (supra), the respondent had been sued challenging the validity of her

election as a Member of Parliament. In her answer to the petition, she sought to challenge and task the petitioner to prove his academic qualifications. The court held:-

**“the appellant as a losing candidate had a right to bring a petition regardless whether he possessed the necessary academic qualifications or he might have been involved in any electoral malpractices or not. The winning candidate in his or her answer to the petition cannot raise such malpractices by the losing candidate to defeat the petition.”**

In the instant case, the DR Forms in contestation were brought to court as a result of and so as to determine the genuineness of the DR Forms that the appellant had brought to court to prove his allegation that he was the winner. The respondents only sought to tell court that the petitioner was trying to rely on DR Forms that were fraudulent. He was disputing the genuineness of 11 of the 117 DR Forms brought to court by the appellant. The respondents were not raising a new matter to defeat the petition before court as was the situation in the **Ngoma Ngime** case (*Supra*). The 3<sup>rd</sup> respondent was challenging the authenticity of the DR Forms that the appellant sought to rely on. He was not disputing or contesting the election that he had won.

The forms were in court at the instance of the appellant. The appellant was insisting that the DR Forms he produced in court were authentic. The trial Judge called the Returning Officer to court for cross-examination on the contested 11 DR Forms. Counsel for the appellant faulted the trial Judge for allowing the Returning Officer to testify and submitted that, that was irregular. According to counsel for the appellant, the general rule is that a court of law is not entitled to doubt the validity of DR Forms produced by the Electoral Commission in favour of anything else. Results of an election petition cannot be proved by anything else other than by certified DR Forms. He relied on the Supreme Court case of **Kakooza John Baptist vs. Electoral Commission & Yiga, Electoral Petition Appeal No.11 of 2007 UGSC** where the court held:-

***“A non-certified DR Form is a public document within the meaning of section 73(a) (ii) of the Evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence.”***

We find that the Supreme Court was handling the admissibility of official documents under **section 73(a) (ii)** of the **Evidence Act**. This is clearly brought out in the judgement of Chief Justice C.J Odoki:-

***“I have had the advantage of reading in draft the judgment of my learned brother Kanyeihamba JSC, and I agree with him that this appeal should be dismissed with costs. I have also read in draft the concurring judgements of my learned brothers, Mulenga JSC and Katureebe JSC, and I agree with their comments regarding the legal requirements for the returning officers and candidates’ agent to sign the Declaration of Results Forms (DR Form) and for the candidates’ agents to be supplied copies of the Declaration of Results Forms. I agree with their comments concerning the circumstances under which a court may admit in evidence, uncertified copies of Declaration of Results Forms, as in the present case.”***

The Supreme Court did not state that once admitted, then the documents authenticity cannot be questioned or challenged.

In the instant case, counsel for the 3<sup>rd</sup> respondent argued that the impugned DR Forms presented by the appellant were never certified as required by law and they cannot form the basis or qualify to be called public documents. Storage of election materials is not provided for under the **LGA**. In such a scenario, **section 172** of the **LGA** empowers the Electoral Commission to apply the **Presidential Elections Act** and the **Parliamentary Elections Act** with such modifications as it may deem necessary. Since storage of election materials is an election matter, **section 52** of the **Parliamentary Elections Act** which provides for storage of election materials applies.

**Section 52** provides:-

**“52. Safe keeping of election materials and records**

- (1) The returning officer shall be responsible for the safe custody of all the election documents used in the district in connection with an election until the documents are destroyed in accordance with the directions of the Commission, but the Commission shall not give such directions before the settlement of disputes, if any, arising from the election.**
- (2) A returning officer shall, on receipt of each ballot box**
  - (a) take every precaution for its safe custody;**
  - (b) examine the seal affixed to the ballot box, with a view to ensuring that the box is properly sealed and;**
  - (c) if the box is not in good order, record his or her observations and affix a different seal supplied by the Commission.”**

From the above clear provisions of **s.52** of the **Parliamentary Elections Act**, we agree with counsel for the 3<sup>rd</sup> respondent's submission that the Returning Officer is by law the custodian of election materials and records until they are destroyed. The appellant's DR Forms were obtained from the Secretary to the Electoral Commission who is not the legal custodian of the DR Forms at this stage. The trial Judge was therefore right when he believed and relied on the evidence of the Returning Officer on the DR Forms.

The results from 11 of the 110 certified DR Forms presented by the Electoral Commission contained discrepancies and irregularities. The rest of the 99 polling stations results were similar in both the DR Forms and the Tally sheet and were agreed upon by all parties. Results for all the stations were not contested except for 11.

We shall proceed as the first appellant court to reappraise the evidence in respect of the 11 disputed polling stations.

The Declaration of results Forms (DR Forms) presented to court annexed to the petition of the petitioner/appellant are similar to

the ones produced by the Electoral Commission on court order. We shall herein after refer to them as DR Forms presented by the Electoral Commission in our analysis.

### **1. HOIMA ROAD FLATS (No.28)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 553 votes at this polling station and the 3<sup>rd</sup> respondent had 25 votes. However, the tally sheet admitted in evidence has no results for this polling station. Evidence adduced by the Returning Officer confirmed that there were no results received from this polling station and he denied the DR Forms presented by the Electoral Commission. The Returning Officer told court that there were no results from this polling station because there were allegations of ballot stuffing to the extent that the votes were not counted. The ballot boxes were still at the police station.

The presiding officer at this polling station was Lutwama John Mark. Lutwama swore an affidavit in support of the 3<sup>rd</sup> respondents answer to the petition and denied the signature on this DR Form as forged and fraudulent. This was collaborated by the evidence of the handwriting expert, Sebuwufu Erisa who as an expert produced a report to the effect that Lutwama John Mark was not the author of the signature on this DR Form. However, the appellant also brought an affidavit sworn by Lutwama John Mark, in which he (Lutwama) stated that he never swore an affidavit in support of the 3<sup>rd</sup> respondent's answer to the petition, that the signature thereon was forged and that the results on this DR Form were declared and signed by him.

The evidence from the handwriting expert, an independent witness, had already proved that the signature on this DR Form was not written by Lutwama John Mark. The evidence of Lutwama John Mark could not be relied upon as credible evidence.

There was no other evidence to disapprove the averments of the Returning Officer. We find that the trial Judge was right to disregard Lutwama's evidence and was justified in allowing the Returning Officer's evidence. The DR Form from the Electoral Commission cannot be relied upon as showing the true result of the election. The Returning Officer is the custodian of the election



results and therefore, the results as shown in the tally reflect the true results of the election. There were no results received from this polling station.

## **2. KALINA POLLING STATION (No. 45)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 567 votes and the 3<sup>rd</sup> respondent 154 votes. The tally sheet admitted in evidence indicated that the appellant attained 87 votes and the 3<sup>rd</sup> respondent 137 votes. However, the Returning Officer told court that there were no results from this polling station because there were some disputes that arose on allegations of ballot stuffing and the ballot boxes were still in the hands of the police at the time of the hearing of the election petition.

The figures that appeared on the tally sheet against the column for Kalina polling station were exactly similar to the polling station (Luvuma) immediately above it on the tally sheet. The Returning Officer explained that this was a double entry error that did not affect the outcome of the election. This evidence was confirmed by the 3<sup>rd</sup> respondent's agent at Kalina polling station, Ssengonzi Umar who deponed an affidavit in support of the Petition. He confirmed that there were no results from this polling station. He further stated that the results and the purported signature contained on this DR Form were both false.

Ssengonzi Umar's testimony was corroborated by the handwriting expert report which showed a fundamental difference between the signature on the DR Form and the specimen sample signatures of Ssengonzi. There was no other evidence to controvert his averments. We find that the trial Judge was right to disallow this DR Form, it cannot be relied upon as showing the true result of the election. The Returning Officer is the custodian of the Election results and therefore, the results as shown in the tally sheet reflect the true results of the election. The trial Judge was correct to have held that there were no results received from this polling station.

## **3. KCC WATER TAP POLLING STATION (No. 101)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 650 votes and the 3<sup>rd</sup>

respondent 131 votes. The tally sheet showed that the appellant had 150 votes and 131 votes for the 3<sup>rd</sup> respondent. The Returning Officer during cross examination confirmed that the results in the tally sheet reflected the true result for this polling station. Walugembe Drake, the 3<sup>rd</sup> respondent's agent at this polling station swore an affidavit in support of the answer to the petition disputing this DR Form. He attached another DR Form with results that corresponded with those on the tally sheet. During cross-examination, counsel for the appellant questioned Walugembe how he got to swear and sign his affidavit in support of the 3<sup>rd</sup> respondents answer to the petition. Walugembe explained to court that he found the affidavit in his lawyer's office where he had been asked as to what transpired at this polling station. Thereafter, one of the lawyers interpreted the document (affidavit) for him from English to Luganda and then he swore and signed it.

The appellant did not bring to court any other evidence to controvert the evidence of the Returning Officer and Walugembe. We fault the trial Judge on allowing the DR Form from the Electoral Commission when there was evidence that, that DR Form was false and did not reflect the actual results of the election. The actual results were 150 votes for the appellant and 131 votes for the 3<sup>rd</sup> respondent.

#### **4. KIBWA CHURCH POLLING STATION (No.100)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 498 votes and the 3<sup>rd</sup> respondent had 84 votes. The tally sheet showed that the appellant had 98 votes and the 3<sup>rd</sup> respondent had 84 votes. The Returning Officer during cross examination confirmed the results on the tally sheet as the true results for this polling station.

The appellant produced no further evidence to support his allegations of results being different from those produced by the Returning Officer who is the custodian of the election results. We find that the trial Judge erred when he allowed the results of this DR Form. The correct results were those as shown on the tally sheet.

## **5. OLD CATHOLIC CHURCH (M-NAK) POLLING STATION (No. 66)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 411 votes and the 3<sup>rd</sup> respondent had 187 votes in figures and 'one hundred seven' in words. The tally sheet showed that the appellant had 121 votes and the 3<sup>rd</sup> respondent 153 votes. The Returning Officer during cross-examination told court that there was an error made on the tally sheet whereby the results from Old Catholic Church (M-Nak) and those of Old Catholic Church (Nal-O) were switched during entry. He stated that the results for (M-Nak) were erroneously entered as those of (Nal-O) and vice versa.

The erroneous switch is affirmed by the undisputed DR Form for Old Catholic Church (Nal-O) (No.67) which showed that the appellant got 121 votes and the 3<sup>rd</sup> respondent got 153 votes. The tally sheet had the appellant with 111 votes and 187 votes were for the 3<sup>rd</sup> respondent for (Nal-O).

The Returning Officer confirmed that the true result for Old Catholic Church (M-Nak) polling station should have been 111 votes for the appellant and 187 votes for the 3<sup>rd</sup> respondent. For Old Catholic Church (Nal-O), the appellant had 121 votes and the 3<sup>rd</sup> respondent had 153 votes. He further added that there was a variation between the appellant's DR Form and the tally sheet.

Indeed the results from Old Catholic Church (M-Nak) and Old Catholic Church (Nal-O) polling stations were switched. It is our view that this could not have changed the result of the election in favour of the other candidate as the votes obtained, even though correctly written, would produce the same result.

We find that the trial Judge erred in allowing this DR Form, the evidence from the Returning Officer and the undisputed DR Form for Old Catholic Church (Nal-O) (No.67) confirmed the true results for this polling station. The DR Form presented by the Electoral Commission does not show the true result of the election and therefore cannot be relied upon. The Returning Officer is the custodian of the election results and therefore the results as shown in the tally reflect the true results of the election. We find that the

true results were 111 votes for the appellant and 187 votes for the 3<sup>rd</sup> respondent.

#### **6. NAMALWA I POLLING STATION (No. 32)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 755 votes and the 3<sup>rd</sup> respondent had 25 votes. The tally sheet had the appellant with 37 votes and the 3<sup>rd</sup> respondent had 109 votes. The evidence of Mukasa Emmanuel, the 3<sup>rd</sup> respondent's agent for this station disputed the contents of this DR Form as forged. He attached to his affidavit, a copy of the DR Form that he obtained from the station. The results on his DR Form corresponded with those indicated on the tally sheet. The Returning Officer collaborated Mukasa's evidence and disowned this DR Form. There was no other evidence to controvert these averments.

The appellant produced no further evidence to support his allegations of results being different from those produced by the Returning Officer who is the custodian of the election results. We find that the trial Judge was correct to have so found.

#### **7. PEOPLES PLAZA LANE POLLING STATION (No. 23)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 300 votes and the 3<sup>rd</sup> respondent had 67 votes. The tally sheet showed that the appellant had 110 votes and the 3<sup>rd</sup> respondent had 67 votes. The evidence of Kayongo Fauzi, the polling agent of the 3<sup>rd</sup> respondent disputed the results in this DR Form as forged. In Kayongo Fauzi's affidavit in support of the answer to the petition, he deponed that the correct results from Peoples Plaza were the results in the tally sheet. He attached a copy of the DR Form that he obtained from this polling station which had results corresponding with those on the tally sheet. The Returning Officer also denied having used this DR Form during tallying.

Kayongo Fauzi further deponed that his purported signature on the appellant's DR Form was forged. This was confirmed by the evidence of the handwriting expert, Sebuwufu Erisa, who as an expert, produced a report to the effect that Kayongo Fauzi was not the author of the signature on this DR Form.

Indeed, this DR Form could not be relied on. We do not fault the trial Judge for that finding.

#### **8. MANAGEMENT INSTITUTE POLLING STATION (No. 85)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 478 votes and 109 votes for the 3<sup>rd</sup> respondent. The tally sheet had the appellant with 178 votes and 109 votes for the 3<sup>rd</sup> respondent. The Returning Officer pointed out that this DR Form could not be genuine because it was coded 00. He explained that the codes used at the polling stations start from code 01. That there is no polling station which has the code 00. He further confirmed that the results on the tally sheet were the true results for this station.

The 3<sup>rd</sup> respondent's agent, Kinene Pius, swore an affidavit disputing the results in that DR Form. He deponed that the results from this DR Form were forged. He attached a copy of the notes he made on the election day which indicated results for all candidates that were similar to those on the tally sheet. He added that the signature purported to be his on this DR Form was not his and was therefore forged. This was confirmed by the handwriting expert who examined both signatures on the DR Form and the one on Kinene's affidavit/ID. The expert observed that there was a glaring difference between the two signatures and confirmed that Kinene did not sign the disputed DR Form. With such overwhelming evidence, the DR Form could not be relied on. We find that the trial Judge was correct to so hold.

#### **9. TWO-WAY NURSERY SCHOOL POLLING STATION (No.64)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 445 votes and the 3<sup>rd</sup> respondent with 135 votes. The tally sheet had the appellant with 135 votes and the 3<sup>rd</sup> respondent 445 votes. The Returning officer confirmed that the results in the DR Form were a total departure from what he had followed while tallying.

The evidence of Rwaretse George, an agent to the 3<sup>rd</sup> respondent, in his affidavit denied the signature assigned to him on the DR Form. He averred that it was not his signature and the same was therefore a forgery. This was collaborated by the evidence from the

hand writing expert who gave a report which confirming that indeed the two signatures, the ones on the DR Form and his ID, differed and therefore, the signature on the DR Form presented by the appellant was not for Rwaretse.

We find that the trial Judge was right to find that such DR Form could not be relied upon as it was confirmed to have been a forgery by the handwriting expert. Indeed, this DR Form could not be relied on. We do not fault the trial Judge for that finding.

#### **10. OLD CATHOLIC CHURCH (K-L) POLLING STATION (No. 63)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 494 votes while the 3<sup>rd</sup> respondent had 151 votes. The tally sheet showed that the appellant had 94 votes and the 3<sup>rd</sup> respondent had 151 votes.

This DR Form had the candidates with the following results; Mawanda- 11 Nsegumire- 494, Sserunjogi- 151 and Zziwa- 01. The total number of votes recorded on the DR Form was 257 votes when the actual total is 657 votes. The total number of votes cast as shown on the DR Form was far below the total number attributed to the candidates. It's interesting to note that the total number of votes (257 votes) as indicated on the DR Form corresponded with the total number of votes cast on the tally sheet. Indeed such a discrepancy could not be ignored by the trial Judge.

The Returning Officer as the custodian of election results confirmed that the results on the tally sheet were the true results for Old Catholic Church polling station.

We find that the trial Judge was right to find that the DR Form results brought by the Electoral Commission could not be relied upon as showing the true results of the election. We do not fault the trial Judge for that finding.

#### **11. ST. BALIKUDEMBE POLLING STATION (No. 46)**

The DR Form presented to court by the Electoral Commission showed that the appellant obtained 511 votes while the 3<sup>rd</sup> respondent attained 112 votes. The tally sheet had the appellant with 111 votes and 112 votes were for the 3<sup>rd</sup> respondent. The Returning Officer during cross examination confirmed that the

results in the tally sheet were the true results and that he never used this DR Form during tallying.

Muyonge Hassan, the agent for the 3<sup>rd</sup> respondent at this polling station swore an affidavit in support of the answer to the Petition disputing the said DR Form. He deponed that this DR Form is false and does not show the true reflection of the outcome of the voting process at the said polling station. He stated the results as obtained by the candidates and attached a copy of the DR Form for St. Balikudembe. The results in that DR Form corresponded with those on the tally sheet. He further denied the signature adjacent to his name on the disputed DR Form. He deponed that the signature is not his and therefore was a forgery. There was no further evidence from the appellant to controvert these averments. Therefore, this DR Form could not be relied on.

We do not fault the trial Judge for so finding in view of the evidence before the trial court.

Re-evaluation of the disputed 11 polling stations indeed showed that there were several irregularities with the DR Forms presented to court by the Electoral Commission. Once disputed, the 3<sup>rd</sup> respondent, supported with affidavit evidence from his agents, the handwriting expert and the Returning Officer showed court that these DR Forms were false and therefore could not be relied upon as a reflection of the true results of the election. It is worth noting that none of the appellant's agents swore affidavits to collaborate or support his allegations as regards the 11 disputed DR Forms. Yet, the appellant's agents were supposed to be in possession of DR Forms obtained from the polling stations.

**Section 136 (1) of the LGA Provides:-**

**“136. Declaration of Results Forms**

**(1) Each presiding officer shall complete the necessary number of copies of Form EC 9 prescribed in the seventh schedule to this Act for the declaration of results, sign them and do the following-**

**(a) one copy shall be retained by the presiding officer for display at the polling station;**

**(b)one copy shall be enclosed in an envelope supplied by the Electoral Commission for the purpose, sealed by the presiding officer and delivered to the nearest result collection centre prescribed by the returning officer, together with the report book, for transmission to the returning officer;**

**(c)one copy shall be delivered to each of the candidates' agents or, in the absence of those agents, to any voters present claiming to represent the candidates; and**

**(d)one copy shall be deposited and sealed in the ballot box.”**

(The underlining is for our emphasis)

In view of the provision of **section 136 (1)** of the **LGA** quoted above, the appellant's agents should have been in a position to support the appellant's allegations in form of affidavit evidence and attach the original DR Forms obtained from the disputed polling stations.

On completion of the election, the Returning Officer is left in charge of the safe keeping of electoral materials and records until the documents are destroyed, as provided by **section 52** of the **Parliamentary Elections Act**. Where there is a dispute in respect of election results, the records kept by the Returning Officer would need to be produced, for the purpose of resolving the disputes. In the instant case, the Returning Officer relied on the Tally sheet to show Court that the 11 disputed DR Forms presented by the Electoral Commission were false.

By law therefore, the Electoral Commission could not have been in possession of the election records. It is our view that, if certification of the DR Forms was needed, it should have been carried out by the Returning Officer who was legally in possession of the election records. We find that the trial Judge was right to rely on the evidence from the Returning Officer.

Following our analysis of the DR Form evidence from the Electoral Commission in respect of the 11 disputed polling stations, we agree with the learned trial Judge and find that he was right when



he disallowed the 8 DR Forms results from Hoima Road Flats, Kalina, Namalwa 1, Peoples Plaza, Management Institute, Two-way Nursery School, Old Catholic Church K-L and St. Balikudembe.

However, we find that the trial Judge erred when he allowed the DR Form for results from the Electoral Commission for KCC Water Tap, Old Catholic Church (M-Nak) and Kibwa Church. The evidence from the Returning Officer, the 3<sup>rd</sup> respondent and his polling agents and the handwriting expert have proved to the satisfaction of the court that those DR Forms were false and could not be relied upon as a true reflection of the result of the election for these polling stations. Therefore, we also disallow the DR Forms presented by the Appellant for KCC water tap, Old Catholic Church (M-Nak) and Kibwa church.

On the whole, all the 11 disputed DR Forms presented by the appellant from the Electoral Commission are disallowed.

We find that since the results from all the 11 disputed DR Forms presented by the appellant from the Electoral Commission are disallowed. Issues 1 and 2 are answered in the negative.

In the Court of Appeal case of *Ngoma Ngime vs. Electoral commission and Winnie Byanyima* (supra), the court stated that:-

**“An election cannot be set aside unless it is clear that the anomalies being raised undermined the conduct of a free and fair election. It has to be shown that it affected the democratic choice of voters.”**

A petition will only succeed if the burden of proof is met to that degree of a balance of probabilities. The petitioner/appellant failed to discharge this burden. The irregularities that the appellant relied upon to challenge the election of the 3<sup>rd</sup> respondent did not, on the evidence adduced, substantially affect the election as provided in **section 139** of the **LGA**.

The learned trial Judge rightly upheld the 3<sup>rd</sup> respondent's election as LC III Chairperson Kampala Central.

As a result, the appeal fails for the above mentioned reasons. The same stands dismissed. The 3<sup>rd</sup> respondent in Election Petition

No.71 of 2016, Serunjogi Charles Musoke, is the duly elected Chairperson Kampala Central Division.

As to costs, we award costs of this appeal and those in the court below to the 3<sup>rd</sup> respondent as against the appellant. We award no costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as the 2<sup>nd</sup> respondent, of whom the 1<sup>st</sup> respondent was an employee has been found to have acted improperly in issuing false DR Forms to the appellant in respect of the 11 disputed polling stations, and this was done to falsify the election results.

We so order.

Dated at Kampala this.....3<sup>rd</sup>.....day of.....August.....2017



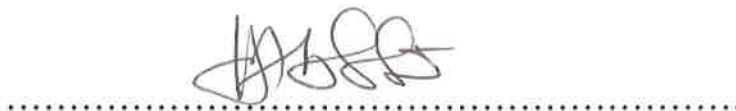
**HON. JUSTICE REMMY KASULE**

**JUSTICE OF APPEAL**



**HON. JUSTICE RICHARD BUTEERA**

**JUSTICE OF APPEAL**



**HON. JUSTICE HELLEN OBURA**

**JUSTICE OF APPEAL**