

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CORAM:

HON. MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE BARISHAKI CHEBORION, JA

HON. MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

ELECTION PETITION APPEAL NUMBER 0027 OF 2016

REHEMA TIWUWE WATONGOLA::: APPELLANT

VERSUS

PROSCOVIA SALAAMU MUSUMBA:::RESPONDENT

(Appeal from the Judgment and orders of the High Court of Uganda at Jinja (Godfrey Namundi J) dated 28th June 2016 in Election Petition No. 14 of 2016)

JUDGMENT

This is an appeal from the decision of the High Court in the exercise of its original jurisdiction.

Briefly, the facts in this case are that on the 18th of February 2016, the Appellant Rehema Tiwuwe Watongola, the Respondent Proscovia Salaamu Musumba and two others contested for the Parliamentary seat of Kamuli Municipality constituency. Eventually the Appellant was declared winner of the polls by the Electoral Commission and was gazetted as the Member of Parliament for Kamuli Municipality constituency.

The Respondent challenged the declaration of the Appellant as the winner of the election on the ground that she did not, at the time of her nomination

and election/ possess the minimum academic qualification to be nominated and elected as Member of Parliament. The petition was successful. Subsequently the election of the Appellant was set aside; the position of Member of Parliament for Kamuli Municipality constituency was declared vacant, fresh elections were ordered and the Appellant was ordered to pay costs of the petition to the respondent.

On appeal the Appellant was represented by Mr. Frank Kanduho while Mr. John Isabirye and Mr. Julius Galisonga represented the Respondent. The memorandum of appeal read as follows:

1. The learned trial judge erred in law and fact when he relied on matters extraneous to the record and thereby made an erroneous decision which caused a miscarriage of justice.
2. The learned judge erred in law and fact when he impeached the appellant's academic qualifications.
3. The learned judge erred in law by accepting to rely on inadmissible evidence with the result that his decision caused a miscarriage of justice.
4. The learned judge made an error of judgment so far as he did not properly and exhaustively evaluate the evidence before him, thereby arriving at an erroneous decision which caused a miscarriage of justice.

At scheduling the parties framed four issues for determination which were read out at hearing as follows:

1. Whether the trial court relied on supposition, conjecture and matters extraneous to the record.
2. Whether the learned judge erred in law and fact when he impeached the appellant's certificate in Public Administration and Management of Busoga University.
3. Whether the trial court relied on inadmissible documents and used the said inadmissible documents to make a finding against the appellant.
4. Whether the trial court made findings of law and fact without properly and exhaustively evaluating the evidence before it.

We shall dispose of the issues as they were presented and argued, starting with the first, then the third, followed by the second and finally the fourth.

Issue 1:

It was the appellant's objection that the trial Judge relied on supposition, conjecture and matters extraneous to the record in deciding the case before him and thereby occasioned a miscarriage of Justice.

The appellant illustrated this argument with some examples.

He cited a passage at page 181 of the record where it is stated that, 'the other witness summoned by the court, a representative from Busoga University reportedly came to court but for unclear reasons disappeared without a trace later'. It was argued that the finding was informed by materials that cannot be traced from the record. Further at page 189 the judge wondered, 'where is the University and why is it so difficult to summon its officials to own their words to the 1st respondent?' It was

contended that there was no evidence that court instructed the registrar to summon the said Academic Registrar besides an order made in court ordering the Academic Registrar of Busoga University to appear in court. It was his argument that since there was no evidence that the witness was summoned, and no evidence that he came to court and ran away without a trace, the Judge by making the observations cited above, used matters extraneous to the record before him.

In addition counsel for the appellant faulted the judge for finding as he did on pages 188, 189 and 191 of the record of appeal. There the learned Judge blamed the appellant for not striving to clear the doubts that surrounded her academic qualifications. It was counsel's argument that in the pleadings and evidence before the Judge there was nothing to suggest that there were doubts surrounding the appellant's academic qualifications and the said academic documents were certified by Busoga University, the awarding institution.

Another point of objection on behalf of the Appellant was that the Judge faulted the appellant for relying on a document that was not certified by Busoga University, a letter of admission. Learned counsel's argument was that the letter was not a contested document and that there was no evidence before the trial Judge requiring certification of the letter of admission. Counsel further commented that the judge used the words "conveniently certified" in reference to academic documents of the appellant by Busoga University and yet there was no evidence whatsoever before the learned Judge that these

documents were conveniently certified.

He stated also that the trial Judge indicted him for putting up a spirited fight for his client when he held at page 188 in respect to the serious objection by counsel for the respondent/appellant objecting to the application to summon the witness from Busoga University. That the learned Judge faulted the appellant for "hiding behind a court order" and used terms like "hide and seek".

In response, counsel for the respondent supported the trial Judge's findings, saying they were apt.

When an appellant complains to court that the decision of the lower court is based on extraneous matters, the appellant is taken to mean that the decision was not based on evidence adduced before the court but on other information that is not on the court record. Needless to say a case before the court must be decided only on the evidence adduced before that court.

Black's Law Dictionary defines a Judgment as "The official and authentic decision of a court of Justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.

Halsbury's Laws of England 3rd Edition defines a Judgment as "Any decision given by a court on a question or questions or issue between the parties to a proceeding properly before court."

The above definitions read together emphasize the point that a decision of the court must be based on the evidence or case or issues that arose in the proceedings before the court and not on matters that were not before the

Court.

Counsel for the appellant faults the trial Judge for expressing doubt why it was difficult to summon officials from Busoga University and how a witness from Busoga University had come to court but had disappeared. Were these statements based on matters extraneous to the record? Upon perusal of the record, counsel for the petitioner/respondent is seen to have applied to court for an officer from Busoga University, the Academic Registrar, to be summoned in court to enable parties examine and cross examine him to clear issues of certification, qualification and documentation. Court issued the order under **section 64(1) (b)** of the Parliamentary Elections Act

summoning the Academic Registrar of Busoga University to appear in court. This was in open court and the decision was not unusual since courts have always summoned witnesses to appear when found necessary for the determination of issues before them. This witness however never appeared in court. Counsel for the petitioner, Mr. Isabirye, stated in the lower court that he was informed the witness from Busoga University was around court but that he could not trace him. These proceedings were before court and the Judge rightly informed himself from the record. The appellant's allegations are baseless.

The case rotated around the genuineness of the appellant's Certificate in Public Administration and Management. There is evidence on record referring to the said certificate as forged. Such allegation together with evidence before court clearly created doubt as to the genuineness of the certificate in question. It is not true as counsel for the appellant suggests that there was nothing to suggest there were doubts surrounding the appellant's academic qualifications. In the Judge's mind, doubt was created and he found it incumbent upon the Appellant to clarify such doubts hence holding as he did. Given that doubt was created in the mind of the Judge he found it incumbent upon the Appellant to clear what doubts lingered. His holding must have been in that light.

It is true the Judge faulted the appellant for relying on a document that was not certified by Busoga University, the Letter of Admission. The same letter appears as Annexure 'C' and is not certified. The choice of words in Judgment writing is a matter of style to a judicial officer. He cannot be faulted for emphasizing certain words in his Judgment in which counsel finds offence. Be that as it may we do not consider the matters alleged herein extraneous to the record or as occasioning a miscarriage of justice. Issue 1 fails.

Issue 3:

Whether the trial court relied on inadmissible documents and used the said inadmissible documents to make a finding against the appellant.

In arguing this issue counsel for the appellant referred to specific documents as the inadmissible documents relied on by the judge.

Annexure 'C' to the affidavit of Salaamu Musumba, the letter of admission which the Judge cited in his judgment, at page 192 of the record of proceedings, is one such; Annexure 'H', are the minutes of the senate (Busoga University) meeting convened on 17th December 2010. It was argued on behalf of the appellant that the said annexure should not have been admitted in evidence because the respondent never disclosed its

source and how it came into her possession. No official of Busoga University owned to it. Secondly at page 31 of the record of appeal, minute 116/2010, states that the certificate could not have been awarded in 2004. Given that the appellant's certificate was awarded in 2005 it was his view this document could not have been premised on the appellant's academic qualifications. Also in the same minutes at page 29 of the record of proceedings, Dr. Rose Badaaza who was shown among persons present later appeared among persons absent. This was seen to bring into question the authenticity of the document. Finally he faulted the judge's reliance on a document that was signed by one person instead of two even when that same person was not present.

Counsel for the appellant contended that the copy of the minutes attached as annexure IT and also attached to the 3rd respondent's (Busoga University) affidavit in reply to the Petition ought to have been similar but appeared different. He pointed to the different signatories, different contents and different dates.

We have observed the two documents. Both are in regard to the 30th senate meeting of Busoga University convened on the 17th of December 2010, discussing several issues including one concerning the appellant under MIN.SEN/116/2010. The first set of minutes were attached to the affidavit in support of the petition as annexure 'IT and the other set attached to the 3rd respondent (Busoga University's) affidavit in reply to the Petition.

Counsel for the appellants asked this court to consider those minutes

inadmissible documents based on the inconsistencies that are manifest. He

also condemned them for not being certified by the university, which to him meant they did not belong to the university.

Looking at the differences cited by counsel for the appellant where one document reflects the minutes as 120/2010 and the other shows them as 120/201. In our view this is a result of a typo.

Appellant's counsel also complains about the wordings appearing on contrasting pages on minute 119/2010, any other business, issue on identity cards. This appears to have arisen following extraction of the two scripts which was on different occasions. In one script, some words moved from page 5 to the next page leaving just three lines and continuing to page 6. When it came to the other script with 12 lines, the entire minute could be accommodated on the same page. It is also not in doubt that the signatures were different as were the dates of signing. These documents were extracted at different times one on 18th March 2011 and the other on 13th April 2016. The claim by counsel for the appellant that Tumwine Benon, whose signature appears on the minutes, was not present in the deliberations of these minutes is not accurate. Tumwine Benon is number two on the list of members present.

Concerning the source of the minutes, counsel for the appellant had an opportunity to cross examine the respondent at trial and asked her how she got the minutes. The respondent answered that she got them from the Academic Registrar of the university in February 2016. We consider her source viable and that should have answered counsel's question. As to certification of the same, the position of the law is that contents of documents may be proved either by primary or by secondary evidence. Secondary evidence means and includes certified copies and copies made from the original by mechanical processes. Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it where that person does not produce it. when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his or her representative in interest. **Sections 60-64 of the Evidence Act** are relevant.

Annexures K1, K2 and K3 show the unsuccessful attempts by the respondent to acquire

certified copies of the aforementioned documents. Photocopies of the same were produced instead. Uncertified copies of the senate minutes and general statement were secondary evidence and given that Busoga University was a respondent, certification was not done. Instead a representative of Busoga University, the awarding institution deponed to the existence of the same documents and attached them. This makes the documents admissible as secondary evidence.

Unfortunately Busoga University was not in court to explain the discrepancies in their documentation and counsel for the appellant was right to condemn the discrepancies because logically the minutes should have appeared similar. Nevertheless what is of import to this court is what appears in M1N.SRN/T16/2010. In both impugned documents the content is the same and of relevance to this case both read: "**...the certificate for which the appellant was admitted to advance her studies at Busoga University was investigated and found false. Hence any corresponding academic documents she attained after presenting the false certificate were deemed null and void. Owing to the fact that the appellant did not certify (sic) the requirements of entry into Busoga University, the senate resolved to revoke all awards given to her**". Most likely the requirements needed satisfaction! Given that the relevant minute has the same content in both versions of the minutes the content must be the sole content. The documents containing the content are admissible, albeit secondary evidence. There **was** need to satisfy the requirements on the part of the appellant. Issue 3 too should fail.

Issue 2:

Whether the learned Judge erred in law and fact when he impeached the appellant's certificate in Public Administration and Management of Busoga University.

The complaint in this ground is that the trial Judge found that the appellant's Certificate in Public Administration and Management was not authentic. Counsel for the appellant submitted that the particular certificate in issue was certified by Busoga University the awarding institution which to him was proof of its authenticity.

Counsel for the respondent submitted that the trial court carefully evaluated the evidence on the record and came to a proper conclusion. It was their submission that since Busoga University had resolved and revoked the appellant's academic awards on ground that the Certificate in Public Administration and Management upon which she was admitted was not authentic the appellant bore the burden to disprove this allegation. Yet she failed to discharge it.

The position of the law was rightly stated by the trial judge and we shall revisit the same for purposes of clarity. Section 61 of the Parliamentary Elections Act states:

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

a).....

b).....

c).....

d) That the candidate was at his or her election not qualified or was disqualified for election as a Member of Parliament".

The standard of proof is stated under Section 61 (1) and 61(3) of the Parliamentary Elections Act to be

"to the satisfaction of court" and "on a balance of probabilities".

The qualifications of a Member of Parliament are laid down under Article 80 (1) (c) of the Constitution as follows:

"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 a minimum formal education of Advanced Level standard or its equivalent which shall be established in a manner and at a time prescribed by Parliament by law."*

The position remains similar in the enabling law. The Parliamentary Elections Act under **section 4(1)(c)** thereof provides for the minimum formal education as Advanced Level or its equivalent.

The complaint before the trial Judge was that the appellant was nominated and elected on the basis of academic documents or awards which had been revoked and were therefore null and void.

At the lime of her nomination, in her statement on oath, the Appellant claimed to be a holder of the following academic awards:

- a) The Uganda Certificate of Education.
- b) Certificate in Public Administration and Management (Busoga University)
- c) Diploma in Public Administration and Management (Busoga University)
- d) Degree in Public Administration and Management (Busoga University).

She attached copies of the Certificates from Busoga University and a Letter of Verification of results from UNEB.

Before coming to his conclusion the trial judge had the following evidence to consider:

That the Appellant contested as a candidate for Member of Parliament in 2011; but that the appellant's effort to contest in the same election was blocked by the Electoral Commission on grounds that she did not possess the requisite academic qualifications. It was then that the appellant filed Election Petition No. **6/2011 ilajati Rehema Tiwuwe Watongola vs Electoral Commission and National Council for Higher Education**. Consequently, court reversed and set aside the decision of the Electoral commission. That decision is still standing. There was also an interim order arising from Miscellaneous Application No. **16/2011 Hajati Rehema Tiwuwe Watongola vs Busoga University and National**

Council for Higher Education, which restrained the respondents therein from depriving the Applicant (Appellant) of **her** academic documents and/or in any way assaulting her academic status. The order therein had not been set aside and the main application giving rise to it was yet to be heard.

In their affidavit in support of the petition, Busoga University stated that an attempt had been made to withdraw the appellant's awards on ground that the certificate upon which she was admitted to the university was investigated and found to be false and based on a forgery. There were documentations of senate meetings and a general statement passed by Busoga University in 2010 withdrawing the appellant's awards on grounds that the certificate upon which she was admitted to the university was investigated and found to be false and/or a forgery. Such was the basis for the petitioner/respondent's case that the appellant herein lacked the requisite minimum academic qualification given that what she possessed had been recalled/revoked by the university. However the University had not taken any further step in confirming the withdrawal of the awards to the appellant.

The learned trial judge upon consideration of all the evidence on record stated that he noted the interim order stopping Busoga University from depriving the appellant of her academic award and the decision in Election Petition No. 6/2011 which restored the appellant as a contestant in the election. Nevertheless he observed that the question of the veracity of the appellant's academic documents had not been dealt with. The decision of the Electoral Commission was set aside on ground that it had been taken without proper information on which it could be based.

It was the trial court's view that the existence of the interim order did not clear the questions hanging around the authenticity of appellant's academic credentials, especially the certificate issued by the university which was the basis for the attainment of higher qualifications. He relied on the case of **Abdul Balingira Nakendo vs Patrick Mwendha, Election Petition Appeal No. 9/2007** and **Article 86 (1) (a)** of the Constitution which vests in the High Court jurisdiction to hear and determine any question whether a person has been validly elected as a Member of Parliament.

The authenticity of the certificate is key in this matter. In arguing this issue Mr. Isabirye, counsel for the respondent, implored court to view the evidence surrounding the certificate in question which the lower court considered.

The certificate in issue is a Certificate in Public Administration and

Management said to have been awarded to the Appellant in June 2005. This was a certificate in equivalence to the requisite minimum formal education of Advanced Level given that the appellant lacked the basic Advanced Level qualification.

Upon perusal of the record we observe that on the 17th of December 2010, Busoga University convened a senate meeting to discuss several issues and also discussed the appellant under MIN.SEN/'116/2010. Those minutes were attached to the affidavit in support of the Petition as annexure 'H' and also attached to the affidavit of the 3rd respondent (Busoga University) in reply to the Petition. The content of the said minute was that the certificate which was the basis for the appellant to be admitted to advance her studies at Busoga University had been investigated and found to be false. Hence any corresponding academic documents she attained after presenting the false certificate were deemed null and void. Owing to the fact that the appellant did not satisfy the requirements of entry into Busoga University, the senate resolved to revoke all awards given to her by the institution.

It should be noted also that on 20th December 2010, a University General Statement, which is annexure T to the affidavit in support of the petition, was issued recalling the academic papers awarded to the appellant. The appellant was served with this general statement from Busoga University

revoking her academic documents on the 14th of January 2011 as evidenced by her affidavit in support attached to the response to the Petition. Suffice to say the appellant admits she received the statement from Busoga University cancelling/recalling her academic awards.

In an affidavit in reply to the Petition, Associate Professor Dr. DL Kibikyo of Busoga University in paragraphs 8, 9 and 10 denied the university ever issued the certificate to the respondent. However he went on to state that, the diploma and degree certificates had also been recalled, revoked and cancelled owing to forgery. He referred to the 30th senate sitting on 17th December 2010, under MIN/SEN/116/2010 and MIN SEN/117 2010 that- revoked the same awards. He added that the appellant was notified to return the academic documents on the 20th of December 2010.

It was the evidence of the respondent in her affidavit in rejoinder to the 1st respondent's answer to the Petition that charges were preferred against the appellant and a one Lugwcre Geoffrey in Iganga Chief Magistrate's Court for the offences of forgery and uttering a false document. The forgery was said to be of a certificate in Public

Administration and Management in the names of the appellant. The charge sheet was attached to the said affidavit.

In respect to the charge sheet, it was argued for the appellant that the court should put in focus the presumption of innocence until proof of guilt, as enshrined in the Constitution. We certainly cannot be seen to flout this cardinal constitutional provision. Nevertheless it is incumbent upon the court to weigh and consider all the evidence before it and arrive at an informed decision.

The assembled evidence creates doubt as to the authenticity of the impugned certificate. The awarding university itself claims to have conducted an investigation and found the certificate to be a forgery and they went ahead and denied having issued it as per the affidavit of the university representative. This led to the ensuing awards being recalled. The University senate acted within the law as per section 45 (3) of the University and Other Tertiary Institutions Act, 2001 which gives the senate power to deprive any person of a degree, diploma, certificate or other award of a Public University if after due inquiry it is found that the award was obtained through fraud or dishonourable or scandalous conduct.

In view of the fact that questions were raised regarding the authenticity of the appellant's academic documents the appellant bore the burden of proving that the documents which she presented for nomination were authentic. We find that the trial judge rightly found that where the authenticity of the certificate was questioned the burden fell on the appellant to show otherwise. The burden of proof lies with the Petitioner according to Section 101 of the Evidence Act, Cap 6. However, once an allegation is made challenging qualifications of a candidate/ Member of Parliament, then the burden shifts to the party who claims to have the qualifications to prove so. See *Katureebe JSC*, as he then was, in **Nakendo Vs Patrick Mwendha, Election Petition No. 09/2007**. The appellant therefore bore the burden of proving otherwise but this she never accomplished. She also never appealed the decision of the University senate to the University Council as section 45 (4) of the University and Other Tertiary Institutions Act, 2001 provides for aggrieved person whose awards are withdrawn. Instead she armed herself with an Interim order issued against Busoga University and National Council for Higher Education restraining the respondents therein from depriving the Applicant (Appellant) of her academic documents and/or in any way assaulting her academic status.

It is on record as earlier stated that the appellant received the statement revoking her academic credentials from Busoga University dated 20th of December 2010, on the 14th of January 2011. This is in her affidavit in support attached to the response to the petition. She obtained the interim order on the 25th of January 2011, days after the revocation by the University, Counsel for the Respondent in our view rightly argued that

the interim order did not revoke the decision of Busoga University that cancelled her qualifications. Me added that the interim order was to expire upon hearing of the main application, adding that it was not an order in perpetuity. He relied on **Humphrey Nzeyi vs. Bank of Uganda and the Attorney General, Constitutional Application No. 1 of 2013.**

Respecting interlocutory injunctions which seek to preserve the status quo, It was stated in the above case:

'As to "status quo" this is the existing state of affairs, things or circumstances during the period immediately preceding the application for an interlocutory injunction. An order to maintain the status quo is intended to prevent any of the parties involved in a dispute from taking any action until the matter is resolved by court. It seeks to prevent harm or preserve Lite existing conditions so that a party's position is not prejudiced in the meantime until a resolution by court of the issues in dispute is reached. It is the last, actual, peaceable, uncontested status which preceded the pending controversy. The cases of American Cynamid V Ilichon Limited [1975] AC 396, Dr. Sola Saraki V N.A.1J Koloye, Supreme Court of Nigeria SC 174/89 are persuasive in this respect.

The status quo as of 25th of January 2011 was that of Busoga University recalling/revoking the academic awards. The interim order that was issued on that day was therefore an order in error. As if that was not enough, the interim order purported to be a consent order. Consent judgments are binding on the parties involved in the agreement. For a court to issue a consent judgment, all parties involved in a suit or the agreeing parties must indicate that the agreement has been mutually arrived at and that they find it acceptable. This was hardly the case here since Busoga University was not party. Therefore such was an order in error subject to review.

Counsel for the respondent raised controversy with the names of the appellant claiming that the names referred to three different persons. They pointed to the appellant's admission letter at page 84 of the record of proceedings with the names '**Watongola Rehema Rose Mubialiwo**', also at page 23 of the record annexure 'C' to the Petition, a statement under oath by person to be nominated as a parliamentary candidate, where the appellant registered her name as '**Watongola Rehema**'. Her academic documents state that she is '**Watongola Rehema**'. Then in the gazette, annexure '**B**' the declared winner for Kamuli woman MP was '**Rehema Tiwuwe**

Watongola/ It was their submission that the appellant is not at liberty to change her names as she pleases. She needed to follow procedure. In response to the issue of the different names, counsel for the appellant contended that, that issue was not pleaded and therefore could not form pari of an appeal.

We are in agreement with counsel for the appellant that the issue of the names was never raised at trial. As such we find no reason to chart those waters for now.

We have held already that once the authenticity of the appellant's academic qualification came into question, the burden shifted to her to prove that her qualifications were authentic. This she never did. After reappraising the evidence on the trial court's record, we fully concur with the trial court's findings. The learned trial Judge rightly found that the petitioner proved to the satisfaction of court that the appellant herein did not possess the minimum requirement of Advanced Level or its equivalent. Accordingly she was not qualified to be nominated and to stand for elections as Member of Parliament for Kamuli Municipality. The second issue too fails. This should also dispose of issue 4, which similarly collapses. We find that the trial court properly evaluated the evidence and reached the correct decision on the facts before it.

This appeal is dismissed with costs to the respondent. The orders of the lower court are upheld.

Dated at Kampala this 14TH Day of February 2017

Signed by:

HON JUSTICE RICHARD BUTEERA, JA

HON.BARISHAKI CHEBORION,JA

HON.JUSTICE PAUL .K .MUGAMBA,JA

