THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 41 OF 2016

(ARISING FROM JINJA HIGH COURT ELECTION PETITION NO. 11 OF 2016)

ENG. IBAALE DANIEL JOSEPH ..... APPELLANT/ PETITIONER

VERSUS

1. **HON. ABDUL KATUNTU**
2. **THE ELECTORAL COMMISSION** ..... **RESPONDENTS**

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

HON. JUSTICE REMMY KASULE, JA

HON. JUSTICE RICHARD BUTEERA, JA

JUDGMENT OF THE COURT

Introduction

This is an Appeal against the Judgment of the High Court of Uganda at Jinja (*Margaret Mutonyi, J*) dated 18th August 2016.

Background

The background to the Appeal is that the appellant and the 1st respondent stood for elections for the Member of Parliament, (M.P.) for Bugweri County Constituency held on 18th February 2016. The 2nd respondent returned declared and gazetted the 1st respondent the winner of the said election.

The appellant, being dissatisfied with the election outcome, challenged the same by filing Election Petition No. 11 of 2016. The

Petition was heard and court dismissed the same with costs, hence this Appeal.

Grounds of Appeal

The grounds upon which the Appeal is premised are set out in the Memorandum of Appeal as follows:

1. *"The learned trial Judge erred in law and fact in denying the appellant chance to reply to the 1st respondent's forty one affidavits served upon the appellant's counsel at 5:20pm on 25th May 2016 thus denying the appellant a fair hearing resulting into a mistrial and a decision void abinitio.*
2. *The learned trial Judge erred in law and fact in holding that Dhakala Hussein is not a Ugandan.*
3. *The learned trial Judge erred in law and fact in holding that false statements made in favor of a candidate making them to falsely promote his election are not within the realm of S. 73 (1) PEA.*
4. *The learned trial Judge erred in law and fact in her failure to strike out the 1st respondent's supplementary affidavit in which he introduced his other new evidence generally.*
5. *The learned trial Judge erred in law and fact in holding that the illiterates' insertion of signatures in their affidavits complied with section 2 of the Illiterates Protection Act.*
6. *The learned trial Judge erred in law and fact in excluding a plethora of the appellant's evidence on account that*

instances of false utterances mentioned therein were not set out verbatim in the Petition.

7. *The learned trial Judge erred in law and fact in holding that the appellant's witnesses ought to have set out the false statements made by the 1st respondent against the appellant verbatim in their respective affidavits.*
8. *The learned trial Judge erred in law and fact in her failure to hear the appellant on issues relating to a recount of votes and holding that an order for a recount be made in the Judgment or after judgment.*
9. *The learned trial Judge erred in law and fact in her holding that it had not been proved that the respondent did commit an electoral offence of uttering false statements against the appellant during campaigns.*
10. *The learned trial Judge erred in law and fact in her failure to properly evaluate evidence thus erroneously coming to the conclusion that the 1st respondent did not commit electoral offences contrary to section 23, 73 and 80 of the Parliamentary Elections Act.*
11. *The learned trial Judge erred in law and fact in giving the 1st respondent's statements at Bulunguli a narrow interpretation and holding that the statements made by the 1st respondent at Bulunguli were not defamatory of the appellant but mere political banter/ hyperboles.*

12. *The learned trial Judge erred in law and fact in her exclusion of the appellant's compact Disc evidence relating to the 1st respondent's statements at Mufumi because they were not translated in English".* (Sic)

Representation

At the hearing of the Appeal, the appellant was represented by Mr. Hassan Kamba, (counsel for the appellant), while the 1st respondent was represented by Mr. Medard Ssegona, (counsel for the 1st respondent), and the 2nd respondent by Mr. Musa Ssekaana, (counsel for the 2nd respondent).

The case for the appellant

Ground 1

Counsel for the appellant argued that there was no justification to close out the appellant from responding to the affidavit evidence and allegations made against him in the 41 affidavits of the 1st respondent served upon the appellant on 25th May 2016. He referred to **Kamba Saleh Moses v Hon. Namuyangu Jennifer EPA No. 0027 of 2011** where the Court of Appeal held that **Article 28** of the Constitution provides for the right to a fair hearing as one of those principles of natural justice and it is a non-derogable Article and that any proceedings conducted in its contravention could not and did not amount to any decision at law.

He submitted that fair trial entails that the other party should be given a chance and sufficient time to reply to any evidence brought against it in a trial, failure of which, was a miscarriage of justice. He prayed that this ground be allowed.

Grounds 3, 6, 7, 9 and 11

Counsel for the appellant submitted that the 1st respondent made defamatory statements against the appellant. Counsel contended that the statements were recorded under a CD at Bulunguli and were translated. He contented further that the holding that the witnesses of the appellant at the diverse places had to set out the words complained of verbatim in their evidence, was a misplaced statement.

Counsel cited **Kizza Besigye v Yoweri K. Museveni Supreme Court Election Petition No. 1 of 2001** and submitted that Court had observed that in an Election Petition, the petitioner has to prove that the impugned statement has been published by the candidate or his agent or with the consent of the candidate. Further, that he has to show that the impugned statement is false and that the candidate did not believe it to be true. It has also to be proved, *inter alia*, counsel contended, that the statement must be in relation to the personal character or conduct of the complaining candidate. Finally, it has to be shown that the publication was calculated to prejudice the prospects of the complaining candidate's election.

To counsel, those statements were duly proved and he referred Court to their translation by Makerere University. To him, that corroborated some other evidence on record that the statements were designed to cause mischief to the appellant. He also referred to **Wasike Stephen Mugeni v Aggrey Awori Siryoi Supreme Court Election Petition Appeal No. 05 of 2007**, and contended that on the issue of the words being produced verbatim, the Supreme Court in that case confirmed the position of the Court of Appeal that Section 73 of the Parliamentary Elections Act, (PEA), is very clear and needs no elucidation. The Supreme Court, counsel asserted, agreed with the Court of Appeal that any false statement against a political candidate with intent to sway voters against him, is sufficient to establish an election offence of a false statement concerning the character of a candidate. To counsel, the 1st respondent's motive is reflected in his affidavit where he averred that the statements were truthful and intended to demonstrate the unsuitability of the appellant. He thus prayed that Court finds that the only statements protected are those of opinion and not of fact. He further prayed that this Court, as the first and the last appellate Court, re-evaluates the evidence on record and upholds grounds 3, 6, 7, 9 and 11 of Appeal.

Ground 4

Counsel submitted that the learned trial Judge caused a miscarriage of justice when she did not strike out the 1st

respondent's supplementary affidavit that resulted in introducing new evidence by the 1st respondent.

Ground 5

Counsel argued that it was erroneous for the trial Judge to hold that a signature without a certificate of translation amounted to a mark under Section 2 of the Illiterates Protection Act, Cap 78, of the Laws of Uganda. To counsel, if that had been the intention of the Act, then it would have been clearly put as a signature and not as a mark. He referred to **Kasaala Growers Cooperative v Kakooza Jonathan & Another Civil Application No. 19 of 2010** where the Supreme Court held that any affidavit which offends a statutory provision is a nullity. He submitted that without those affidavits, the 1st respondent's answer remained with no substantial evidence and as such, when weighed against that of the appellant, it would leave the appellant having proved his case on a balance of probabilities.

Counsel prayed that the impugned signatures be struck out and the ground allowed.

Ground 8

Counsel argued that according to Section 63 (4) of the PEA, a recount is an interlocutory part of an inquiry in an election that can never be sought as a final judgment. He argued that the learned trial Judge erred in holding that a recount can never come before judgment. He referred to the Zambian case of **Seth Shibulo Loongo**

v Kennedy Mpolobe Shepande (1984) Z.R. 59 (H.C) where Court held that *'a scrutiny is not the shine thing as a recount of the votes cast, an order for the recount is not a relief, it merely helps the Court in arriving at its decision as to which candidate should have been declared duly elected'.*

Counsel stated that the appellant did not submit on the issue of a recount because the Court was not considering whether to order a recount or not. He added that Court needed to probe the assertion that most of the invalidated votes belonged to the appellant. To him, that failure was wrong and contrary to the principle of fair hearing.

Grounds 2 and 10

Counsel submitted that the learned trial Judge did not properly evaluate the evidence in the case on proof of violence and on the holding that one, Dhakala Hussein, was not a Ugandan.

Ground 12

Counsel referred Court to Section 8 of the Electronic Transmissions Act which provides to the effect that evidence cannot be defeated on technicalities once it is recorded. He submitted that the instances complained of were clearly detailed in the English language by witnesses at Bulunguli and other places and are corroborated by the translation as further proof that the appellant was a resident of the Constituency.

He prayed that the Appeal be allowed with costs here and in the Court below.

The case for the 1st respondent

Counsel for the 1st respondent opposed the Appeal contending that it lacked merit. He adopted his submissions in the lower court and contended that parties are generally bound by their pleadings and the petitioner is duty bound to prove all the ingredients of the Petition.

Ground 1

Counsel for the 1st respondent submitted that counsel for the appellant did not ask for a fresh trial and therefore his claim that the affidavits were not attended to, had the effect of amending the Memorandum of Appeal. He noted that at the trial of the Petition, counsel for the appellant did not seek any adjournment but rather raised objections.

He noted that election matters are time bound and once the parties were given a schedule, they were required to adhere to it. He added that granting an adjournment was a discretionary matter and unless the party proved injudicious denial of the same, it cannot form the basis of an appeal. He further stated that counsel for the appellant did not mention at the lower court or even at this Court what he intended to rebut and how the rebuttal would affect the trial so as to amount to a mistrial. He thus invited Court to dismiss the ground.

Grounds 3, 6, 7, 9, 10 and 11

Counsel submitted that the key words in Section 73 of the PEA included; that one must make a statement in relation to character not the general life of an individual. He contended that a look at the Petition showed no pleading in relation to character. He referred Court to the recordings of the rally at Bulunguli Primary School Play Ground in Kiwani 'A' Village. He contended that in there, the 1st respondent was basically comparing himself to the other candidates and praising himself. He submitted that politics is a game of comparisons and no party would go to campaign and say that his/ her opponent is better than him/ herself.

Counsel argued that the 1st respondent was only confessing that whereas he knew where the LC1 Chairman stayed, he did not know where the appellant resided. To him, this did not in any way touch upon the character of the appellant, but rather the events that were actually happening, for instance that the appellant had left from a lodge to go for nominations.

He contended that defamation cases were determined not on the basis of the petitioner's deductions from the message but on the judgment of the right thinking members of society.

He referred Court to the 1st respondent's Affidavit in Answer to the Petition to establish his denials and prayed that the statements be placed into their proper context and not the stories of the appellant.

In response to the authority of **Kiiza Besigye** (supra) that was relied upon by counsel for the appellant, counsel for the 1st respondent submitted that the requirement to set out the words verbatim was to prove that the respondent must know the specific words complained of, not only portions thereof. He noted that in this case, it was up to the appellant to prove that he was indeed a son of the land if he thought that someone had wrongly misrepresented that he was not.

On the issue of the lodge, counsel submitted that the 1st respondent never stated that the appellant sleeps in a lodge but rather that on the day of nominations, he set off from a lodge and this was not rebutted.

Counsel invited Court to find that there were no defamatory statements made against the appellant in the campaign.

Ground 8

Counsel relied on the decisions in **Kiiza Besigye** (supra) and **Fred Badda & Anor v Prof. Muyada Mutebi EPA No. 25 of 2006** as regards Section 63 (4) of the PEA. He pointed out that first of all, the provision provides that Court 'may' order a recount. He added that the appellant's allegation that there were so many invalidated votes that the loss margin of 400 votes was unsustainable, since 400 is no small figure in election matters had no logical basis as the appellant did not highlight any specific polling station where his votes were invalidated. Counsel agreed with the learned trial Judge that the appellant fell short of the required standard of proof.

As for setting down the date for the delivery of the Judgment before hearing the issues on recounting votes, counsel submitted that under Section 63 (4) of the PEA, for court to order a recount of votes, the petitioner must, under Section 63 (5) of the Act, first establish a prima facie case that there is need for a recount. He emphasized that in the instant case, basing on the affidavit evidence before her and the cross- examination, the learned trial Judge found no justification for a recount.

He referred to **Amama Mbabazi v E.C and another; Supreme Court Election Petition No. 1 of 2016** as the authority on ordering a recount wherein Court held that in their view, the petitioner did not discharge the burden of satisfying the court that it was necessary to order a recount of the votes cast in 43 districts or in any one of them. Consequently the court did not have to embark on the aspect of whether it was practical to conduct a recount or not in the circumstances.

Counsel thus submitted that if court does not deem it necessary to order a recount, it is free not to do so in its absolute discretion. He contended that the exercise of that discretion can only be based on the pleadings which pleadings the learned Judge studied carefully before finding that there was no need for a recount, bearing in mind the provisions of Section 48 of the PEA.

Counsel cited **Keziah Nyeketcho v EC and Another; High Court Election Petition No. 11 of 2006** and **Saleh Kamba vs. Namuyangu Jennifer; Court of Appeal Election Petition Appeal**

No. 27 of 2011, where both courts emphasized that a party can only be entitled to ask for a recount if it followed the procedure and process and not just alleging generally that the votes were declared wrongly. Counsel emphasized that **Saleh Kamba** (supra) viewed a host of authorities including **Ngoma Ngime v Winnie Byanyima Election Petition Appeal No. 11 of 2002 (COA)** where it was held that Court will not go for a speculative expedition or exploration with a view to chancing on some votes wrongly invalidated and as such, the pleadings must be specific.

He prayed that Court finds that the learned Judge was justified to hold as she did, that she did not find a prima facie case from the pleadings.

Ground 2

Counsel submitted that Dhakala Hussein averred in his affidavit that he was an adult Ugandan. He claimed that he was a registered voter but did not possess a National Identification Card (I.D.). To counsel, a voter ID number was no proof that Dhakala was Ugandan. He added that looking at the capacity in which Dhakala swore the affidavit; as the appellant's supporter, the learned Judge was justified to find that without a Voter ID and a National ID, the witness had nothing useful to present to court. Counsel invited Court to look at the entire affidavit and the evidence sought to adduce. He stated that he had been beaten for being a supporter of the appellant. Counsel wondered, how an assault, if true, affected the election. He noted that it could only affect an election if it was

committed with the knowledge, consent and/ or approval of the candidate and no evidence had been adduced to that effect.

Ground 4

Counsel submitted that counsel for the appellant was given a 15 minutes adjournment to point out those affidavits for possible striking out. He argued that affidavits are severable and as such he could have struck out the particular paragraphs he was uncomfortable with instead of engaging in unnecessary objections.

Ground 5

Counsel for the 1st respondent emphasized that their submissions in the lower court and the learned Judge's findings were the correct interpretation of the law. He contended that the purpose of the Illiterates Protection Act, Cap 78 of the Laws of Uganda, is to ensure that an illiterate does not put his mark or even put his signature on a document not translated to him/ her, since some illiterates are able to sign, without understanding the affidavit which is prepared in a language he/ she does not understand. He noted that in all the affidavits complained of, it is clearly indicated that they were translated to and clearly understood by the deponents.

Ground 12

Counsel submitted that the learned Judge rightly rejected the CD evidence for not having been transcribed and translated which violated Section 87 of the Civil Procedure Act (CPA), Cap 71 of the Laws of Uganda. He noted that under Section 88 of the CPA, the

language of all courts shall be English and sub Section 2 provides that evidence in all courts shall be recorded in English. He noted that the appellant had ample opportunity to translate the recordings but did not and was now seeking to have the appellate court listen to recordings which are in Lusoga. He wondered how, accepting that kind of evidence, would afford a person who does not understand Lusoga a fair opportunity. Counsel referred to this as a mere technicality. He noted that even if counsel for the appellant wanted to convince Court to re-evaluate that evidence, he never made any application for such in his submissions to this Court.

He thus prayed Court to look at the whole record, re- evaluate the whole evidence and find that this Appeal should be dismissed with costs in this Court and in that below.

The case for the 2nd respondent

Ground 1

Counsel for the 2nd respondent submitted that whereas the right to a fair trial was enshrined in the Constitution, it goes with certain procedures. He contended that a party who takes him/ herself away from enjoying the principles of fair trial cannot be seen to come before this Court to cry foul that a trial Judge violated his/ her right. He stated that the appellant failed to comply with court directions and as such could not fault the learned Judge for deciding the way she did.

He added that the issue of filing pleadings in rejoinder was bringing confusion in court and moreover, there was no law providing for it. If a party, like the appellant, comes before court with his evidence under the Petition, and afterwards says that he/ she is rejoining, what would he/ she be rejoining to? It was his contention that the appellant was trying to re-open a case or tie loose ends created by someone's defense. He argued that the right to rejoin was not automatic since raising a new matter required filing an application. Counsel referred to *Black's Law Dictionary* definitions of 'rejoinders' and 'sub- rejoinders'. He submitted that Courts were now facing an unnecessary confusion since the rules provided for the filing of a Petition supported by affidavit evidence and once an Answer was filed, the case was closed for court to make its decision. It was his contention that if any issue arose thereafter, it could be addressed by cross- examination. He noted that the protracted adducing of evidence defeats the purpose of expeditious disposal of Election Petition litigation.

It was his view that there was no basis for seeking a rejoinder because the appellant had already made out his case in his Petition and the supporting affidavits and as such, he was not prejudiced in any way by the court's decision to reject his Application to respond to the 1st respondent's affidavits. He prayed that ground 1 should fail.

Ground 5

Counsel submitted that what Section 2 of the Illiterates Protection Act, Cap 78 of the Laws of Uganda, envisages is that another person should not write the name of an illiterate by way of a mark on any document unless such illiterate shall first append his or her mark to it confirming that the document is his/ hers and it has been read and explained to him/ her. He argued that 'mark' was not defined and as such, that should not be used to say that a signature could not qualify as a mark and thus offending the Act. He prayed that Court finds that the ground lacks merit.

Ground 8

Counsel associated himself with the submissions of counsel for the 1st respondent but added that the basis of a recount is derived from the electoral laws under Section 48 of the PEA that provides for raising complaints during the counting of votes. He stated that having not complained at the time of voting and that of counting the votes, the appellant could not be seen to seek a recount at this late stage. He observed that during the hearing at the lower court, the appellant made allegations about invalid votes and yet he also stated that he had agents at each polling station but none of them made a report concerning such votes. Neither was any reflected in the DR Forms produced before Court.

He contended that whereas one, Julie Logose, was an agent for the appellant who had declined to sign the DR Forms, she did not write the reasons for her refusal. The other evidence was of one,

Muwereza Robert, who was the agent of the appellant at Bulogoda Polling Station. He duly signed the DR Forms and did not state anywhere that there was invalidation of any of the appellant's votes. It was thus counsel's contention that a party must produce cogent and credible evidence before seeking a recount. The evidence the appellant had adduced was not cogent, let alone credible.

On the issue of violence, counsel for the 2nd respondent submitted that whereas it is true that the 2nd respondent is in charge of elections from the time it begins up to the end, a party or a candidate who has any grievance in the course of the elections, has a duty to report that complaint to the 2nd respondent. It was thus counsel's contention that it was not proper for a losing party to wake up after the electoral process had been concluded and raise all sorts of allegations against the conduct of the elections. He noted that if there had been violence, then the appellant's agents should have informed the Returning Officer who, in turn, would have informed the Head Office about the violence. He added that all his agents prepared reports but none of them informed the appellant of any violence. To counsel, this was a case of an aggrieved party fishing for evidence and reason to justify or contest his loss.

He prayed that Court be pleased to dismiss this Appeal with costs here and in the court below.

Reply

On the issue of affidavits, counsel for the appellant submitted in reply that if it was to be the case, as submitted by counsel for the

2nd respondent, that affidavits in rejoinder and sur rejoinder should not be permitted, then that would disqualify the affidavits of the 1st respondent which he filed on 24th of May 2016 since the Petition was filed on 31st March 2016 and the 1st respondent answered on 15th April 2016 and the petitioner made rejoinder on 18th May 2016. It was his contention that it was actually the 1st respondent who brought in fresh evidence after seeing the rejoinders. He thus argued that justice demanded that the appellant should have been permitted to respond to the new evidence raised by the 1st respondent.

On the issue of adjournments, counsel submitted that whereas granting an adjournment is discretionary, that discretion should not be exercised injudiciously. He stated that the appellant asked for a 3 days' adjournment which, in his view, was reasonable and denial of this was unfair.

Grounds, 3, 6, 7, 9, 10 and 11

Counsel submitted that defamation was clearly pleaded and that whereas it is not wrong for a person to sleep in a lodge, the 1st respondent's statements intended to cast the appellant into disrepute.

On the issue of ordering a recount, counsel submitted that concerning the issue of raising a prima facie case, Court needed to make that order before the final judgment.

He reiterated his earlier prayers.

Court's consideration of the Appeal

Duty of Court

This being the 1st and last appellate Court, it has the duty to re-hear the case and re-consider the evidence and all the materials placed before the trial Judge and make its own conclusions bearing in mind, however, that it did not have the advantage of seeing the witnesses testify. See **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I. 13-10, Pandya v R [1957] E.A 336, Okeno v Republic [1972] E.A 32, Kifamunte Henry v Uganda SCCA No.10 of 1997** (Unreported) and **Mugema Peter v Mudhiobole Abed Nasser EPA No. 30 of 2011**. In so doing, this Court is further to be guided by the principle that the standard of proof in election matters is on the basis of a balance of probabilities and that the burden lies upon the petitioner to prove his case to the satisfaction of Court.

We now proceed to consider the grounds raised in the Memorandum of Appeal in the order in which counsel for the appellant addressed them.

Ground 1

The gist of this ground is the appellant's complaint that the learned trial Judge denied him an opportunity to reply to 41 of the respondent's affidavits.

By law, evidence in election litigation is by affidavit. In the instant case, the appellant filed his Petition, the 1st respondent answered it.

The appellant filed a rejoinder and the 1st respondent filed a sur rejoinder. When the appellant attempted to file another rejoinder, the trial court decided that it was not necessary. This Court is fully cognizant of the unique nature of election litigation and the fact that Section 63 (2) of the PEA, enjoins it to hear and determine election matters expeditiously. Court is equally aware of the fact that litigation is not supposed to go on endlessly and as such, time lines are set for parties to follow when conducting their respective cases. This is more so in election litigation. See **Court of Appeal Civil Application No. 22 of 2011; Electoral Commission and Another vs. Piro Santos,** which quoted with approval the Kenyan case of **Muiya vs. Nyangah and Others, [2003]2 EA 616 C.H.C.K)** where the importance of expedience in election related litigation and of the need to strictly adhere to the law relating thereto was emphasized.

The appellant is taken to have been aware of the timelines he had to follow and the steps he had to take together with the opportunities that were open for him to prepare for the presentation of his case to court. If he relented on any of the above, he cannot now turn around to argue that the learned trial Judge rejected his attempts to respond to the 41 affidavits. He also could have made an application to this Court to be allowed to introduce the evidence he wanted but he did. Further, we note that the appellant did not seek to cross- examine the witnesses who had deponed to the impugned affidavits. We, therefore, do not find that the appellant suffered any injustice in the matter now before us. We are further satisfied that

the learned trial Judge exercised her discretion properly in law in refusing to grant the said adjournments to the appellant and we do not fault her on that. We, therefore, find no merit in this ground and it fails.

Grounds 3, 6, 7, 9, 10 and 11

The gist in these grounds revolves around the appellant's complaint about the learned trial Judge's holding on the alleged defamatory statements by the 1st respondent.

The law on defamation in election matters is that the false statements that are complained of must have been made about and shown to have affected the character of the victim by lowering his/ her esteem in the eyes of the voters or fair-minded persons. In **Kiiza Besigye v Electoral Commission and Y. K. Museveni; Presidential Election Petition No. 1 of 2006,** the Supreme Court found that a candidate is not guilty of making such statements if he had reasonable grounds for believing the statements to be true. In the instant case, it was not challenged that the appellant left from a lodge to go for his nomination. We accept counsel for the 1st respondent's submission that the message the 1st respondent was conveying to his listeners, when he made the statements complained of, was by way of comparison where he rated himself as the best legislator. With no proof provided by the appellant that the statements made by the 1st respondent were false, we are unable to find that they were defamatory of the appellant. The statements were factual and not, in the contest they were made, about

undermining the character of the appellant. These grounds, therefore, fail.

Ground 8

The gist in this ground is the appellant's complaint about the question of vote recounting.

Before court can order a recount of votes, there must be sufficient evidence to show that it is necessary. In **Ngoma Ngime v Electoral Commission & Winnie Byanyima** (supra), this Court held 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. In **Saleh Kamba** (supra), again this Court emphasized that a party can only be entitled to ask for a recount if that party followed the procedure and process but not by just alleging generally that the votes were declared wrongly. The EPA is illustrative.

Section 63 (5) of the PEA provides:

> **"The High Court before coming to a decision under sub section (4), may order a recount of the votes cast."**

Section 54 provides for cases of mandatory recount, including that there was an equality of votes, or where the number of votes separating the candidates is less than 50. Section 55 of the PEA provides for an application to the Chief Magistrate's Court for a recount. In the instant case, the appellant sought a recount of the votes on grounds that the margin between him and the 1st,

respondent was small and that there were so many invalidated votes from which the 1st respondent benefited. A study of the Record of Proceedings does not show any evidence that was raised by any of the appellant's agents to show that they were dissatisfied with the manner in which the vote counting was done. In **Babu Edward Francis v the Electoral Commission & Erias Lukwago EP No. 10 of 2006**, the High Court held:

> **"When an agent signs a DRF he is confirming the truth of what is contained in the DRF, he is confirming to his principal that this is the correct result of what transpired at the polling station. The candidate in particular is therefore estopped from challenging the contents of the form because he is the appointing authority of the agent"**

We uphold the above as the correct statement of the legal position.

In the instant case, in the absence of any evidence from the appellant or any of his agents justifying the conduct of a vote recount, we find no reason to fault the trial Judge's decision. We also note that there was no application for a recount made to the Chief Magistrate's Court as is required by law and the appellant did not show what particular polling stations had a problem that necessitated a vote recount. Without following the proper procedure for causing a vote recount, the appellant put himself out of the scope of the law and cannot, therefore, blame his failure on the trial court. More so, the contention that the learned trial Judge decided

the issue at the end of the trial and not as a preliminary issue, is in our view, unjustifiable. On the basis of the above reasoning, this ground also fails.

Grounds 2 and 10

The gist of these grounds is the appellant's complaint that the learned trial Judge wrongly held that one, Dhakala Hussein, was not Ugandan and that the Judge wrongly exonerated the 1st respondent from committing any offences contrary to Sections 23, 73 and 80 of the PEA.

The learned trial Judge found that Dhakala Hussein was an unreliable witness given that he had neither voter card nor National ID to prove his citizenship. We find no cause for faulting the learned trial Judge for the decision she made. As to the offences under Sections 23, 73 and 80 of the PEA, we find that without showing what statements of the 1st respondent related to and defamed the character of the appellant, it cannot be found that the 1st respondent committed any such offences. This ground too fails.

Ground 4

Under this ground, the appellant faults the learned trial Judge for her failure to strike out the 1st respondent's supplementary affidavit.

We have noted that the supplementary affidavit by the 1st respondent was in reply to the affidavits by 32 witnesses of the appellant, then the petitioner, in support of the Petition. The

appellant has not convinced this Court as to how the refusal by the trial Judge to strike out that supplementary affidavit prejudiced him. We find no merit in this ground. The same is disallowed.

Ground 5

The gist in this ground is that some of the respondent's affidavits did not comply with the law on documents signed by illiterates.

Counsel for the appellant contended that a signature did not amount to a mark under Section 2 of the Illiterates Protection Act and as such, the affidavits of the 1st respondent should be struck out. Section 2 of the Act provides for verification of signature of illiterates thus:

> **"No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall also write on the document his or her own true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending his or her mark, the document was read over and explained to the illiterate."**

Black's Law Dictionary, 10th Edition, defines '*mark*' at page 1113, as:

> **"A symbol, impression, or feature on something usually to identify it or distinguish it from something else"**

It also defines '*signature*' at page 1593 as:

> **"A person's name or mark written by that person or at the person's direction especially one's handwritten name as one ordinarily writes it, as at the end of a letter or a check, to show that one has written it"**

From the above Section and the definitions, it is clear to us that a signature can be a mark that may be put by a person on a document to show that the person owns up to it. The idea or essence of the illiterate appending a mark on a document is to prove that the document has been authored by them or that it belongs to them. In the instant case, we find no satisfactory evidence that the impugned signature did not belong to the deponent or that the affidavit was not read and explained to the deponent. In the result, we find that the impugned signature amounts to a mark under Section 2 of the Illiterates Protection Act. This ground too fails.

In the result, we find that this Appeal lacks merit and is accordingly dismissed.

We declare that the 1st respondent is the validly elected Member of Parliament for Bugweri County Constituency.

It is ordered that the appellant pays the costs of the 1st and 2nd respondents of both this Appeal and those in the court below.

We so order.

Dated at Kampala this 20th day of Oct 2017

S. B. K. Kavuma
DEPUTY CHIEF JUSTICE

Remmy Kasule
JUSTICE OF APPEAL

Richard Buteera
JUSTICE OF APPEAL