

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION APPEAL NO. 05 OF 2020**

**(ARISING FROM HCT-ELECTION PETITION APPEAL NO.11 OF
2019)**

(ARISING FROM ELECTION PETITION NO.05 OF 2018)

ELECTORAL COMMISSION:.....APPELLANT

VERSUS

SEREBE APPOLLO KAGORO:.....RESPONDENT

CORAM:

HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE BK, JA.

HON. MR. JUSTICE STEPHEN MUSOTA, JA.

HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA.

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA.

This is a second appeal arising from the decision of the High Court (Bashaija J) delivered at Kampala on the 7th February, 2020 in High Court Election Appeal No.11 of 2019 on appeal from the decision of Her Worship Nantege Christine a Magistrate Grade One in the Chief Magistrates Court of Kajjansi at Kajjansi.

Duty of a second appellate court

This being a second appeal it is important that I state the duty of a second appellate court. The role of this court as a second appellate court is laid down under **Rule 32(2) of the Judicature (Court of Appeal Rules) Directions** which provides that;

10 *“On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence.” (underlining mine for emphasis)*

This Court is therefore obliged to appraise the inferences of fact drawn by the 1st Appellate Court.

15 In the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997** the Supreme Court on the duty of a first and a second appellate court held thus;

20 *“We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court’s own consideration and views of the evidence as a whole and its own decision thereon. 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. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See *Pandya v. R* [1957] EA 336, *Okeno v. Republic* [1972] EA 32 and *Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985* at page 5.

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 33(i) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles: See *P.R. Pandya v. R* (supra), *Kairu v. Uganda* 1978 HCB 123....”

Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied, (i.e. to re-examine and re-evaluate the evidence, and come to its own conclusion), were properly applied and if it did not, for it to proceed
5 and apply the said principles.

Background of this appeal

The background to this appeal is that the respondent (Serebe Apollo Kagoro) participated as an independent candidate in the election of LC1 Chairperson of Nsaggu Central Cell, Nsagu Ward, Kajjansi Town
10 Council, Wakiso District. The election was conducted by the appellant (Electoral Commission) on the 10th day of July 2018. Upon the respondent being declared winner, a one Kitandwe Amir lodged a complaint with the appellant Commission. The appellant Commission took a decision pursuant to the complaint to conduct a
15 fresh election for the reason that the results of the elections could not be ascertained by the Commission. As a result they did not gazette the results of the election which took place on the 10th of July 2018. Indeed fresh elections were conducted on the 16th day of August, 2018 but the Petitioner did not participate. At the end of the
20 2nd round of elections, the appellant Commission declared Kitandwe Amir (who was the 1st respondent in the High Court Election Appeal) as the winner of the fresh election conducted on the 16th of August 2018. The respondent as a registered voter in the constituency then filed a petition in the Chief Magistrates Court of Kajjansi at Kajjansi
25 seeking nullification or setting aside of the fresh election conducted

on the 16th August 2018 and an order that he was the duly and validly elected LC1 Chairperson of Nsaggu Central Cell, Nsaggu Ward, Kajjansi Town Council, Wakiso District on the 10th of July 2018. The trial Magistrate dismissed the petition for several reasons including incompetence of the petition. The respondent being dissatisfied with the decision of the Magistrate Grade One filed an appeal in the High Court by way of Memorandum of Appeal on the 12th day of August, 2019. The High Court found merit in the appeal and allowed it in its entirety. The High Court then declared that the respondent (Kagoro) was duly and validly elected in the elections held on the 10/07/2018 as LC1 Chairperson of Nsaggu Ward, Kajjansi Town Council Wakiso District. The High Court also found that the subsequent elections held on 16/08/2018 were illegal and declared their outcome null and void. Further the High Court set aside the Judgment and Orders of the Trial Magistrate Grade One and awarded costs on appeal and in the court below to the respondent.

The Electoral Commission was dissatisfied with the judgment and orders of the High Court and filed this appeal on the following grounds;

- 1. The Learned Honourable Judge of the High Court erred in law in failing to find that the Petition filed in the Chief Magistrate's Court Holden at Kajjansi was incompetent, incurably defective thus arrived at a wrong decision and contrary to the law.**

2. **The Learned Honourable Judge of the High Court misdirected himself when he found that by virtue of section 60(2) of the Parliamentary Elections Act, 2005, the respondent was not precluded from exercising his right to petition hence arrived at a wrong decision**

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3. **The Learned Honourable Judge of the High Court erred in law when he found that the appellant had indeed taken the decision to repeat the elections of chairperson Local Council 1 for Nsaggu Village but failed to hold that such decision could only be either appealed in accordance with Article 61(1)(f) and 64 of the 1995 constitution or challenged by way of judicial review**

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4. **The Learned Honourable Judge of the High Court failed to appreciate the Statutory Duty of the appellant of establishing, ascertaining, declaring and publishing the results in the gazette and arrived at a wrong decision and contrary to the law**

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The appellant commission prays that

a. The appeal be allowed

b. The findings of and the orders of the High Court be set aside

c. Costs of the Appeal be provided for

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Representation

At the hearing of the appeal, Mr. Lugoloobi Hamidu Senior Legal Officer at the Electoral Commission appeared for the appellant while Mr. Kahunde Simon appeared for the respondent. This court directed
5 the parties to file written submissions. The appellant filed his submissions on the 9th December, 2020 but the respondent did not and there was no explanation as to why they did not file.

However, on the 1st day of December, 2020 when counsel for the respondent appeared before court he raised an objection that the
10 appeal is premature because the judgment was *ex parte*. That the electoral commission did not appear or submit.

This court also probed the appellant on whether they had a right of appeal. Mr. Lugoloobi Learned counsel for the appellant submitted that they did have the right of appeal. For this submission counsel
15 relied on section 66 of the Civil Procedure Act and Section 168 of the Local Government Act.

These preliminary matters as raised orally at the hearing give rise to two preliminary issues for resolution. These are:

- 20 **1. Whether or not the appellant has a right of second appeal under the circumstances of this case?**
- 2. Whether or not the appellant is precluded from appealing given the fact that the appeal at the High Court proceeded *ex parte* without their participation?**

Consideration of the appeal

Although the appellant in their submissions deal with the grounds of appeal together, this court will first deal with the preliminary issues raised above and thereafter deal with each ground of appeal separately in the order in which they appear in the memorandum of appeal.

1. Whether or not the appellant has a right of second appeal under the circumstances of this case?

The appellant submitted in their written submissions at page 1 and 2 that they have a statutory right of Appeal by virtue of **sections 168 and 145 (1), (2) and (3) of the Local Government Act (LGA)**. The said sections provide as follows;

Section 168 of the LGA;

168. Election petition for a village, parish or county.

An election petition relating to elections at a village, parish or county shall be filed in the magistrate grade I court having jurisdiction in that constituency.

In Section 145 of the LGA it is enacted as follows;

145. Appeals.

(1) A person aggrieved by the determination of a lower court on hearing an election petition may appeal to the High Court or Court of Appeal against the verdict.

(2) The High Court or Court of Appeal in case of a subsequent appeal shall proceed to hear and determine an appeal under this section within three months after the day on which the petition was filed and may, for that purpose, suspend any other matter pending before it.

(3) The decision of the Court of Appeal in an appeal under this section shall be final.

I agree with the submission of the appellant that by virtue of the section 145(2) and (3) of the LGA they have a statutory right of a second and final appeal to the court of appeal. I accordingly find in favour of the appellant and resolve this issue in the affirmative.

2. Whether or not the appellant is precluded from appealing given the fact that the appeal at the High Court proceeded *ex parte* without their participation?

It is true indeed that the appellant did not appear or submit on the appeal at the High Court as clearly demonstrated by the order of the Judge at page 50 of the record of appeal. The appellant participated at the hearing of the Petition before the Magistrate Grade 1 as a 2nd respondent, filed an answer to the petition and submissions on preliminary points of law which the trial court upheld.

It is also clear from page 2 of the record of appeal that the appellant was a 2nd respondent to Petition No.5 of 2018 and from page 47 of

the record of appeal they were 2nd respondent to the High Court Election Appeal No.11 of 2019.

Therefore the appellant in the instant appeal was a party throughout the lower court proceedings. It is my view that had the 1st Appellate Court been cognisant of this fact, it would have found that the earlier appearance gives the Appellant the *locus standi* to appeal where they are dissatisfied by the *ex parte* decision of the appellate court.

I reviewed case law and written law and have not found any law prohibiting an appeal by a party to an *ex parte* appeal decision. The right of appeal is a creature of statute and in absence of any statute barring the appellant from filing this appeal and in presence of provisions of the Law giving that right of appeal I am inclined to find and do hereby find that the appellant commission has a right of appeal against the *ex-parte* appeal decision. I carefully scrutinised the submissions of both parties and I am inclined to agree with the submission of the appellant that the respondent ought to have made their objections formal as required by Rules 82 and 102(b) of the Rules of this Court which they did not do.

For the above reasons, I am unable to agree with the objections of the respondent and find no merit in them. I will find in favour of the appellant on this issue and resolve the same in the negative.

I will now proceed to consider the substantive grounds of appeal

Ground 1: The Learned Honourable Judge of the High Court erred in law in failing to find that the Petition filed in the Chief

Magistrate's Court Holden at Kajjansi was incompetent, incurably defective thus arrived at a wrong decision and contrary to the law?

5 **Submissions of the appellant.**

The appellant submitted that the reason why the original Petition was incurably defective is because the petition offended the provisions of **Section 137(1), 138(4) and 168 of the Local Government Act (LGA)**

10 The respondent did not file any submissions in reply.

I have cautiously considered the submissions, the law and the record of appeal. I am inclined to agree with the submission put forward by the appellant. It is undisputed that the respondent filed the petition at the trial court as a registered voter. It is also a fact that he did not
15 participate as a candidate in the election which he sought to challenge by way of the Election Petition No.5 of 2018. It is also not in dispute that the Electoral Commission made a decision to repeat the election afresh after failing to ascertain the results upon receipt of a complaint from a one Amir Kitandwe.

20 These are the facts as identified by the trial Magistrate and the 1st appellate Judge.

For ease of reference, I hereby reproduce the provisions of ***the Local Government Act (LGA)*** which provide for the filing of Election Petitions.

In ***Section 138 of the LGA*** it is enacted as follows;

5 ***Election petitions.***

138. Petition against a declared elected candidate.

10 ***(1) An aggrieved candidate for chairperson may petition the High Court for an order that a candidate declared elected as chairperson of a local government council was not validly elected.***

(2) A person qualified to petition under subsection (3) who is aggrieved by a declaration of the results of a councillor may petition the chief magistrate's court having jurisdiction in the constituency.

15 ***(3) An election petition may be filed by any of the following persons—***

(a) a candidate who loses an election; or

20 ***(b) a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency.***

(4) An election petition shall be filed within fourteen days after the day on which the results of the election

has been notified by the Electoral Commission in the Gazette.

Under **Section 137 of the LGA** it is enacted as follows;

5 **137. Declaration of results and reports by the Electoral Commission.**

(1) *The Electoral Commission shall, as soon as practicable after the election, ascertain, declare and, in writing under its seal, publish in the Gazette the results of the election in each constituency.*

10 (2) *The Electoral Commission shall, as soon as practicable after each general election, produce a detailed report on the conduct of the election.*

15 (3) *For the purposes of a report under subsection (2), every candidate at an election and every official agent of any candidate has the right to send to the commission a statement in writing containing any complaint that he or she may wish to make with respect to the conduct of the election or of any election officer and any suggestions with respect to*
20 *changes or improvements in the law that he or she may consider desirable.*

In **Section 168 of the LGA** it is enacted as follows;

168. Election petition for a village, parish or county.

An election petition relating to elections at a village, parish or county shall be filed in the magistrate grade I court having jurisdiction in that constituency.

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What is clear upon perusal of the above cited provisions of the LGA is that the respondent got the forum at which he filed the petition correct, that is, the Magistrate Grade One right as provided for under **section 168 of the LGA**. However, there were specific requirements of the law which he did not fulfil before he filed the Petition and this rendered the whole Election Petition incurably defective. The trial Magistrate was therefore right in dismissing it.

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The first requirement was that as a petitioner who was seeking to file an election petition as a voter, he ought to have filed the petition with the support of signatures of not less than five hundred registered voters as dictated by **section 138 subsection (3) paragraph (b) of the LGA**. This he did not do and was fatal to the whole petition. Furthermore, he ought to have filed the petition **within fourteen days after the day on which the results of the election had been notified by the Electoral Commission in the Gazette**. There was no proof of Gazette of the Results as at the time when the Election Petition No.5 of 2018 was filed. Therefore the petition was not only premature but also inherently incurably defective.

I do agree with the position of the trial Magistrate at **page 43 of the record of appeal** that the respondent having not been a candidate in the subsequent/fresh election he had no *locus standi* to lawfully/validly present an election Petition challenging that election as if he was a candidate. The respondent knew this and that is why he chose to petition as a registered voter but even then he did not fulfil the requirements of the law of filing the petition with the support of signatures of not less than five hundred registered voters.

I do agree with the reasoning of the appellate Judge in High Court Election Appeal No.11 of 2019 (**see pages 76A and 76B of the record of appeal**) that the law allows a registered voter to file an Election Petition but this right comes with requirements which the respondent did not follow, fulfil or comply with. Failure to do so rendered him as good as without *locus standi* to be before court.

I accordingly find that the 1st Appellate Court erred in law in failing to find that the Petition filed in the Chief Magistrate's Court Holden at Kajjansi was incompetent and incurably defective thereby arriving at a wrong decision inconsistent with the law.

I accordingly find merit in the first ground of appeal.

Ground 2: The Learned Judge of the High Court misdirected himself when he found that by virtue of section 60(2) of the Parliamentary Elections Act, 2005, the respondent was not precluded from exercising his right to petition hence arrived at a wrong decision.

The learned High Court Appellate Judge applied the provisions of **section 60(2) of the Parliamentary Elections Act** in finding that the respondent had a *locus standi* to file the Election Petition but which also requires a registered voter to only file a petition where they have the support of signatures of not less than 500 registered voters within the constituency. Therefore the learned appellate Judge erred in law when he found that the respondent had *locus standi* to file the petition and that the petition was validly and lawfully filed without satisfying himself whether or not the respondent had obtained the signatures of the 500 registered voters prior to filing the petition. The application of the provisions of the **section 60 of the Parliamentary Elections Act** was not necessary since the LGA had specific provisions on the matters before him.

I accordingly find that the learned appellate Judge of the High Court misdirected himself when he found that by virtue of **section 60(2) of the Parliamentary Elections Act, 2005**, the respondent was not precluded from exercising his right to petition hence arrived at a wrong decision

Consequently, I find merit in the second ground of appeal. For the reasons I have given, I am inclined to agree with the trial Magistrate who found the Petition incompetent and incurably defective for lack of *locus standi* to present the petition.

Ground 3: The Learned Honourable Judge of the High Court erred in law when he found that the appellant had indeed taken the decision to repeat the elections of chairperson Local Council 1

for Nsaggu Village but failed to hold that such decision could only be either appealed in accordance with Article 61(1) (f) and 64 of the 1995 Constitution or challenged by way of judicial review

- 5 Counsel for the Appellant submitted, and rightly so in my view, that the decision of the Electoral Commission should only be appealed to the High Court through the procedures laid down in **Articles 61(1) (f) and 64 of the 1995 Constitution.**

Article 61(1) (f) states as follows;

10 **61. Functions of the Electoral Commission.**

The Electoral Commission shall have the following functions—

(a) to ensure that regular, free and fair elections are held;

15 ***(b) to organise, conduct and supervise elections and referenda in accordance with this Constitution;***

(c) to demarcate constituencies in accordance with the provisions of this Constitution;

20 ***(d) to ascertain, publish and declare in writing under its seal the results of the elections and referenda;***

(e) to compile, maintain, revise and update the voters register;

(f) to hear and determine election complaints arising before and during polling;

(g) to formulate and implement civic educational programs relating to elections; and

5 **(h) to perform such other functions as may be prescribed by Parliament by law.**

Article 64 of the 1995 Constitution states as follows;

64. Appeals from decisions of the commission.

10 **(1) Any person aggrieved by a decision of the Electoral Commission in respect of any of the complaints referred to in article 61(f) of this Constitution may appeal to the High Court.**

15 **(2) A person aggrieved by a decision of the commission in respect of a demarcation of a boundary may appeal to a tribunal consisting of three persons appointed by the Chief Justice; and the commission shall give effect to the decision of the tribunal.**

20 **(3) A person aggrieved by a decision of the tribunal made under clause (2) of this article may appeal to the High Court.**

(4) A decision of the High Court on an appeal under clause (1) or (3) of this article shall be final.

(5) Parliament shall make laws providing for procedure for the expeditious disposal of appeals referred to in this article.

For avoidance of doubt I must state that **Articles 61(1) (f) and 64 of the 1995 Constitution** do not include powers of the Electoral Commission to make a decision after polling. It is also clear from my discussion of the issues in the other grounds of appeal above that the respondent as a registered voter in the constituency where the elections were held had a right to file an Election Petition but without the support of 500 signatures of registered voters, he had no locus standi to file the petition. It therefore follows that the appellant could challenge the results of the fresh election had he followed the right procedure.

There is no law that barred him from petitioning and the provisions of **Articles 61(1) (f) and 64 of the 1995 Constitution** do not bar him from filing the petition as long as he did comply with the conditions of doing so as a registered voter in the constituency.

However, the decision of the Electoral Commission to conduct a fresh election could only be challenged by way of judicial review or appeal in accordance with **Article 61(1) (f) and 64 of the 1995 Constitution.**

Polling means to vote at a polling station. The question then is at what stage of the electoral process should the complaint which was filed at the electoral commission arise? This is a question of fact and

page 23-30 of the Record of Appeal clearly shows the unchallenged evidence of the complaint record form which shows that the complaint was that a Parish supervisor ran away with registers of voters and coupons and no one knew where he had gone. This was also stated in the affidavit in support of the appellant Commission's Answer to the Petition (**see page 23 of the record of appeal**). This evidence casts doubt over the integrity of the register at polling. **Paragraph 7 of the appellant commission's affidavit in support of the answer to the petition** (see page 24 of the record of appeal) also demonstrated that polling never came to a conclusion and the results could not be ascertained. Therefore there was no basis to cause a gazette of results. In my view this was a complaint well within the mandate of the Electoral Commission and the electoral commission can entertain complaints on issues before and during polling even after polling has closed as long as the complaint relates to activities before and during polling.

Hence, I find that even after polling the electoral Commission can receive complaints on issues that may have arisen during polling as long as the results have not yet been gazette as was in the instant case. Therefore the appellant Commission was justified in law and in logic to have ordered a fresh election to be conducted.

It follows therefore that the respondent could only challenge that decision by appealing to the High Court or by way of judicial review. As a result I find merit in this ground of appeal as well.

Ground 4. The Learned Honourable Judge of the High Court failed to appreciate the Statutory Duty of the appellant of establishing, ascertaining, declaring and publishing the results in the gazette and arrived at a wrong decision and contrary to the law

The relevant provisions of the Local Government Act (LGA) state that

137. Declaration of results and reports by the Electoral Commission.

(1) The Electoral Commission shall, as soon as practicable after the election, ascertain, declare and, in writing under its seal, publish in the Gazette the results of the election in each constituency.

(2) The Electoral Commission shall, as soon as practicable after each general election, produce a detailed report on the conduct of the election.

(3) For the purposes of a report under subsection (2), every candidate at an election and every official agent of any candidate has the right to send to the commission a statement in writing containing any complaint that he or she may wish to make with respect to the conduct of the election or of any election officer and any suggestions with respect to changes or improvements in the law that he or she may consider desirable.

Section 168B LGA (as amended) states that;

168B. Electoral Commission to settle disputes.

For the avoidance of doubt the powers of the Electoral Commission to settle disputes in relation to elections under the Electoral Commission Act shall apply to elections at local councils.

Section 165 the LGA further provides that;

165. Action where elections are interrupted.

(1) Where the proceedings at any polling station are interrupted or obstructed by riot, violence or any other unforeseen impediment, the presiding officer shall adjourn the elections to a later time of the same day or till the following day and shall notify the returning officer.

(2) Where the poll is adjourned at any polling station, the hours of polling on the day to which it is adjourned shall be the same as on the original day.

Having found merit in the ground 3 of this appeal, it follows that had the High Court Appellate Judge appreciated the role of the Electoral Commission in **establishing, ascertaining, declaring and publishing the results in the gazette, and** its implications under the law, he would have come to a different conclusion on the grounds

of appeal. On the basis of the above cited provisions of the law, I accordingly find merit in the fourth ground of appeal as well.

Conclusion

5 In conclusion, I find merit in all the grounds of appeal. This appeal accordingly succeeds with the following orders;

- a. The appeal is wholly allowed
- b. The Judgment and orders of the High Court are quashed
- c. The Judgment and orders of the Trial Magistrate are reinstated
- 10 d. The respondent shall pay the appellant the costs of this appeal and in the trial court. No order as to costs is made in respect of the first appellate court since the matter proceeded *ex parte*.

I so order.

Dated this 15th day of Feb 2021.

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Stephen Musota.

JUSTICE OF APPEAL

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Hon. Catherine Bamugemereire JA, Hon. Stephen Musota JA, Hon. Muzamiru Mutangula Kibeedi, JA)

ELECTION APPEAL NO. 05 OF 2020

(Arising from High Court Election Petition Appeal No.11 OF 2019 & Original Election Petition No.05 OF 2018 of the Chief Magistrate's Court of Kajjansi at Kajjansi)

ELECTORAL COMMISSION:.....APPELLANT

VERSUS

SEREBE APPOLLO KAGORO:.....RESPONDENT

JUDGMENT OF HON. LADY JUSTICE CATHERINE BAMUGEMEREIRE

I have had the occasion to peruse in draft the Judgment of Musota JA. I am in agreement with the Decision and the Orders as proposed.



**Catherine Bamugemereire
Justice of Appeal**

15 - 02 - 2021

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Catherine Bamugemereire, Stephen Musota & Muzamiru M. Kibeedi, JJA)

ELECTION APPEAL NO. 05 OF 2020

*(Arising from High Court Election Petition Appeal No.11 OF 2019 & Original Election
Petition No.05 OF 2018 of the Chief Magistrate's Court of Kajjansi at Kajjansi)*

ELECTORAL COMMISSION:.....APPELLANT

VERSUS

SEREBE APPOLLO KAGORO:.....RESPONDENT

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by My Lord, Stephen Musota, JA. I concur with the reasoning and Orders he has proposed.

Dated at Kampala this 15th day of Feb 2021



Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL