THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

ELECTION PETITION NO. 0009 OF 2011

YERI OFWONO APOLLO…….....…….……..……..PETITIONER

VERSUS

1. TANNA SANJAY }

2. THE ELECTORAL COMMISSION}…….....……RESPONDENTS

JUDGMENT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOOKI

Introduction:

This petition was brought by Yeri Ofwono Apollo challenging the validity of the results of the Parliamentary Election held in Tororo Municipality Constituency on 18th February 2011. The final result of the election in this constituency declared Mr. Tanna Sanjay the 1st Respondent herein as the winner with 7578 votes.

The Petitioner challenged the nomination and subsequent election of the 1st Respondent arguing that the 1st respondent's academic qualifications, which were certified by the National Council for Higher Education, did not meet the minimum academic requirements of a parliamentary election candidate in Uganda. He contended that the Electoral Commission, the 2nd respondent herein, failed in law to exercise its duty properly under the Constitution by not thoroughly researching the 1st respondents academic certificates referred to in his nomination papers. The petitioner contended that the nomination was null and void since the 1st respondent did not present valid academic qualifications of Advanced Level Standard or its equivalent.

The petitioner further contended that the election was characterized by numerous election malpractices and/or illegal practices, and was not conducted in compliance with the

applicable electoral laws, which non-compliance affected the elections result in a substantial manner.

The petitioner contended that the 1st respondent by himself and by his agents publicly and maliciously made defamatory statements about the petitioner. He claimed that these statements were false, were actuated by malice, and had the effect of unfairly promoting the election of the 1st respondent in preference of the petitioner.

The petitioner further contended that he was portrayed as incompetent in English and was, by necessary implication, unable to carry out functions of the demanding office as a Member of Parliament.

The petitioner also contended that the 1st respondent, personally and by his agents and with his knowledge and consent or approval, forged the letter and forged the minutes of a purported meeting which the petitioner allegedly chaired. The petitioner contended that these documents were completely fictitious and were created with the intent to incite the voters and the public against the petitioner.

In addition, the petitioner alleged that there was widespread bribery by the 1st respondent himself and by his agents with his knowledge consent or approval.

In response, the 1st respondent denied being unqualified for election as a Member of Parliament and denied engaging in any illegal practices or election offences, or indeed consenting to their commission by other persons on his behalf. The 1st respondent contended that he was investigated by the 2nd respondent and that the petitioner has no legal basis to contest. He contended that he had previously defeated the petitioner in an earlier contest.

The 1st respondent further contended that he studied at Makerere College School and that this was verified by the Uganda National Examination Board (UNEB) in writing. The 1st

respondent also answered that at no time during the electoral process did he publicly and/or maliciously make the alleged defamatory statements against the petitioner.

He also contended that he had no knowledge of the author or validity of the letter and alleged meeting minutes that the petitioner claimed were circulated. The 1st respondent contended that he held the petitioner responsible for the origin and consequences of the letter and meeting minutes, and that he was not accountable for them. He contended that the publication of the alleged letter was not within his knowledge, consent, or approval. The 1st respondent denied bribery and contended that no bribery of voters occurred in the election for his benefit, by himself or by his agents with his knowledge and consent or approval.

At the hearing of the petition, Hassan Kamba together with Muhumuza Kaahwa and Joseph Kyazze represented the petitioner. Alfred Okello Oryem represented the 2nd respondent, and together with Edmund Wakida also represented the 1st respondent.

Agreed Facts.

At the scheduling conference, the following facts wee agreed.

1. On 18th February 2011, general elections for Tororo Municipality constituency were held by the 2nd respondent in which the petitioner and 6 others contested. The 2nd respondent declared the 1st respondent as the winner of the elections.
2. The 1st respondent was registered as a voter, nominated as a candidate and elected as MP as Tanna Sanjay.
3. At nomination the 1st respondent presented in support of his nomination 'O' and 'A' level certificates of academic qualifications plus verification of results from UNEB in the names Tanna Gokaldas Sanjay.
4. The 1st respondent holds a passport No. GA002937 issued by the Republic of Uganda in the names of Tanna Sanjay Kumar Gokaldas issued on 30th October 2001 and due to expire on 30th October 2017.

Issues:

The following issues were agreed for determination by court;

1. Whether the 1st respondent was, at the time of his nomination and election, possessed of the minimum academic qualifications for election as a Member of Parliament?
2. Whether the 1st respondent personally, or by his agents with his knowledge and consent or approval, committed the alleged electoral offences.
3. Whether the petitioner is entitled to the remedies sought.

Standard of Proof:

Section 61(3) of the Parliamentary Elections Act explicitly sets the standard of proof in election petitions at proof on a balance of probabilities. It is now settled law that the burden of proof lies with the Petitioner. This position has since been affirmed by Odoki CJ, who in *Kiiza Besigye v. Yoweri Museveni Kaguta & Anor,* Election Petition No. 1 of 2001 held:

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

Thus, a petition will only succeed if the burden of proof is met to that degree, on a balance of probabilities.

Issue No. 1: Whether the 1st respondent was, at the time of his nomination and election, possessed of the minimum academic qualifications for election as a Member of Parliament?

Article 80(1)(c) of the Constitution addresses the issue of academic qualifications of candidates in a Parliamentary election, and qualifies an individual to be a Member of Parliament if that person 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*'.

In the present case, the 1st respondent stated in para. 7 of his reply to the petition and affirmed in para 12 of his affidavit dated 30th March 2011, that he obtained his advanced level certificate in Uganda, so there is no need to verify his qualifications.

The 1st respondent attached to his affidavit a letter dated 9th January 2006 from UNEB addressed to the Returning Officer, Tororo in which UNEB verified that Tanna Gokaldas Sanjay was a person who sat for 'A' level in 1992 at Makerere College School. The results were shown, as well as the index number. Also attached was a certificate issued by UNEB answering to the details shown in the above letter. It was agreed that the 1st respondent presented the above documents as his academic qualifications at the time of nomination.

However, the petitioner makes his claim on the grounds that there is a variation between the names on the nomination paper and the voters register on the one hand, and the academic papers which he presented on the other. While the 1st respondent was registered as 'Tanna Sanjay,' his passport obtained in 2007 contains the name of 'Tanna Sanjay Kumar Gokaldas.' The Petitioner argues that there is suspicion that this variation in name indicates the falsehood of the academic certificates.

It was submitted that the 1st respondent could not be the owner of the academic papers he presented because, apart from the variation in names, there was the problem of the years he claimed to have attended the various schools. Evidence was from the 1st respondent's manifestos. In the one marked 2006 – 2011, exhibit P3 it was stated at the back that the 1st respondent went to Kololo Nursery school from 1976 to 1979. From 1980 to 1986 he was at Kitante Primary school. From 1987 to 1992 he was at Makerere College School for 'O' and 'A' level.

The exhibit P2 which was the 1st respondent's manifesto marked 2011 – 2016 at the back thereof, the information provided is thus;
1976 to 1979 Kololo Nursery School. From 1980 Kitante Primary School. 1985 sat for PLE. 1986 to 1992 Makerere College School for 'O' and 'A' level.

It was argued that the information is not similar. That is correct. It was not pointed out to me what value court ought to put on a political manifesto of a candidate. I did not put any

weight on evidence from such a document. There was no cross examination to show its authenticity, and the truth of whatever was referred to therein.

It was argued that the person named in the said manifestos could not have attended the various schools as indicated as the years could not match the various levels and standards of those schools. That was evidence from the bar, and is not acceptable. There was no evidence that a person in the schools as indicated could not have completed and attained the grades and certificates claimed by the 1st respondent.

There was no evidence to show that a person could not enter and remain at a nursery school at the age of 3 years. There was no evidence that a person could not sit for PLE in 1985 having joined the primary school in 1980 i.e. a period of 6 years, depending on the level at which one joined. There was no evidence that one joining O level in 1986 could not sit for those exams in 1989 i.e. after the 4 years, or that one could not do A level exams thereafter in 1992.

The arguments about the period when the various examinations were or were not one was pure conjecture. The Evidence Act in Section 101 provides that whoever desires court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove that those facts exist. The burden of proof lies on that person. The petitioner did not discharge the burden in respect of the allegations he made in respect of the above matter.

The bigger matter was on the discrepancies in the names. It was submitted that the evidential burden shifted to the 1st respondent once his academic qualifications were questioned. The case of *Balingira v. Nakendo Patrick Mwondha* E.P. No. 9/2007 (SC) was cited in support.

In answer to the variation of names where the 1st respondent in nomination papers did not add the name Gokaldas, which appears in the academic papers which he presented, and in the passport in which a yet other name of Kumar was added, the 1st respondent stated that

these are all names he goes by. Kumar is a title meaning ‘sir’, while Gokaldas is his father’s name.

The evidence on record was that the 1st respondent was the MP for this constituency in the outgoing parliament. The evidence adduced by the petitioner was that the 1st respondent was known as and went by the names of Tanna Sanjay in that parliament. Admitted evidence in this petition was that the 1st respondent was the holder of Uganda passport No. GA002937, issued on 30thOctober 2007. This passport was issued during the currency of the parliament in which he was a member. That passport is still valid. There has not been any question as to whether the holder of that passport is masquerading in the names of another person. The names in that passport are Tanna Sanjay Kumar Gokaldas.

It was pointed out and rightly so that a passport is a document of identity. It is not issued lightly or without the necessary checks on the identity of the recipient, as it fully identifies the holder as a citizen of Uganda both in and outside the country. It is a symbol and proof of citizenship. There was no dispute that the holder of that passport is the 1st respondent. There was no dispute that that is the person who was nominated for and was elected as a member of parliament for Tororo municipality. That is the person who is known as and goes by the names of Tanna Sanjay.

The question then to me is whether the documents he presented were valid, and if so referred to him. The evidence from the school where the 1st respondent claims to have attended both ‘O’ and ‘A’ level Makerere College School, through its Headmistress wrote a letter to UNEB asking for the certification of the results of Sanjay Tanna, exhibit P9. UNEB the autonomous body which is mandated to answer and report on examination results wrote a verification to the Head teacher of Makerere College School certifying the results of Tanna Sanjay Gokaldas exhibit R6. Exhibit R7 is another certification by UNEB of the results of Tanna Gokaldas Sanjay in respect of his ‘O’ level results at the same school. That certification is dated 18th January 2011. Exhibit R9 is a verification of the same results from UNEB dated 19th July 2011.

There is no difference in the names on the 'O' and 'A' level certificates. That distinguishes this case from the case of *Serunjogi James Mukiibi v. Umar Lule Mawiya* EP No. 15 of 2006, which learned Counsel for the petitioner put so much reliance on. There were no allegations or proof of fraud in this case, which further distinguished it from the *Umar Lule Mawiya* case (supra). There was no person who claimed to be Tanna Sanjay or Tanna Gokaldas Sanjay or Tanna Gokaldas Kumar Sanjay, since the documents bearing some or all of those names were tendered to the Returning Officer in Tororo, or up to the time of hearing this petition.

There was no evidence adduced before court of the existence of any person claiming to own those names. Again this distinguishes this case from that of *Umar Lule Mawiya*, where at the trial evidence was led, and it was neither denied nor controverted of the existence, during the appellants school days of a student who went by the initials SMJ, which were now being claimed by the appellant.

The above shows that a person named Tanna Gokaldas Sanjay sat for 'O' and 'A' level exams at Makerere College School and obtained the grades shown in the respective certificates and letters of verification. These are the documents which the 1st respondent presented at nomination in proof of his academic qualifications. I have already found that the person named Tanna Sanjay and so known from the voters register, the statement on oath and even in the outgoing Parliament, also goes by the names Tanna Sanjay Kumar Gokaldas as shown on his valid Uganda passport.

I may, before leaving this matter add that the purpose of the law regarding names is intended to prevent the confusion of voters so that they may freely exercise their right to choose their Member of Parliament. It seems unreasonable to infer that the variation in the use of names in this case confused the registered voters in this municipality.

The petitioner failed to prove on a balance of probabilities that the 1st respondent was not qualified to be elected as a member of parliament. That answers the 1st issue.

Issue No. 2: Whether the 1st respondent personally or by his agents with his knowledge and consent or approval committed any illegal practices.

The Petitioner's case on this issue was that the 1st respondent personally or by his agents, with his knowledge and consent or approval, committed numerous election offences and illegal practices. The election offences and illegal practices complained of in the petition include bribery and defamation of the petitioner. These allegations were all denied by the 1st respondent.

Bribery.

Bribery is defined in section 68 of the Parliamentary Elections Act to include influencing voter(s) by way of gift, money, or other consideration; while defamation as libel is defined as a false statement that exposes a person to distrust, hatred, ridicule or obloquy. Proof of the commission of illegal practices or election malpractice is a matter of fact that must be sufficiently proved as such. The totality of the evidence must be considered to determine whether the alleged offences were indeed committed as pleaded or at all.

Bribery as an electoral offence was dealt with extensively in *Kizza Besigye v. Y.K Museveni* (supra) and also in *Mathina Bwambale v. Crispus Kiyonga* EP No. 7 of 2007. Three things must be satisfied;

1. A gift must be given to a voter.
2. The gift must have been given by a candidate or his or her agent with his or her knowledge and consent or approval.
3. The gift must have been given with the intention of inducing the recipient to vote or not to vote for a particular person.

A single incident of bribery is capable of nullifying an election. Such is the seriousness of electoral offences that courts look at them with close scrutiny.

It should be noted that in accordance with the law, evidence in election petitions from both parties is by way of affidavits. Given the highly polarised nature of election petition disputes, it must be accounted for that there is a possibility of the introduction of

untruthful and possibly non-existent evidence. Mulenga JSC alluded to this in the case of *Besigye v. Museveni & Anor* (supra), when he observed thus:

> "An election is a highly politicised dispute arising out of a highly politicised contest. In such a dispute, details of incidents in question tend to be lost or distorted as the disputing parties trade accusations, *each one exaggerating the others wrongs*, while *downplaying his or her own*. This is because most witnesses are the very people who actively participated in the election."

This is not untrue in the present case, as the petitioner was the runner-up of the election which the 1st respondent won. Both the respondent and petitioner presented several dozens of affidavits.

The incidents of bribery complained of are said to have taken place at the residence of the 1st respondent and at his shop. Deponents in this respect included Opio Godfrey, Awada James opwoya, Nambozo Annet, Akongo Esther Rose. Suneka Ibrahim stated that on polling day, she was given money at 1st respondents shop, together with some 68 fellow Somali women. Nyamange J. received the money from the 1st respondent directly at his residence. She was led there by Samaki. She later went there as part of her village group of Bison Mugaira, where they all wined and dined and got money from the 1st respondent. Athieno Irene got money from the 1st respondent's home on 4th January 2011. Jennifer Wangara also went to the 1st respondent's residence on 18th January 2011 among other market vendors, and got money.

The petitioner in para 14 of his affidavit in support stated that he never saw the 1st respondent at any rally, but that he would send lorries to his rallies after he (the petitioner) had left and ferry those present to his residence, where he would bribe them and defame the petitioner. The petitioner deposed to matters which at best can be described as hearsay, as he readily admitted he never saw the 1st respondent. He did not disclose the source of his information. That paragraph of his affidavit was clearly inadmissible. The petitioner never witnessed any bribery or defamation taking place.

Owori Peter who was a candidate in the same contest for election as an MP. He deposed in para 6 of his affidavit that he never went inside the residence of the 1st respondent, but whenever he was passing by that residence, he would see money being distributed to groups of people.

That could not be the kind of evidence of bribery being sought to be relied on to prove an electoral offence. A passerby sees money being given out to people, and that constitutes bribery? Who were these people, who was giving them the money, and for what purpose? Were they voters? All these questions were unanswered by the witness. And to cap it all, he was one of the losing candidates in the same election. His evidence would therefore be considered with caution.

Opio Godfrey deposed that on 13th February 2011 all the teachers and staff of Manjansi High School were invited to the residence of the 1st respondent. The invitations were distributed by a geography teacher one Mudega.

The 1st respondent filed affidavits in which the incidents of bribery were denied. Deponents included Rutaisire, Naigaga Kemba, Roselyn Nabirye, Mudaga Charles, Emokor Geoffrey and Wafula Rashid. Aziz Mbubi denied that 68 Somali women were bribed. Mama Yudaya denied receiving shs 1 million on behalf of their association as alleged. Indeed deponents of affidavits by the petitioner conceded that she was not at that meeting. The Chairperson of the Market Vendors Association denied that Samaki mobilised market vendors and took them for a meeting at the residence of the 1st respondent.

Five Head teachers and other teachers denied attending the alleged meeting of all teachers and head teachers in the municipality, at the residence of the 1st respondent at which money was given. These included Mangula Vincent Wangale head teacher of Tororo College Primary School, Imai Julius Onyapidi head teacher of Morukatipe View Primary School, Washambe David head teacher of Chamwinula Primary School.

Attendance Registers were brought to show that on the material day, the teachers who allegedly went for the meeting were as a matter of fact at their respective schools. Dinah Rose produced a register showing that Annet Nambozo could not have attended the meeting at the residence of the 1st respondent, as she was at school. Nandudu Rebecca did the same in respect of Akongo Rose Esther.

In the present case, court was faced with two contradictory sets of evidence. There were allegations by the petitioner and rebuttals by the 1st respondent. This is not entirely unexpected in election petitions. What court would then rely on is other evidence to establish what exactly happened.

The evidence of both parties is, in its entirety, quite subjective and cannot be relied upon without testing its authenticity from a neutral and independent source. In *Mbayo Jacob v. Electoral Commission & Anor* Election Petition Appeal No. 7 of 2006, Byamugisha JA, alluded to such subjectivity when she said of evidence in election petitions that:

> "Some other evidence from an independent source is required to confirm what actually happened."

It is not so much the numbers of affidavits filed, but rather the consistency and credibility of the evidence adduced in such affidavits that court will rely on. The burden is on the petitioner to adduce such credible and consistent evidence to prove on a balance of probabilities his allegations. In the present case there was no independent evidence, let alone credible and consistent evidence. The burden of proof was thus not discharged.

Defamatory statements.

In para 6 of the petition, it was alleged that the 1st respondent made statements about the petitioner which were defamatory. These were cited as the following;

> 'An ugly man to the heart, was a racist who was inciting the Japadholas and Christians against non Japadholas and Muslims respectively, was illiterate in the queens language (English) and he called the municipality 'mini spirit'.

Para 8 of the petition stated thus;

> ‘The humble petitioner further states that the 1st respondent also personally and by his agents with his knowledge, consent and approval uttered a forged letter dated 12th February 2011 and purported minutes of a purported meeting allegedly chaired by me to the effect that; ...’

There followed the minutes of the meeting and the letter.

The deponents in support of the petition stated that at the various meetings at his residence, the 1st respondent always repeated the quoted words or words to that effect, and that he would wave around and distribute the letter and minutes of the alleged meeting.

In the reply to the petition, the 1st respondent denied ever making statements which were defamatory of the petitioner. He stated that he had no knowledge of the author or correctness of the letter and minutes. He stated that the matter was brought to his attention by the RDC of the District.

There was an allegation that the 1st respondent called the petitioner unschooled in the Queens language. In answer thereto, the 1st respondent stated that he only mentioned the fact that the word municipality was misspelt as ‘municipality’ on the petitioners posters. A copy of such poster with the misspelt word was exhibited, exhibit R11. There was no evidence that the poster did not belong to the petitioner. There was an attempt from the bar to describe it as a scanned document. But that was inadmissible evidence.

The evidence of the defamatory words, just like the incidents of bribery were made by those in support of the petition. Responses in denial were made by those in support of the 1st respondent. What was clear from the evidence in this regard from both sides was that the 1st respondent was not the author of the letter and the minutes. The allegation against him was that he uttered the defamatory words and the contents of the letter and that he distributed the same particularly by his agents.

Virtually all those who were named as agents of the 1st respondent, and therefore responsible for the distribution or circulation of the letter, or giving out coupons by which masses were invited for the infamous 'wine and dine and money' sessions at the residence of the 1st respondent denied being so. There was no other evidence to controvert that denial. No letter of appointment of agent was produced in respect of any of these persons. The law requires that each agent of a candidate be given a letter appointing such person as such.

Several affidavits indicated that the respondent called the petitioner "evil" and "illiterate." However, in the 1st respondents answer, he indicated that he did not call the petitioner any names, nor made any defamatory statements against him. There were some inconsistencies on both parties ends as to persons present and events which purportedly transpired over the course of the electoral process. One affidavit presented by the petitioner accounts for an individual who was present at a meeting at the 1st respondents home, but a contradictory affidavit was presented by the 1st respondent by the aforementioned individual indicating that he was not present at the said function.

There was no proof that the words defamatory words were indeed uttered or that the letter and its minutes were distributed by the 1st respondent or his agents with his knowledge and consent or approval. That allegation was not proved to the satisfaction of court on a balance of probabilities. On the whole, the 2nd issue therefore fails and is dismissed.

The 3rd issue was on remedies. In view of my holding in the 1st and 2nd issues, the 3rd issue is rendered irrelevant.

I already alluded to Section 101(1) of the Evidence Act which provides that whoever desires any court to give judgment as to any legal right, dependant on the existence of facts which s/he asserts must prove that those facts exist.

It is now settled law that the burden of proof in election petitions lies with the petitioner. See *Besigye vs. Museveni & Anor* (supra). Section 61(1) of the same act provides that

such proof should be *to the satisfaction of the court*, and it should be discharged *on a balance of probabilities.*

I agree with the holding that election petitions should be determined on a high degree of probability, as enunciated in the case of *Karokora Katona Zedekia vs. Electoral Commission & Kagonyera Mondo*, where Musoke-Kibuuuka J. observed that:

> "Setting aside an election of a Member of Parliament is, indeed, a very grave subject matter. It is a matter of both individual and national importance. The decision carries with it much weight and serious implications…the crucial need for courts to act in matters of this nature are only in instances where the grounds of the petitioner are proved at a *very high degree of probability*." (emphasis mine).

Thus, in the event of reasonable doubt as to the probability of the allegations pleaded, a petition (or ground thereof) should be disallowed.

As indicated above, I was not satisfied that the petitioner proved the allegations in the petition to the required standard. In the premises, the petition is dismissed.

Ordinarily a winning party will be entitled to costs unless court for reasonable cause decides otherwise. In this case, the issue of the academic qualifications of the 1st respondent was a matter of great concern to a section of the voters in this constituency. Efforts to resolve the same started well before the date of the elections. The 2nd respondent attempted to settle it, but obviously there was dissatisfaction by some of the parties. It was therefore important that such an issue comes before court for final determination.

There was also talk of tribal sentiments as intruding in the matter of the election of the Member of Parliament for this constituency. Such need a lot of mending. To award costs against the petitioner would not be a way of ameliorating such concerns.

I therefore order that each party shall bear their own costs.

Rugadya Atwooki

Judge

25/07/2011.