

OURUM OKIROR SAM :::::::::::::::::::: **PETITIONER**

VERSUS

2. OCHWA DAVID ::::::::::::::: RESPONDENTS

In conclusion, the petitioner avers that the election was conducted without compliance to the provisions of the Parliamentary Elections Act and the Electoral Commission Act, which non compliance with the provisions of the law affected the results of the elections in a substantial manner to the direct benefit of the 2nd respondent.

The petition is supported by the affidavit of the petitioner and several other voters in the constituency and prays that the election for Member of Parliament Agule Constituency, Pallisa District and subsequent declaration of the 2nd respondent as winner be set aside as an invalid election, an order for a fresh election be issued and costs of the petition be provided for.

In answer to the petition, the 1st respondent contended that the elections were conducted in accordance with the principles of transparent, free and fair elections laid down in the laws of Uganda and as a result the results from the Agule Constituency reflect the true will of the majority of voters.

In the alternative, it is argued for the 1st respondent, if there were any irregularities and non compliance with Electoral laws, such non compliance or irregularities did not affect the outcome of the election in a substantial manner. The 1st respondent's answer to the petition is accompanied by the affidavit of Dr. Badru Kiggundu the Chairperson of the 1st respondent.

The 2nd respondent in his answer to the petition states that he won the election in Agule Constituency, which was conducted in compliance with the provisions and principles of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act.

The 2nd respondent specifically denies the illegal practices and electoral irregularities alleged and further states that neither were they committed with his knowledge, consent or approval. His answer to the petition is accompanied by his affidavit and those of several other voters.

Both respondents asked court to dismiss the petition with costs.

The petitioner was originally represented by Ms Lukwago and Co. Advocates but later represented himself in submissions.

The 1st respondent was represented by Counsel Martin Asingwire and Robert Okalang while the 2nd respondent was represented by Counsel Okello Oryem.

During the course of filing pleadings, the petitioner wrote two letters of complaint to court stating that his witnesses were being rounded up, wooed, convinced, lured, intimidated, hosted at Country Inn Pallisa and ordered to change their witness. The petitioner made the same allegations at the hearing of the petition. Court advised the petitioner to file a complaint with the Police.

Indeed a number of witnesses who deponed to affidavits in favour of the 2nd respondent eventually recanted and swore affidavits in favour of the 2nd respondent.

At the scheduling conference, the parties agreed on the fact that a parliamentary election was conducted on 18th February, 2011, the petitioner, 2nd respondents and others were candidates in the election in which the petitioner polled 7075 votes while the 2nd respondent polled 10,614 votes and was declared and gazette winner.

There were four issues which the parties agreed upon:-

- Whether the election was not conducted in accordance with the law.
- Whether the non compliance affected the results.
- Whether the 2nd respondent committed the alleged illegal practices or electoral offences.
- Whether the petitioners are entitled to the remedies sought.

The parties agreed not to call any witnesses for cross examination. They agreed to make oral submissions on 19-21 July, 2011, which they eventually did on 20th July, 2011.

In view of the contradictions in the affidavit evidence of more than fifteen witnesses, some of the contradictions touching on the credibility of Commissioners for Oaths Kenneth Omoding and Sebastian Angeret, court decided to summon them as officers of court to shed some light on the circumstances surrounding the commissioning of those affidavits.

Unfortunately the two Commissioners decided to ignore the summons and did not even have the courtesy to explain to court why they chose to stay away. It was agreed by all the parties that their presence be dispensed with so that the hearing of the petition continues. The parties however agreed with court that the conduct of the two Commissioners for Oaths be followed up, which court undertook to do.

The petitioner as earlier indicated informed court that his lawyers had not been able to attend and therefore asked and was permitted to represent himself. He opened by stating that it is trite law that the petitioner bears the burden of proof and that the standard of proof in election petitions is that of balance of probabilities.

On issue number one, he first delved into a matter that he claimed goes to the root of the petition. That matter referred to being that of examining the effect of the change of heart of the petitioner's witnesses. He stated that since his witnesses had changed and deposed affidavits in favour of the 2nd respondent this act went to the authenticity and truthfulness of their evidence. He put the number of his witnesses who had recanted to 24 out of 33.

He went to great lengths to explain that the witnesses indeed deposed their affidavits in his favour in the first instance and that their subsequent affidavits in favour of the respondents were untruthful and unreliable. He ultimately invited court to believe their first affidavits in favour of the petitioner and disbelieve the later affidavits sworn in favour of the 2nd respondent.

The petitioner went into a detailed analysis of one by one of the affidavits and why their subsequent affidavits should be disbelieved because their averments comprise a pack of lies. Finally on this matter he pointed out that the affidavit of Badru Kiggundu was purported to have

been affirmed in Jinja a fact which he doubted since he found it difficult to believe that the Chairperson could have traveled from Kampala just for that fact.

On the substantive issue number one on whether the election was not conducted in compliance with the law, he contended that it was not. As evidence of this he referred to affidavits which highlighted issues of disenfranchisement of voters, failure to control use of ballot papers, voting by non registered voters, violation of the principle of secret ballot, failure to record complaints by election officials, improper counting and tallying of results and failure to provide lighting as required by law.

On issue number two whether the non compliance with the law affected the results, the petitioner stated that instances of non compliance affected several polling stations in Adodoi, Kadodio, Gogonyo, Agururu and Ogute. The sum total of all this non compliance, he argues, being that all sub counties were affected by instances of non compliance with the provisions of the law.

As further evidence of this he points out that the District returning officer, Pallisa District admits in his affidavit that 5 out of 65 polling stations' Declaration Forms were not signed by polling agents. Consequently the total outcome of the election was affected to the effect that had the election been conducted in a proper manner the results would have been different.

Issue number three was whether the 2nd respondent committed illegal practices and electoral offences. The petitioner outlined a litany of offences ranging from bribery using salt to bribery using money to offering voters transportation on Election Day, contrary to the Electoral Commission Act and the Parliamentary Elections Act, as contained in affidavits of diverse witnesses.

In conclusion, the petitioner contended that since election petitions involve many stakeholders the non compliance and illegal practices and electoral offences pointed out all call for nullification of the election. He therefore prayed for the setting aside of the election, ordering of fresh elections in Agule Constituency and for payment of costs by the respondents.

Counsel Okello Oryem for the 2nd respondent agreed with the petitioner's statement of the law regarding the burden of proof and standard of proof. He cited the **Election petition No. 9 of 2002 Masiko versus Babihuga** to state that the standard of proof must be proved beyond a balance of probabilities.

On the affidavits recanted by their owners counsel and summarized them into three:-

- The deponents swore regarding the allegations raised but subsequently recanted meaning that the petition is without merit.
- Alternatively, the deponents are saying two differing things at the same time. They are therefore not witnesses that a court of law can rely on which boils down to the fact that the allegations in the petition are not supported by evidence.

- In the absence of independent evidence therefore, there is nothing to evaluate and nothing to prove the petition.

On the remaining affidavits that were not recanted, Counsel states that they, including the petitioner's own, are arguing with the petitioner's own other witnesses. Moreover the argument is not on what happened in the constituency but about the process of affidavits, which leaves court with nothing to base a decision on.

Since court has two different positions by the same witnesses, counsel argues that cross examination would have assisted court to establish which version of affidavit to believe but the petitioner did not ask for cross examination. In the circumstances, he argues, it is logical to believe the latter affidavits since they are the latest.

On issue number three Counsel cited the case of **Opio John versus Ogolla Election Petition No. 19 of 2006** where Bamwine J held that illegal practices must be proved with clear and unequivocal proof. That there must be proof of the fact that recipients of the bribes were registered voters, evidence of their names, registration numbers and polling stations must all be availed before such evidence can be taken as being clear and unequivocal.

Counsel then proceeded to discredit the deponents one by one stating that they were either stating hearsay by alleging that salt was given to their wives or had recanted. The evidence on bribery by salt was therefore not cogent and was sufficiently rebutted.

The same was the case for the allegation of bribery by saucepan and plate donations and transportation. No particulars of voters who were transported by who or that it happened with the respondent's approval or consent has been sufficiently adduced.

Counsel argued that in conclusion of issue number three the allegations of illegal practices were all disowned and what is left is not cogent at all and therefore since court must be left in no doubt of the allegations in order to make a finding for the petition, in this case the court has no evidence to rely on.

On issue number two Counsel contended that the case of **Kiiza Besigye versus Museveni** and section 61 (1) (a) of the Parliamentary Elections Act bring out the fact the law does not assume that elections will be perfect. Therefore failure to comply one hundred percent with the provisions of the law is not enough to invalidate an election unless the outcome was affected in a substantial nature.

He further cited the case of **Masiko versus Babihuga** to elaborate on the qualitative and quantitative tests required to be proved before an election can be overturned. He concluded that even if court found that there was sufficient evidence to sustain the case for the election failing to pass the qualitative test this in itself did not affect the results in a substantial manner.

He highlighted the public importance of an election and called upon court not to set it aside on flimsy grounds and trivial issues. The petitioner therefore, in his view, failed to discharge the burden of proof placed upon him and therefore the petition should be dismissed with costs.

Counsel for the 1st respondent, Robert Okalang and Martin Asingwire associated themselves with the submissions of Counsel for the 2nd respondent. They point out that most of the petitioner's affidavits were recanted by their owners and the remaining ones are full of hearsay evidence.

Further that given the range of votes between the winner, the 2nd respondent, and the petitioner 3500 no evidence has been adduced to show that non compliance affected the results in a substantial manner. Counsel Okalang cited the case of **Mbowe 1967 EA 240** to highlight the burden the petitioner needs to discharge if he were to move court to find in his favour.

On the doubt cast on Badru Kiggundu's affidavit, counsel cited the cases of **Uganda Cooperative Creameries versus Liamton CA No. 44 of 1998** and the case of **Gordon Sentiba versus IGG CA No. 14 of 2007, 2008 HCB, 85** to show that Oaths can be taken anywhere in Uganda and that naming the place though mandatory was just procedural and should not stand in the way of substantive justice.

He also asked court to consider the case of **Kadama Mwogeza versus Wambuzi Gaggawala** when considering the issue of bribery.

In conclusion, counsel asked court to find that the petition is supported by hostile witnesses who cannot be relied upon. Since a petition without supporting affidavit collapses the petition should be allowed to collapse.

The petitioner in final reply reiterated his prayers for the invalidation of the election. He prayed court to find that he had amply discharged the burden of proof beyond a balance of probabilities. He called upon court to rely on his remaining witnesses who had not recanted to grant his prayers.

The practice of witnesses in election petitions switching sides is becoming too common. The fact that they can state one thing on oath one day state a contradictory thing on oath the next day portends very bad news for the state of law and order in the country. It is easier to believe that one of the affidavits was not deposed by the same individual yet there is no way of establishing this unless Police takes up the matter and investigates it fully.

The court cannot engage in that role. As I advised the petitioner to report the matter to Police when he raised the issue of his witnesses being intimidated, so I do now, as a court, refer this particular issue to Police for investigations. This practice should not be left to flourish as if it were normal. The Registrar will therefore refer the matter of the more than twenty witnesses who claimed to have been impersonated or whose Oaths were purportedly taken in their absence or without their knowledge or involvement to Police for investigations and further management.

As far as this petition is concerned, I agree with Counsel for the 2nd respondent that for a court of law to rely on the evidence of such witnesses would be untenable. The credibility of a witness who appears on both sides of the case, stating contradictory statements is left considerably compromised. The safest course of action for court to take is to completely disregard his/her evidence and so I do.

The affidavits and evidence of the petitioner's witnesses except the following will therefore not be considered as credible in this election petition:-

- Ourum Sam Okiror
- Okurut Michael
- Okia Lawrence
- Apunyo Daniel
- Ogolet Bosco
- Otule Sam
- Omunyokol Stephen
- Omasei Bosco
- Ikobot Simon
- Odiit Charles and Okwatum Charles.

The affidavit of Badru Kiggundu was attacked by the petitioner for possessing some inconsistencies. These inconsistencies included changing the place of commissioning from Kampala to Jinja and therefore the likelihood of the affidavit having been commissioned in Jinja but in the absence of Badru Kiggundu. This is a very likely possibility but there is no evidence for court to base on to uphold such a possibility. The affidavit therefore stands.

Issue number one is whether there was non compliance with the law in conducting the elections in Agule Constituency, Pallisa District. The petitioner has listed disenfranchisement, failure to control use of ballot papers, allowing non registered voters to vote, violation of the principle of secret ballot, failure to record complaints, improper counting and tallying of results and lack of lightning as some of the instances of non compliance that were exhibited during the election. These instances of non compliance contravened sections of the Electoral Commission Act and the Parliamentary Elections Act.

My scanning of the affidavit evidence shows that there is no single supporting affidavit on this issue except that of the petitioner himself. The others were all disowned by their makers and as

already agreed they have been disregarded. The petitioner does not purport to have witnessed any of the infractions complained of. Almost all of his affidavit evidence is based on somebody else's experience.

The affidavits of Ogwatum Charles, Okurut Michael and Okello Okiria Thomas, which would otherwise back up these allegations, do not go far enough to substantiate the claims. There is no evidence that any complaints were put in writing as envisaged by section 46 of the Act. While I agree with the petitioner that such a requirement is impracticable for purposes of rectifying a situation that is going out of hand, there is no other way of keeping record of complaints and knowing that they were made, in case, like the present where evidence becomes necessary.

In all the allegations of non compliance there is scanty detail of exactly what happened, how, where, by whom and with what effect on the overall results. The sum total of this non proof of the allegations of non compliance to the satisfaction of court is that though the election was not perfect the petitioner has failed to satisfy court that the non compliance affected the results in a substantial manner.

Using the qualitative and quantitative test set out in **Masiko versus Babihuga** therefore I conclude that though some evidence of failure to conduct a quality election has been adduced it does not go far enough to warrant annulling the election. There is absolutely no evidence on the quantitative front to warrant invalidating the election.

The petition is not supported by enough evidence to convince court to overwhelmingly agree with the petitioner that the election was not conducted in compliance with the provisions of the law.

Issue number two is whether the non compliance affected the results. The conclusion from the discussion of issue number one was that there is not sufficient evidence to conclude that there was non compliance with the law in the conduct of elections for Member of Parliament of Agule Constituency.

Consequently issue number two is answered in the negative. Since there is insufficient evidence to support claims of non compliance, court cannot say whether the results were affected or not.

On issue number three whether the 2nd respondent committed electoral offences, the evidence of Ikobot Simon, Otule Sam, Omunyokol Stephen, Omasei Bosco and Ogolet Bosco is rebutted by later affidavits. Their evidence of bribery by salt is also not sufficiently backed by enough details to convince court that it happened and indeed influenced the results.

Why did the recipients of the salt, the wives of the deponents, not depone to affidavits themselves? Were they registered voters? Did they vote for the 2nd respondent as a result of the salt or not? What are their voter card numbers? Where are they registered to vote? Did they vote?

All these are questions that were left unanswered by the affidavits in support of this particular allegation.

Court is not denying the possibility of this bribery by salt having taken place. All we are saying is that there is not enough evidence to prove that it took place and that burden, to convince court beyond a balance of probabilities rests with the petitioner as he rightly stated at the opening of his submissions.

On cash bribery I find that only one affidavit that of Ogolet Bosco is left. It was rebutted by the one of AIP Moleka Emmanuel. Be that as it may, it does not substantively provide details of the voters who were bribed and what impact the bribe had on them.

There was the allegation of the 2nd respondent having provided transport to voters. The affidavits of Ikobot Simon, Omasei Bosco, Otule Sam and Ogolet Bosco testify to this illegal practice. There were rebutted by AIP Moleka, Osire Clement and Odeke Erifasi. Additionally, I find that the accusation is quite omnibus. There are no specifics of which voters were transported from where to which polling station and there is no evidence that they were influenced as a result to vote for the person who offered them transport.

As a result the evidence in support of issue number one is left unsatisfactorily assembled and therefore incapable of convincing court that it happened. The petitioner has therefore fallen short of reaching the required standard of convincing court on this issue.

Issue number four is on remedies. The finding of the court is that the petitioner has failed to prove to the satisfaction of court that the election in Agule Constituency was not conducted in compliance with the law or that the 2nd respondent committed illegal practices and electoral offences during the course of the election.

Therefore the petitioner is not entitled to the remedies prayed for. The petition is dismissed as a result.

I will not award costs in this petition until I get a report from the Police investigations on the matter of alleged intimidation, coercion and violation of the law in regards to Oaths.

Until then, the petition is dismissed but with no order as to costs.

Dated this 29th day of July 2011

JUSTICE MIKE J. CHIBITA

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Judgment read and delivered in the presence of:

1. Petitioner: Ourum Okiror
2. Counsel for petitioner: self represented.
3. Respondents: Ochwa David
4. Counsel for respondents: Okello Oryem, Martin Asingwire
5. Court clerk: Grace Kanagwa

Dated this 29th day of July 2011

BY JUSTICE MIKE J. CHIBITA