

THE EREPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT TORORO

HCT-00-CV-EP-0028-2011

OCHWO NYAKECHO KEZIAHPETITIONER

VERSUS

1. ACHIENG SARAH OPENDI }

2. ELECTORAL COMMISSION }.....RESPONDENTS

JUDGMENT

The petitioner and the 1st respondent plus 7 others were candidates in the elections for woman member of parliament for Tororo District which were held on 18th February 2011. The 2nd respondent declared the 1st respondent as the winner of the election. Ms Achieng Sarah Opendi has since been sworn in as the Member of Parliament and taken her seat accordingly.

The petitioner disputed the results of the election hence this petition. The complaints were that there was non compliance with the electoral laws, secondly that the elections were held under conditions which were not conducive free and fair elections. Thirdly it was alleged that the 1st respondent was guilty of electoral offences and illegalities. Several affidavits were filed in support of the petition. The respondents denied the allegations and also filed several affidavits in support of the denial.

Mr. Aggrey Bwire represented the petitioner while Mr. Kanduho represented the 1st respondent and Mr. Mwasa Jude represented the 2nd respondent. The Returning Officer of the 2nd respondent Mr. Erikwaibe Ngobi (RO) was the only person called for cross examination.

The issues for determination by court were the following;

1. Whether there was non compliance with electoral laws and principles therein in the conduct of elections for Woman MP for Tororo District.
2. Whether if so, such non compliance affected the results of the election in a substantial manner.
3. Whether any illegal act or offence was committed by the 1st respondent personally or by her agents with her knowledge and consent or approval.
4. The remedies available to the parties.

Non compliance with Electoral laws

Disenfranchisement

The complaint was set out in paragraph 3(a)(i) of the petition, and paragraphs 23 and 24 of the petitioners affidavit in support. It was alleged that results from 17 polling stations were not considered in the final tally of results for Woman MP for Tororo district. This was confirmed by the affidavit of the RO, and also during his cross examination.

The polling stations whose results were not included in the final tally were the following;

1. Angolobo;
2. Kointangiro;
3. Aguguru;
4. Miganja Primary School B;
5. Bendo Nursery School;
6. Achilet Primary School;
7. Aginesio Obara's compound;
8. Panyangasi Primary School B;
9. Papol Primary School;
10. Petta Primary School;
11. Mukujju Sub County Headquarters;
12. Bishop Okille Primary School;
13. Manakor Catholic Church;
14. Aputir Primary School;
15. Nawire Primary School;
16. Atapara Primary School;
17. Barinyang Cooperative Society.

The winning candidate who is the 1st respondent herein received 41,165 votes while the runner up, the petitioner herein received 33,486 votes. This is per the Uganda Gazette dated 4th March 2011 exhibit P1. The difference between the winner and the runner up therefore was 7,679 votes. There was no dispute that the total number of registered voters from the above 17 polling stations was 8,144.

The RO told court in cross examination that results from 2 of the 17 polling stations were cancelled. These being Bendo Nursery School polling station where the votes cast exceeded the total number of registered voters at that polling station; and Panyangasi Primary School B polling station; where the

results received on the Declaration of Results (DR) form were for only two candidates rather than for the nine candidates vying for election for Woman MP for Tororo district. The number of registered voters at these two polling stations being 330 for Bendo Nursery and 509 for Panyangasi respectively totalled 839.

It was submitted that the RO realised that the irregularities at these two polling stations called for immediate remedial measures to ensure fairness of the vote. He thus cancelled the results, which was within the powers granted to the 2nd respondent under Section 12 (1)(e) of the Electoral Commission (EC) Act, and the cancellation affected all candidates across the board.

The RO told court that the results from the remaining 15 polling stations were not included in the final tally because the envelopes from those polling stations did not contain the DR forms. After computing that the number of total registered voters at those 15 other polling stations was 7,305, he reasoned that even if all these votes were to be added to the petitioner, she still would lose to the 1st respondent by a margin of 374 votes.

It was submitted for the respondents that the non addition of the results from the 15 polling stations was of no effect to the results of the election. Even if all were added to the petitioner, there would not be any change as to who the winner of the election was. The people of Tororo therefore got the representative of their choice in the 1st respondent.

The Constitution in Article 59 guarantees the right of every citizen of Uganda who is of or above the age of 18 years the right to vote. The EC is mandated to conduct such elections in a free fair and transparent manner. The elections must be conducted in an atmosphere which does not in anyway subvert the democratic will of the people to choose a candidate of their choice. These were re echoed by Odoki CJ in *Rt. Col. Dr. Besigye Kizza v. Yoweri Kaguta Museveni & Ano*. EP No. 1 of 2001.

The right to vote goes beyond casting the ballot paper on polling day. It includes and presupposes that the ballot paper so cast shall be counted and the vote so counted given equal treatment as all the others. That is one of the lynchpins of the democratic principle of the right to vote. Failure to so do amounts to disenfranchisement of the voters as they will have been denied the right to choose a candidate of their choice.

The results of an election must be based on majority votes cast. Parliament set out an elaborate procedure of ascertaining the results of an election. This is in Part IX of the Parliamentary Elections Act (PEA) 'Counting of Votes and Announcement of Results'. The votes are counted and results announced at a polling station by the Presiding Officer. The Presiding Officer fills out DR forms, and the Act sets out where each copy is placed. The RO tallies the results from the different polling stations from the DR forms before announcing the results of the election. The law gives the RO options where the DR forms are not found in the envelopes from the Presiding Officers. The results must therefore be ascertained from the DR forms. The law does not provide to the RO the option of statistical manipulation and speculative conclusions in order to arrive at the results of an election.

The EC must naturally be and is clothed with power to ensure free fair and transparent electoral process. It may do all that will ensure that the process is not manipulated by a candidate to the disadvantage of another. The EC may in this regard order cancellation of results of particular polling stations. However, that does not alter the fact that the voters at such polling station were disenfranchised.

The irregularities leading to the cancellation of the results are partly if not mainly attributable to the 2nd respondent. At Bendo Nursery polling station, the number of votes cast exceeded the total number of registered voters. The EC is the body mandated to conduct and be in charge of all stages of the electoral

process. It is the only body empowered to provide and issue ballot papers, and ensure that there is no ballot stuffing, multiple voting, or allowing ineligible persons from voting. One or more of these must have happened at Bendo Nursery leading to the number of votes cast exceeding the total number of registered voters. This thus led to the cancellation of the results of that polling station. The voters or at least those who did not participate in the irregularities were, by the cancellation of the results, denied the right to choose a candidate of their choice.

The Panyangasi debacle where the results of candidates came in bits and pieces, and even then only for two candidates only was the work of the agents of the EC. The effect of the cancellation was that the voters at this polling station could not exercise their right to choose their leader.

When therefore one considers the voters who were disenfranchised, those at polling stations where results were not dispatched by the Presiding Officers will be added to those where due to admitted irregularities, the EC cancelled the results.

The RO in cross examination told court that he decided to ignore the 15 polling stations where the DR forms were absent. He did not explain why he did not exercise one of the options provided by Section 53(3) or (4) of the PEA. He reasoned that the difference in votes between the winning candidate and the runner up was 7,679. His computation of the persons who were disenfranchised was 7,035 which was much lower than the winning margin.

The RO ought to have considered all the 17 polling stations and not only the 15 since results from all these polling stations were not being included in the final tally and this was to affect all the candidates. In any event, the RO appears to have decided that the election was about candidates and their interests. The interests of the voters are paramount in an election and had to be taken into account. The total number of voters whose interests were not considered in the final tally was 8,144. This was higher than the winning margin of 7,679.

There was an allegation that the RO in tallying the results even where the DR forms were present, messed up the exercise. The evidence to that effect was from the results which were shown in the Results Tally Sheets were not correct. The petitioner attached DR forms for Mission of Hope polling station where she was shown as having received 145 votes. The tally sheet credited her with only 45 votes. At Akworot polling station the DR form showed the petitioner had 230 votes while the Results Tally sheet showed she got only 30. The DR form for Nyasireng polling station showed the petitioner with 27 votes while the tally sheet gave her 20. These were a total of 307 votes which were allegedly denied of the petitioner.

Another candidate not a party to this petition Ayo Jacinta Othieno deposed that a similar tragedy befell her when the 2nd respondent failed to properly record her votes shown on the DR forms onto the Results Tally Sheet. This was at Morikiswa Primary School polling station where the DR form duly signed by the Presiding Officer shows that she got 150 votes, but the Results Tally Sheet gave her only 5 votes. At Namwendia Primary School the DR form shows that she got 230 votes yet the tally sheet gave her only 1 vote. That was evidence of incompetence on part of the 2nd respondent in the tallying of results. That was evidence from an independent witness who was party to the election process and deposed to the flaws therein.

The response to this was that these DR forms were unknown to the 2nd respondent. It was argued that they were not certified and therefore inadmissible. In the case of *Kakooza John Baptist v. EC & Ano*, E.P.No. 11/2007, it was held that public documents which to be used in court ought to be certified. There is however an exception in that where a party demands for the certified documents and these are not availed, such a party may tender in court the uncertified copies.

The petitioner exhibited a request she made to the 2nd respondent asking for certified copies. The request is dated 7/7/2011. She deposed that up to the time of hearing, the EC had not availed those DR forms. The reason given for such failure was that the petitioner did not enclose the fees for the same. That was a ridiculous excuse. One cannot enclose fees which are yet to be determined.

The 2nd respondent was always aware that the results were disputed. The results could be got from the DR forms, which he claimed to have, as indeed is his statutory duty. He did not produce any to court.

Court will therefore take into account the DR forms which the petitioner tendered in court. They show that the 2nd respondent carried out the tallying exercise with ineptitude. The whole reason of casting ballot papers is that they be correctly counted and a proper and correct tally is made so that a winning candidate is ascertained. The 2nd respondent could not do a simple act of putting correctly figures from the DR forms on to the tally sheets. The petitioner was denied some 307 votes which validly belonged to her according to the DR forms which were properly signed by the 2nd respondents Presiding Officers.

If the 2nd respondent had taken account of the voters who were disenfranchised in the 17 polling stations, and also the incorrect figures in the Results Tally Sheets, the winning margin would have reduced considerably bringing the results of the poll within the ambit of a mandatory recount.

Whether the non compliance had a substantial effect

This was the 2nd issue. The consideration whether or not the non compliance had a substantial effect on the result is not that the winner would have lost, but that the result would have changed such as to put the result of the election in doubt. The 1st respondent secured 41,165 votes. The petitioner got 33,486 votes. The margin was 7,679 votes. The total number of disenfranchised voters from the 17 polling stations was greater and was 8,144. The difference between the winning margin and the disenfranchised voters was 465. To compound the problem some 307 votes for the petitioner were not added in the final tally. The non compliance certainly affected the results of the election in a substantial manner. This was proved to the satisfaction of the court.

Illegal act or offence

Bribery

This was the 3rd issue. The complaint was that there was bribery which was committed by the agents of the 1st respondent with her knowledge and consent or approval.

Court does not require a multiplicity of incidents of bribery in order to annul an election. This is clear from the wording of Section 61 of the PEA. Several allegations of bribery were made. Andiko Rose Mary deposed that she saw Nyadoi Sarah who was said to be an agent of the 1st respondent giving money to voters in Rubongi A village. Alfred Onyango Oyum deposed that he saw Okoth Peter and Okiria Joseph giving shs 2000/- to each voter. Agnes Ochwo deposed that she received shs 2000/- from Onyango Obbo, an agent of the 1st respondent and that she voted for the 1st respondent on that account.

There was no person who testified that he or she received a bribe from the 1st respondent personally. Apart from Agnes Ocwo there was no person who testified that he or she received money from an agent of the 1st respondent. The allegations of bribery were from people who deposed that they only saw agents of the 1st respondent giving money. Proof of the allegation of bribery requires more than merely seeing one person give money to another. There was no evidence what that money was for. There was no evidence that the people receiving the money were voters. There was no evidence that the people who received the money voted for the person in respect of whom they received the money. The evidence was speculative at best.

Agnes Ocwo deposed that she was a resident of Akadot village. On polling day while on her way to cast her vote, she met Onyango Obbo, whom she described as an agent of the 1st respondent. The said Onyango Obbo offered her shs 2000/- so she could vote for the 1st respondent. She took it and for fear of reprisals, she went and dutifully voted for the 1st respondent at Akadot Primary School polling station.

Padde Oguti Simon was an agent of the petitioner. While he was at Akadot primary school polling station, he saw Onyango Obbo giving money to Agnes Ocwo. He reported this and other anomalies to the police.

Onyango Obbo alias Jacob Obbo deposed that he was not anywhere near Akadot polling station on polling day. He said further that he never set foot on Tororo County where that polling station is situate. He denied giving Agnes Ocwo any money to influence her to vote for the 1st respondent. He however admitted that he was an agent of the 1st respondent. Johnson Omolo an agent of the 1st respondent deposed that he was with Jacob Obbo the whole of voting day supervising elections on behalf of the 1st respondent. They did not set foot in Tororo County where Akadot Primary School polling station is situate.

Okoth Michael was a polling assistant at Akadot Co op. Society polling station. On polling day, he was seated on the desk of the Presiding Officer. He checked said Onyango Obbo's name, and ticked the voters register as said Onyango Obbo went and cast his vote. Onyango Obbo is well known to him as a resident of Akadot A village and is a well known cattle trader. It was therefore not correct for Onyango Obbo and Johnson Omolo to swear that on polling day Onyango Obbo never set foot in Tororo County where Akadot Primary School polling station is situate.

Agnes Ocwo swore another affidavit where she rubbished the claims of Onyango Obbo that he never set foot on Tororo County on polling day. She insisted in her affidavit that said Onyango Obbo is her village mate in Akadot. On polling day he was physically at Akadot Primary School dishing out money and telling those he gave the money to vote for the 1st respondent, and that she was a beneficiary of that gesture, and voted in compliance with the directives of Onyango Obbo after receiving shs 2000/- from him.

I found that the evidence before court proved to courts satisfaction that Onyango Obbo alias Jacob Obbo, an agent of the 1st respondent gave out money to voters and in particular to Agnes Ocwo at or near Akadot Primary School in order that she should vote for and she indeed voted for the 1st respondent.

The law requires that an illegal act or offence of which bribery is one will only be proved where it is shown that it was given by the agent of the candidate 'with his or her knowledge and consent or approval.' This does not mean that the candidate must give written instructions to the agents to give bribes well aware that bribery is a criminal offence. As Oder JSC; stated in *Rt. Col. Dr. Besigye Kiiza* (supra)

‘There is no way a witness who is alleged to have committed a criminal offence or malpractice in a personal capacity is going to own up to such an accusation. This part of behaviour applies to all human beings. This is common knowledge for which proof is unnecessary.’

Oder JSC; (RIP) in *Rt. Col. Dr. Besigye Kiiza* (supra) dealt with the issue agency in election petitions. He cited Halsbury’s Laws of England 4th Edition Vol. 15 paragraph 698 which is to the effect that in order to prove agency, it is not necessary to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment, or authorisation of the agent by the candidate to do some election or the adoption of his work when done. The candidate, however, is liable not only for the acts of the agents whom he has himself appointed or authorised, but also for the acts of the agents employed by his election agent or by any other agent having authority to employ others.

Onyango Obbo deposed that he was appointed by the 1st respondent and given the assignment to supervise elections on her behalf. He further deposed that in that capacity he deployed agents in the constituencies under his jurisdiction. In this he was supported by Johnson Omolo, his co agent. They even had a vehicle for that purpose. The only inference to be drawn from the above is that these two had full authority to act in the best interests of their candidate with her knowledge and approval. It cannot therefore be said that the acts of the agents of the 1st respondent were not with the knowledge and consent or approval of the 1st respondent.

I found that the 1st respondent by her agent committed the offence of bribery contrary to Section 68(1) of the PEA. I was satisfied that this was with her knowledge and consent or approval. This is one of the grounds for which an election may be set aside under Section 61(1)(c) of the PEA.

There were other complaints in the petition including use of derogatory language and violence. I did not find these proved and so I did not take any time on them. There was an allegation of an illegal polling station called Paya. This was explained to courts satisfaction that this was reference to Padula Church of Uganda polling station. An examination of the results of Padula Church of Uganda polling station in the Results Tally Sheets showed exactly similar results as in the DR form which was tendered by the petitioner under Paya polling station. There was no polling station known as Paya in the Results Tally Sheets.

Remedies

The last issue was on remedies. Section 61(1) of the PEA provides that an election of a candidate as a Member of Parliament shall only be set aside on any of the following grounds if proved to the satisfaction of court. These include non compliance with the provisions of the PEA relating to elections, where it is proved to courts satisfaction that there was failure to conduct the elections in accordance with the principles laid down in those provisions, and that the non compliance and failure affected the results in a substantial manner.

Section 1(2) of the PEA provides that the EC Act shall be construed as one with the PEA. I found that there was non compliance with Section 12 (1)(b) and (e) of the EC Act, and Article 59 of the constitution. I also found that these affected the results of the election in a substantial manner. I also found that the 1st respondent committed the offence of bribery contrary to section 68 of the PEA.

Section 63 (4) of the PEA sets out the remedies available in an election petition. Subsection (4)(c) provides for setting aside the election and ordering a new election. That was one of the prayers in this petition.

This petition is allowed. The election of Woman Member of Parliament for Tororo District is hereby set aside and a new election is hereby ordered. This petition arose for most part due to the incompetent manner in which the elections were conducted by the 2nd respondent. The 2nd respondent shall therefore pay the costs of the petitioner. The 1st respondent shall meet her own costs as she was not entirely blameless.

Rugadya Atwoki

Judge

23rd September 2011.