

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT MBARARA
HCT-05-CV-EP - 7 of 2011

ALEX MUSINGUZI KIIYIMBA.....PETITIONER

VERSUS

1. ELECTORAL COMMISSION,

2. OWOYESIGA DEUS MUKYENGA.....RESPONDENTS

J U D G M E N T

Before: LADY JUSTICE CATHERINE BAMUGEMEREIRE

The Agreed facts:-

The Petitioner (Alex Musinguzi Kiyimba) and the 2nd Respondent (Owoyesiga Deus Mukyenga) were both candidates in Local Council LC III Elections held on 7th /March/2011. The Elections were in respect of the LCIII Chairperson for Ishaka Division, Ishaka - Bushenyi Municipality in Bushenyi District. Both Candidates had been duly nominated on the 29th October 2010. The said elections for LCIII Chairperson were conducted by the 1st Respondent, the Electoral Commission. The Electoral Commission declared the 2nd Respondent winner of the elections having polled 2,317 votes as against 1633 votes garnered by the Petitioner. The vote margin is 684 votes. It is also agreed as a fact that the 2nd Respondent had served as a Public Servant to-wit a special Police Constable (a.k.a SPC). It is the Petitioner's case that 2nd Respondent having been an SPC did not effectively resign the said office on being nominated and eventually elected as LCIII Chairman of Ishaka Division. The 2nd Respondent on the other hand contends that he was lawfully nominated and subsequently elected to office. He further contends that he did everything in his power to relinquish the office of SPC as proven by his letter of resignation dated 24th July 2010 and received by the Police Force on 13th August 2010.

The Petitioner challenged the declaration of the 2nd Respondent as winner by filing this Petition. Petitioner challenged the 2nd Respondent for being irregularly nominated and further alleged that

the respondent committed offences and illegalities whose effect is to invalidate the whole election and render it null and void.

In a joint scheduling memorandum filed before this Court the Learned Counsel for the Petitioner, Adonia Benyamisa and Counsel for the Respondents, Tabaro Edwin assisted by Mwebesa for the 1st Respondent and Magoba for the 2nd Respondent agreed on a set of facts followed by four issues. The Trio also agreed that all the parties would rely on their affidavits which had been deemed as read and are on Court record. In addition they agreed on witnesses for cross-examination and the amount of time they would need for this whole exercise. Agreement was reached about the number of days needed for this petition. To this end the trio decided that they needed two days to carry out cross-examination of witnesses and submissions to make oral submissions and time was allotted for this exercise.

The main grounds of Alex Musinguzi's Election Petition are contained in paragraph three of the Petition and state as follows:

1. That the 2nd Respondent being a civil Servant did not resign before contesting as a candidate as required by the law.
2. That on the date of the elections on 7th March 2011, his agent, one Magezi Vincent at Ward III Taxi Park II Polling Station, wrote down the names of all the people who came for the voting exercise and they were (389) Three Hundred Eighty Nine voters of which Two Hundred Forty Two (242) were male and One Hundred Forty Seven (147) were female. There were also Seven (7) invalid votes making up (altogether) (396) Three Hundred Ninety Six votes.
3. That at the conclusion of the voting exercise, the counted votes were (435) Four Hundred Thirty Five only which exceeded the number of voters who came for the voting exercise and all this was well- known to the Returning Officer.
4. That the Petitioner states that all the above amount to gross malpractices which substantially affected the outcome of the election.

This Court will address the final prayer made during the submission of Learned Counsel Adonia Benyamisa for the Petitioner after a full review of the submissions by both counsel.

The agreed issues were as follows;

1. Whether the 2nd Respondent resigned from the Uganda Police Force prior to his nomination as a candidate for LCIII Chair/Person Ishaka Division in the Municipality of Ishaka – Bushenyi, Bushenyi District.
2. Whether there were any illegalities and offences committed by the Respondents?
3. Whether there were any malpractices and or irregularities committed and if so whether they affected the results of the election of LCIII Chairperson Ishaka, in a substantial manner?
4. What remedies, if any, are available to the parties?

The five witnesses were cross-examined during the course of the petition. They are;

1. PW1 Alex Kiyimba Musinguzi
2. The Petitioners were unable to procure Magezi Vicent for cross-examination. His affidavit (which for unknown reasons was not on Court record) was expunged but was availed to the Learned Counsel) from the record.

Respondent's case

3. RW1 Owoyesiga Deus Mukyenga
4. RW2 Twine Mike
5. RW3 Mulimira Barbara

It should be noted that the Petitioners having failed to procure Magezi Vincent, closed the Petitioner's case accordingly.

PW1 Musinguzi Alex Kiyimba filed one main affidavit in support of the Election Petition and supplementary affidavits. In his main affidavit Musinguzi Alex Kiyimba stated that indeed he contested against Owoyesiga Deus Mukyenga the 2nd respondent for the post of Chairperson LC III. He stated that the 2nd Respondent did not resign from his post of a civil servant as required by law. In his supplementary affidavit dated 25th May 2011 he stated that thus:

“That it is true the 2nd Respondent never resigned as a police special constable before being nominated as a candidate for Chairperson Ishaka Division, Bushenyi-Ishaka Municipality Local Government Council Elections 2011.”

In this supplementary affidavit he further stated that the 2nd Respondent continued to draw a salary on the Government contrary to the law and to the Attorney General's opinion.

In this main affidavit in support of his petition dated 4/4/2011 he stated that the votes counted by his polling agents were not equal to the votes announced by the presiding officer. He further alleged that on polling day 7th March 2011, the 2nd Respondent used his car to transport people who were to participate in the election.

In cross-examination by Magoba for the 2nd Respondent PW1 stated that he knew Owoyesiga very well. He further said in cross that he noticed after the elections that the Petitioner did not resign from office. He further said this had not come to his attention during the campaigns. In cross he acknowledged seeing a letter of resignation dated 24/07/2010 which had been received on 29/07/2010.

He stated that he acknowledged a receipt date of 13.08.201 and of an endorsement on 20.09.2010. He conceded that he did not know the procedure for resigning. He also referred to an uncertified document on "Edit payroll" with petition names dated March 2011.

Concerning the vote stuffing this witness stated that the petitioner relied on one Magezi who was his agent. He conceded that Taxi Park Ward II results would not have changed his results very much.

On cross-examination by Mwebesa for the 1st Respondent the Petitioner stated that at nomination 2nd Respondent stated his occupation as businessman. Further, regarding the transportation of votes he conceded that he did not personally see the 2nd Respondent transporting votes. That the vehicle must have belonged to one of his supporters whom he could not name and had no sound knowledge of the owners.

RW1 Owoyesiga Deus Mukyenga was the 2nd Respondent in this petition. In his affidavit in support of the answer to Petition stated that it was true prior to his nomination as a candidate for the post of LCIII Chairperson he was a Special Police Constable appointed on contract. He stated that on 24/July/2010 before his nomination he duly resigned in compliance with the electoral requirement.

In his affidavit he denied there being any irregularities or malpractices before, during and after his election to the post of Chairperson LCIII Ishaka Division and insisted that the election was free and fair. He the 2nd Respondent won this election by a margin of 684 votes.

He denied using his vehicle for transporting votes. In paragraph II of his affidavit he stated thus,

“That in response to paragraph 2 and 3 of the Petitioner’s supplementary affidavit I wish to state that I resigned by my letter of 24.July.2010 and left duty and I expected my employer to remove my name from the pay roll thereafter. I was not aware that my name remained on the pay roll though as usual I continued operating my Account which I opened even before I was appointed as Special Police Constable.”

In cross-examination Owoyesiga Mukyenga testified that he completed Junior Four. He also obtained a Diploma in Business Administration in 1992. He was appointed as an SPC on 26.08.2004.

In cross-examination he further said his duties as an SPC are to assist the police in executing their duties, to keep law and order and to protect property. Although he had an SPC uniform he did not own a gun. He earned 195,000 UGX a month. He stated on cross that he last received salary in June 2010. He stated that when the Police Force saw his resignation they stopped his salary immediately. He testified that the Police Registry received his letter of resignation on 13/August/2010. His evidence was that he never received any money in March 2011. When asked by Bemanyisa about his varying signatures he stated that he had sworn an affidavit showing a change in his signature. He indeed did acknowledge that the signature on most of his documents was different from the signature on his affidavit dated 27th May 2011. He then testified that he had sworn another affidavit changing his signature.

On re-examination is confirmed that he stopped receiving money in June 2010 and has thus not received any pay slips. He stated that he had duly handed over his uniform and that he did not have any property belonging to the police.

RW1 Twine Mike, a polling agent of RW1 Owoyesiga stated in his affidavit dated 27th /May 2011 that he reported to Ward III Taxi Park II polling station, on 7th March 2011 at around 7:00am.

He also stated that he did not see Magezi Vicent writing down names of the people who voted at that polling station.

He further stated that at Taxi Park II the Petitioner polled 93 votes while the 2nd Respondent polled 335 votes. There were 7 invalid votes. He denied that ballot papers cast exceeded the number of people who voted. He also stated that Magezi Vicent did not raise any objection at all. He (Magezi) only refused to sign after his candidate lost at this polling station. He testified that no complaint was lodged at all.

PW3 Mulimira Barbara in her affidavit dated 24/5/2011 stated that she is Returning Officer and also Registrar of Bushenyi District. She is an Officer of the Electoral Commission. She stated that the elections held on 7th March 2011 were free and fair and reflected the will of the people of Ishaka Ward III.

She stated that she never received any complaints from the Petitioner. She stated that had the Petitioner complained immediately his complaints would have been handled immediately. She stated that for instance the nomination forms of the 2nd responded disclosed that he was a businessman. He never disclosed that he had resigned as an SPC and therefore the Electoral Commission is not to blame for this. She stated that the polling agents in ward III Taxi Park II did not contest the result.

Under cross-examination by Benyamisa for the Petitioner, RW3 stated that she joined Mbarara Registry in June 2010. She had earlier been a Voter's Roll Editor in 2001. She was Data Entrant in 2006. This was her first time to be directly engaged in elections.

She further stated that nominations for LCIII were conducted around 29th October 2010. She also stated that for a person to be validly nominated she would have to verify signatures of a candidate's supporters. That addition, a candidate was required to present 50 signatures from the electoral area. If the candidate is a party flag bearer the officials verify that the chairman of the respective party has signed off and attested with a stamp. An independent candidate only needs his own signature and that of his agents. The officials also check for the stamp of the commissioner of oaths in order to ensure that documents are properly commissioned. In addition

officials check whether a candidate has paid the requisite fees. A civil servant is also required to present a letter of resignation.

A candidate signs three sets of nomination papers which are then stamped. All three copies are original. The Returning Officer retains two copies and gives the candidate one copy of the nomination.

The returning officer stated on cross-examination that the most important oath was the oath authenticating the candidate. She further stated that the oath relating to the official agent carried less weight since candidates could pick, choose and change agents at will. She further stated that the omission in the dates of the oath authenticating candidate was a minor omission.

The Witness stated that she had 13 presiding officers. In reference to a declaration of result form for Ward III Taxi Park II, she saw only the signature of one agent, Magezi Medard. She did not know of any other Polling Agent. On re-examination she again restated that the 2nd Respondent said he was a businessman. She stamped his nomination forms on 29/October/2010. The Declaration Return DR form she referred to was the one found in the sealed ballot box after the elections took place. She stated that she only re-opened the sealed ballot box on receiving count papers which required the DR forms. Otherwise there were sealed away after polling day.

Annexures

The following Annexures received and marked as follows:

“Annexure A”-Resignation letter Marked “P1”

“Annexure B” the edit pay roll is not marked as Petitioner’s exhibit since it lacks authentication.

“Annexure C” Marked “P2”

Annexure relating to the Respondents will be marked as R1

Annexure “A” appointment letter of second Respondent Marked “R1”

Annexure “B” Resignation letter dated 24/7/2010 Marked “R2”

Annexure “C” Termination Notice dated 27th May 2011 Marked “R3”

Annexure “D” Return Form for Transmission of Results Marked “R 4”

Annexure “Y” Appointment NKA polling Agent Marked “R5”

Annexure “M” Chairperson DR Form marked “R6”

The Law Applicable to Electoral Petitions of this nature is as follows:-

1. The Constitution
2. The Local Government Act (otherwise referred to hereafter as (LGA))
3. Presidential Elections Act
4. Parliamentary Election Act (PEA)
5. Civil Procedure Act
6. The Evidence Act
7. Civil Procedure Rules
8. Case Law
9. Election Commission Act
10. Procedures and Circulars relating to running of Government Office.

Burden and Standard of Proof

Although a Petitioner is required to prove his case on the balance of probabilities, that degree is heightened by the requirement to prove the matter to the satisfaction of Court. **See Dr Kiiza Besigye v Yoweri Kaguta Museveni & Anor. Elec. Petition No.1 2001.**

It is trite that the burden of proof in an election petition lies upon the Petitioner whose duty it is to prove the grounds of his petition to the satisfaction of Court. This degree of proof which is ‘to the satisfaction’ is a higher than that normally required in an ordinary civil suit.

Section 61 of the PEA sets down the degree and standard of proof expected in an election petition.

Section 61 (1) of the PEA states and I quote,

“(1) the 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.”

While in criminal cases a Court must be satisfied beyond reasonable doubt, the degree of proof in election petitions is to the satisfaction of Court. S. 61 (3) stipulates the standard of proof. It states;

“(3) Any ground specified in subsection (1) shall be proved on the basis of a balance of probabilities.”

As stated above, the standard of proof is on a balance of probabilities; however, the degree of proof is heightened. This in part is due to the fact that election petitions are matters of national and collective interest. Due to the importance of the subject matter, the gravity of allegations and the sensitivity surrounding election petitions, the degree of proof in an election petition required is higher than that required in an ordinary suit.

As stated above, four issues were agreed upon and I will proceed to address the first issue:

Whether the 2nd Respondent resigned from the Uganda Police Force prior to his nomination as a candidate for LCIII Chairperson Ishaka Division in the Bushenyi-Ishaka Municipality.

Submitting on this issue, Benyamisa for the Petitioner adopted the definition of resignation in Aggrey Awor v Mugeni Steven Wasike & the EC Petition No.5 of 2006, in which it was stated that resigning was a formal renouncement or relinquishment of an office. That resignation must be made with the intention of relinquishing of office. Further that resignation must be spontaneous and the person must relinquish his rights under the post earlier held.

Relying on the Petitioner’s supplementary affidavit dated 25.05.2011 Benyamisa submitted that the Respondent never resigned at all. He further averred that the authority who should have accepted the resignation of the 2nd Respondent was the IGP. He went on to state that by the day of election, the IGP had not accepted the 2nd Respondent’s resignation. Benyamisa further submitted that going by his appointment letter Exh “P1” the duties of an SPC were the same as those of a normal police man. He then went further to submit that since the appointment letter stated that the appointment was subject to acceptance in a similar vein resignation could only be effective when accepted.

Relying on **A.G v Gen David Tinyefuza** Constitutional Appeal No.1 of 1997 (Supreme Court) Wambuzi C.J, as he then was, held that an army officer could only be discharged from the army by the authorized officer. The above case cited with approval the holding in **A.G V Opolot (1969) EA 631**, that a dismissal could only be effective only if it had been exercised by the President as the law provided. Benyamisa observed that in this petition before Court only the IGP or a person authorized by him was mandated to accept a resignation. He further submitted that the resignation was not effective until there was an acceptance from the IGP in writing (which did not happen before the 29/October/2010).

He argued that in the instant case an acceptance was written after Petitioner had filed his case and that the purported acceptance was simply an attempt to validate past illegalities.

The other leg of his argument was that whilst the 2nd Respondent wrote a resignation letter, he did not forthwith surrender the benefits that came with his job. It is therefore the Petitioner's case that there was some evidence that the 2nd Respondent may still have been on the pay roll by March 2011.

Benyamisa further argued that the 2nd Respondent in his affidavit dated 27.05.2011 was aware of the Edit Pay Roll which proved that he was still receiving salary. He further asserted that the 2nd Respondent admitted that his account was receiving salary although the 2nd Respondent blamed it on his employer.

Benyamisa alluded further to dishonest and untruthfulness in the evidence of the 2nd Respondent.

He submitted that the 2nd Respondent lied when he denied receiving a salary by March 2011. Further that he also lied when he stated that his salary was stopped in June 2010 when the record at the Police Headquarters showed that his letter of resignation was first received on 13th August 2010.

Furthermore, Benyamisa further argued that only documentary proof by way of bank statement would rebut the assertion that the Petitioner received salary in March 2011.

Further reference was made to S.90 and S.91 Evidence Act, **General Industries v NPART Civil Appeal No.5 of 1998** (Supreme Court), **Kasifa Namusisi & others v Francis Ntabazzi Civil Appeal No.4 of 2005**(Supreme Court)

Learned Counsel Magoba for the second Respondent replied first. He submitted that indeed the 2nd Respondent effectively resigned his office thirty days before his nomination. He further contended that the 2nd Respondent's resignation letter was written by the 2nd Respondent on 24/July /2010 and received by the police on 13th August 2010. He further submitted that the 2nd Respondent's appointment to the role of Special Police Constable (SPC) was made within the ambit of Art. 252(2) of the Constitution & S.64 of the Police Act which Counsel understood to mean that 2nd Respondent was to hold an office on such terms and conditions as the appointing authority reviewed from time to time. Further still that the post of Special Police Constable was held on contractual basis. Magoba emphasized S.64 2(d) of the Police Act.

Magoba further averred that the Police Act and Regulations do not provide for a procedure for resignation of an SPC.

Quoting Art. 252(2) of the Constitution of Uganda 1995 he stated that where the procedure is not provided for or stipulated under any law, resignation takes effect when the officer resigning writes a letter addressing it to his appointing authority and that it must be received by such authority or authorized office.

That in this case the 2nd Respondent wrote a resignation letter and it was received on 13th /08/201. Consequently, in his view, the 2nd Respondent duly complied with the requirements of Art 252(2) Constitution and S.115 of the Local Government Act. As such, Magoba continued, the 2nd Respondent was validly nominated and elected.

Regarding the effectiveness of the resignation, Magoba averred that the 2nd Respondent did all that was within his power to leave the Police Force within the law. The 2nd Respondent had tendered his resignation letter and it was duly received on 13th .August.2010. Magoba further contended that the 2nd Respondent had no authority over his appointing authority and could not force them to delete his name from a pay roll. It was entirely the duty of his employer to perform that action.

Further in reply to the Petitioners assertion that the 2nd Respondents resignation was not effective because his name remained on the pay roll and did not receive a reply, Magoba for the 2nd Respondent averred that the 2nd Respondent did all that was within his power to leave the police force well before 30 days as required by law. Magoba asserted that the 2nd Respondent resignation was received by the police on 13th August 2010. Magoba further insisted that there is no evidence to prove that the 2nd Respondent continued to receive a salary. Further he averred that it was the function / duty of the police force, not his client, to take him off the pay roll. He further submitted that he believed his client's resignation was effective the moment the letter was received by the authorized Police Officer.

Replying in respect of the authorities relied upon by the Petitioner Magoba for the Respondent submitted that the cases were distinguishable. Starting with the case of **AG V Major Gen. David Tinyefunza** Supreme Court Constitutional Appeal No. 1 of 1997. Magoba averred that David Tinyefunza was an officer in a regular Army Force which has a well laid down procedure for resignation of an officer. He stated that in the case now before Court, there was no such procedure.

Distinguishing the case of Aggrey Owori Magoba replied that Wasike was a town clerk and there were standing orders which provided a procedure under which such an officer could resign. He further averred that Awori's case was distinguishable because the letter was addressed to a wrong authority. Again he averred that this case could not apply to the principles laid down in Awori's case because the set of facts are different and so are the instances addressed.

In responding to the first issue, Tabaro for the 1st Respondent associated fully with the submissions of Magoba for the 2nd Respondent. He further submitted that the 1st Respondent cannot be faulted at all for the acts of the Petitioner. Relying on the evidence of the Returning Officer, Mulimira Barbara, he submitted that the 2nd Respondent made representations to the Returning Officer that he was only a businessman. His submission was that the Returning Officer was therefore unaware of his immediate past service with the Uganda Police. She clearly stated in her evidence on cross examination that had it been brought to her attention that the 2nd Respondent was a police man, she would have required

him to present a resignation letter. Tabaro prayed that if the first issue was found in favour of the Petitioner then the 1st Respondent should not be condemned in costs.

Nobody addressed the issue of the acceptance of resignation which was retrospective.

Concerning the issue whether there were any illegalities and offences committed, Bemanyisa for the Petitioner stated that an illegality goes to the root of the petition itself. He relied on the case of **Cardinal Emmanuel Nsubuga** supra which states that an illegality overrides questions of pleadings before Court and that as such there is no need to prove that the illegality substantially affected the election. In enumerating the illegalities committed by the 2nd Respondent counsel for the Petitioner referred to S. 111(3) of the LGA, he stated that during cross-examination, he noted that there was violation of the oath. In some cases the oaths were not dated and in other cases the 2nd Respondent did not sign. He relied on the Oaths Act. Submitting on the Oath, Benyamisa for the Petitioner stated that there was no valid oath and therefore no valid nomination.

He referred to the case of **Kanyua V Nganga E.A Vol. 4 (2004) Pg. 104** where an originating summons lacked the signature of the deponent. It was held in Kanyua that the affidavit was null and void and the affidavit was struck out. He submitted further that in **Baguma Robert Eliphaz V E.C & Anor. Pet. No. 10 of 2006** (Fort Portal), Rugadya J held that a petition that was not dated was incompetently before Court. Counsel for the Petitioner submitted that failure to sign and date nomination papers was a fatal illegality. He further submitted the RO misinterpreted the law when she said these were minor irregularities.

Submitting on whether the police officer should enter politics, he stated that a public servant should not stand or offer himself as a candidate without resigning. Benyamisa further submitted that a person who contravenes the Act commits an offence. Benyamisa made reference to S. 139 (d) of the LGA. Submitting further, Benyamisa referred to the Attorney General's circular regarding the participation of public servants in an election.

When challenged by Court to distinguish between an irregularity and an illegality Benyamisa stated thus;

“In my view an illegality is an act that offends a legal provision. An irregularity is an act that offends a legal procedure... it is my submission that the omissions and acts of the Respondents offend the legal provisions of the law and therefore amount to illegalities. I urge Court to hold so.”

In reply to the Petitioner’s submission on the issue of illegalities and offences, Magoba for the 2nd Respondent averred that under S.139 of the LGA a Court may set aside an election on account of illegalities and offences committed by a Respondent personally or by his agents with his knowledge and consent or approval. Magoba contended that the 2nd Respondent committed no such illegality or offence nor did any of his agents. Counsel for the 2nd Respondent submitted that other than the grievance of resignation, the Petitioner in his pleadings does not mention any offences or illegalities that had been committed by the Respondents. Submitting further Magoba’s contention was that the irregularities referred to are not provided for under the Local Government’s Act.

Magoba further contended that the errors pointed out under the Administration of Oaths Act may be procedural illegalities but not illegal acts under the Local Government Act. One of the documents of contention was an oath authenticating an agent of a candidate. Magoba submitted that this document was inconsequential to an election as pointed out by the Returning Officer.

On failure to resign being a fatal illegality, Magoba submitted that the 2nd Respondent duly resigned. He submitted further that failure to resign may not amount to an illegality but rather a procedural irregularity. On the issue of misrepresentation, Magoba stated that his client did not misrepresent himself. He submitted that his client was no longer a policeman hence calling himself a businessman.

Tabaro for the 1st Respondent invited Court to critically appraise the procedure adopted by the Petitioner. Tabaro contended that the illegalities and offences submitted upon by counsel for the Petitioner were never pleaded.

Tabaro referred to paragraph 3 of the petition which raised the two issues:

1. Resignation of 2nd Respondent and

2. Anomalies at Ward III Taxi Park II polling Station, Bushenyi Ishaka.

Tabaro contended that Bemanyisa should have amended his petition to allow for an argument on purported irregularities. He further contended that Benyamisa's submissions are tantamount to a fishing expedition.

On points of law that require evidential proof, Tabaro submitted that such points of law ought to be pleaded. Tabaro prayed that Court blinds itself to the submissions of counsel because they offend rules of procedure.

Concerning the irregularities raised by the Petitioner, Tabaro contended that they do not warrant setting aside an election.

Responding to the question relating to the meaning of an illegality Tabaro for the 1st Respondent submitted that an illegality was anything unlawful. He stated that not every unlawful act by parties in a petition forms ground for setting aside an election.

Referring to S.139(c) of the LGA he submitted that it spells out an illegality. Further that S.146-158 lists illegal practices. Pointing to S. 146 – 158 of the LGA Tabaro submitted that no offences mentioned there-under were committed in this election.

Tabaro further submitted that the Parliamentary Elections Act applies to Local Government Elections and the local government election interpretation section. That the PEA defines an illegal practice. He further argued that S.146-159 of the Local Government Act was similar to provisions in the Parliamentary Elections Act.

I have carefully examined and considered the status of a Special Police Constable as provided for under the laws of Uganda. Under S.3 of the Police Act Cap 303 Special Police Constables constitute part of the Uganda Police Force. Further S.64 of the Police Act empowers the officer in charge of an area in which an unlawful activity has occurred or may occur to appoint such a number of residents in the neighbourhood as he or she thinks necessary to be a Special Police Constable to reinforce members of the force in that area. The appointment has to be made in writing and only when there is need to re enforce the regular police officers. The terms on which the special police officers are employed are terms which may be determined by the Inspector

General of Police. Also under S.65 (a) the special constables have the same protection and perform the same duties as police officers.

Having considered the totality of the provisions of the law relating to police constables I am of the view that their role is of a temporary nature, and that they do not enjoy the same terms and conditions as a police officer. More over their service lapses when the task for which they were appointed expires. Given that they are appointed locally to respond to a local need and that they are required to respond to situations of a temporary nature and that their roles are performed in their local neighborhoods and that their terms and conditions are determined by the IGP as he deems fit, Special Police Constables are not bound by the Police Act and are not covered by part IV of the Act which regulates appointment, promotion, retirement, service and discharge or termination of appointments of police officers.

In my view therefore, the status of a police constable is that of a temporary employee. As such since there is no clear policy regarding and regulating the resignation of a special police constable, the default position is Art. 252 (2) of the constitution as argued by Learned Counsel for the 2nd Respondent.

Article 252 (2) of the constitution states:

“(2) The resignation of a person from any office established by this constitution shall take effect in accordance with the terms on which that person who appointed or if there are no such terms, when the writing signifying the resignation is received by the person or authority to whom it is addressed or by any person authorized by that person or authority to receive it”.

I am satisfied that the 2nd Respondent took the necessary steps to resign from the job. He wrote a letter resigning from his job dated 24.07.2010. This letter is Annex “A” of the Supplementary Affidavit in support of petition. The resignation letter was received by the police force on 13th August 2010. An endorsement to that effect appears on the letter reinforced by earlier endorsement instructing the assistant commissioner of police to go ahead and terminate the person.

Clearly this case and scenario can be distinguished from the cases referred to by the Learned Counsel of the Petitioner. For instance the case of **A.G & ANOR vs. General David Tinyefunza Constitutional appeal No. 1 of 1997** (supreme Court) refers to an Army officer who was serving in a regular army force. In that Army force there was a procedure for resignation which was clearly spelt out. The officer (Tinyefuza) could not act outside existing procedures. In the case of Owoyesiga, however, the position of the police is that the IGP determines the terms and conditions as he deems fit. There is no procedure laid down for the resignation of Special Police Constables.

In distinguishing the case of **Aggrey Awori V Mugeni Stephen & EC Election Petition No. 5 of 2006** which was upheld on appeal in **Wasike Stephen Mugeni V Aggrey Awori** Election Petition Appeal No. 1 of 2006 (Court of Appeal). I do agree with Learned Counsel for the 2nd Respondent that the facts related to a resignation addressed to the wrong authority. In the case of Awori the set of facts and the circumstances addressed are not applicable to the petition now before Court. In this petition the Petitioner addressed his letter to the IGP who is the rightful authority. He got a response from an officer authorized by the IGP to act on his behalf accepting the resignation retrospectively. I therefore find that the facts giving rise to this petition are unique and need to be tested on their own merit.

I find that the Petitioner failed to prove to the satisfaction of Court that the 2nd Respondent did not resign. I also note in passing that there is no evidence to prove that the 2nd Respondent received a salary after his resignation. The Annexure B “Edit Pay Roll” was found inadmissible because it lacked authentication. Once again I find that the Petitioner has failed to prove to Courts satisfaction that the 2nd Respondent’s resignation was not effective.

Indeed I find that that the 2nd Respondent resigned from the Uganda Police Force prior to his nomination as candidate for LC III Chairperson Ishaka Division.

Under common law just as employment may be inferred from the conduct of an employer so may a resignation. Inference can be drawn from the messages and conduct of the employer.

I now turn to the issue 2. Whether there were any illegalities and offences committed by the 2nd Respondent?

Before I specifically address this issue, I would like to make a few comments. Learned Counsel Tabaro for the 1st Respondent invited Court to critically appraise the procedure adopted by the Learned Counsel for the Petitioner. Tabaro noted and I agree with him that the illegalities and offences submitted upon by Learned Counsel for the Petitioner were never pleaded. This implies that there was a substantial deviation from the original grounds of the petition.

Tabaro further contended that the grounds of this petition were very clear. They related to the resignation of the 2nd Respondent and the anomalies in Ward III Taxi Park II polling station in Bushenyi- Ishaka. It was Tabaro's contention that Bemanyisa should have amended his petition to allow for an argument on purported illegalities. He further contended that Benyamisa's submissions were tantamount to a fishing expedition.

Tabaro submitted that an illegality was anything unlawful. He stated that not every unlawful act by the parties in a petition forms ground for setting aside an election.

I must say that I agree that Learned Counsel Benyamisa appeared to be on a newt-picking or fishing expedition.

I do agree with Tabaro to the extent that the grounds of the petition must be stated upfront in the main body of the petition. The law clearly requires the Petitioner to state as clearly as possible the grounds upon which they rely. In the instant case there were two core grounds raised in the main body of the petition. These were resignation and malpractices. During the course of the proceedings the Learned Counsel for the Petitioner drifted into new areas outside what was earlier pleaded. Rather than stick to the grounds of his petition Benyamisa totally abandoned the grounds of his petition and sought and attempted to introduce new grounds. By abandoning the third and fourth issues of this petition which formed a major ground of this election petition I find that the Learned Counsel for the Petitioner departed from his proceedings and even conceded failure in these particular grounds. This is particularly glaring in face of the expunged affidavit evidence of a one Magezi Vicent, who had purportedly witnessed irregularities at Ward III Taxi Park. I therefore find that there is no basis upon which issue no. 2 can be discussed since it was never a pleaded ground for this petition. I note that since Benyamisa for the Petitioner abandoned issue no. 3 and no. 4 Court has no reason to examine these issues either and makes no finding on them.

In the premises, since the Petitioner has failed to prove to the satisfaction of this Court that the 2nd Respondent resigned his post I have no option but to dismiss this Petition with costs.

Signed 8/7/2011

Lady Justice Catherine Bamugemereire

Judge of the High Court

