

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
ELECTION PETITION NO. 04 OF 2011**

DR. NABWISO FRANK WILBERFORCE B :::::::::::::::::::: PETITIONER

VERSUS

1. ELECTORAL COMMISSION

2. MBAGADHI FREDRICK NKAYI :::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

JUDGMENT

On the 18th day of February 2011, the Electoral Commission (hereinafter referred to as the 1st Respondent) conducted Parliamentary Elections in which the petitioner together with MBAGADHI FREDRICK NKAYI (2nd respondent) BALLYABYE CHARLES, BALIDAWA DANIEL, GABULA FAROUK, NADIOPE KALULU, KINTU ALEX BRANDON, KIRYA DANIEL, TALUGENDE LAWRENCE, WAKUDUMIRA DAVID FRED and WALYOMU MUWANIKA MOSES contested for the Kagoma County Constituency. At the conclusion of the poll the following results were declared and later published in the gazette.

1. Mbagadhi Fredrick Nkayi polled 11,948 votes
2. Nabwiso Frank Wilberforce B polled 11,469
3. Walyomu Muwanika polled 10,819
4. Talugende Lawrence polled 5,263 votes
5. Kintu Alex Brandon polled 2,208 votes
6. Balabye Charles polled 2,187 votes
7. Kirya Daniel polled 1,108
8. Wakudumira David Fred polled 1102 votes
9. Gabula Farouk Nadiope Kalulu polled 366 votes
10. Balidawa Daniel polled 104 votes

The petitioner contests the above results. His first contention was that the 1st Respondent miscomputed the results from various polling stations and that as a result the miscomputation, the 2nd Respondent was wrongly declared as the winner whereas the petitioner is the one who had won the election. His second contention was that the electoral process in Kagoma County Constituency was not conducted in compliance with the provisions and principles of the Constitution of the Republic of Uganda, the Electoral Commission Act and the Parliamentary Elections Act, 2005 which affected the elections in a substantial manner and that the failure to conduct the elections in compliance with the provisions and principles of the electoral laws affected the results in a substantial manner and benefitted the 2nd respondent. The petitioner prayed this Court to declare:-

- (a) That the 2nd Respondent was not validly elected as a Member of Parliament of Kagoma County Constituency.
- (b) That the election of the 2nd Respondent as a directly elected Member of Parliament of Kagoma County Constituency be annulled and set aside.
- (c) That the petitioner, who on a correct computation of the results actually won the election, but was declared by the 1st Respondent to have been second, declared winner and validly elected member of Parliament for Kagoma County Constituency.
- (d) That in the alternative but without prejudice to the foregoing, fresh elections be conducted in the said Constituency.
- (e) That the Respondents pay the costs of this petition.
- (f) Such other remedy available under the Electoral Laws as the Court considers just and appropriate.

In the 1st Respondents answer for the petition, its Chairperson Dr. Eng Badru Kiggundu contended that contrary to what was alleged by the petitioner the said Elections were conducted in accordance with the principles of transparency, freedom and fairness and that the outcome of the said results reflected the true will of majority voters and that the 1st Respondent lawfully declared the 2nd Respondent winner of the election having polled

the highest number of votes and having been validly elected as member of Parliament for Kagoma County Constituency.

The second Respondent also denied that the petitioner had lost the election through miscomputation of the votes cast. He pointed out that he himself had suffered a miscomputation of the results otherwise the correct computation was that he had polled 12,235 votes to the petitioners 11,491 which gave him a margin of 744 votes instead of 479 votes as declared by the 1st Respondent. He contended that he was validly elected Member of Parliament Kagoma County Constituency because he polled the majority votes.

When the petition was called for hearing on 29th June 2011, Court directed the parties and their Counsel to do a retallying and recomputation of the results to determine as to whether the petitioner had the majority number of votes as he claimed. This would effectively dispose of the petition because if it was to be found that the petitioner had been cheated through a miscomputation, Court would have no difficulty declaring him the winner of the election. This was not to be.

A joint scheduling memorandum to which a schedule marked "A" was attached was later filed. In this schedule it was indicated that results from 118 polling stations out of 133 polling stations were not being disputed. From these undisputed polling stations the computations showed that the 2nd Respondent polled 10,546 votes to the petitioner's 10,540. The 2nd Respondent would still win by a margin of six votes. The question that remains unanswered is as what would be the fate of the fifteen polling stations whose Declaration of Results Forms were disputed for various reasons as this judgment will show. Arising out of the above question the following issues were framed for determination by this Court:-

1. Whether or not the Petitioner won the election of Member of Parliament for Kagoma County Constituency

2. Whether in the conduct of the election by the 1st Respondent there was non-compliance with the electoral laws and the principles therein.
3. If so, whether, the non compliance affected the results of the elections in substantial manner.
4. What remedies are available and to which party.

The first issue stems from the allegation that the petitioner other than the 2nd respondent won the election. Under S. 63(4) (b) of the Parliamentary Elections Act, 2005 after due inquiry the Court hearing an election may declare that a Candidate other than the Candidate declared elected was validly elected.

Without any hesitation I find that on the evidence presented before this Court, it is unable to declare the petitioner as the winner of the Election for Kagoma County Constituency. According to the submissions of Mr. Kiryowa Kiwanuka Counsel for the Respondent, that finding would dispose of the petition because on his failure to prove that he won the election, the petitioner should accept that another person won the election and that person is the second respondent.

In the view of this Court, the essence of a trial of this nature is to do more than merely determine that the petitioner did not win. The second and third issues framed for trial are testimony that Court is required to investigate and establish as to whether or not the conduct of the election by the first respondent was in compliance with the electoral laws and principles therein and whether in case there was non compliance it affected the results of the election in a substantial manner. Indeed a number of infringements are cited in the disputed fifteen polling stations that would warrant such an investigation or audit in order to determine the validity of the second respondent's election. It is only then that the winner of the election can be found.

The first dispute about the fifteen polling stations relate to Declaration of Results Forms that infringe Article 68 Sub Article 4 of the Constitution of the Republic of Uganda. This Sub- Article is reproduced hereunder:-

Article 68 voting at elections and referenda

“(4) The presiding officer, the candidates and their representatives and in this case of a referendum, the sides contesting their agents, if any, shall sign and retain a copy of a declaration stating-

(a) the polling station

(b) the number of votes cast in favour of each candidate or question,

and the presiding officer shall there and then, announce the results of the voting at that polling station before communicating them to the Returning officer.”

The Declaration of results forms in this category were produced by both the petitioner and respondent and the polling stations affected were Namagoma, Mpumwire Primary School, Buwenge South C and Universal Apostles Church, Bugongwe polling station. Submissions were laid before this Court as to the validity of these Declaration of Results Forms but to me there is no other way of describing Declaration of Results Forms that infringe on the Constitution of the Republic of Uganda other than that they are invalid. I am strengthened in this view by the decision of the Supreme Court in the case of **Kakooza J. B Vs- Electoral Commission & another** where the Supreme Court found that failure by the Presiding Officer to sign the forms invalidates the results from the affected polling stations. Both Counsel cited the authority of **Joy Kabatsi Kafura Vs- Hanifa Kawooya (Supreme Court Appeal No. 25 of 2007)** where the Supreme Court faced with a similar situation was not as explicit as they were in the case of Kakooza J. B so the position remains that an invalid Declaration of Results Form cannot be a basis for declaration of results for that particular polling station. So the results from the above polling station would be excluded from the results declared by the Electoral Commission and the effect of this exclusion will be determined after the rest of the disputed polling stations have been discussed.

The second category of Declaration of Results Form disputed by the petitioner is a Declaration Form for Kyerinda North Polling Station exhibited by the Petitioner as Exh. P11 and by the Respondents as Exh. D. 13. The two forms bear the same serial Number and were signed by the same presiding officer but what struck this Court was the glaring discrepancy between the results declared on the Form issued to the Petitioner and those results on the Form held by the first Respondent. The one held by the Petitioner indicates that he polled 185 votes to the second Respondents 107 while the one in possession of the first Respondent indicates that the Petitioner polled 85 votes while the second Respondent polled 307 votes. Court was of the view that the easiest way to clear the discrepancy was to examine the Declaration Form retained in the Ballot Box for this polling station but when the Ballot Box was opened none was found. The votes in the ballot box tallied with the ones on the Declaration Form in possession of the first respondent but in absence of any explanation as to how this glaring discrepancy came about. It would be unsafe to include the results from this polling station in the final results of this constituency.

A similar situation arose in Mutayi II Polling station tendered as exh. P 9 for the Petitioner and exh. D 11 for the respondents. In the one issued to the petitioner he polled 206 votes to the second respondent's 94 votes. The one produced by the first respondent indicates that the petitioner had the same number of votes while the second respondent's are indicated as 97 an increase of three votes. The ballot box was opened. No Declaration of Results Form was found in the box. The Number of votes in the box tallied with those of the Declaration of Results Form in possession of the 1st respondent. Again there is no explanation as to how the discrepancy, however small came about.

A declaration of Results Form for Buwala store indicated that one person had signed for three agents of the petitioner. A scan of this signature shows that it was scribbled by the same person. One explanation advanced was that one agent of the petitioner could have signed for all the three agents of the petitioner but the explanation does not sound plausible because there is no reason as to why a presiding Officer should allow that to happen.

The last batch of disputed Declaration of Results Forms are for Mpumwire Primary School, St Peters Primary School, Kivubuka, Nabukosi, Buwera Primary School and Mpungwe A Polling stations. The complaint is that the 1st Respondent relied on unsigned Declaration of Results Forms to declare results for those polling stations. The fate of these unsigned Forms has been already been determined during the course of this judgment. They are invalid and cannot be included in the final results for Kagoma County Constituency.

The above analysis of the disputed results from the fifteen polling station answers the second issue in the positive because not only did the 1st respondent infringe on Article 68(4) of the Constitution, the unexplained discrepancies on some of the results tended to favour the second respondent against the petitioner. The election cannot be said to have been held with the principles of transparency, freedom and fairness as alleged by the Chairperson of the Electoral Commission.

The answer to the question as to whether the non compliance affected the results of the election in a substantial manner is to be found in the second respondent's claim that a proper computation of the results from the 133 polling stations would give him a winning margin of 744 votes. If the results of the fifteen disputed polling stations are excluded as it was done during the scheduling conference the winning margin is reduced to only six votes. The reduction in the winning margin is so substantial that the effect the mismanagement of the fifteen polling stations had on this election cannot be overlooked. The issue is answered in the affirmative.

In the result while Court is unable to find that the petitioner won the election and cannot declare him the winner, Court is also unable to find that the second respondent won the election. Instead Court finds;

That the second respondent was not validly elected as a Member of Parliament of Kagoma County Constituency and his election is annulled and set aside. A fresh election will be conducted in the said constituency.

On costs Court finds that the Electoral Commission takes full responsibility for the mismanagement of the electoral process in the fifteen polling stations that has led to the nullification of this Election. It is ordered that the 1st respondent meets the costs of both the petitioner and the 2nd respondent in this petition.

Eldad Mwangusya

J U D G E

21/07/2011

21/07/2011

Mr. Kiryowa Kiwanuka

Mr. Thomas Ocaya

Mr. Sekaana Musa

Mr. Kyazze Joseph

Petitioner present

2nd Respondent present

1st Respondent's Representative present

Election officer Mr. Mayingo George present

Mr. Kawesi Peter Court clerk

Court:

Hon Justice Mwangusya, the trial Judge has written this judgment but due to other assignment given to him by the Hon. The Principal Judge, his Lordship is unable to

personally deliver his judgment. He has accordingly briefed me to deliver the same on his behalf, which I hereby do under Rule 12(2) of the Parliamentary Elections (Election Petition) Rules.

Mukasa Lameck

J U D G E

21/07/2011