THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CV-EP-0044 OF 2011

1. LUYIMBAZI JOHN
2. KASIRYE FRED ::: PETITIONERS

- VERSUS -

1. BAZIGATIRAWO FRANCIS AMOOTI
2. THE ELECTORAL COMMISSION ::::::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

LUYIMBAZI JOHN and KASIRYE FRED (hereinafter referred to as the "1st" and "2nd" "Petitioners" respectively) petitioned this court against BAZIGATIRAWO KUBUUKA FRANCIS AMOOTI and ELECTORAL COMMISSION (EC) (hereinafter referred to as the "1st" and "2nd" "Respondents" respectively).

The Petitioners participated as candidates together with the 1st Respondent for the District LCV Chairmanship for Mubende District. The 1st Respondent emerged winner with the highest votes, and was accordingly declared and gazetted winner by the 2nd Respondent.

The Petitioners contend that the said election was conducted in contravention of the provisions and principles of the ***Local Governments Act (Cap. 243), the Electoral Commission Act,*** *and the* ***Constitution*** of the Republic of Uganda**,** which affected the result of the election in a substantial manner, rendering it invalid for being obtained by the contravention and non-compliance with the provisions and principles of the above stated laws.

In particular, the Petitioners contend that contrary to ***Section 12 (j)*** of the ***Electoral Commission Act (Cap. 140)*** and the principle of compliance with the Law encapsulated in the said provision, the EC failed to ensure that the entire electoral process in Mubende District was conducted in

compliance with the Law when the 1st Respondent was nominated, campaigned, elected and declared the winner by the EC, when he did not qualify to stand as LCV Chairperson candidate for Mubende District, contrary to ***Articles 183*** and ***80 (2)(f)*** of the Constitution.

Article 183 (supra) specifies the qualifications and functions of a District Chairperson, while ***Article 80(2) (f)*** provides that such a person is not qualified for the office if he or she has, within the seven years immediately preceding the elections, has been convicted by a competent court of a crime involving dishonesty or moral turpitude.(underlined for emphasis).

The Petitioners contend that the 1st Respondent was not qualified to stand as LCV District Chairperson in Mubende District on account of having been found guilty and convicted by the Magistrate's court for committing an offence of *Assault Occasioning Actual Bodily Harm* contrary to ***Section 236*** of the ***Penal Code Act (Cap. 120)*** which the Petitioners argue is a heinous crime involving ***moral turpitude*** (hereinafter abbreviated as "MT"). They further contend that it is an act of depravity, wickedness, baseness and vileness that is contrary to the community standards of justice and good morals. Furthermore, that it is an act of violence which has no place in the democratic process. The Petitioners also want the EC held accountable for having failed to exercise its powers to apply the law and disqualify the 1st Respondent and avert the constitutional violation and infringement resultant from the candidature and election of the 1st Respondent. The Petitioners pray this court to declare that:

a) The 1stRespondent was not validly elected as the LCV District Chairperson for Mubende District.
b) Alternatively, the election the 1st Respondent as an LCV District Chairperson for Mubende District be nullified and set aside.
c) The 2nd Petitioner having been returned second with 12700 votes be declared winner and validly elected under ***Section 142 (3) (b)*** of the ***Local Governments Act*** (supra).

d) A new election be organized and held under ***Section 142(3)*** of the ***Local Governments Act*** (supra).

e) Further, in the alternative, the Petitioners are entitled to restitution and restoration for all the electoral expenses specifically pleaded in paragraph 8 of the petition and any other relief that court may deem fit from the Respondents.

f) The Respondents do pay the costs of the petition.

The Respondents, for their part, denied all the allegations advanced by the Petitioners. In particular, the 1st Respondent maintained that the said election was conducted legally and in a free and fair atmosphere contrary to the Petitioners' allegations, and that the alleged conviction of the 1st Respondent by the Magistrate's court was being challenged before the High Court at Nakawa, vide ***Criminal Revision Application No. 001 of 2011***, where it pending determination, and as such, that this petition is premature and brought in bad faith. The 1st Respondent argued that facts pertaining to his case ought not to be discussed as this petition seeks since it would prejudice the application for revision, which was filed earlier in time than this petition and is pending determination before the High Court.

For its part, the EC responded by asserting that the 1st Respondent was duly qualified, and the said election was conducted in accordance with the principles underlying transparent, free and fair elections laid down in the electoral laws of Uganda, and that the election results in Mubende District reflected the true will of the majority voters. The EC advanced an alternative argument that if there were any irregularities or non-compliance with electoral laws, they did not affect the outcome of the election in a substantial manner. Both Respondents prayed for the dismissal of the petition with costs.

At the Scheduling Conference, four issues were agreed and framed for court's determination as follows:

(1) What is the effect of the pending application for Revision; vide Nakawa High Court ***Revision Application No. 1 of 2011*** against the judgment of the Magistrate Grade I at Mubende Chief Magistrate's Court?

(2) Whether the effect in (1) above, if any, has any material bearing on the current petition.

(3) Whether *Assault Occasioning Actual Bodily Harm* contrary to ***Section 236*** of the ***Penal Code Act*** amounts to a crime involving **moral turpitude.**

(4) Whether the parties are entitled to the remedies sought.

Learned Counsel Mr. Mbabazi Muhammad for the Petitioners, Mr. Kasumba and Mr. Kawesa Brian for the 1st and 2nd Respondents respectively, agreed that the first two issues be resolved first, and in event they entirely dispose of the matter - which was mainly Mr. Kasumba's view – then there would be no need to resolve the rest of the issues since, in any case, the petition would be entirely determined on those two issues.

Issue No.1.

What is the effect of the pending application for Revision vide Nakawa High Court Revision Application No. 1 of 2011 against the judgment of the Magistrate Grade I at Mubende Chief Magistrate's Court?

Mr. Kasumba argued that hearing this petition would be prejudicial to the 1st Respondent's rights to have his conviction by the Mubende Magistrate Grade I court revised by the High Court. Counsel argued that revision is a right, and the application is still pending before court, and that disposing of this petition would be prejudicial to the 1st Respondent's right to the remedies sought in ***Revision Application No. 001/2011*** at Nakawa High court.

He further submitted that the revision application is not limited by time since no law requires it to be filed in any particular period. Counsel went on to argue that the said application was filed earlier than this petition; hence the application should not be viewed as a device or blocking

mechanism to the petition which would prejudice the Petitioners' rights to be determined in this petition. Instead, the situation is the reverse. Mr. Kasumba maintained that where there are two competing equities, the one filed first in time prevails. In the instant case, the revision application was filed earlier and it takes priority. To back this proposition, counsel relied on the case of ***Byanyima Winnie Vs Ngoma Ngime, High Court Civil Revision No. 9/2001***. Counsel asserted that the effect of the revision application is to stay the judgment in this matter until the rights of the 1st Respondent who filed the application for revision first can be determined before the instant petition is heard.

Mr. Mbabazi Muhamad, counsel for the Petitioners, did not specifically respond to this particular point, but generally advanced the view that for the 1st Respondent to argue that he was convicted but was still applying for revision would be equated to someone stating that that at the time of voting he or she was not of age but *enroute* to becoming of age. Rather, what is of essence is what obtained at the material time of voting. If there was a conviction, then a party needed to resolve it first before he could contest. The issue is whether the court that convicted the 1st Respondent was "competent" and not "final". The other operative word is "conviction". Since a conviction by a competent court exists, the 1st Respondent was morally bound not to contest. It is only in event of a reversal or change in the conviction that he would inform the EC in time of such reversal or change. Short of that, the 1stRespondent should not be heard to argue that he was still pursuing remedies in court, which he should have done much earlier if, indeed, he considered them to be relevant.

Consideration.

The relevant part of ***Article 80(2) (f)*** (supra) which provides for the qualifications of a candidate states as follows:-

> ***"(2) A person is not qualified for election as a Member of Parliament, if that person –***

(a)……

(b)……..

(c)……..

(d)……..

(e)…….

(f) has, within the seven years immediately preceding the election, been convicted by a competent court of a crime involving dishonesty or moral turpitude; …" .

The operative words are underlined for emphasis. In my view, "a competent court", invariably, refers to one vested with the necessary jurisdiction to hear and determine a matter before it; bearing in mind that jurisdiction is conferred on any particular court by the express provisions of a statute/Act, and that a court cannot assume or exercise jurisdiction by implication. See ***Assanand & Sons (U) Ltd. v. East African Records Ltd. [1959] EA 360.***

A "conviction", on the other hand, is defined by the *Black's Law Dictionary (7th Edition) at page 335;* as the act or process of judicially finding someone guilty of a crime. It is consequent upon a finding of guilty of a person charged with a criminal offence by a court vested with competent jurisdiction to do so. Going by these definitions, it follows that *Article 80 (2) (f)* (supra) is, essentially, concerned with the question whether a person has been "convicted by a competent court" or not. The filing of any revision application in court against such conviction is necessarily besides the fact that the person was or has been "convicted", and nothing else. Only the fact of a "conviction by a competent court" is what is contemplated under ***Article 80(2) (f)*** (supra). The additional phrase *"…within the seven years immediately preceding the election…"* is simply meant to qualify the period within which the conviction should have occurred.

Regarding the revision in criminal matters, ***Section 48*** of the ***Criminal Procedure Code Act (Cap. 116)*** provides the High court may call for revision the record of the lower court to examine any criminal proceedings before any magistrate's court to satisfy itself as to the correctness,

legality or propriety of any finding, sentence or order and as to the regularity of any proceedings. In the instant case, the 1st Respondent moved court by filing ***Revision Application No. 001/2011*** at Nakawa High Court; a copy of which he did not attach to enable this court to ascertain whether or not the particular orders sought involved orders against the conviction of the 1st Respondent in the earlier ***Criminal Case No. MBD-CO-429-2008 (MCB-105/08).*** Even then, it would not change the position that the main issues in the instant petition remains whether the revision application acts as a bar to this petition.

The reading of ***Article 80 (2) (f)*** (supra) shows that it only requires the existence of a "conviction by a competent court". I would agree with Mr. Mbabazi, learned counsel for the Petitioners, that there was a deliberate choice in the use of the words "competent court" and not "final court". If the "final court" or even "appellate court" were contemplated, the Constituent Assembly would, no doubt, have expressly stated so. They did not, and we have to give full effect to the words used in ***Article 80 (2) (f),*** and come to the logical conclusion that the intended purpose and effect was for a person convicted by a competent court not to qualify. That being the case, the revision application does not operate as a stay to further proceedings in a case, in as much as it cannot *per se* set aside or overturn a conviction. It is only after the application is heard and determined by the court that the decision may have any effect at all. In the instant case, the revision application is said to be pending before the High court at Nakawa, and it is not even clear that it has been fixed for hearing. Besides, there are no guarantees that it must inevitably succeed on the orders sought. By analogy, had the 1st Respondent been convicted and sentenced to a longer custodial term against which he filed for revision, there is no doubt that he would still continue to serve the sentence until reversal of the same. By this simple analogy, it is meant to demonstrate that a revision application filed in the High court does not have any affect on a conviction by a lower competent court, which remains effective until the same has been reversed by an order of a

higher court. The current status is that there is a valid conviction by a competent court against the 1st Respondent, which has not been set aside by a higher court, and the mere fact of filing a revision application against the conviction does not have any effect the subsequent instant petition. It would follow that the principle of equities advanced by Mr. Kasumba is misplaced in the circumstances of this case.

Regarding Mr. Kasumba proposition that no law specifies the time limit within which to make a revision application, and that it could be filed any time and be properly before the court, I would hold that *prima facie*, that appears to be the case, but it is not necessarily true. The guiding principle is that no revision would be ordered where, from the lapse of time or other cause, the exercise of such power would involve serious hardship to any person. In my view, this principle does not seem suggest that the time for filling for revision is indefinite. I would, accordingly, agree with counsel for the Petitioners, that the issue of revision should have been resolved much earlier if, indeed, the 1st Respondent considered it to be relevant. I believe that this finding takes care of *Issues No.1 and 2* in this petition which are on the same point.

Issue 3:-

Whether Assault Occasioning Actual Bodily Harm contrary to Section 236 of the Penal Code Act amounts to a crime involving moral turpitude.

This is the pivotal issue upon which the petition hinges. ***Article 80 (2) (f)*** of the Constitution unequivocally bars from contesting for the office of LCV Chairperson any person who: -

> ***"(f) …has, within the seven years immediately preceding the election, been convicted by a competent court of a crime involving dishonesty or moral turpitude."*** (underlined for emphasis)**.**

The constitution does not define the term "moral turpitude" (MT), and I have also not come across any statutory or judicial authority in Uganda that has dealt with the concept which could

offer guidance on the matter. The option open to court in such circumstances would be to assign the term its ordinary plain meaning. This was the position adopted by the Supreme Court in ***Attorney General Vs Masalu Musene & 3 O'rs, Constitutional Petition Appeal No. 5/2005,*** and this court adopts the same stance.

It would also be instructive to look at what various authors, and decided cases in other jurisdictions on the similar matter say, which may offer useful guidance. ***Black's Law Dictionary*** (supra) at page 1026 defines "moral turpitude" to mean;

> ***"a conduct that is contrary to justice, honesty, or morality. In area of legal ethics, offences involving moral turpitude – such as fraud or breach of trust – traditionally make a person unfit to practice law – Also termed as moral depravity"***

Quoting ***50 Am. Jur. 2d Libel and Slander, 165, at 454 (1995),*** the extract states as follows –

> ***"Moral turpitude means, in general, shameful wickedness –so extreme a departure from ordinary standards of honest, good morals, justice, or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another, or to society in general, contrary to the accepted and customary rule of right and duty between people".***

Words and Phrases Legally Defined (2nd Edition) Volume 3 1-N (John B. Sounders (Editor)) p.294, quotes a Court of Appeal of Canada case ***King and Brooks [1960], 129, Man. CA,*** *per Mounin, J. at page 249,* where "moral turpitude" was assigned similar definition as in the ***Black's law Dictionary*** (supra), that it involves acts of baseness in the duties which a man owes his fellow men contrary to the accepted rule of right and duty between man and his fellow man. The learned judge went on to state as follows;

"I agree entirely with American decisions that the word "moral", preceding the word "turpitude", adds nothing to it, it is a pleonasm which has been used only for the sake of emphasis".

My understanding of the position adopted by the Canadian court of appeal is that the use of the word "moral" is unnecessary to describe a conduct, save for the sake of emphasis. The word "turpitude" alone would suffice to describe the act or conduct.

The ***American Heritage Dictionary*** defines "turpitude" to mean depravity, baseness, a base act. It has its origin from the Latin word "*turpis*" which meant "foul", "shameful", "ugly" or "disgraceful".

Based on these definitions, it would appear that whereas "turpitude" clearly concerns the negative aspect of human actions or conduct, "moral", on the other hand, introduces the value judgment standards of goodness or badness of human action and character. In other words, it ascribes the standard to conform to as regards the right or just or virtuous in human behavior. It would also seem certain that "moral" arises from and, or resides in the human conscience or sense of right and wrong.

The ***Encyclopedia of American Law*** also defines "moral turpitude" not any differently from the above cited authorities, but takes it a step further by assigning examples of crimes that would, in the ordinary parlance, constitute crimes of MT. They include rape, forgery, robbery and solicitation by prostitutes. By these examples, clearly MT is a phrase commonly used in criminal law to describe a conduct that is considered contrary to community standards of justice, honesty or good morals. Crimes involving moral turpitude usually entail that inherent quality of baseness, vileness, or depravity with respect to a person's duty to another or to society in general.

In ***British Exparts.com "Crimes involving Moral Turpitude; A broad Overview***, by J. Craing Fong; a more apt approach to MT was taken, but only added to a similar background as the

above. MT was defined as an act which is *per se* morally reprehensible and intrinsically wrong. It comes from Latin *malum in se*, or bad in themselves. A crime is regarded as *malum in se* because of its specific nature. The individual facts and circumstances of a particular case do not affect the classification of a crime as a crime involving moral turpitude (CIMT). Also, the seriousness of the crime and harshness of sentence imposed on the offender have nothing to do with whether a crime is a CIMT. It has nothing to do with whether one thinks the crime is "bad enough" to raise to the level of a CIMT. The determination of the standard is made by the courts. As can be discerned from the various definitional authorities, there appears to be no *rule of the thumb* in determining what would amount to a CIMT for every casse. The concept is an elusive one and certainly incapable of a precise definition, owing to the fact that each case has to be weighed and judged upon its surrounding circumstances. I would also add that one cannot possibly list every possible CIMT in every possible circumstance, because the outcome of the analysis, usually, depends on the context.

It was argued for the Petitioners that ***Article 80(2) (f)*** (supra) read together with ***Article 180*** (supra) have a supreme constitutional effect. Counsel for the Petitioners further referred to ***Article 257***, which defines "court", and Chapter VIII thereto which provides for the "court" generally, and that ***Article 129 (d)*** creates "such subordinate courts as Parliament may by law establish". Further, that the ***Judicature Act (Cap. 13)*** and the ***Magistrate's Court Act*** flowing from ***Article 129 (d)*** (supra) created Magistrates courts, and ***Section 161*** of the ***Magistrates Courts Act*** specifies the levels of magistrates and vests them with their respective jurisdictions. Counsel argued that the Magistrate Grade I court which convicted the 1st Respondent is a competent court and ***Article 80 (2) (f)*** (supra) used the word "competent" not "final".

Mr. Mbabazi for the Petitioners then referred to the USA jurisdiction to elucidate on what amounts to MT, and that the USA has a similar provision used in determining ineligibility for a visa; where MT has three elements:

(i) Fraud

(ii) Larceny; and

(iii) Intent to harm persons or things; such as crimes against property, government authority, persons, family relations or sexual immorality.

When it comes to offences against a person, “assault” is categorized as a CIMT. "Common assault" is not a CIMT, but if it involves bodily harm, it involves MT. Counsel submitted that in Uganda the ***Penal Code Act*** categorizes assaults into three types:-

i. Common Assault contrary to ***Section 235*** of the ***Penal Code Act***;

ii. Assault Occasioning Bodily Harm contrary to ***Section 236***(supra);

iii. Grievous Harm contrary to ***Section 219(***supra).

Mr. Mbabazi argued that the instant petition is based on (ii) above of *Assault Occasioning Actual Bodily Harm* contrary to ***Section 236*** (supra). Though declared as a misdemeanor, under ***Section (2)(e)*** of the ***Penal Code Act***, in its definition, there must be medical evidence and actual “harm”, and unlike common assault, ***Section 2 (h)*** of the ***Penal Code Act*** defines “harm” as bodily hurt, disease, or disorder whether permanent or temporary. Also, there has to be *mens rea*, which is the aspect of being unlawful. Although a misdemeanor, our courts have found the offence to be a minor and cognate to murder contrary to ***Section 188*** of the ***Penal Code Act***. To buttress this argument, counsel cited the case of ***Robert Ndeiho and Ogunyu Vs R [1951] 18 EACA 171*** where the appellant had been charged with murder, but it was substituted with assault occasioning actual bodily harm. Also in ***De Souza Vs Uganda [1967] EA 784 at page 788***, it was held that assault is a minor and cognate offence to Robbery. In ***Musa & O'rs Vs R. [1967] EA 573***, assault occasioning actual bodily harm was substituted for robbery. In ***R. Vs Cheya***

[1973] EA 500, it was also held that assault is minor and cognate to the offence of murder. Mr. Mbabazi was of the firm view that this shows the *genre* of the offence of *Assault Occasioning Actual Bodily Harm*, and how grave it is.

Counsel further quoted from the ***US Department of State Foreign Affairs Manual Vol. 9,*** which is used to determine ineligibility of visa applicants. On page "6 of 28", on crimes committed against the person, family relationship, and sexual morality, which constitute MT, item (3) (d) thereof lists "assault with intent to commit serious bodily harm", as one such offence. Counsel also referred to a USA Case of ***Re Fernando Alfonso Torres –Varela, Respondent File A29, 242 698 – Florence***, decided on May 9, 2001 (on pages 82-83) where it was stated:

> ***"The meaning of the phrase "crime involving moral turpitude" is a matter of federal law, and any analysis of whether a crime involves moral turpitude necessarily entails agency and judicial construction….***
> ***The term "moral turpitude" has long been the subject of interpretation, and its precise meaning has never been fully settled…. We have held that moral turpitude refers generally to conduct that is inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general…."***

In the above latter case, the respondent was found guilty of driving under the influence ("DUI") in violation of Arizona law, but on appeal it was held it did not amount to a CIMT. On page 84, of the same extract in the case, court held that "*crimes in which evil intent is not an element, no matter how serious the act or harmful the consequences, do not involve moral turpitude"*.

Mr. Mbabazi then cited Malawi cases of ***The State and Malawi Electoral Commission Respondent Ex parte Yeremiah Chihana Applicant, Miscellaneous Civil Cause No. 41 of 2009; and Hon. J. Z.U. Tembo, Hon. Kate Kainja and Attorney General, Civil Appeal Cause No. 50 of 2003***. Counsel noted that Malawi has similar constitutional provisions as Uganda which bars members of Government on grounds of having been convicted of CIMT. He urged

that given the three types of assault in Uganda, the assault contrary to ***Section 236*** of the ***Penal Code Act*** is of a higher kind. To back this proposition Mr. Mbabazi cited ***Andrew Bowalick Vs The Commonwealth of Pennsylvania No. 799 C.D 2003,*** which dealt with whether common assault is always a CIMT. It was held that it was not but that aggravated assault is a CIMT.

Counsel contended that the assault under ***Section 236*** of the Uganda ***Penal Code Act*** is aggravated, and therefore involves MT, and that the provision of the law itself describes the ingredients. He further referred to ***Archibold [1997] page 1632-33*** where the ingredients of the offence "actual bodily harm" are discussed and that one does not look at what was done, or go behind the judgment to consider the evidence, but look at the provisions of the law. That given the provisions of ***Section 236*** (supra), the 1st Respondent committed the CIMT, and based on the authorities cited, violence against a person is not well placed in a modern society. Counsel maintained that even the judgment of the court that convicted 1st Respondent stated that a leader should be able to contain his rage. Further, that although this vile act does not shock the conscience of a nation, the Constitution deemed it fit to bar for some period such people from contesting, and that is the intention of the provision which court should give it effect.

Mr. Brian Kawesa counsel for the EC responded and concurred with Mr. Mbabazi regarding the operative words in ***Article 80(2) (f)*** (supra). He submitted that the key words are “competent court” and “a person convicted” and “crime involving moral turpitude”, but that not any crime is the basis for disqualification under the Article. Counsel also agreed that there is currently no judicial or statutory authority in Uganda as to the definition of MT, or even dishonesty. Counsel however referred to the definition found in ***Black’s Law Dictionary*** (supra) and also quoted the case of ***Andrew J. Bowalick Vs The Commonwealth of Pennsylvania*** (supra) at page 1026), and the extract quoted in *extensio* earlier in this judgment.

Mr. Kawesa Brian advanced the view that in light of the definition in the above authority, MT must be understood *edjsdem generis* with dishonesty. The crime must be such that it involves elements of a corrupt mind or a mind that is accompanying the act or a conduct that is reprehensible and viscous in nature so as to be shocking to the normal sense of that particular community where the person lives. When the definition is applied to ***Article 80(2) (f)*** (supra), the offence under ***Section 236*** (supra) is not a crime involving MT. Counsel was of the view that the crime as depicted in the judgment cannot be said to be one involving MT, or one committed with a corrupt mind or a mind that is reprehensible and viscous. He further argued that to upgrade the conduct or act of a person to that level, the act or conduct must constitute demonstrable elements of dishonesty or corrupt mind, and that where bodily injury is involved, there must be demonstrated cogent evidence that the person caused the injury with a viscous motive or reprehensible mind so that such act or conduct is depicted as grave and disgraceful to the moral standards of the community. That it should be an act such as would vitiate the person's moral standing in the estimation of the average members of his community. It is an act that must have been committed with mischievous intent that is private impropriety as held in the ***Andrew J. Bowalick*** case (supra). Such an act must be capable of or have potential for social disruption. Counsel gave examples of the crimes of corruption, murder, theft, especially of public funds, sexual offences, drug trafficking as quoted in the said case to be CIMT.

Mr. Kawesa further argued that in the instant case, the Magistrate Grade court's judgment shows that, indeed, this was not a CIMT, where it is stated that it was a fist-fight arising from a heated political debate. On the other hand, the ***Andrew J. Bowalick*** case (supra) breaks down the elements of assault under the Pennsylvania Crimes Code in Section 270 as;

(i) Attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another,

(ii) Negligently causes bodily injury to another with a deadly weapon;

(iii) Attempts by physical menace to put another in fear of imminent serious bodily injury; or

(iv) Conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of that person"; and it was held that these elements do not constitute MT.

Mr. Kawesa went further and submitted that in determining whether or not a crime involves MT, courts will consider the elements of the offence. Simple assault, under the Pennsylvania Code referred to, was held not always to be a crime of MT, yet it includes element of assault occasioning actual bodily harm similar to the Uganda ***Section 236*** of the ***Penal Code Act.*** The elements include "intentionally", "knowingly" or "recklessly" causing bodily injury to another. Counsel was of the view that the act/conduct of the 1st Respondent was not to that degree, and does not fall within the operative words in ***Article 80(2) (f) (supra)***. He was further of the view that to hold otherwise would be absurd and as it would affect the 1st Respondent as a respected leader of his people as well as his constituents who overwhelmingly voted for him. The 1st Respondent won the election by an incredibly wide range as against the 2nd Petitioner by over 75,000 votes. The 1st Respondent was elected by members of the community where he committed the crime, and by the time he committed the crime, he was just a councilor for a sub-county. Contrary to the definition of MT, which should have been an act that shocks his community, the 1st Respondent was instead elected for a wider jurisdiction of LCV Chairperson of a District, with a wide range in victory among the people where the crime was committed. Therefore, the crime was not one that shocks the moral sense of the community. To hold the

contrary would not only infringe the constitutional rights of the 1st Respondent, but also of his constituents. Mr. Kawasa cited ***Article 59 (1)*** (supra), which provides for the right of citizens to vote for their representatives, and argued that the people of Mubende exercised their right almost at consensus level, and this right cannot be derogated from or restricted or limited in any way.

Counsel was of the view that ***Article 80(2) (f)*** (supra), should be interpreted liberally. For this proposition, Mr. Kabayiza also relied on the decisions of Malawi Supreme Court in ***Fred Sewula Vs Attorney General & Malawi Congress Party, Misc. Civil Appeal No. 32 of 1997; Attorney General Vs Dr. Mapopa Chipeta Misc. Civil Appeal No. 33 of 1996; and State Vs The President of Republic of Malawi & the Minister of Finance & Secretary to Treasury Exparte Malawi Law Society, Constitutional Case No. 6 of 2006.***

Counsel argued that people of Mubende expressed their will and aspirations which embody their values, customs and morality by electing the 1st Respondent. Court should preserve these aspirations under ***Article 126 (1)*** (supra), and deliver substantive justice.

Counsel concluded by arguing that the 1st Respondent was lawful and right to accept nomination as a candidate and to eventually declare him the winner and gazette his as such. In absence of the purported disqualifications under ***Article 80(2) (f)*** (supra), the 1st Respondent was otherwise qualified and was duly elected in full compliance with the law and principles of elections. Counsel prayed for dismissal of the petition with costs. Mr. Kasumba for the 2ndRespondent associated himself with the submissions of learned counsel for the 1st Respondent.

Consideration.

Judging by the authorities cited on what constitutes a CIMT, this court's initial observation is that the term "MT" is not difficult to appreciate - at least from the definitional and conceptual perspectives. What, however, poses the challenge lies in how to determine which crime falls

within the category of CIMT, and in particular, the applicable standard used to determine them and the limits of the standard chosen. I have attempted to lay down what I consider to be the guiding principles in determining what constitutes a CIMT, based on the conceptual underpinnings of MT, but bearing in mind that there is no particular rule of the thumb to make such a classification. It is purely an interplay of multifaceted factors; some of which are indicators of a CIMT while others are outcomes.

Firstly, that a crime involves MT cannot alone be measured by its nature or character unless, of course, it is an offence *malum in se,* the very commission of which implies a base and depraved nature. The context of the commission, the intent, the *mens rea* and knowledge of the gravity and consequences of the offence, the nature and level of development of the public morals of the given society would usually, in my view, furnish the best guide.

It is, therefore, understandable that given the inherently nebulous and elusive nature of the concept of MT, different jurisdictions treat similar crimes differently when it comes to CIMT; and even within a same jurisdiction judicial approaches do not seem to pin-point to a uniform standard of application to classify CIMT.

Secondly, the concept of MT is a constantly shifting one – certainly in subtle ways. It inevitably conforms to the ever fluid circumstances in the equally transient society – though usually it responds less fast to societal dynamics. The morality of a given society may not necessarily be the same in another society, and similarly, different dynamics inherent within the socio-economic development of a given society at different stages precipitate different sets of moralities. I would simply sum it up thus;

> *"What is moral here today may not be moral here the next day, and what is moral here today may not be moral there the next day".*

Thirdly, while it may be suggested that MT depends on the sate of public morals and varies according to a given community's level of socio-economic development and the set standards against which morality is measured at different times, what is unmistakable is the fact that a definitive common streak cuts across the particular crimes which have variously been found to constitute CIMT. They are generally "intent crimes" involving dishonesty or fraud or other reprehensible anti–social behavior that harms and or, corrupts others. It invariably means that for a crime to fit the classification as a CIMT, the commission entails a deliberate intent or, at least, recklessness with the actual awareness of the risk on part of the offender – who nevertheless chooses to take the risk. The particular streak of intent, whether it is expressed or implied, covers a broader range of offences than merely the generic definition of MT. I have made this particular observation fortified by decided cases on this particular matter drawn from the USA jurisdiction. For instance in the case of ***People Vs Onledo, 167 Cal. App. 3d, 1085, 1098 [1985]*** assault with intent to murder was held to involve MT; in the ***People Vs Miles 172 Cal. App. 3d, 474, 482 [1985]*** arson was held to involve intent to do evil hence a CIMT; in the ***People Vs Rodriguez 177 Cal. App. 3d 174, 178 [1986]*** it was held that automobile theft necessarily involve MT; and in ***People Vs Lindsay 206 Cal. App. 3d 849, 857,*** it was held that knowledge of the crime of battery demonstrates the readiness to do evil and hence involves MT. These cases bring to mind the inherent element of intent or *mens rea* and knowledge of the gravity of the crime on part of the perpetuator. Doubtless, in such a scenario the aspect of *malum in se,* the knowledge of the act and the consequences become quite apparent on part of the offender.

Fourthly, in the determination of whether or not a particular crime fits the classification of a CIMT, one does not go behind the conviction and take evidence or reconsider the facts and the circumstances of a particular case. Rather, court should look at the statutory definition of the particular crime, and only if the least adjudicated elements of the crime necessarily involve MT.

For instance, a person needs not to have intention to injure to commit an assault, but only needs to intend to do the act. The moment court determines the existence of the ingredient, MT is duly established for the crime.

Fifthly, some crimes do not necessarily demonstrate readiness of the offender to do evil, and to that extent do not involve MT, even though by definition the elements constituting the crime do, in fact, involve MT. As such, an assault may involve MT on part of the assailant in one case, but not necessarily in another. Similarly, the manner of commission of crime may not necessarily involve MT, even though the elements of the particular crime involve MT. Examples of this category abound. For instance, simple assault does not necessarily always exhibit readiness of the offender to commit evil but is, nevertheless, constituted by ingredients which involve MT. The ultimate logical conclusion to draw from this particular example is that while some crimes *prima facie* establish MT, others do not. To that extent, one needs to look beyond the definitional ingredients of the crime to other aspects including the manner of commission/omission and the attendant *mens rea*. A proposition akin to the latter foregone was taken in the USA in the case of ***People Vs Mazza 175 Cal. App. 3d 836, 483 [1986]***, which I have found to be of high persuasive value.

I have made the above observations, and consider them to constitute the general principles upon which MT can be determined. Based on these principles, I believe it is also possible to determine the appropriate standard to adopt to tell with certainty whether a crime involves MT or not. The test, in my view, does not lie simply in the definition of the terms - otherwise that would be a narrow view - but what the judicial authorities have laid down as applicable standard over time. It needs to be emphasized here that the standard usually does not apply in a similar way across the board in all societies in similar situations. This postulation is based on the recognition that society is morally plural comprising of diverse mutually tolerant molarities. In such a scenario, it

is my considered opinion that the time-tested standard of a “reasonable man” would be the appropriate standard to apply, and I have given the reasons below.

In ***Hughes, Morals and the Criminal Law, 32 J. CRIM.L 624, 625, [1962]*** quoting Lord Devlin, the standard of a "reasonable man" is elucidated thus:-

> ***“…a reasonable man is not to be confused with a rational man. He is not expected to reason about everything and his judgment may largely be a matter of feelings.”***

I would, therefore, take it that the "MT" envisaged under ***Article 80(2) (f)*** (supra) refers to the dominant morality of the society, whose measure is that of the reasonable man. I am acutely aware that the Constitution does not use the term "reasonable man" but "the people" – but I regard the two to mean the same thing, only that the latter signifies the plural society. If a given "people's" society espouses a particular morality, then the applicable standard, I believe, is that of a reasonable man within that society at that time.

The use of the term “crime” in ***Article 80(2) (f)*** (supra), however, refers to an act or omission prohibited by law, the breach of which attracts sanctions. On the other hand, when the term “crime” is qualified and/or emphasized by words “moral turpitude”, then it could only mean that the act or omission is not only against the dominant morality of the society but also against the law. This reasoning is premised on the postulate that what is immoral is not necessarily illegal, and the converse is true, that what is criminal in a legal sense may not necessarily be offensive to the moral conscience of a given society. See the USA case ***of Drazen Vs New Haven Taxi Cab. Co, 95 Comm. 257, 132, A 540 [1926];*** and ***State Vs Malusky 65 F. 158 [1894].***

In Uganda, there is a dearth of judicial and statutory authorities on the subject. Nonetheless, the test of “a reasonable man” is a common one and there should be no difficulty in appreciating it. However, before applying it to the facts of the instant case, it is pertinent to make further

observations relating to the USA cases to which constant reference has been made in this judgment.

Firstly, in almost all the cases cited, there seems to be convergence of ideas on the definition of a CIMT, but beyond that each case treats the matter differently according to the set of facts and how they relate to the crime under consideration. Thus, there are wide divergences on the conclusions reached even where facts appear to be similar in some cases.

Secondly, it is easier with the USA system mainly because, for some states, CIMT have been legislatively catalogued. In such instances, the position for the court to take has been clearly "cut out" out for them; which is simply to apply the rigidly pre-set statutory standard to the particular set of facts of each case. Good examples of this are the cases regarding the ineligibility for visa applications. This latter stance also means that the concept of MT is assigned a fixed and absolute meaning as opposed to the Uganda scenario where it has an indefinite and fluctuating context. It follows that the burden of having to "invent" the applicable standard to determine whether or not "*Assault Occasioning Actual Bodily Harm"* contrary to ***Section 236*** of the ***Penal Code Act*** is a CIMT falls on entirely on court; and as earlier observed, there is no shortage of variables from which to draw inferences and make deductions.

In the instant petition, the 1st Respondent was convicted of *Assault Occasioning Actual Bodily Harm* contrary to ***Section 236*** of the ***Penal Code Act***, after he was found guilty of committing the said offence by a competent court. He had slapped a colleague after a Local Council meeting where the two had disagreed on how to allocate motorcycles to Sub-counties. The 1st Respondent felt that his Sub-count was being deliberately side-lined at the instance of th1st Petitioner who was a Deputy Speaker of the Council. The 1st Respondent was subsequently charged and convicted and sentenced to a fine of UGX 1/= and in default, to imprisonment for twenty-eight days. Convicted he was, and convicted he stands. Borrowing from Lord Devlin's expression of

the standard of “a reasonable man” (supra) - or since we are currently viewing MT in the ordinary parlance - the test of the “ordinary man”, the question to ask is;

> *"Would the act of slapping of a fellow colleague/councilor by the 1st Respondent be considered an immoral or dishonest act by the ordinary man in the 1st Respondent's community?*"

To answer this question, Mr. Mbabazi, Counsel for the Petitioners, advanced the view that one only has to look at the elements of the act/offence and how it is defined and categorized under the law. I would agree, but only to an extent. This is because the particular proposition does not satisfy the entire conundrum of what MT entails in the ordinary parlance. For instance, is the slapping of one man by another following immediately after a heated political argument so viscous, wicked, depraved, vile and so base and shameful an act that the ordinary man in Mubende would be shocked by it?

In attempting to give answer, one should be alive to the fact that he or she ought to exercise caution, not substitute one's own value judgments or idiosyncrasies for those of a reasonable man in the community of the 1st Respondent. Having done so, I would proceed to answer in the negative based on the firm conviction that no reasonable man in the Mubende district community would consider the act of slapping of one man by another as a viscous, wicked depraved, vile and so base and shameful an act, that he or she would be shocked by it. Three basic considerations have informed this answer in the negative.

Firstly, although slapping of one man by a fellow man is inherently bad, the act does not upgrade to the level of MT, given that the essential elements which constitute MT by definition, invariably, do suggest the extreme degree of an act. For instance “vile” means extremely unpleasant. “Baseness” refers to the very lowest level. “Wicked” means morally bad and dangerous. “Depravity” refers to the state of being morally bad; wicked. "Shameful” means

disgraceful behavior. “Reprehensible” means morally wrong; deserving criticism. The list is long, but the cross-cutting *genre* in all of them is the extremity of the degree of the act, omission, conduct or character. To that extent, I would not consider a slap on the cheek of a man by a fellow man to be so extreme an affair as to merit the description of a CIMT. More so, I would not consider that in choosing to use the term "MT" in ***Article 80(2)(f)*** (supra) the Constituent Assembly intended it to include crimes such as the type of assault the 1st Respondent was convicted of. If that were to be the case, it would lead to absurdity in a society where such acts are almost common occurrences.

Secondly, while the assault of the type in issue may be regarded as a CIMT in the USA society – from where most of the judicial authorities cited in this judgment originate - it is highly doubtful that similar conditions which precipitate such a categorization in the USA society equally obtain in the rural community of Mubende district in Uganda, where it is not uncommon for arguments to get resolved or concluded with a slap or a fist-fight; and such acts do not attract the apprehension of the degree or magnitude of the shock-effect on the conscience of the community as it would in socio-economically highly developed societies such as the USA. It is not unusual for the ordinary man even to slap a spouse once or twice, and the matter does not see the light of day in the court of public opinion of that community where similar acts, omissions, or conduct are regarded as “normal”, and probably as a result of transient ebullitions of passion.

I wish to emphasize here that I am not laying down a rule of general application for all assaults of the type the 1st Respondent was convicted of, nor providing a justification thereof. I have only gone to that extent in order to contextualize the conviction of the 1st Respondent for an offence which is not in the *genre* of CIMT, by applying the flexible standard of "a reasonable man".

It is also not suggested that if the ordinary man commits a crime of assault contrary to ***Section 236*** of the ***Penal Code Act***, he is entirely blameless and free from MT. Far from that. I have only

underscored the point that elements of the crime are by themselves not sufficient to classify a CIMT, unless accompanied by the necessary *mens rea*, which has to be judged in the context of each case. Certainly, if a man causes harm to another while committing an assault, the propriety of an application of the rule of construction should be determined by the facts which appear by his intent, malice, or knowledge of the gravity of his act – the measure of whether or not that act is immoral being the public sentiment, which is the expression of the public conscience.

It also needs to be stated that sometimes the standard of a "reasonable man" may be manifest, unwritten or even more or less nebulous, as an opinion or custom which, ultimately, is crystallized as written law. It is fixed by the consensus of opinion of the judgment of the majority. It is a truism, though, that those aspects which are discountenanced and regarded as evil or forbidden by society are accordingly immoral; and that the doing of any of them contrary to the sentiment of society is expressed to involve MT. See also the USA case of ***State Vs Malusky 59 ND 501, 230 NW. 735 (1930)***.

The third reason for adopting the flexible standard of "a reasonable man" to hold that the conviction of the 1st Respondent does not involve MT resides in intention of the Constituent Assembly in the deliberate use of the term “moral turpitude" in an unrestricted manner in ***Article 80 (2) (f)*** (supra). I believe the purpose and effect was to allow greater latitude for the judicial analytical mind and discretion to determine each case on its particular set of facts and circumstances. The Constituent Assembly intended to leave it as an exclusive province for the courts to make such categorization. If the contrary was the intention, the Constituent Assembly would have proceeded to formulate and determine the applicable standard in a comprehensive legislation detailing the types of crimes which involve MT, and defining the various degrees of morality. It should be recognized that the Legislature is more closely in touch with public sentiment and opinion than the courts of law. In that regard, I would fully agree with the

proposition of the learned Counsel for the 2nd Respondent that a liberal approach should be adopted when interpreting the provision of ***Article 80(2) (f)*** (supra) to grant wider enjoyment of rights to citizens as opposed to a strict legalistic and pedantic manner, which appears to be the suggestion from submissions by Counsel for the Petitioners. I am equally persuaded by the Malawi Supreme Court authorities cited by counsel for the EC, in ***Fred Sewula Vs Attorney General & Malawi Congress Party Misc. Civil Appeal No. 32/1997; Attorney General Vs Dr. Mapopa Chipeta, Misc. Civil Appeal No. 33 of 1994;*** and the ***State Vs. President of Republic of Malawi & the Minister of Finance & Secretary to Treasury Exparte, Malawi Law Society, Constitutional Case No. 6/2006,*** all of which held the firm view that courts should interpret provisions of the constitution in a manner that gives force and life to the words used by the Legislature, and to at all times avoid interpretations that would produce absurd consequences. A similar stance was taken in Uganda in ***Attorney General, Constitutional Appeal Vs. Maj.Gen. Tinyenfunza David No.1 of 1997*** quoting with approval a Tanzania High Court case of ***Rev. Mutikila v. Attorney General Civil Case No.5 of 1993***, to the effect that where two constructions are possible one restrictive and another favorable, the latter should be preferred notwithstanding the clear words of the provisions, if their application would result in gross injustice. The foregone authorities are not only persuasive but also binding on this court.

The fourth reason I would not consider assault under consideration as amounting to CIMT is based on the concepts of "*public opinion"* and *"community conscience"*. In my view, the two are sides of the same coin. It is true that the 1st Respondent was convicted of the said offence, but it did not shock the public conscience of the greater majority of the people of Mubende. I agree with the reasoning that at the time he committed the crime he was just a Councilor for a Sub-county, but contrary to the definition of MT as an act that shocks the conscience of same community the 1st Respondent was instead "rewarded" by the same community with a landslide

victory and was elected at a wider and higher level in a community where the crime was committed. In my view, this implies, *inter alia,* that the crime was not one that could shock the community's sense of morals. It would also seem to me that the voting of the 1st Respondent with a landslide victory demonstrated great confidence in him by members of his community contrary to the Petitioners' assertions that the 1st Respondent is immorally depraved and wicked, whose conduct has no place in the society. It cannot be denied that the people of Mubende expressed their democratic choice by overwhelmingly voting the 1st Respondent, which was an epitome and embodiment of their norms, values and aspirations. In the circumstances, I would agree with the proposition that the crime for which the 1st Respondent was convicted would not amount to a CIMT. It could not disqualify him in the minds of the right thinking members of his community, and the net effect is that the EC was right and justified and lawfully nominated and declared 1st Respondent the winner of the election for LCV Chairperson Mubende District, and gazetted him as such. The 3rd issue is answered in the negative.

Issue 4:-

Whether the Petitioners are entitled to the remedies sought:

The remedies sought by the Petitioners were enumerated in the earlier part of this judgment. I will not repeat them but only add that they do not arise given the findings I have made above that the 1st Respondent was duly qualified for the entire process of election, and that the 2nd Respondent acted lawfully in allowing the nomination, election, declaration as winner and gazetting of the 1st Respondent. Similarly, I need not to delve into detailed reasons on each of the remedies sought. I accordingly dismiss the petition with costs.

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BASHAIJA K. ANDREW

JUDGE

21st July, 2011.

Judgment read in open court before all the parties present.

1st Petitioner

2nd Petitioner

2nd Respondent.

Counsel for the Petitioners

Counsel for the 1st Respondent

Counsel for the 2nd Respondent

Court clerk:

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BASHAIJA K. ANDREW

JUDGE

21st July, 2011.