

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

ELECTION PETITION APPEAL NO. 11 OF 2021

**(Arising from Chief Magistrates Court of Mengo Election Petition No. 005 of
2021)**

KALYANGO HENRY----- APPELLANT

VERSUS

1. WASAJJA EDWARD GGULU

2. ELECTORAL COMMISSION----- RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The appellant and the 1st respondent were some of the contestants in the elections conducted by the 2nd respondent on 25th January 2021 for the position of Directly Elected Councillor for Kasubi Lubaga Division, Kampala District where the 1st respondent was returned and declared the runner up with 176 votes while the appellant was declared the winner with 179 votes and the other two candidates Muleke Ponsiano polled 84 votes and Muwanga Daniel Lubulwa did not get any votes.

The 1st respondent was aggrieved and challenged the election results on grounds that the 2nd respondent's agent failed to comply with the election laws and guidelines and caused the appellant now to be declared as the winner. The 2nd

respondent officials illegally excluded results for-UPTO DATE PRIMARY SCHOOL A-M where the 1st respondent polled 153 votes and the appellant polled 119 votes. The omission affected the results in a substantial manner and thus the appellant was declared a winner which denied the 1st respondent victory.

The lower court heard the election petition and allowed the same by declaring the 1st respondent the duly elected councilor. The appellant being dissatisfied with the decision filed this appeal on five grounds.

- 1. The learned trial Magistrate erred in law and fact when she relied on the results on the Declaration form which was not used in the transmission and computation of final results by the Electoral Commission to declare the 1st respondent as the validly elected Male Councillor for Kasubi Ward.***
- 2. The learned trial Magistrate erred in law and fact when she relied on results that had been cancelled by the Electoral Commission to declare the 1st respondent as the validly elected Male Councillor for Kasubi Ward.***
- 3. The learned trial Magistrate erred in law and fact when she found that the election was not conducted in accordance with the provisions of the Electoral laws and the non-compliance affected the election in a substantial manner and yet went ahead to declare the 1st respondent as the validly elected Male Councillor for Kasubi Ward.***
- 4. The learned trial Magistrate erred in law and fact when she awarded costs against the appellant when she found that the non-compliance was attributed to the 2nd respondent.***
- 5. The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence on the Court record thereby coming to the***

conclusion that there was non-compliance which affected the election in a substantial manner.

The appellant prayed for the appeal to be allowed, the decision and orders of the Magistrate be set aside with costs to the appellant.

At the hearing of the appeal, the appellant was represented by Counsel *Alinda Jerry* and the 1st respondent was represented *Ssematenga Abubaker* holding brief for *Mujurizi Jamil* while 2nd respondent was represented by *Lugoloobi Hamidu*.

In the interest of time the court directed that the matter proceeds by way of written submissions which I have read and considered in this Judgment. The appellant withdrew the appeal against the 2nd respondent and the said withdrawal was recorded by court.

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion.

Following the cases of ***Pandya vs R [1957] EA 336; Bogere Moses and Another v Uganda Criminal Appeal No.1/1997***, the Supreme Court stated the duty of a first appellate court in ***Father Nanensio Begumisa and 3 Others vs Eric Tibebaga SCCA 17/20 (22.6.04)at Mengo from CACA 47/20000 [2004] KALR 236***.

The court observed that the legal obligation on a first appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:-

“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.”

This position was reiterated by the Supreme in the case of ***Kifamunte Henry v Uganda SCCA No. 10 of 1997***, where it was held that;

“The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.”

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings of the lower Court and have considered the written submissions of both parties.

Grounds 1 & 2

This appeal is hinged on one ground of appeal of whether learned trial magistrate erred in law when she allowed the inclusion of results of the Polling stations of Up To-date Primary polling station.

The appellant’s counsel submitted that the results of Up To-date Primary School were tainted and would confer unfair advantage to any candidate. Therefore the returning officer legitimately and in the interest of free and fair elections nullified the said results. It was their contention that the said results were affected by violence that ensued at the polling station that saw ballots scattered by the public thereby compromising their accuracy and safety.

The respondent’s counsel submitted that the learned trial Chief Magistrate was justified to rely on the certified DR Forms for Up-Todate Primary School A-M and N-Z polling stations in the circumstances of this case. The voting went on well until when counting started that the supporters putting on red shirts caused chaos but police was called and the situation was calmed down. That when calm was restored, vote counting resumed and at the said polling station Up To-date

Primary School A-M the petitioner/1st respondent in appeal obtained 153 votes while the 1st respondent/ appellant in appeal obtained 119 votes.

The results were duly filled in the declaration of results forms and was signed but the agents for the 1st respondent/ appellants refused to sign. The results were then transferred to the returning officer with a report for declaration of the candidate who won as required by law and that the 1st respondent obtained majority of the votes 329 against appellant's 298.

Analysis

This appeal as noted earlier emanates from the decision of trial court where the learned Chief Magistrate held as follows; ***“ looking at the two polling stations of Up-To-date Primary School (A-M) and (N-Z) and certified Declaration results forms by the Electoral Commission as true and authentic.....a total results of the two polling stations showed the petitioner as having obtained the highest number of votes”***

According to the evidence on record the voting process went on smoothly but the counting of votes was interrupted by violence when some people allegedly putting on some red shirts disrupted the counting of votes by kicking the ballot boxes and this scattered the votes cast. However, it is also not in dispute that the police managed to control the violence and the vote counting continued and results were duly declared. The appellant according to declaration of results form for Up To-date Polling station A-M obtained 119 votes against the 1st respondent's 153 votes and Muleke's 91 votes and Muwanga Daniel Lubulwa's 01 vote.

According to the report of the presiding officer contained in PE6 states that; The disruption of the vote process was instigated by the NUP agent who was handling the cast votes of the appellant after he threw them on the ground and chaos started. Immediately another NUP supporter came from the back and he the hands of the P.A in charge of sorting and ballot papers fell on the black box and later kicked the white box which was containing already counted ballot papers of the counted votes of mayor.

The ballot papers of the directly elected councilor remained guarded by the presiding officer since they were had been poured on the black plastic for sorting and counting. The situation normalized and ballot/vote counting resumed under the watch of the DPC and the process ended smoothly thereafter. This evidence contained in the report is supported by other evidence of presiding officer, Mbaziira Julius and Mulugga Brian.

It is unfortunate that the counting process was disrupted through violence but this should not mean that the election results were affected as the appellant would wish this court to believe. The process was secured and the counting was conclusively done and the declaration of results form properly accounts for all the ballots issued at this polling station.

The appellant's agent gave reasons for declining to sign on the Declaration of results form as “ *the box (A-M) was raided and thrown out of the polling station and all the votes scattered. This all happened amidst of tear gas and live bullets. Afterwards ticked ballots were brought into the polling station....Evidence is available because even the presiding officer hadcontaining ticked ballots.*”

The Presiding officer on the same DR form explained what happened and rebutted the allegations of ballot stuffing during this disruption. It is clear the appellants agents who advanced a reason for declining to sign the DR form never included the same reason in their affidavit in support of the petition. This therefore means they told lies on the DR form and the results remained unassailed. Justice Yorokamu Bamwine (as he then was) in the case of ***Bantalib Issa Taligola vs Electoral Commission & Wasugirya Bob Fred*** noted that:

“Court is cutely aware that in election contests of this nature, witnesses, most of them motivated by the desire to score victory against their opponents, deliberately resort to peddling falsehoods. What was a hill is magnified into a mountain”.

The appellant wants to take advantage of the chaos in order to deny the 1st appellant of his victory through disregarding results were he had lost. The disruptions which occurred after the voting had been concluded cannot be the basis of cancellation of results. The appellant’s agent was the source of disruptions as he threw the votes for his candidate on the ground and this sparked off the violence of his supporters. It would appear it was a planned move to swing the victory to their side. The court must act cautiously and ought to thoroughly interrogate and scrutinize the evidence surrounding the case.

The court has noted in several cases the need to be cautious in evaluation of such evidence; ***Hon Nakate Lillian Segujja & EC vs Nabukenya Brenda Election Petition Appeals 17 & 21 of 2016***

“The need for caution is due to the fact that Election Petitions present peculiar and out of ordinary situation where parties and their supporters extend political contest right up to the Courts of law. In this contest, not infrequently, the parties and their witnesses do everything possible, including blatant fabrication of evidence, to ensure victory for their cause”

But matters concerning validity of elections are matters of great public concern. These are matters with far reaching implications. They call for and indeed deserve the most diligent inquiry possible so that a party, who emerged victorious in a rather hotly contested election, is not denied the fruits of his victory on flimsy grounds. Such inquiry must therefore involve cogent evidence that applies directly to the facts in issue. See ***Bantalib Issa Taligola vs Electoral commission & Wasugirya Bob Fred*** Election petition No.15 of 2006

The appellant has not adduced any cogent evidence for disregarding results that were duly returned apart from relying on disruptions instigated by his own agent. The violence that arose after voting should be critically interrogated especially in circumstances of this case, otherwise candidates may use this as a strategy of causing cancellation of results in an election which has ended smoothly especially where one detects a possible loss of an election. The presiding officer in her evidence the votes were preserved and kept safe from the violence and therefore there was no reason to disregard the results by the Returning officer. These results were duly certified by Electoral Commission and any attempt to cancel results properly returned would be an abuse of authority by the Returning officer. The powers conferred must be exercised in accordance with set standards and not whimsically.

The provisions of section 12 of the Electoral Commission Act are applied cautiously and not mechanically. It is not applied to cover wrongful exercise of power to disenfranchise voters or putting the entire election into question without any justification. The purpose of section 12 of the Electoral Commission Act and Article 68(4) of the Constitution is not to disenfranchise but to safeguard

the votes against fraudulent manipulation. ***See Mbaghadi Fredrick Nkayi & EC v Dr. Nabwiso Frank Wilberforce B Election Petition Appeal No. 14 &16 of 2011***

Under the circumstances of this election petition appeal, I find that the duty of court is not confined to balancing the rights and merits of parties. Rather the question is whether there was a valid election held having regard to the rights of voters at Rubaga-Kasubi Parish Ward IV. The voting process ended without any problem but the disruptions occurred at counting of votes after the voters had duly cast their ballot/votes.

The Learned trial Chief Magistrate was right to consider the results of the Up To-date Primary School A-M polling station since the said results were not affected by the violence.

These grounds of appeal fail.

The learned trial Magistrate erred in law and fact when she found that the election was not conducted in accordance with the provisions of the Electoral laws and the non-compliance affected the election in a substantial manner and yet went ahead to declare the 1st respondent as the validly elected Male Councillor for Kasubi Ward.

The appellant's counsel submitted that the learned trial Magistrate did not cite or refer to any single provision of the local government act or other electoral laws that was allegedly violated. Therefore, according to counsel the learned magistrate's findings were unsubstantiated and unsustainable.

However, counsel cited the judgment of court where trial magistrate noted that; “*Yes, the non-compliance by the 2nd respondent affected the results in a substantial manner as evidence by the declaration of results forms from both polling stations (A-M) & (N-Z)*”

Therefore, having found that the non-compliance with electoral laws substantially affected the results or outcome of election at Up To-date Primary School Polling station, the learned trial magistrate was under a legal obligation to overturn an election and order a re-run at the affected polling station.

The 1st respondent's counsel submitted that the Learned trial Chief magistrate relied on section 135 of the Local Government Act to declare the respondent winner having obtained the highest number of votes from all the polling stations. This is because there was non-compliance with the provisions of section 135 of Local Government Act.

The failure to tally the two polling stations had a substantial effect on the final outcome because the 1st respondent would have won.

Analysis

The Learned trial Chief Magistrate indeed found that there was non-compliance with the electoral laws and this was premised on the fact that results of one polling station had been omitted by the Returning officer. The failure to cite the exact provision which was not complied with does not take away the fact the decision of the Returning officer not to include the results of Up To-date Primary School A-M polling station was a non-compliance with the electoral laws.

Section 135 (1) of the Local Government Act provides that each Returning officer shall, immediately after addition of all the votes for each candidate or after a recount, declare elected a candidate who has obtained the largest number of votes by completing the return in a prescribed form.

It is proper in discharging of the burden of proof by the parties concerned, that court can be in position to determine whether or not the contravention of the electoral laws in an election had a substantial effect upon that election. Indeed the learned trial Chief Magistrate found that the non-compliance affected the results in substantial manner. This court agrees with the finding of the learned trial Chief Magistrate that the omission of the results of Up To-date Primary School A-M polling station affected the results and gave the appellant a victory and yet he had lost in the summation of results.

In the final result for the reasons stated herein above this appeal fails and is dismissed.

The law is settled that costs in civil litigation follow the event and a successful party is entitled to costs except for good reason connected with the case. The decision to award or not to award costs is within the discretion of the court which tried the case.

Normally an appellate court will not interfere with the exercise of discretion unless it is shown that wrong principles were followed by taking into account an irrelevant factor or failing to take into account a relevant factor.

I do not find any justified reason to interfere with the discretion of the trial court in awarding costs to the successful party.

Since this appeal failed on all the grounds of appeal. The appellant is awarded costs of the appeal and the trial court costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
22nd April 2022