

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LUWERO

ELECTION PETITION No. 0047 OF 2011

REBECCA BALWANGA BALWANA PETITIONER

- VERSUS -

1. THE ELECTORAL COMMISSION
2. LUWERO DISTRICT RETURNING OFFICER } RESPONDENTS
3. NABUKENYA BRENDA

BEFORE: HON. MR. JUSTICE VINCENT T. ZEHURIKIZE

The Petitioner was one of the candidates in the by-election for Luwero District Woman Member of Parliament held on 21/11/2011 in which the 3rd Respondent was declared the winner by the 1st and 2nd Respondents having obtained 14,945 votes cast in her favour as opposed to 14,915 votes cast in favour of the Petitioner. Eventually the 3rd Respondent was gazetted as the winner and accordingly sworn in as Member of Parliament by the 1st Respondent who is charged with the duty to organize free fair and periodic elections among other things. Thereafter she was sworn in as a Member of Parliament.

The Petitioner having been dissatisfied with the outcome of this election filed this Petition which is couched in lengthy, detailed and sometimes somewhat argumentative grounds.

What I have been able to discern from all this is the complaint that the election was not conducted in accordance with electoral laws and that the non-compliance and failure affected the results in a substantial manner.

Specifically it is contended that there was disenfranchisement of voters and failure to conduct a mandatory recount.

Consequently the Petitioner prayed that the Petition be allowed with a declaration that she is the winner of the 21st November 2011 Luwero District Woman Member of Parliament by-election.

In the alternative it is prayed that this court allows the Petition and nullifies the election of 3rd Respondent, with the consequence that she vacates her seat.

It is further prayed that fresh elections be conducted but not under the stewardship of 2nd Respondent.

She also prayed for the costs of this Petition.

When the Petition came up for hearing Mr. Gabriel Byamugisha and Kanduho Frank appeared for the Petitioner. Mr. Eric Sabiti represented the 1st and 2nd Respondents while Mr. Samuel Muyizi and Mr. Julius Galisonga were for the 3rd Respondent.

The following issues were agreed for determination by court namely:-

1. Whether the elections were held in compliance with the electoral laws.
2. Whether non-compliance affected the results in a substantial manner.
3. Remedies available to the parties.

The affidavits in support and in opposition to the Petition having been admitted to form part of the record, both sides prayed court to summon some of the deponents for cross-examination and which was done.

Thereafter both sides filed written submissions followed by oral ones for clarification.

Counsels' extensive submissions dealt with the two said complaints i.e. the alleged disenfranchisement and the issue of mandatory recount.

DISENFRANCHISEMENT:

This complaint was split into three major grievances namely:-

- (a) Closing Polling before the statutory time of 5.00p.m. contrary to section 29 (2) of the Parliamentary Elections Act (PEA).
- (b) Allowing mercenaries to vote in people's names hence denying them the right to vote.
- (c) The election officers failing or refusing to check the names of registered voters on the register thereby denying them a right to vote.

EARLY CLOSURE OF POLLING STATIONS:

Counsel for the Petitioner explained that section 29 (2) of the PEA provides that at every Polling Station, Polling time shall commence at 7.00a.m in the morning and close at 5.00p.m in the afternoon.

He contended that in the instant case there is evidence that several polling stations closed before the stipulated time. He singled out Polling Stations such as Buyuki C.O.U Polling Station, Kasana Kakokolo Poling Station, Kasana Health Centre Polling Station, Kakumbe RC Primary School and Late Marifoni's place Polling Stations, Bombo Umea Primary School and Bombo Central C.O.U Polling Stations, Bombo North Masjid Noor "A" and Namaliga Bombo Mixed Primary School Polling Stations, Kasana St. Jude Polling Station, Gangama Mosque Polling Station and Katiti Bibbo Polling Station.

Others are Kabila Katiti Kalasa Polling Station, Kikunyu Polling Station and Kiremera Kelezia.

In support of this allegation the Petitioner presented about 39 affidavits to demonstrate that polling at the above Polling Stations closed before 5.00p.m.

It is interesting to note that these affidavits were all sworn and filed on 30/4/1012 while the Petition was filed on 21/12/2011.

Most of the Deponents/Voters claimed to have arrived at their respective Polling Stations at around 4.30p.m. or soon thereafter only to find the Polling Stations closed and counting of votes going on.

Their alleged coming towards closure time appears to be similar and strategic. For instance none of them claims to have been in the line to vote when the premature closure of the polling stations

happened. They simply came towards the official closure time only to find the counting of votes having commenced.

None of the complainants made any complaint to the Presiding Officer or to their party agents nor register any formal complaint. They merely swallowed the bitter pill, until they belatedly expressed their grievances on 30/4/2012 when they made these affidavits.

In a bid to assert credence to the above claims counsel for the Petitioner drew Court's attention to a number of Declaration Forms which indicate that they were signed at 5.00p.m.

Counsel reasoned that this shows that counting of votes must have started earlier so that by 5.00p.m. the whole exercise was complete. That this was an indication that polling must have closed before the time allowed by law thereby disenfranchising the Deponents who asserts that they were supporters of the Petitioner.

But it is important to note that on all those Polling Stations the Petitioner had agents who signed these Declaration Forms without any complaint. None of them ever swore affidavit supporting the claim that Polling was closed before time.

As already observed all the affidavits regarding the allegation of early closure of the polling were sworn and filed on 30/4/2012 which supports the Respondents' arguments that it was an afterthought.

The absence of any complaint soon after polling, supports the proposition that some of the Presiding Officers merely inserted 5.00p.m. as the official polling closing time rather than when they actually concluded the whole exercise.

I am inclined to agree with counsel for the 3rd Respondent's argument that the various deponents on this issue were merely among the voters who never went to vote, but were later mobilized in April 2012 to make these claims. They all claim to have been ardent supporters of the Petitioner and yet they treated the alleged disenfranchisement so lightly that it took them over five months before they could assert their frustration.

From their own evidence these are partisan witnesses whose evidence needs some other evidence to lend credence to their testimony. There is none. They are simply capitalizing on the time that was inserted in the Declaration Forms. They are also capitalizing on the fact that some voters never turned up to vote, which is normal in all elections.

In *Mbaghadi Fredrick Nkayi & another Vs Dr. Nabwiso Frank Wilberforce Election Appeal No. 14 & 16 of 2011*, the Court of Appeal having found that the agents, who are candidates representatives, having signed the documents with no evidence of complaints whatsoever the results could not be interfered with even where the presiding officers had not signed on some of the Declaration Forms.

In the instant case the agents of all candidates signed the Declaration Forms without any complaint. This court would not interfere merely because it appears as if the whole process ended at 5.00p.m. at some Polling Stations.

The affidavit evidence in this case was adduced from self-confessed partisan deponents whose evidence is not reliable.

In the premise I find that the allegation that some voters were disenfranchised due to early closure of the Polling Station was not proved to the satisfaction of the court.

ALLEGED MERCENARIES:

Similarly unproven is the allegation that some mercenaries went around voting in the names of other registered voters who could not vote as they found their names ticked.

Some six affidavits were presented in support of this claim. Lubega Yusuf and Mutyaba Yusuf averred in their affidavits that they were voters at Kikubajinja/Ears Polling Station. When they walked to the Presiding Officer's desk and were told that they had already voted they simply went back to their respective places of work.

But the Petitioner had agents at this Polling Station. These alleged voters did not raise any complaint to anybody and not even to the candidates' agents who in turn never expressed any complaint on the Declaration Forms.

The same conduct applies to Segawa Vincent, Kigozi Moses Sikaji Ramadhan and Abubakar Abdulai who filed their affidavit evidence on 30/4/2012.

They claim to be NRM supporters and therefore supporters of the Petitioner who had agents at the relevant Polling Stations. None of the Petitioner's agents has come forward to support this claim.

If such denial to vote ever existed there is no reason why the agents would not have petitioned the Presiding Officer to proceed under section 36 of the PEA. In case the Presiding Officer refused, such agents would have expressed their complaint on the Declaration Forms. It should be remembered that these voters would easily have been identified given the fact of their photographs being on the register.

FAILING OR REFUSING TO CHECK NAMES OF REGISTERED VOTERS THEREBY DENYING THEM A RIGHT TO VOTE:

No evidence was led in respect of this allegation and rightly no serious submission was made on this complaint. Instead evidence was led on two other matters namely invalidating of the Petitioner's votes and the using of extra 8 ballot boxes to facilitate rigging.

In conclusion I find that the allegation of use of mercenaries who voted in other voter's names was not proved to the satisfaction of the court.

INVALIDATING OF THE PETITIONER'S VALID VOTES:

On this allegation the Petitioner adduced the evidence of Jimmy Mukasa who was her agent at Kikubajinja/Ears Polling Station.

He averred in his affidavit that 10 votes cast in favour of the Petitioner were declared invalid where a mark of choice was placed in the candidate's picture or in the candidate's symbol. That this was done by Mr. Grace Lwanga who was the Presiding Officer at this Polling Station.

An affidavit in reply was obtained from the said Grace Lwanga who was indeed the Presiding Officer at this Polling Station.

It is his evidence that he rejected 10 votes because he could not ascertain the choice/intention of the voters. He does not explain in whose favour the votes had been cast, but asserted that he registered no complaint at Kikubajinja Ears Polling Station during the polling exercise.

However it is not disputed and the evidence on record shows that 10 votes were rejected for being invalid at this Polling Station. I will come back on this point later in my judgment.

USING AN EXTRA 8 BALLOT BOXES TO FACILITATE RIGGING:

It is contended that the whole Constituency had 340 Polling Stations, which would call for the use of 340 ballot boxes. But that 8 extra boxes were used in only 8 Polling Stations. That this was intended to facilitate rigging.

It is not explained whether these ballot boxes were used in rigging this election or not. And if so how they were used in the rigging. Counsel for the Petitioner however lamented that we may never establish their impact on the election process.

On the other hand, according to exhibit D2 which is a summary of the *Status of Seals on Ballot Boxes during the recount on 24/11/2011* it is indicated that the extra 8 ballot boxes (8) were supposed to be used to pack reusable materials.

I will comment further on those boxes later in my judgment.

I will now move to the next issue with regard to failure to conduct the mandatory recount.

MANDATORY RECOUNT:

Section 54 of the Parliamentary Elections Act (PEA) partly provides:-

“54 Cases of mandatory recount.

- (1) Where after the official addition of the votes –***
 - (a) There is an equality of votes between two or more candidates obtaining the highest number of votes or,***
 - (b) The number of votes separating the candidate receiving the highest number of votes and any other candidate is less than fifty,***

the Returning Officer shall, if requested in writing by a candidate, a candidate’s agent or a voter registered to vote in the Constituency, in the presence of a Senior Police Officer recount votes after giving a written notice of the intention to recount to all interested parties.”

In the instant case it is not in dispute that the number of votes separating the 3rd Respondent who received the highest number of votes and the Petitioner, who was second to her, is thirty votes.

Such an outcome fell into the category of results envisaged by section 54 (1)(b) of PEA which calls for mandatory recount as long as the Returning Officer is requested in writing by a candidate, a candidate's agent or a voter registered to vote in the Constituency.

According to the Petitioner's evidence in support of the Petition it is averred that upon the 2nd Respondent declaring that she had lost the election with 30 votes she quickly applied for a mandatory recount.

The 2nd Respondent in his affidavit stated he immediately scheduled for the recount after notification by the Petitioner about the desire for it.

Apparently he did this by letter of 22/11/2011, a day after the polling. The recount was to be conducted on 24/11/2011 at 9.00a.m. at Luwero District Council Hall.

What happened at the tally centre on 24/11/2011 is contained in paragraphs 9, 10 and 11 of the 2nd respondent's affidavit as follows:

- “9. That at the tally centre, after going through the right procedure, started counting only to realize that the ballot box was not well sealed so this caused concern among the people present.**
- 10. That I proceeded with the second box and it was not also sealed so I decided to call the recount off immediately to first resolve the issue of the seals since it looked like some ballot boxes were tampered with.**
- 11. That, however, the boxes were not actually tampered with but it is just that some Presiding Officers were not aware of how to seal the transparent boxes which had been used instead of the black ballot box which they were aware of and doesn't have so many seals unlike the transparent boxes.”**

According to Mr. G. Byamugisha counsel for the Petitioner, the 2nd Respondent's decision not to continue with the recount was deliberately intended to frustrate the exercise to the disadvantage of his client.

It was his view that under section 54 of the PEA the requested recount was mandatory and the Returning Officer had no discretion to call it off even if the ballot boxes had been tampered with. That in any case the 2nd Respondent deponed that the boxes had not been tampered with.

On the other hand counsel for the Respondents and in particular Mr. Muyizi contended that since the Petitioner applied for recount after declaration and transmission of the results was done the mandatory recount could not be legally conducted.

He cited the case of Byanyima ***Winnie Vs Ngoma Ngime Civil Revision No. 0009 of 2001.***

I have considered submissions by both sides on this point.

The facts in ***Byanyima Winnie*** (Supra) were summarized by court briefly as follows:

After counting, the Returning Officer declared the winning candidate. Thereafter he transmitted a return of the results to the Electoral Commission.

In turn the Electoral Commission, after ascertaining the numerical correctness of the results contained in the return, went ahead and in writing under the Commission's seal declared the applicant (i.e. Winnie Byanyima) as the winner of the parliamentary seat for Mbarara Municipality. Then the Commission published in the Uganda Gazette the name of the applicant as the winner, of Mbarara Municipality seat of Parliament.

Subsequently the applicant was sworn in as a Member of Parliament and dully took her seat in the House.

In the instant case, it appears the counting ended well after midnight of 21/11/2001 and the Returning Officer declared the winner at around 1.20a.m.

The Petitioner formally applied for recount in the morning of 22/11/2011 and the Returning Officer, by a letter of same day, accepted the Petitioner's request and fixed 24/11/2011 as a day for recount as already stated in this judgment.

Under cross-examination by Mr. Byamugisha Counsel for the Petitioner the Returning Officer, Mr. Kasozi Peter Kizito told court that at the time he received the Petitioner's application for the recount he had not transmitted the results to the Electoral Commission.

He transmitted the results on 2/12/2011. He explained that transmission includes the form (RF), and tally sheets for the 340 Polling Stations. It also would include the Constituency Summary Results and the 340 Declaration Forms.

He further explained that the transmission of results delayed because he had been arrested for halting the recount exercise. As already stated he halted the recount on 24/11/2011 when he found missing seals on some of the ballot boxes.

It is clear to me that on 22/11/2011 when the Petitioner applied for recount the results had not been transmitted to the Electoral Commission contrary to what Mr. Muyizi wanted this court to believe.

It is also clear that as a result, the Electoral Commission could not ascertain the correctness of the results so as to declare in writing under its seal and publish the result of this election as required under section 59 (1) of the PEA.

In short, when the Petitioner applied for recount the 3rd Respondent had not been officially and legally declared a winner of the Parliamentary seat of Luwero District Women Representative.

She must have been declared the winner under the seal of the Electoral Commission on or after 2/12/2011. Her election was subsequently published in the Uganda Gazette in its issue of 5/12/2011.

In the premise I find that the Petitioner's request for recount had not been left by the fast "flowing river" or fast moving "bus" if I could be allowed to use the metaphors used in the *Byanyima Winnie* case.

Mere filling of the Return Form for Transmission of Results was not such a segment in the electoral process that could defeat the Petitioner's right to seek a mandatory recount under section 54 of the Act.

There is no way the Petitioner could exercise her rights under section 54 of the PEA before the results of the Poll had been declared showing that she had lost the election by less than 50 votes.

In my view declaration of the results at the Tally Centre by the Returning Officer was a condition precedent to the request for recount where number of votes separating the candidate receiving the highest number of votes and any other candidate (the Petitioner in this case) is less than 50 votes.

And since the results had not been transmitted to the Commission to ascertain, declare in writing under its seal and publish the results of the election, the 2nd Respondent's decision to conduct the recount was lawful.

Probably the only intriguing question is whether the Returning Officer was justified to or correctly halted the recount.

He stopped the recount on ground that some ballot boxes lacked some of the seals but that these boxes were not tampered with. That the transparent boxes have very many seals and that some Presiding Officers were not aware of how to seal these transparent boxes.

If indeed he was satisfied that the ballot boxes were not actually tampered with them there was no justification for halting the recount.

Apart from being mandatory, the recount in this election was necessary given the fact that there was a complaint regarding some votes which were invalidated.

There was also the issue of the eight extra ballot boxes whose contents would have been of interest to the Commission and the candidates.

The custody of the ballot boxes was in the hands of the 1st and 2nd Respondents.

Under section 51(1) of the PEA the Presiding Officer is obliged, after closure of Polls, to deliver sealed boxes to the sub county headquarters or the division headquarters as the case may be for transmission to the Returning Officer.

Under section 52 of the Act the Returning Officer was obliged to ensure that the ballot boxes were securely kept.

Thus if this court was to find that the ballot boxes had been tampered thereby justifying the halting of the recount since its object was not achievable the legal effect would be the same.

Failure to secure the ballot boxes is evidence of non compliance with the provisions of the PEA specifically section 52 of the Act.

Similarly failure to conduct a recount without any justification is also non compliance with the same law and specifically section 54 of the Act.

The next question is whether this non compliance and failure to conduct this election in accordance with principles laid down in the aforesaid provisions of the PEA affected the result of the election in a substantial manner.

My answer to this question is in the affirmative. This was a very close contest where the Petitioner lost the election by a mere 30 votes. She complained that some of the votes cast in her favour were wrongly invalidated. It was also her case that there was no justification for an extra 8 ballot boxes and that was for facilitating rigging in favour of the 3rd Respondent. The recount would have sorted out these issues.

The total number of invalid or rejected votes was 720. There was need for their scrutiny to determine whether some votes in her favour were wrongly invalidated.

What was in the 8 ballot boxes is not known.

Given the winning margin of 30 votes the recount, in such circumstances, was critical. Leave alone the fact that it was mandatory. The recount is intended to correct any error which could swing the outcome of the election one way or the other.

It is clear to me that the Petitioner's prayer for recount was premised on the argument that if the recount is conducted she would turn out the winner thereby bringing her case not only under section 61 (1) (a) of the PEA but also under paragraph (b) thereof.

All in all I find that failure to conduct the requested mandatory recount violated the Petitioner's right under section 54 of the Act. This non compliance and failure affected the result of the election in a substantial manner.

Consequently this Petition is allowed with the following orders:

- (a) The 3rd Respondent was not duly elected.
- (b) The seat of the 3rd Respondent is declared vacant.
- (c) The Electoral Commission is directed to conduct fresh by-election for Luwero District Woman Member of Parliament in accordance with the law.
- (d) Since this was entirely the fault of the 2nd Respondent who is an Officer of the 1st Respondent, costs incurred by the Petitioner shall be paid by the 1st Respondent.

VINCENT T. ZEHURIKIZE

JUDGE

DATE: 1st/11/2012

Judgment delivered by the Deputy Registrar this...1st..... day of ..November..... 2012.

JOHN EUDES KEITIRIMA

DEPUTY REGISTRAR/CIVIL DIVISION