

J U D G M E N T :

OUNDO SOWEDI (hereinafter referred to as “Petitioner) filed the

petition against OUMA ADEA, and the Independent Electoral Commission (**hereinafter referred to as the “1st ” and “ 2nd “ Respondent” respectively)** seeking declaration that the 1st Respondent was at the time of nomination not qualified for election as LCV chairman Busia District; that the election of the 1st Respondent be annulled and fresh elections be conducted; and that the Respondents pays costs of the petition.

In yet another petition filed by Hasubi Deogratiuous Njoki (**hereinafter also referred to as “Petitioner”** against the 1st and 2nd Respondents respectively, the Petitioner seeks declaration that the 1st Respondent was not qualified to be nominated and elected as District Chairman Busia District; that the election of the 1st Respondent was null and invalid; that the Petitioner having been returned second with margin difference of only 29 votes be declared the winner and validly elected LCV Chairman, Busia District, that in the alternative, the election be set aside and a new one be held for the Chairman, Busia District, and that the Respondents pay so costs of the petition.

The first petition was registered as No. 18 of 2016 and the later as No. 19 of 2016. The two petitions were consolidated by order of court pursuant to **Order 11 r.2 of the Civil Procedure Rules**, and so were the respective applications arising there from, which were all argued and disposed of altogether.

Background:

In 2011, the 1st Respondent was charged with the offence of corruptly soliciting and receiving gratification contrary to **section 2(1)** and abuse of Office contrary to **section 11 of the Anti-Corruption Act**. He was found guilty on both offences by Magistrate Grade 1 Court and convicted and sentenced to a prison term of one year or to pay a fine of Shs.2,000,000/-.He opted to pay the fine, but subsequently appealed against both conviction and sentence to the High Court.

On 8th April, 2014, the High Court dismissed the appeal and upheld both conviction and sentence. The 1st Respondent appealed against the decision of the High Court in the Court of Appeal which, on 9th February, 2016 also dismissed the appeal and upheld the conviction and sentence.

On 15th February, 2016, the 1st Respondent lodged a Notice of Appeal in the Court of Appeal Registry against the judgment/decision of the Court of Appeal seeking to appeal to the Supreme Court. The appeal in the Court of Appeal being on a second appeal was the final appeal in the matter and the 1st Respondent could only appeal to the Supreme Court after applying and obtaining a certificate of importance in the Court of Appeal showing that the intended appeal concerns a matter of law of great or general importance, which he never did or obtained. In other words; the 1st Respondent had no automatic right of appeal to the Supreme Court from the decision of the Court of Appeal.

The consolidated petitions were fixed for hearing on 28th June, 2016. On the date, however, the 1st Respondent applied for leave to file his answer to the respective petitions out of time. He contended that he was never served with the petitions, which were served by substituted service through newspapers. Leave was granted for the 1st Respondent to file his answer on or by 30th June, 2016, and the hearing of the consolidated petitions was fixed for 1st July, 2016.

On 30th June, 2016, the 1st Respondent filed Miscellaneous Application No.82 of 2016 in the Court of Appeal seeking a certificate of importance to appeal to the Supreme Court. No date was fixed for its hearing. Worthy of note is that the said application was filed just two days after the adjournment of the instant petitions to enable the 1st Respondent file his answer on or by 30th June, 2016 and the hearing to proceed on 1st July 2016.

On 1st July, 2016 the actual date of the hearing of the consolidated petitions, counsel for the 1st Respondent, Mr. Jude Byamukama, filed the respective answers to the petitions. He attached a copy of the Miscellaneous Application No.82 of 2016 which he filed in the Court of Appeal the previous day seeking certificate. I have labored to set out these facts in detail; particularly including Miscellaneous Application 82 of 2016 in the Court of Appeal, because it is essentially the mainstay of the 1st Respondent's case. He contends that the application is evidence that he has not exhausted his rights of appeal against his conviction under the appellate system. That as such any decision to bar him from contesting or holding a public office on account of his conviction and sentence before his rights have been finally and conclusively pronounced up by the highest and final appellate court in the land would be violation of his constitutional rights.

A scheduling conference was conducted and the following were the admitted facts;

(i) That on 28th March, 2013, the 1st Respondent was convicted of contrary to **section 2(a)** and abuse of office contrary to **section 26 of the Anti-Corruption Act, 2009** (as amended).

(ii) That as a consequence the 1st Respondent was sentenced to one year imprisonment or to pay a fine of Shs. 2 million, and he paid the fine.

iii) That he subsequently he appealed against the conviction and sentence on 8th April, 2014 to the High Court which dismissed the appeal and upheld the sentence and conviction.

(iv).That the 1st Respondent appealed to the court of Appeal on 9th February, 2016 which dismissed the appeal and upheld the conviction and sentence.

(v)That on 24th February, 2016, the 1st Respondent contested with both Petitioners, Namulanda Bernard Wafula, Wandera Geoffrey, Wasswa Simon, and Estone Wanyama Oundo, as candidates for LCV Chairman, Busia District.

(vi).That the 2nd Respondent declared the 1st Respondent winner and validly elected LCV chairperson Busia.

Two issues were framed for determination as follows;

(1) Whether at the time of the elections and nomination the 1st Respondent was not qualified for election as LCV Chairperson for Busia District.

(2) What remedies are available to the petitioners?

The Petitioner in No. 18 of 2016 was represented by Mr. Andrew Lumonya. The 2nd Respondent in Petition No. 18 of 2016 who is the same in No. 19 of 2016 was represented by Mr. Kyazze Joseph and Mr. Richard Latigo respectively. Mr. Jude Byamukama represented the 1st Respondent in both consolidated petitions. All learned counsel made submissions and supplied authorities; for which I am thankful to them. Issue No. 1 being purely an issue of law, all counsel for the parties opted to make submissions on the particular issue and not to call witness for cross-examination.

Issue No. 1: Whether at the time of the elections and nomination the 1st Respondent was not qualified for election as LCV Chairperson for Busia District.

At the centre of the issue is the contention of the Petitioners that the 1st Respondent was at the time of nominations and elections legally disqualified from contesting as candidate for the office of LCV chairperson having been convicted and sentenced by a competent court of law for the offences of corruptly soliciting and receiving gratification contrary to **section 2(a)** and abuse of office contrary to **section 26 of the Anti-Corruption Act (supra)**. Further, that under **section 46 (supra)**, a person convicted and sentenced of the offence under **section 2(a)** of the Act, among the other offences listed there under, is automatically disqualified from holding a public office for a period for ten years from the date of conviction. Mr. Andrew Lumonya in particular argued that the office of the LCV chairperson of district is a public office, and that the conviction of the 1st Respondent by court of the specified offences under the **Anti-Corruption Act (supra)** automatically barred him from contesting or holding the public office.

In their respective submissions, counsel for the Petitioners further faulted the 2nd Respondent for having allowed the nomination and election of the 1st Respondent despite being variously notified of the court decision and made aware of the conviction and sentence of the 1st Respondent which disqualified him from nomination for election as LCV chairman. In reply Mr. Jude Byamukama, counsel for the 1st Respondent, cited the case of **Mugisha Gregory vs. Uganda Criminal Ref: No.1 79 of 2011** in which the Court of Appeal held that the right of appeal to a convicted person is rooted in the Constitution which also recognises the right of an appellant in appealable cases to appeal, where applicable, to the highest appellate court of the land. Mr. Byamukama vehemently argued that in this case the 1st Respondent was still actively pursuing his right of appeal under the appellate system, and that it is not until the final appellate court has pronounced itself on the conviction and sentence that the 1st Respondent's constitutional right to the presumption of innocence is completely extinguished. Further, that since that presumption of innocence still prevails, any decision that has the effect of barring the 1st Respondent from the contesting or holding of a public office would be a violation of his constitutional rights.

Mr. Byamukama advanced the view that **Section 46 (supra)** can only be invoked as a bar to holding a public office only after the individual in question has fully exhausted his rights within the appellate system. That there must be a definite final judgment upholding a conviction from which no appeal has preferred or steps taken to challenge the said decision. Further, that the determination based on the fact that the 1st Respondent is a convict; which does not take into

account the fact that the has taken definite steps to challenge his conviction will be a violation of **Article 28(3)** of the **Constitution** as was stated in the **Mugisha Gregory case** (supra). Counsel argued that the said issue of law under determination is quite premature and cannot be relied upon to entirely dispose of the instant consolidated petitions, and that it should be dismissed with costs.

Mr. Latigo Richard and Mr. Kyazze Joseph counsel for the 2nd Respondent in Petition No. 18 of 2016, and No. 19 of 2016 respectively, submitted primarily that the 2nd Respondent cannot be faulted for having allowed the nomination and election of the 1st Respondent. They argued that the issue of the 1st Respondent's conviction and sentence was not in the 2nd Respondent's knowledge, as it was never brought to its attention. That for this reason the 2nd Respondent could not take steps to disqualify the 1st Respondent from nomination without the 2nd Respondent having been served with copies of the 1st Respondent's conviction and sentence. They submitted that the respective petitions against the 2nd Respondent should therefore be dismissed with costs.

Opinion:

The main contention of the respective Petitioners is that the 1st Respondent was at the time of nomination legally disqualified to stand for election as LCV Chairman, Busia District. As can be discerned from the pleadings and supporting affidavits, the Petitioners do not contest the 1st Respondent as not being qualified in the academic sense or in the context of the required qualification under **Section 111(3) and (4) of the Local Governments Act (supra)**. Rather, they premise the issue on the stand point of the statutory bar which curtails the 1st Respondent's nomination and election to the seat of LCV chairman for Busia District.

It is an admitted fact that the 1st Respondent was convicted of the offences of corruptly receiving gratification contrary to **Section 2(a)** and abuse of office contrary to **Section 26 of the Anti Corruption Act (supra)**. He was sentenced to one year imprisonment or to pay a fine of Shs.2 million. He opted for a fine and paid, but subsequently appealed to the High Court, which upheld both conviction and sentence.

In his second and final appeal to the court of Appeal, the conviction and sentence were also upheld.

Section 46 of the Anti — corruption Act (supra) provides that;

“A person who is convicted of an offence under Section 2, 4, 5, 6, 25 shall be disqualified from holding a public office for a period of ten years from his or her conviction. ”

The provision is mandatory by the choice of the use of the term “shall”. Under **Section 1(d) (supra)**, a district council local council and any committee of any such council are defined as “public body”. The district council being a “public body” means the office of the LCV is recognised as a public office under the law. This being the position of the law, it means that the 1st Respondent’s conviction and sentence by court automatically barred him from holding a public office for a period of ten years from the date of his conviction. Logically, it inevitably rendered him legally not qualified for nomination for election as LCV chairman, Busia District.

Mr. Judge Byamukama strenuously argued that despite the conviction and sentence, the 1st Respondent still has his right of appeal protected under the Constitution, and that until he exhausts all the appellate avenues available to him, his right to the presumption of innocence still prevails, and that he cannot be barred from holding a public office on account of the conviction and sentence against which he is actively pursuing an appeal. He relied on the case of **Mugisha Gregory (supra)**. With due respect to Mr. Byamukama, the case he cited enunciated an important principle of law which, however, does not support his argument. Their Lordships in the cited case unequivocally stated that once a person is convicted of a criminal offence, his or her status is changed with its implications on his right to the presumption of innocence. In other words; a convicted person can no longer enjoy the same rights to presumption of innocence as when he was charged simply because he has been found and pronounced guilty by a competent court of law. In the cited case their Lordships were considering the right of a convicted person to apply for bail pending appeal. They recognized an appeal as a constitutional right, where it is available to a convict in appealable cases; and where applicable, to the highest appellate court in the land. Their Lordship guardedly held that to a certain extent the appellant’s right to presumption of innocence is not completely extinguished and it remains until the final appellate court in the matter has conclusively determined the appeal. They concluded that point as follows;

“In our view, any prior conviction of the appellant before his or her appeal is finally determined only suspends his/her right to presumption of innocence I entirely agree that the case set the correct principle of the law, which is also binding on this court. **I** must, however, emphasize that the case made a clear distinction of rights of a convicted person and rights of an appellant. One must necessarily be an appellant against a conviction to enjoy the “suspended” right to the presumption of innocence. The principle presupposes the existence of a substantive appeal against conviction for a convicted person to be recognized under the law as an appellant and to be availed of the rights due of an appellant. Until that is done, the convicted person legally remains in the domain of a convict, and cannot by any stretch of imagination be presumed to be innocent or entitled to the right of presumption of innocence. The right to the presumption of innocence only accrues after he or she has availed himself or herself of that right by filing a substantive appeal against his or her conviction. This finding is more poignant in cases of bail pending appeal where the primary consideration is whether there is a pending appeal. See: **Arvind Patel vs. Uganda, S C Crim. Application No.1 of 2003** per Oder JSC (R.I.P.). No appellate court would grant bail pending appeal when there is no substantive appeal filed. This extends even to cases where a convict has an automatic right of appeal. The appellate court would not risk speculating as to whether the convicted person will pursue his rights of appeal or not.

The other point to note is that the right to appeal is generally a creature of statute except in a few instances where an appeal is as of right. Otherwise, appeals are with the leave of court. See: ***Shah vs. Attorney General [1970] EA 543***. The right to appeal does not accrue until the person has availed himself that right through the due process of the law establishing the right. That is primarily what their Lordships in ***Mugisha Gregory case*** (supra) meant when they stated (at page 12 of the judgment) that the supreme law recognizes - the right of an appellant “in appealable cases” to appeal to, where applicable; to the highest appellate court in the country. By necessary implications, it means that some appeals lie as of right to the highest court in the land and others do not.

The case of the 1st Respondent’s conviction is not one of such cases where the law recognises the automatic right of appeal to the highest court in the land. By virtue of ***Section 6(2) Judicature Act (Cap. 13)*** and ***Section 73 of the Civil Procedure Act (Cap. 72)*** the 1st Respondent’s second appeal was to the Court of Appeal which was the final appellate court in the matter. At that point all avenues of appeal were legally curtailed and the right to presumption of innocence was also completely extinguished and it would remain so until the 1st Respondent obtained the certificate of importance from the Court of Appeal, which he has not got up to now. Hurriedly filing an application for a certificate just after the petitions challenging his qualification for a public office are set for hearing does not amount to “actively pursuing rights of appeal” as argued by Mr. Byamukama. If anything, it demonstrates bad faith on part of the 1st Respondent and a vain pre - emptive measure to forestall the hearing of the petitions against him.

It is in no doubt that the 1st Respondent cannot be considered as an appellant within the meaning of the law to be entitled to the right to the presumption of innocence within the context of the ***Mugisha Gregory case*** (supra). He is purely and simply a convict for the offences stated, and the provisions of ***Section 46*** (supra) apply with full force. It needs to emphasise, that in enacting ***Section 46(supra)***, the Legislature was acutely alive to the procedure and rights of appeal of a convicted person, but they choose only to state as follows;

“A person who is convicted on an offence under section 2, 3,4, shall be disqualified from holding a public office for a period of ten years ...”

The Legislature only considered conviction at the time it is rendered, and not whether a convict has appealed or might appeal or not. The question whether a convict might or might not appeal the conviction to enforce his rights of appeal is a matter of the convict to determine, but the intention of the Legislative was not to speculate on the course of action a convict might take.

Indeed, also the courts of law cannot be left to speculate what a convicted person might or might not do as regards his constitutional right of appeal after conviction. The constitutional rights of an appellant would not accrue to the 1st Respondent until he has filed a substantive appeal. Until then, his the status remains that of a convict not of an appellant. Merely filing an application seeking for a certificate in the Court of Appeal does not bestow on him the rights of an appellant. He remains purely a convict.

As earlier observed the said application for a certificate of importance has no date fixed for its hearing. To that end, I would tend to agree with Mr. Andrew Lumonya that it was actually filed in bad faith. It was filed only on 30th June, 2016 after the case was adjourned on 28th June, 2016 to enable the 1st Respondent file his 355 answer to the petitions and the hearing was on 1st July 2016. It is apparently clear that the filing of the application was intended merely to bolster the 1st Respondent’s argument that he is actively pursuing his rights of appeal. This

court is, nevertheless, very alert to the maneuver and acutely recognises that there is no substantive appeal lodged that lies to the Supreme Court. This court therefore cannot speculate whether or not the 1st Respondent will pursue the application or not. I find that the issue under consideration is not premature. The net effect is that the 1st Respondent was not qualified for nomination at the time of election as LCV Chairman, Busia District. This renders his election null and void.

Regarding the 2nd Respondent, I am not persuaded by argument that it was never notified of the conviction and sentence of the 1st Respondent to take necessary steps to disqualify him from nomination for elections. In the first place, the record is awash with several correspondences; **Annexure I and J** to the affidavit of Ms. Irene Mulyagonja Kakooza, the Inspector General of Government. She clearly brought out all the facts bearing on the 1st Respondent's conviction and sentence to the attention of the Chairman Electoral Commission who acknowledged receipt of the same on 12th February 2016. This is as regards Petition No. 19 of 2016.

Under Petition No. 18 of 2016, **Annexure F** to the affidavit in support of the petition of the Oundo Sowedi shows that the Chairman Electoral Commission was aware of the complaint by IGG about nomination of the 1st Respondent. The Chairman Electoral Commission even wrote to the Returning Officer Busia Electoral District over the same issue asking for a response to the concerns raised by IGG, and also indicated in the same letter that the EC would sit on 17th February 2016 at 12:00 noon to determine the same issue. The "received" stamp shows the Returning Officer 385 acknowledged receipt of the same. **Annexure D** to the same affidavit is a letter dated 2nd February, 2016, also written by the Chairman Electoral Commission to one Kivumbi Mary N. who had also written to the EC complaining and bringing to its attention facts challenging the nomination of the 1st Respondent. The Chairman EC informed Kivumbi that at its special meeting held on 27th January, 2016, the EC upheld the Returning Officer's decision to nominate candidate the 1st Respondent. The Chairman claimed that the 1st Respondent had complied with the statutory nomination requirements under **Section 111 of the Local Government's Act (supra)**. There is also the evidence in **Annexure "F"** to the affidavit of Ms. Irene Mulyagonja in Petition No. 18 of 2016. It is a copy of letter dated 6th October, 2014 written by the Chief Administrative Officer, Busia District to the EC Chairman, who received it on 15th October, 2014. It confirmed to the Chairman EC that the 1st Respondent had vacated office upon being convicted and sentenced. In fact in **Annexure "B"** to the affidavit of Hasubi Deogratious Njoki in Petition No. 19 of 2016 dated 5th November, 2014, it shows that a by-election was conducted by 2nd Respondent to fill the vacant seat of Busia LCV chairman after the 1st Respondent had vacated it upon conviction by court of the above stated offences. Also to note is that the EC of the NRM Party refused to nominate the 1st Respondent as its flag bear after heeding the warning of the IGG. This prompted the 1st Respondent to seek nomination on an independent ticket; all of which the 2nd Respondent was acutely aware of. Therefore, the argument that the 2nd Respondent was not informed or not aware of the 1st Respondent's disqualifying factors is simply not true. The 2nd Respondent was well informed and very much aware, but instead went ahead to allow the nomination and election of the 1st Respondent. This was against the warning especially issued by IGG that such an act would cost the Government money. I cannot agree more. The 2nd Respondent being a well legally advised institution ought to have known better; even without the IGG's warning that allowing the nomination and election of the 1st Respondent against conviction as a criminal would cause financial loss to the tax payers. It did and the 2nd Respondent cannot escape the blame. I find that the 2nd

Respondent was aware but went on to nominate the 1st Respondent. It acted illegally and in contravention of the principles governing the elections. It is accordingly declared and ordered as follows;

- (1)** *The 1st Respondent was disqualified from contesting and holding a public office at the time of nomination for election as LCV Chairman Busia District.*
- (2)** *The election of the 1st Respondent is hereby nullified.*
- (3)** *A fresh election for LCV chairman Busia District be conducted.*
- (4)** *The 1st and 2nd Respondents shall pay costs of the consolidated petitions.*

ANDREW K BASHAIJA

JUDGE

14th July, 2016