

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.178 OF 2016

NAMULI JANAT ::: APPELLANT

VERSUS

TIBATEREZA JOY WALYOMU ::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

1. The Appellant and the Respondent were amongst four candidates who contested for the position of Woman Councillor, Namirembe – Bakuli Parish, Rubaga Division, Kampala District in the Local Government elections on 2nd March 2016. The Electoral Commission (herein after referred to as the EC) returned results in which it declared the Appellant as winner and validly elected Woman Councillor with 1050 (One Thousand Fifty) votes representing 33.98 percent of the votes while the Respondent was first runner up with 869 (Eight hundred and sixty nine only) votes representing 28.12 percent. The Respondent was aggrieved by the Appellant’s win and challenged the same through Election Petition No. 002 of 2016 in Mengo Chief Magistrates’ court.

2. In her judgment returned on 29th November 2016, the trial Magistrate allowed the petition and nullified the Appellant’s election. The grounds she gave for the nullification were that there was noncompliance with the electoral laws which affected the results in a substantial manner. This appeal was in regard to two polling

stations; the polling station in front of Victorious school and the other at the school for the blind.

3. The Appellant is represented by Mr. Abed Nasser Mudyobole of M/s. Luganda, Ojok & Co. Advocates and the Respondent is represented by Mr. Mujurizi Jamiru of M/s. Mujurizi, Alinaitwe & Byamukama [MAB] Advocates.
4. The issues framed for resolution based on the grounds of appeal in the Memorandum of Appeal, were:
 - i. Whether the learned trial Magistrate erred in law and fact when she held that there was non-compliance with the electoral laws which affected the election in a substantial manner.
 - ii. Whether the learned trial Magistrate erred in law and fact when she relied on the uncertified Declaration of Results (DR) form for the school of disabled submitted by the Respondent/ Petitioner.
 - iii. Whether the learned trial Magistrate erred in law and fact when she found that there was gross non-compliance with the law by the Appellant participating in an election in an area where she was not a registered voter.
 - iv. Remedies available to the parties.
5. I will address these issues jointly resolving each in turn. I wish also to reiterate at the onset that the standard of proof in election petitions is on a balance of probabilities. It is this standard that I will adopt. The Respondent argued that grounds of appeal concerning the actions of the EC should not be raised by the Appellant when the EC has not appealed. This argument is obnoxious and not supported by law. The Appellant as a party aggrieved by the judgment of the trial court had every right to

appeal any part of the said judgment. I therefore reject this argument from the Respondent.

Issue three- Whether the learned Chief Magistrate erred in law and fact when she found that there was gross non-compliance with the law by the Appellant participating in an election in an area where she was not a registered voter

6. In regard to the Appellant being a non-registered voter in the area where she contested the applicable law is section 116 of the Local Governments Act (herein after referred to as LG Act). This section provides that (1) A person is qualified to be a member of a district or city council other than the chairperson if that person— (a) is a citizen of Uganda; (b) is a registered voter. Subsection 2 provides that a person shall not be elected a local government counselor if that person— (a) is of unsound mind; (b) is acting in or holding an office the functions of which involve a responsibility for or in connection with the conduct of an election under this Act; (c) is a traditional or cultural leader as defined in article 246(6) of the Constitution; (d) is under sentence of death or imprisonment exceeding six months without the option of a fine; or (e) is employed by that local government council.
7. Section 117 of the same Act is about elections of women representatives to councils. Subsection (1) provides that the election of women councillors to local government councils shall be conducted in accordance with the provisions for election of the relevant councils under this part with such modifications as may be deemed necessary by the EC. Subsection (2) provides that the election of women councillors shall be by universal adult suffrage. Subsection (3) provides that the presiding officer shall conduct the election by allowing the electorate to cast their votes by lining behind the candidate, an agent or a portrait of the candidate of their choice.
8. At the hearing, the Appellant explained that she is a registered voter in Mulago Kawempe Division and adduced her National Identification Card (herein after National ID). She said she explained her possession of this ID to the trial Magistrate at the petition hearing though she did not have it in court with her at the time. Before me she adduced her National ID No. CF92098100PLWA which expires on 26th /09/

2024. It is common knowledge that registration for National IDs as part of the election process was conducted and completed prior to the elections in 2016. It would therefore follow that the Appellant was a validly registered voter at the time of the elections in issue by virtue of her National ID.

9. It is not clear why the trial Magistrate faulted the EC for allowing the Appellant to participate in the councillor elections. The provisions in Section 116 as enumerated above do not bar a contestant to run in an election in a local area where she is neither registered nor votes from. Much as the common practice that most people are used to is for contenders in elections to run in localities where they are registered and vote from, there is no provision in the electoral laws that bars standing in an area where you are not locally registered.
10. Failure to run in an election locality where one is registered can arise out of so many reasons not of the making of the person who desires to contest. So, to deprive such Ugandan to contest would be to unfairly deny him or her to take part in the governance of the affairs in her country. It was therefore an error in law and fact for the trial Magistrate to fault the EC for allowing the Appellant to contest in an area where she was not a registered voter. What the trial Magistrate should have interested herself in is proof that the Appellant was a registered voter. To this end she should have required the Appellant to bring her National ID or other proof of registered voter status since the issue arose in court without prior notice to the Appellant/Respondent but she did not. Issue three is resolved in the affirmative.

Issue one- Whether the learned trial Magistrate erred in law and fact when she held that there was non- compliance with electoral laws which affected the election in a substantial manner.

11. At (unnumbered) pages four to five of her judgment the trial Magistrate held that “there was gross non-compliance with the electoral laws because (1) the Petitioner’s 100 votes from “in front of Victorious School” polling station were excluded; (2) the D/R form from School of disabled went missing from the tally centre; (3) the EC

allowing a non- registered voter of a local area to run in an election where she was neither registered nor voted from. So, court answers the 1st issue in affirmative that there was non-compliance with the electoral laws.”

12. I have also read the entire judgment of the trial Magistrate. It is glaring that although the trial Magistrate finds gross non-compliance with electoral laws, she cites no single provision of the LG Act or other electoral laws that were violated. This makes her findings of violations of the law lacking, unsubstantiated and unsustainable. In my discernment, a violation of the law starts with identification of the legal provision or requirement in the law then a demonstration that what was done in the case at hand was in contravention of the said provision. So, at a macro level without citing the specific provisions of the law the trial Magistrate erred in law and fact when she held that there was no compliance with electoral laws which affected the results in a substantial manner.

13. Nonetheless I will make an assessment of the events at Victorious primary school and school for the disabled polling stations to determine whether they affected the election result in a substantial manner.

a) Victorious Primary School Playground polling station

14. From the trial record, it is clear that these two were the only polling stations in dispute between the parties at trial. The Respondent adduced a DR form with results from in front of Victorious Playground (A-M) polling station. In it the Appellant had 54 votes and the Respondent had 126 votes. While the same was not certified by or brought by the EC, the votes therein were verified by the Appellant as the accurate results posted from that polling station. In cross examination, the returning officer DW5 Mr. Ntege Charles also acknowledged this error in counting of votes which lessened the Respondent’s votes by 100 and clarified that the 26 votes included for the Respondent in the tally sheet were less by 100 but had not corrected this error because he had not seen it.

15. In these circumstances where the Appellant conceded the additional 100 votes for the Respondent and the returning officer clarified their non-inclusion at tallying as a genuine error or oversight, the trial Magistrate committed no error of law or fact in adding the results from Victorious Primary School polling station to the votes posted from the election. She could safely rely on them in the circumstances of this case. This gave the Respondent a total of 969 votes and the Appellant was left with a total of 1050 votes.

Issue two- Whether the learned trial Magistrate erred in law and fact when she relied on the Respondent's uncertified DR form for the school of disabled

a) The DR forms

16. PW4 Mr. Kafeero Romu who was an agent of Anyango Kevina- another candidate in the same race would have assisted the court better if she had brought her DR form but she did not. The Appellant takes issue with inconsistencies regarding Mr. Kajubi Elijah's residence and profession. I am not satisfied that these are material inconsistencies for consideration in this appeal. I will therefore disregard the same. I will also not consider inconsistencies in regard to his signatures. This is because any one is entitled to have short and/or long signatures and although for clarity and coherence it is better to use one of the two and not both in a given course of events like the election in issue, there is no bar to the interchangeable use of signatures. Also in my discretion, I am reluctant to turn into a hand writing expert to examine his signatures.

17. In her assessment, the trial Magistrate relied on annexure A4, a DR form adduced in court by the Respondent, to add the Respondent 370 votes from the disabled school polling station giving her a total of 1339 votes and making her the winner of the election. She thus overturned the EC's declaration of the Appellant as the winner, ordered that she be de-gazetted, the Respondent be gazetted and immediately sworn in as woman councillor Namirembe Bakuli.

18. For this polling station unlike the Victorious School polling station, there was no agreement between the Appellant and the Respondent on the results in the DR forms.

Both the Appellant and Respondent adduced DR forms on court at the petition hearing. The Appellant's form gave her 61 votes and the Respondent 20 votes. The Respondent's DR form on the other hand gave the Appellant 29 votes and the Respondent 370 votes. The trial Magistrate disregarded the Appellant's form calling it a photocopy with a different serial number. In the process, she also disregarded the Appellant's explanation that although her DR form was a photocopy it was given to her by the presiding officer after tallying the votes at the polling station because the DR forms were finished and that it was for this reason that although the DR form was a photocopy the entries therein were in original.

19. On a balance of probabilities, the trial Magistrate in her assessment discretion needed to investigate this claim of the EC not providing authentic DR forms to the Appellant's agent which might have been a violation of section 136 (1) (c) of the LG Act before dismissing the Appellant's claim. However, the trial Magistrate found the Appellant's DR form to be a photocopy with a different serial number. She therefore left only the DR form of the Respondent with the results therein for her assessment.
20. The Appellant, Respondent, the presiding and returning officers from the disabled school, the Appellant's and the Respondent's agents testified about the events at this station on polling day. All these witnesses testified to a successful election from which DR forms were filled out and remitted for transmission to the returning officer. It would mean therefore that both the Appellant and Respondent had a DR form handed to them from this polling station and a similar copy sealed in the tamper proof box for transmission to the returning officer at the tally center. Up to this level there is no disagreement.
21. It is baffling what happened between moving the DR form and other materials from this polling station to the tally center. The best evidence on this movement of the DR form should have come from the EC which was the second Respondent at the petition hearing.
22. The presiding officer testified as a Respondent witness and the returning officer testified as an Appellant witness. The returning officer could not know what

happened at the polling station and the transmission; his role was at the tally center. He confirmed that he had no results from the school of disabled polling station at the time of tallying and he never used them and this is not disputed by the Appellant or Respondent. From the record the presiding officer did not assist court understand the circumstances under which the DR form and other materials left the polling station for transmission to the tally center which would have assisted court understand why the DR form from this polling station did not get to the tally center. For this failure to satisfactorily explain these circumstances and the fact that he chose to testify as a Respondent witness and not a witness of the EC, I am reluctant to view the presiding officer as an objective, credible and reliable witness in the circumstances of this case.

23. Mr. Kajubi's credibility as the presiding officer is also left hanging in the balance by his failure to adduce his appointment letter as the presiding officer; the returning officer's testimony that he did not conduct Mr. Kajubi's oath as a presiding officer and his denial of the purported signature of the returning officer in Mr. Kajubi's oath. This questions the authenticity of Mr. Kajubi's claim that he was the presiding officer and lends credence to the Appellant's claim that although Mr. Kajubi's name was registered in the register at EC offices as the presiding officer for this station, due to some problems he actually was not the presiding officer on polling day and that it was Bwogi Nathan who was the presiding officer.

24. Mindful that I did not witness Mr. Kajubi testify first hand to assess his demeanor and other related issues and taking extra caution in this regard, with all these issues surrounding Mr. Kajubi's credibility, I am reluctant to safely rely on him as a witness.

25. What is clearly made out is that the failure by the presiding officer to transmit or deliver to the returning officer or the nearest results center the sealed ballot box, the

duly filled and signed DR forms and other materials after closing the polls was a violation of section 136 of the LG Act.¹

26. Both the Appellant and Respondent adduced DR forms before the trial Magistrate. The DR form of the Appellant was tendered as DW Exh 2A. The Respondent's DR form was admitted as PW Exh 1. The Appellant also adduced a certified copy of the DR form for directly elected councillors for the same polling station and it was admitted as DW Exh 2B. The EC which was a party to the proceedings at trial conceded that the certified copy was from its office and did not object to its tendering. Because it is a certified copy from the EC DW Exh 2B can safely be relied on and it is relevant to this case to the extent it was from the same polling station.

27. A look at the three DR forms aligns DW Exh 2B to DW Exh 2A than to PW Exh 1 of the Respondent/Petitioner. Its total number of voters and votes cast are closer in

¹ Each presiding officer shall complete the necessary number of copies of Form EC 9 prescribed in the Seventh Schedule for the declaration of results, sign them and do the following— (a) one copy shall be retained by the presiding officer for display at the polling station; (b) one copy shall be enclosed in an envelope supplied by the Electoral Commission for the purpose, sealed by the presiding officer and delivered to the nearest result collection centre prescribed by the returning officer, together with the report book, for transmission to the returning officer; (c) one copy shall be delivered to each of the candidates' agents or, in the absence of those agents, to any voters present claiming to represent the candidates; and (d) one copy shall be deposited and sealed in the ballot box.

(2) The presiding officer shall, in the presence of the candidates and the candidates' agents as may wish to be present, seal the ballot box with a seal provided for the purpose by the Electoral Commission.

(3) The sealed ballot box referred to in subsection (2) shall contain the following items— (a) one duly signed declaration of results form; (b) the ballot papers received by each candidate, tied in separate bundles; (c) the invalid ballot papers, tied in one bundle; (d) the spoilt ballot papers, tied in one bundle; (e) the unused ballot papers; and (f) the voters roll used at the polling station.

(4) The declaration of results form shall be signed by the presiding officer and the candidates or their agents present who wish to do so, and the presiding officer shall there and then announce the results of the voting at that polling station before communicating them to the returning officer.

range to those in DW Exh 2A and both Exhs DW 2A and DW 2B have Bwogi Nathan as the presiding officer at this polling station. Using the comparative analysis of the three DR forms, the contents in the Appellant's DR form are easily verifiable by the DR form in a different election but on the same date and at the same time. They are more believable than the contents in the Respondent's DR form.

i)The Respondent DR Form

28. As already mentioned the Respondent's DR form was admitted as PW Exh 1 at the petition hearing. It is the entries in this DR form that the trial Magistrate used to add the Respondent 370 votes and make her the winner of the election. I will therefore analyze it in determining whether the trial Magistrate's findings based on this DR form were proper. No results had been posted from this polling station so for accuracy the trial Magistrate needed to add up the Appellant's votes in this DR form as well to get the accurate number of votes but she did not.
29. From the said DR form the total number of issued ballot papers is 1000; the total number of counted/used ballot papers is 600 and the total number of unused ballot papers is 14x50 totaling 700. If these figures are to be reliable the total unused ballot papers and used ballot papers should be 1000. However, it has 1300 ballot papers.
30. The total number of ballot papers counted is 600. The total valid votes cast is 548 and the total number of rejected votes is 02. This makes a total of 550 counted ballot papers which is inconsistent with the 600 counted ballot papers reflected in the DR form.
31. In the same DR form, it is presented that 442 females voted and 158 males voted making a total of 600 voters. This total of 600 should be the same as the total number of valid and invalid votes which from these statistics is 550 instead. This is also different from the total number of ballot papers counted in the DR form which is 600.
32. The Appellant and all her witnesses consistently denied the authenticity of this DR form throughout the petition hearing and in this appeal. DW3 Mukasanga Annet who

was the Appellant's agent at the polling station categorically denied the signature attributed to her in this DR form as well as all the entries therein. Moreover this DR form came from the Petitioner at the petition hearing and was not a copy certified by the EC.

33. The purpose of relying on DR forms certified by the EC cannot be underscored. Where things are done fairly and without fraud, it serves to preserve the accuracy and authenticity of polling results as manifested at the polling station in the presence of all candidates' representatives and the EC agents who append their signatures on the DR form which is then transmitted to EC in the tamper proof envelop and later kept safely by the EC. Because of this tamper proof security, the DR form retained by the EC is the best backdrop from which to verify the authenticity of the results posted at a given polling station.
34. This kind of tamper proof security of the DR form retained by the EC is not availed to the DR forms retained by the candidates' agents. Candidates and their agents can tamper with the DR forms in their hands. So, in case of a dispute like in the case of this polling station, it is incongruous for the court to rely solely on a single uncertified DR form from one candidate, especially where it is strongly disputed by another candidate. In all events without such certified copy of the DR form from the EC it becomes difficult to believe one candidate's version of events over another's which are different. The trial Magistrate therefore erred in law and fact when she relied on the Respondent's uncertified and disputed DR form to take the Appellant's win of the election away. Issue two is resolved in the affirmative.

ii) Substantial effect

35. In **Dr. Kiiza Besigye v. Yoweri Museveni, Supreme Court Election Petition Appeal No. 1 of 2001**, Mulenga JSC at p. 355 explained thus: "To my understanding therefore the expression noncompliance affected the result of the election in a substantial manner ... can only mean that the votes a candidate obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed, the petitioner does not have to prove that

the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would have to be such as would put victory in doubt.”

36. In **Dr. Kiiza Besigye v. Electoral Commission & Anor, Supreme Court Presidential Election Petition Appeal No. 1 of 2006**, Odoki CJ (as he then was) at p. 103 stated that “In determining the effect of the irregularities on the result of the election, the court should consider whether there has been substantial compliance with the law and principles and the nature, extent, degree and gravity of non-compliance. The court should also consider whether the irregularities complained of adversely affected the sanctity of the election. The court must finally consider whether after taking all these factors into account the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt.”

37. In **Amama Mbabazi v. Yoweri Kaguta Museveni & 2 Ors. Presidential Election Petition No. 01 of 2016** the judges of the Supreme Court held that “we must however emphasize that although the mathematical impact of noncompliance is often critical in determining whether or not to annul an election, the Court’s evaluation of evidence and resulting decision is not exclusively based on the quantitative test. Court must also consider the nature of the alleged noncompliance. It is not every violation that can be evaluated in quantitative terms. But whatever the nature of the violation alleged, the quantum and quality of evidence presented to prove the violation must be sufficient to satisfy the Court that what the Constitution envisaged as a free and fair election, as the expression of the consent and will of the people on who should govern them, has been circumvented.” From the jurisprudence, as enumerated, in determining the substantial effect test, the Court is required to invoke both the quantitative and qualitative test to the circumstances of the case.

38. In the case before me, the ideal scenario would have been for all the results from all the 16 polling stations to be tallied. Everyone who votes deserves to have their vote count in the final result. However, it is also noteworthy that there is never a perfect election; some votes are wasted just like some ballot papers are spoiled. From the analysis above, the error in the results posted from Victorious Primary School Polling Station was conceded by all parties including the EC and the trial Magistrate could safely add the extra 100 votes for the Respondent.
39. This addition kept the Respondent in second place with 969 votes and the Appellant in the first place and winner of the election with 1050 votes. These results are from 15 out of 16 polling stations. In the circumstances of this case without satisfactorily verifiable results from the one polling station left, it is hard to say if the numbers of votes posted therefrom in particular for the Respondent could have affected the results in a substantial manner.
40. The numbers from this single polling station are largely, if not only, the determinant of the substantial effect test in this case. However, at a global level, excluding one polling station when it is not demonstrated that the numbers therefrom were such that they would be won by the Respondent or affect the results in a substantial manner, I cannot safely say that these numbers affected the results in a substantial manner in this case.
41. On a balance of convenience, based on all the above, the Petitioner did not demonstrate that there were gross violations of electoral laws that affected the results posted by the EC in a substantial manner. The trial Magistrate therefore had no justifiable basis to find as she did and set aside the Appellant's election victory. This appeal therefore succeeds on issues 1, 2 and 3. The trial Magistrate's judgment and orders are therefore set aside.

42. The Respondent's petition stands dismissed with costs for the Appellant in this and the lower courts. Given the nature of EC officials misplacing the DR form from this polling station, the awarded costs shall be paid by the EC.

I so order

LYDIA MUGAMBE

JUDGE

4TH SEPTEMBER 2017