THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ. TSEKOOKO, MULENGA, KANYEIHAMBA AND KATUREEBE, JJ.SC.)

ELECTION PETITION APPEAL No.05 OF 2007

BETWEEN

WASIKE STEPHEN MUGENI :::::::::::::::::::: APPELLANT

AND

AGGREY AWORI SIRYOYI ::::::::::::::::: RESPONDENT

[An appeal from the decision of the Court of Appeal at Kampala (Okello, Engwau and Byamugisha.JJ.A) dated the 5th day of December, 2006 in Election Petition Appeal No.01 of 2006]

JUDGMENT OF THE COURT

This is a second appeal arising from an election petition instituted in the High Court by the respondent. The High Court allowed the petition. The appellant's appeal to the Court of Appeal was dismissed hence this appeal.

FACTS AND THE BACKGROUND

At the Parliamentary General Elections held on 23rd February, 2006, five candidates contested for the Samia Bugwe North Parliamentary constituency, in Busia District, namely the appellant, the respondent, Emmanuel Sanyu, Padde Deogratia Wowo and James Mugeni. The appellant obtained 19,750 votes and the respondent was runner-up with 12,373 votes. The rest polled 3,773, 1,775 and 972 votes respectively. The appellant was declared the duly elected Member of Parliament for that constituency.

Prior to the said elections, the respondent was the sitting member of Parliament for the Constituency. At the same time the appellant was employed as Town Treasurer of Busia Town Council which is a local government. Two undisputed facts concerning that employment occurred before the election. First, on 12th October, 2005, the appellant wrote a letter (exh. P4) to the Town Clerk, Busia Town Council, intimating that because he intended to contest in the forth-coming parliamentary elections, he was resigning his appointment as Town Treasurer, as required under clause **(4) of Article 80** of the Constitution. Secondly, on 11th of November, 2005, the Deputy Inspector General of Government (DIGG) wrote a letter or a report (exh. P7) directing the Town Clerk, Busia Town Council, to inter alia,

"interdict the Town Treasurer, Mr. Stephen Wasike Mugeni and submit his names to the District Service Commission, for Dismissal for conflict of interest, in breach of Section 8(1) and (2) of the Leadership Code Act, 2002, and breach of Regulation 79(4) of the Local Governments Financial and Accountability Regulations, 1998". Further more the IGG had earlier written two letters (exh. P13 dated 28th/1/2004 and exh. P8 dated 10th/3/2004) recommending the dismissal of the appellant. The significance of these letters will become apparent later in this judgment.

The respondent who considered himself aggrieved by the election results petitioned the High Court, at Mbale, seeking for, inter alia, an order nullifying the appellant's election. The respondent advanced a number of complaints in his petition and in the accompanying affidavit. A number of witnesses swore affidavits in support of the petition. The appellant and the Electoral Commission were cited as co-respondents. The main complaints made against the appellant were that-

1. ***He was not a person qualified for nomination to contest for the Parliamentary seat because: -***

   a) …***..by the date of nomination, he had not effectively resigned his office of Town Treasurer as required by law.***

b) ……***at the time of his nomination, he had been found by the Inspector General of Government (IGG) guilty of breach of the Leadership Code Act and the IGG had recommended for his removal or dismissal from his office as Town Treasurer of Busia Town Council.***

2. …… before, during and after the Parliamentary Elections, the appellant committed the electoral offence of defamation under the Parliamentary Elections Act, 2005 (17 of 2005).

In his amended answer to the petition, the appellant denied all the allegations contained in the petition and swore an affidavit on 1/6/2006 in support. Some twelve witnesses swore affidavits in support of his answer.

The trial judge accepted the respondent's complaints and gave judgment in favour of the respondent. He nullified the election of the appellant as a Member of Parliament and ordered for the holding of a fresh election. The appellant appealed to the Court of Appeal against that decision and based his appeal on four grounds. The Electoral Commission did not appeal.

Those four grounds of appeal can be summarised as follows:-

1. **The trial judge erred in holding that the appellant was not qualified for nomination because he had not resigned.**
2. **The Judge was wrong in holding in effect that compliance with IGG's findings was mandatory.**

3. **The trial Judge failed to evaluate evidence and so wrongly concluded that appellant committed an electoral offence of defamation.**

4. **The trial judge failed to evaluate evidence judiciously.**

In a reasoned decision, the Court of Appeal rejected grounds 1, 3 and 4 but it upheld the second ground only and consequently it dismissed the appeal notwithstanding that it upheld the second ground. Hence this appeal which is based on six grounds. The respondent filed a cross-appeal containing one ground.

GROUNDS OF APPEAL GENERALLY

Rule 82(1) of the Rules of this Court requires that a memorandum of appeal shall set forth ……… concisely …….. the grounds of objection to the decision appealed against

specifying the points which are alleged to have been wrongly decided. In the memorandum before us, we note that most of the grounds are argumentative and not concise. Secondly, the appeal to this Court is against the decision of the Court of Appeal and the grounds should be so framed against the decision of that Court. In the instant memorandum, however, they are framed in an omnibus manner objecting to the decisions of both the Court of Appeal and the High Court.

GROUNDS ONE AND TWO

Grounds 1 and 2 are worded as follows:-

1. **The learned trial judge and the learned Justices of the Court of Appeal erred in law in finding that it was mandatory for the appellant to resign his former Public Office in order to qualify for nomination and Election as a member of the 8th Parliament.**

2. **The learned trial judge and the Justices of Appeal erred in law in finding that the appellant's resignation was ineffective at law.**

These two grounds are directly related to the first agreed issue for determination which was framed at the scheduling conference thus-

"Whether the first respondent was qualified for election as a Member of Parliament for Samia Bugwe North Constituency on 23rd February, 2006".

In relation to the first issue the submissions for both sides centred on the question of whether the appellant had effectively resigned his post as Town Treasurer as required by law in as much as he addressed and delivered his letter of resignation (exh. P4) to the Town Clerk of Busia Town Council instead of addressing and delivering it to the District Service Commission which was his appointing authority.

The learned Judge accepted the contentions of the respondent that the appellant never resigned as required by law. The judge held that the appellant should have addressed and delivered his letter (exh. P4) to the District Service Commission, his Appointing Authority and not to the Town Clerk. The learned Judge concluded that at the time of his nomination, the appellant had not effectively resigned his position as Town Treasurer and, therefore, he was not qualified for nomination to contest election as a Member of Parliament.

The Court of Appeal upheld the finding of the trial Judge to the effect that it was the District Service Commission to

which the appellant should have addressed his letter of resignation and it was that Commission which should have received and accepted the resignation. Secondly, the Court of Appeal also agreed with the trial judge that even if the appellant had properly lodged his letter of resignation, he could not have *"effectively resigned when disciplinary proceedings initiated against him by the IGG were still pending".*

In this Court, the appellant's counsel based submissions in relation to the first ground on the contention that the period between the coming into force of the law requiring candidates to resign public office at least ninety days prior to nomination and the nomination day was less than ninety days so that it was not possible to comply with that requirement. Counsel submitted that by virtue of two decisions of the Constitutional Court, namely – **Sakwa D. and Rutaroh Vs. Electoral Commission and 44 others (Constitutional Petition No. 08 of 2006),** and **Kwizera Eddie vs. Attorney General (Constitutional Petition No. 14 of 2005)** (both unreported) there was no law at the material time that required the appellant to resign his former office in order to qualify for nomination. According to counsel, in the **Sakwa** case, the Constitutional Court held that the provisions of clause (4) of Article 80 of the Constitution and Section 4(4) of the PEA, 2005 were not

applicable to candidates who contested elections to the 8th Parliament. Counsel maintained that in as much as the Court of Appeal did not take the said decision into consideration, its decision in this case is per incurium and should on that account be overturned.

In their written arguments in reply, counsel for the respondent stated, correctly, that the petitions of **Sakwa** (supra) and **Kwizera** (supra) were decided long after the High Court had tried and decided this petition. Counsel contended that since the Constitutional Court had not pronounced itself on the matter, nothing barred the learned trial Judge from invoking Section 4(4) of the **Parliamentary Elections Act.** According to learned counsel for the respondent, ground one in this appeal is academic because neither the trial Judge nor the Court of Appeal applied Section 4(4) of the Parliamentary Elections Act nor Article 80(4) of the Constitution in their final decision. In addition to citing S. 61(1) (d) of the PEA, learned counsel cited the English law set out in **Halsbury's Laws of England, 4th edition, Volume 15,** paragraph 737, page 560 as the law that required the appellant to resign. Finally, counsel contended that the appellant had to resign in order to contest elections and that there is no difference between *"effective resignation"* and *"resignation as by law required"*.

In our view, the law governing resignation from public offices is clear.
Clause (1) of Article 252 of the Constitution states-

"*Except as otherwise provided in this Constitution, any person who is appointed or elected to any office established by this Constitution may resign from that office by writing signed by that person addressed to the person or authority by whom he or she was appointed or elected".*

According to clause (2) of that Article such resignation takes effect in accordance with the terms of appointment and in absence of such terms, it takes effect when the resignation is received by the person or authority it is addressed to in accordance with clause (1).

Under Section 55(1) of the **Local Government Act**, it is the Busia District Service Commission which has the power to appoint the Town Treasurer, in this case, the appellant.

In our view, the English law cited by learned counsel for the appellant is inapplicable in Uganda. *Prima facie*, there were in force two laws which required the appellant to resign in order to participate in the General Elections of 2006. The first law is the basic law of the land, namely, clause (4) of **Article** 80 of the **Constitution** and the second law is **Section 4(4) of the Parliamentary Elections Act**, 2005.

Clause (4) of Article 80 which was enacted in the Constitution (Amendment) Act, 2005, and came into force on 30th September, 2005 so far as is relevant reads thus-

"*Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of a local government or any body in which government has controlling interest, who wishes to stand in a general election as a member of Parliament shall resign his or her office at least ninety days before nomination day".*

Section 4(4) of the Parliamentary Elections Act, 2005, which came into force on 21st November, 2005 reads thus -

"*Under the multiparty political system, a public officer or a person employed in any government department or agency of the government or an employee of a local government or anybody in which the government has controlling interest, who wishes to stand for election as a member of Parliament shall -*

a) *In a case of a general election, resign his or her office at least ninety days before nomination day ...."*

Both the learned trial judge and the Court of Appeal glossed over, or omitted to consider and decide, the question

whether clause (4) of Article 80 of the Constitution applied to the appellant's case. In the latter Court, counsel for the appellant had argued in the alternative that the appellant could not resign, at least ninety days before nomination day, because it was not practical for him to comply. The Court declined to pronounce itself on this argument but instead it accepted the submission of counsel for the respondent that *"it was not the case for respondent that the appellant did not comply with Article 80(4) of the constitution".*

In the first subparagraph of paragraph 7 of his petition, the respondent had alleged, that the Electoral Commission should not have accepted the appellant's nomination because he failed to resign ninety days before nomination. In his letter of the purported resignation dated 12th October, 2005 (exh. P4), the appellant himself stated very unequivocally that he was complying with clause (4) of Article 80. He quoted that clause in full and towards the end of the letter he stated –

> **My resignation therefore is subject to Article 80(4) of the Constitution remaining in force as a legal requirement for any officer who wishes to stand as a Member of Parliament in the general elections under the multiparty system**

The letter was annexed to his answer (and his subsequent amended answer) to the petition. In that answer the appellant had averred that he had resigned his position.

Clearly, the issue of resignation in compliance with Article 80(4) was raised both in the trial Court and in the Court of Appeal and therefore the two courts below should have considered the matter.

With respect we think that the submission by appellant's counsel that clause 4 of Article 80 was nullified by the Constitutional Court in the decisions cited earlier in this judgment is unsustainable. Only the minority (Twinomujuni, J.A,) in **SAKWA'S** case concluded that the clause was null and void. The other members of the Court, who included the learned Deputy Chief Justice, disagreed with that conclusion. However, in spite of Twinomujuni, JA's approach, the court was unanimous in the opinion that the respondents in that petition, who had been members of the 7th Parliament, the majority of whom were ministers, did not have to resign their offices prior to the nomination day because they were not public officers as defined in the Constitution. It is clear from the judgment of the Court of Appeal (four out of the five Justices) that clause (4) was not declared null and void.

In **Kwizera's** case (supra), the petitioner, himself a special Presidential Assistant, sought to have clause (4) declared void and null. The decisions of the members of the Constitutional Court are rather ambiguous. Okello JA, gave the minority lead judgment with which Byamugisha, JA. agreed. He held that the clause amended or was inconsistent with certain specified Articles of the Constitution and, therefore, void. Lady Justice Mpagi-Bahigeine concluded that the clause was inconsistent with or contravened Articles 1(4) and 21(1) but not Article 38(1).

The learned Deputy Chief Justice did not declare the clause void. She held, at page 16 of her judgment, that *"clause (4) is not inconsistent with and not in contravention of Articles 1(4), 21(1) and 38(1)"*. She however held the view she expressed in **Sakwa's** case (supra) that -

"*The enactment was ineffective for 2006 Parliamentary General Elections and therefore not applicable to any candidate who stood for or wanted to stand for the 8th Parliament due to inadequacy of time".*

Kitumba JA., supported the Deputy Chief Justice by holding that clause (4) is not inconsistent with and does not contravene Articles 1(4), 21(1) and 38(1).

By majority decision of 3 to 2, the Constitutional Court

decided that clause (4) is not inconsistent with and not in contravention of Articles 1(4) and 38(1) but it was inconsistent with and in contravention of Article 21(1) but did not declare the clause null and void.

Thus the two Constitutional Court decisions do not declare clause (4) null and void. As we have noted, in both cases, the Court expressed the view in effect that the clause could not apply retrospectively so as to affect candidates for the February, 2006 General elections. In our view this is strange because the clause became operational on 30th September, 2005, which was eleven days before the aspiring candidates were expected to resign. There was no transitional provision in the **Constitution (Amendment) Act,** 2005, exempting candidates aspiring to contest in February, 2006.

Whereas it can be argued that it was impossible for aspiring candidates to comply with Subsection (4) of Section 4 of the **Parliamentary Elections Act, 2005**, (Act 17 of 2005) because it came in force within less that the 90 days limitation, with all due respect to the Constitutional Court, the same cannot be said of the new clause 4 of Article 80, because the clause became operational more than 90 days before nomination day which was 12th January, 2006. It is well known that the day a law becomes operational, it binds

everybody irrespective of whether some people are aware of it or not. Hence the saying that ignorance of the law is no defence. In the appellant's case, however it is evident from his letter (exh. P.4) that he was very much aware of the provisions of clause (4) requiring him to resign.

Furthermore, it must be realised that the Constitution is the basic law of the land from which other laws derive legitimacy. In this case whether Act 17 of 2005 was passed or not, every aspiring candidate for the parliamentary elections was bound to comply with clause 4 of Article 80 which was the basic Law and which was in force.

In Constitutional Appeal No. 3 of 2004, **Attorney General vs. P. Semwogerere and others,** this Court held that even if the **Referendum and other Provisions Act 2002** had been declared invalid, Articles 69 and 271(3) of the Constitution, as the basic law, allowed the holding of the referendum. Court therefore held that the referendum was validly held. By the same analogy, even if S. 4(4) of the PEA, 2005 could not be complied with, clause (4) of Article 80, as the basic law was binding and every candidate who held public office had to comply with it.

Accordingly, ground one must fail.

In ground two the appellant attacks the finding that his

resignation was ineffective. That finding was in consequence of the respondent's pleading in paragraph 6(b) of his petition where he averred –

"…. *other than the breaches named above which disentitled the 1st Respondent from nomination, the first Respondent's nomination by the 2nd Respondent was also defective in so far as he had not fully resigned his position as by law required".*

As we said earlier in this judgment, the appellant sought to resign by his letter dated 12th October, 2005 addressed to the Town Clerk. Nomination day was 12th January, 2006. In order to comply with clause (4), the appellant ought to have resigned on or before 11th October.

What is more, despite his purported resignation by letter, he did not hand over his office as is evidenced by a number of letters produced in evidence as exhibits P9, P10 and P12. In the letters, the Ag. Town Clerk, in apparent desperation, points out that the appellant did not hand over his office months after the purported resignation. Because of these letters, both the trial judge and the Court of Appeal concluded that the appellant had not effectively resigned as required by law. Further, both courts held that even if the Town Clerk had powers to receive and accept the appellant's

resignation, the Town Clerk was enjoined by Standing Orders not to accept the resignation of the appellant because the Town Clerk knew that the appellant was under disciplinary proceedings.

In 2004, the IGG wrote to the Commission and the Town Clerk asking that disciplinary proceedings be taken against the appellant by dismissing or removing him from office. This was not done.

Again on the 11th November, 2005 the IGG wrote exh. P7 directing the same Town Clerk, Busia Town Council, to *"interdict the Town Treasurer, Mr. Stephen Wasike Mugeni and submit his name to the District Service Commission for dismissal for conflict of interest in breach of Section 8(1) and (2) of the Leadership Code Act, 2002 ………".*

Apparently the Town Clerk took no action. Because of this inaction, lawyers for the respondent complained to the IGG who, as late as 20th February, 2006, that is three days to the general elections, wrote a letter to the Chairman, Electoral Commission, drawing the latter's attention to the three instances of breach of Leadership Code Act by the appellant, warranting disciplinary action against him or barring him from holding appointive or elective office.

The cumulative effect of all this is that the appellant was not

eligible for nomination to contest in the parliamentary election because of pending disciplinary proceedings. That is what the two courts below found. We have not been persuaded that the finding was erroneous.

Counsel for the appellant referred to Articles 252 and 200(2) of the Constitution concerning the meaning of a responsible officer in the local governments, and argued that Section 67(3) of the **Local Government's Act** established a responsible officer in local government. He submitted that accepting resignation by a Town Clerk on behalf of government is part of the administrative matters which were admitted by counsel for the respondent. Appellant's counsel contended that Public Service regulations as regards definitions were amended by implication in line with Article 274 and 292(1) of the Constitution to introduce the Town Clerk and Chief Administrative Officer. Counsel relied on the case of **Opolot vs. Attorney General (1969)** E A 631 and submitted that a Town Clerk was and is a responsible officer who is authorised under delegated authority to receive and accept resignations on behalf of Government and that when in his letter, exh. P5, the Town Clerk acknowledged exh. P4 the resignation process was completed and effective.

As regards the recommendations of the IGG, counsel contended that these were not effective and that there were no pending disciplinary proceedings to warrant the

application of Standing Order No. 3 of the Public Service Standing Orders. He contended that even if they had been there, it was the responsible officer who was estopped from accepting the resignation since he is presumed to be aware of all pending disciplinary proceedings in as much as he is the signatory and the initiator of the proceedings to the appointing authority.

In reply on this ground, counsel for the respondent submitted that the resignation of public servants is governed by clear provisions of the law. He relied, correctly in our opinion, on Article 200(1) of the Constitution for the view that the power to appoint and retire persons employed in the service of a District lay with the District Service Commission. Counsel argued that a public officer cannot, by merely intimating that he/she resigns his or her office, at once legally divest himself/herself of all his/her official duties and responsibilities. Counsel supported the findings of the two courts below that the ***"purported receipt and acceptance by the Town Clerk of the purported resignation of the second respondent ………. is null and void on a maxim nemo dat non quit habet".*** Counsel referred to the opinion of Wambuzi C. J., in the case of **Attorney General vs. Major General David Tinyenfuza** (Constitutional Appeal No. 1 of 1997) (unreported) where the learned Chief Justice held that *"powers of appointment and removal from office of any kind*

lay with the employer". Counsel further relied on the opinion of Kanyeihamba JSC., in the same case that resignation is not complete until accepted. Learned counsel contended that the appellant's purported resignation had not been effective as the resignation had not reached, or been noted or accepted by the District Service Commission. Counsel pointed out evidence, namely letters from the Town Clerk which showed that the appellant had not indeed handed over office, which is evidence of ineffective resignation.

In so far as disciplinary proceedings were concerned, counsel contended that the appellant could not leave office because of Order 3 of chapter 1 part A-t of the Public Service Standing Orders which reads as follows:

"*It would be subversive of discipline of the Public Service if by a voluntary resignation the government could at any moment be deprived of the power to dismiss a public officer for any misconduct however gross. Resignations must not be accepted if disciplinary proceedings are pending against an officer which might lead to his/her dismissal".*

We agree that even if exh. P.4 had been addressed to and received by a proper officer, the appellant could not resign because of pending disciplinary proceedings arising from the recommendations of the IGG. In view of the provisions of

the Leadership Code Act, proceedings of the IGG can lead to dismissal as indeed they indicate in this particular case. The IGG's recommendations contained in letter dated 11th November, 2005, show that the appellant was liable to dismissal and he must have been aware of it by the time he purported to resign. The Court of Appeal concluded that *"until the authorised person or authority acts upon the (IGG's) report, the recommendation contained in it remained a recommendation"*. The Court's erroneous view is that a leader is affected only where the IGG's report is implemented, say, by dismissal or removal of a leader from office. With respect to the Court of Appeal, we think that it erred in its conclusions regarding the effect of the recommendations of the IGG that the appellant should be dismissed.

Ground two of appeal must fail.

Ground 3 states that-

The learned trial Judge and Justices of Appeal erred in law when they ignored the Supreme Court precedent that decriminalized utterance of false publications and thereby rendered Section 73(1) of the Parliamentary Elections Act, 2005 null and void.

The arguments of appellant's counsel in respect of the

import of paragraphs (a) and (b) of paragraph (1) of S. 73 are not clear. He contended that Section 73(1) (a) of the Parliamentary Elections Act "effectively criminalised utterance of false publication about the personal character of a candidate, and that Section 73(1) (b) criminalised utterance of true statements and subjected it to recklessness". Counsel then submitted that the principles set out in **C. O. Obbo and A. M. Mwenda vs. Attorney General** Constitutional Appeal No. 2 of 2002 (unreported) declared Section 73(1) of the Parliamentary Elections Act null and void by implication. Counsel referred to the definition of the word "reputation" as *"the opinion that people have of you, particularly whether you can be trusted or relied on",* in the Advanced Learners Dictionary, 6th Edition and argued that Section 73(1) is a legislation against holding and expressing opinions. Counsel cited a number of other authorities including the opinion of Mulenga, JSC, in the Presidential Election Petition No. 1 of 2006, **Col. Dr. Kiiza Besigye Vs. Electoral Commission and Y. K. Museveni** (supra) for the view that statements of opinion rather than of fact are not prohibited.

In reply, counsel for the respondent described the appellant's contentions as fanciful and misleading theories, in as much as Section 73(1) of the Parliamentary Elections Act, creates an electoral offence against false statements

whether libelous or slanderous. Counsel argued that for purposes of an election petition the Section does not create criminal libel or slander, and relied on **Halsbury's Laws of England, 4th Edition, Volume 28, at page 8**. Learned counsel referred to the judgment of Mulenga, JSC, in **Onyango Obbo** case, at Page 92, where the learned Justice said *"like most human rights and freedoms protected by the Constitution, the right to freedom of expression is not absolute because the Constitution provides for limitation of its enjoyment under Article 43".* Counsel further referred to the judgment and reasons of the same learned Justice of the Supreme Court, at page 93 in the **Kiiza Besigye petition, 2001** and Counsel quoted the following passage *"in Onyango Obbo and another ………, this court held that a limitation on enjoyment of a right protected by the constitution is valid only if it is within the parameters of Article 43. It is obvious that Section 23(3) and Section 24(5) of the Presidential Election Petition (equivalent to Section 73(1) of the Parliamentary Elections Act) were enacted to impose on candidates engaged in campaigns, limitations on the enjoyment of the right to freedom of expression, but on the authority of Onyango Obbo's case (Supra), the limitations have to be construed, to the extent possible, in a manner that renders them conform to Article 43 of the constitution. This is achieved by restricting the sections to apply only to such statements as prejudice the fundamental*

and other human rights and freedoms of others or the public interest". Counsel submitted that the two decisions did not decriminalise false utterances as provided for in Section 73(3) of the Parliamentary Elections Act nor did they render the Subsection null and void.

We find it strange that learned counsel for the appellant boldly argued that our decision in **Onyango Obbo** case which was delivered on 11th February, 2004 in effect declared null and void Section 73(1) of the Parliamentary Elections Act. For one thing, **Onyango Obbo** case was decided more than one year before Section 73(1) was enacted. So, however ingenious we could have been, we could not have made, so to speak, a prospective declaration of nullification of a law which was not yet in existence. We are persuaded by the submission of counsel for the respondent in so far as our principles set out in the *Onyango Obbo* case and *Kiiza Besigye* petition are concerned.
We think that ground three has no basis and it must fail.
Ground 4 is worded as follows:

4 – The learned trial Judge and Justices of Appeal erred in
> ***law in interpreting paragraph 9 of the appellant's affidavits of 01st June, 2006, as an admission of defamation as provided for in the Electoral Laws,***

inspite of Section 22(3) of the Parliamentary Elections Act, 2005.

Counsel for the appellant appears to submit that the averment in the petition and the evidence in the affidavits concerning the uttering of defamatory statements are defective because they did not set out
verbatim the statement complained of. Counsel contended that Order 17 rule 3 of the Civil Procedure Rules was contravened and relied on a number of cases for this, especially the decision of the Supreme Court of India in **Charan lal Salin vs. Grane Zail Singh and another** (1985) L R C (Const.) 31, for the proposition that in petitions, pleading has to be precise, specific and unambiguous so as to put the respondent on notice. Counsel again appears to contend that para 6(c) (1) of the petition is defective because no particulars are set out.
Learned counsel criticised both the Court of Appeal and the trial Judge when they found that appellant's answer in respect of defamatory matter was an admission. Counsel submitted that the petition did not disclose a cause of action as required by *Order 6 rule 2 of Civil Procedure Rules* also relied on *Presidential Election Petition* No. 1 of 2006 *(Supra).* According to counsel, the learned trial judge erred in relying on the affidavit evidence of Aroba Mathias. Counsel concluded by submitting that circulation of newspaper *per se* whether defamatory or not, cannot be an electoral

offence; neither can it be evidence of an offence in as much as freedom of the press is a guaranteed right. For this counsel relied on a number of provisions of the *Constitution, on the Press and Journalists' Act 1995 and on Obbo's case* (supra).

In reply counsel for the respondent supported the concurring conclusions reached on the matter by both the trial Judge and the learned Justices of Appeal, contending that submissions of counsel for the appellant did not address the complaint in ground 4 which is whether the Justices of Appeal erred in interpreting paragraph 9 of the appellant's affidavit sworn on the 1st June, 2006 as an admission of defamation within the meaning of Section 22(3) of the Parliamentary Elections Act, 2005. Further, learned counsel contended, correctly in our view, that in the trial court and in the Court of Appeal there was no complaint about pleadings on defamation nor is there any in this ground 4 of appeal or anywhere. Counsel referred to a number of judgments of this Court in which the Court stated that in order for a second appellate court to interfere with the conclusions of a first appellate court, the former has to be satisfied that the first appellate court failed in its duty to reappraise the evidence and reach its own conclusions or it has plainly gone wrong or failed to appreciate the weight of evidence admitted. Counsel concluded that the authorities cited by

the appellant’s counsel do not support appellant’s case.

Having considered all the pleadings and the respective supporting affidavits for both sides and having considered all the submissions, we are not persuaded by the arguments of counsel for the appellant. It is clear from the evidence available on the record that the **New Vision** newspaper of 7th and 8th February, 2002, published articles which were exhibited in court at the trial. In his affidavit, the appellant admits that at a number of campaign rallies he produced these cuttings during his campaign. These articles state that the respondent was engaged in killing or murdering people in Busia, particularly L.Cs’ officials. The articles also claim that the respondent was engaged at the time in raping women. On the face of it, these claims are, unless they are factual, defamatory of the respondent. In his affidavit the appellant does not deny referring to these statements. On the contrary he admits but claims that he was responding to questions raised by people who attended his campaign rallies.

The relevant paragraph 9 of the appellant’s amended answer to the petition of the respondent reads thus:-

“***9 Specifically, the first respondent denies uttering defamatory and degrading statements attributed to him in paragraph 9 of the petitioner’s affidavit and***

paragraph 8 of Mr. Aroba Mathias's affidavit or any other such similar statements and avers that he only **showed to the voters the** ***story about the petitioner which appeared in the New Vision newspaper, volume 17, No. 33, dated 07/02/202 and 08/02/2002 in reaction to a question posed by a voter wherein the petitioner was linked to the killing of L. Cs in his home area of Busia but which he later denied".***

Obviously the trial Judge and subsequently the Justices of Appeal had a duty to make a finding on these averments. The two courts held that the paragraph was an admission by the appellant of publishing the matters contained in the two newspaper cuttings. We think that both the trial judge and the Court of Appeal were justified in their respective conclusions that the appellant admitted that he published the cuttings and therefore published defamatory matter and accordingly the provisions of sub section (3) of Section 22 of the Parliamentary Elections Act, 2005 do not protect the appellant as contended by his counsel. We think that the statement of Mulenga, JSC., in the Obbo case and of Odoki, CJ., in the Besigye petition must be understood in the context in which they appear. In our view neither *Obbo's case* nor *Kiiza Besigye petition* nor the other authorities relied on by the appellant's counsel exonerate the appellant of what he did. Accordingly ground 4 of appeal must fail.

Our conclusions on ground 4 would really dispose of ground 5 and even ground 6. Appellant's complaints in the 5th and 6th grounds have no substance. We will however refer to each briefly.

In ground 5 the complaint is that the two courts below erred in holding that the publication of the contents of the articles appearing in the New Vision of 7th and of 8th February, 2002 constituted defamation within the meaning of S. 73(1) of PEA, 2005.

Counsel for the appellant referred to the definition of defamation by **Black's Law Dictionary, 6th edition, page 417**. He relied on the following passage from the reasons of Odoki CJ. in the **Kiiza Besigye election petition** (Supra).

"*It is also clear that a candidate is not guilty of making such statements if he had reasonable grounds for believing the statements to be true".*

Counsel contended that sections 182 and 183(1) (g) of the Penal Code Act permit the publication of defamatory matters as long as they are absolutely privileged publications and argued, erroneously in our opinion, that these sections also out-law any punishment for such publications. Counsel

seems to claim that because Hamis Kaheru, the journalist who wrote the two articles, was not called as a witness by the respondent, the appellant should not be held liable for the consequences of his voluntary publication of those articles. Again learned counsel relied on our conclusion in **Obbo case** (supra) for the view that what was published in the New Vision was knowledge imparted to the public especially the voters, and counsel implies that the publication was justified and privileged. Counsel concluded that the two articles were neither false statements concerning the personal character of the respondent, nor are they defamatory in as much as they are newspaper publications of truly uttered statements about the past conduct and the past statements of the respondent.

In reply, counsel for the respondent submitted that the appellant had no valid defence at all to the claim of uttering false statement against the respondent and that the trial Judge and the Justices of Appeal properly considered the evidence within the ambit of Section 73(1) of the **Parliamentary Elections Act**, 2005. Counsel contended that there is evidence especially that of Sulaiman Mwanje, which was not contradicted, and who was not cross-examined, which corroborated the evidence of the respondent regarding the uttering and circulation of the newspaper cuttings by the appellant.

On the evidence available we are not persuaded that the conduct of the appellant did not contravene Section 73(1), which reads-

"***73(1) A person who, before or during an election for the purpose of effecting or preventing the election of a candidate, makes or publishes or causes to be made or published by words whether written or spoken, or by song in relation to the personal character of a candidate, a statement which is false-***

a) ***which he or she knows or has reason to believe to be false; or***

b) ***in respect of which he or she is reckless whether it is true or false,***

commits an offence and is liable on conviction to a fine not exceeding twelve currency points or imprisonment not exceeding six months or both".

These provisions are very clear and need no elucidation. We agree with the conclusions of the two courts below.

Similarly we do not think that the appellant is protected by either S. 182 or 183 of the Penal Code Act.

Upon consideration of all the pleadings and the supporting affidavits together with submissions of counsel for both sides

and the relevant law, we are satisfied that the contentions of appellant's counsel have no substance. In our opinion the affidavit evidence of both Aroba Mathias and Sulaiman Mwanje support the respondent that the appellant published defamatory matter. We note that at the trial some key deponents of various affidavits for either side were called for cross-examination on their respective affidavits and were indeed cross-examined to test the credibility of deponents. However, Mr. Sulaiman Mwanje gave incriminating evidence against the appellant by way of affidavit in support of the respondent in so far as the uttering and circulation of the newspaper cuttings is concerned. There can be no doubt that his evidence supports the respondent that the appellant published the New Vision cuttings containing the defamatory or false statements against the respondent. Further, Aroba Mathias, a witness for the respondent, was cross-examined on his affidavit. In answer to a question by appellant's counsel, Aroba stated *"I did not look at the newspaper Mugeni was waving. He did read the newspaper"*. Clearly this supports the respondent that the appellant published the contents of the two cuttings.

We do not agree that the appellant is protected by S. 73(1) of PEA nor by S. 182 and S. 183 of the Penal Code within the context of parliamentary election campaigning. These provisions apply to criminal proceedings.

We are satisfied that the conclusions reached by the Court of

Appeal were justified and we therefore find no merit in ground 5 which should fail.

Ground 6 states-

> **The learned trial judge and justices of Court of Appeal erred in law in holding that the appellant had been convicted for contravention of a law relating to elections and therefore had to vacate his seat in Parliament.**

We think that there is no substance in this ground. In view of our conclusions on grounds 4 and 5, we do not find need to consider this ground.

In our considered opinion this appeal has no merit and the same is dismissed with costs to the respondent in this Court and in the two courts below.

The respondent cross-appealed and set out one ground complaining that the Court of Appeal erred by holding that the appellant was not disqualified for nomination on the ground of breach of the Leadership Code Act.

Because of the conclusions we have reached on the merits of the appeal, especially on ground two of the appeal, we see no need to consider the cross-appeal.

Before we take leave of this appeal we wish to clarify a matter referred to by counsel in an application incidental to this appeal. During the hearing by this Court of Civil Application No. 8 of 2007 between the two parties counsel alluded to an earlier attempt by the respondent to recover through execution costs awarded to him by the High Court. Counsel gave us the impression that there was a misunderstanding as to the import of the trial judge's order that the unsuccessful parties were "severally and jointly" liable to pay the costs.

We would clarify as follows-
Where costs are awarded against one or more litigants to be paid severally or jointly, the order means that those losing parties are liable to pay the costs either in proportion to how they agree among themselves or according to the order of the taxing officer. If one of the losing parties pays the taxed costs in full, the order is thereby fully and finally satisfied. The successful party has no right to claim any further sums from any of the other party or parties. However, the party paying the full cost has a right to demand contribution from the other parties against which the costs were awarded.

Delivered at Mengo this **19th** day of November **2007**.

B. J. ODOKI
CHIEF JUSTICE

J. W. N.TSEKOOKO
JUSTICE OF THE SUPREME COURT

J. N. MULENGA
JUSTICE OF THE SUPREME COURT

G. W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT

B. M. KATUREEBE
JUSTICE OF THE SUPREME COURT