THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

ELECTION PETITION APPEAL NO.40 OF 2011

1. LUYIMBAZI JOHN…… APPELLANTS

2. KASIRYE FRED

VERSUS

1. BAZIGATIRAWO KIBUUKA FRANCIS AMOOTI……RESPONDENTS

2. THE ELECTORAL COMMISSION

CORAM:

HON.JUSTICE A.E.N.MPAGI-BAHIGEINE, DCJ

HON.JUSTICE S.B.K.KAVUMA, JA

HON.JUSTICE M.S.ARACH AMOKO, JA

JUDGMENT OF S.B.K KAVUMA, JA

Introduction

This is an appeal from the decision of the High Court of Uganda at Kampala ***(Bashaija K. Andrew, J)*****,** delivered on the 19th day of July 2011 in High Court Election Petition No.44 of 2011.

Background

The appellants and the 1st respondent were election candidates vying for the seat of Local Council V, (LCV), Chairperson of Mubende District. At the end of the elections, the 1st respondent was declared winner and was duly gazetted as such by the 2nd respondent. The appellants were dissatisfied with that declaration. They filed a joint election petition challenging the declaration on the sole ground that the respondent had, within seven years preceding the date of his nomination, been convicted of the offence of assault occasioning actual bodily harm. The appellants contended that that was a crime involving dishonesty or moral turpitude. Therefore, according to them, the respondent was not qualified for election under **Article 80(2) (f)** of the Constitution and under the relevant sections of the Local Governments Act. The petition was heard and

determined in favor of the respondents, hence this appeal.

Grounds of Appeal

The grounds of appeal as set out in the Memorandum of Appeal are as follows:

"1. The learned trial judge erred in law and fact when in reaching his decision he relied on and applied the subjective test of a flexible reasonable man to define a crime involving moral turpitude (CIMT) and reached a decision formulating a definition of CIMT that is only applicable to the 1st respondent and Mubende community.

2. The learned trial judge erred in law and fact when he contradicted himself and held that "I am of the

firm conviction that no reasonable man and no ordinary person in the Mubende district community would consider the act of slapping of one man by another as a viscous, wicked, depraved, vile and so base and shameful an act, that he or she would be shocked by it.

3. The learned trial judge erred in law and fact when in reaching his decision he took into account wrong factors and applied subjective principles and test based on assumption, conjecture and personal opinions thereby arriving at an erroneous decision.

4.The learned trial judge erred in law and fact when in reaching his decision he went behind the conviction of the respondent and evaluated what the respondent did

viz a slap on the cheek or face in the context of the respondent's electoral successes, public opinion and community conscience.

5. The learned trial judge erred in law and fact when he held that "I would not consider that in choosing to use the term"MT" in Article 80(2) (f) (supra),the Constituent Assembly intended it to include crimes such as assault the type the 1st respondent was convicted of. If that were to be the case, it would lead to absurdity in a society where assaults of that nature are almost a common occurrence".

6. The learned trial judge erred in law and fact when he formulated the definition and meaning of CIMT on the out come of the

election thus failing to give a proper legal effect to Article 80(2) (f) of the Constitution.

7. The learned trial judge erred in law and fact when in enforcing Articles 183 and (80)(2)(f) of the Constitution he failed to appreciate the disqualification as an ex- ante evaluation barring the respondent from running for the office and instead considered it as an ex post assessment for the determination of what constitutes a CIMT

8. The learned trial judge erred in law and fact when in reaching his decision he considered and premised his decision on CIMT being an ex ante bar to a candidate to be elected." sic

Issues

1. **Whether the offence of assault occasioning actual bodily harm is a crime involving moral turpitude.**

2. **Whether by adopting a subjective test of a flexible reasonable man in defining a crime of moral turpitude, the learned judge made a decision only applicable to the 1st respondent and Mubende Community.**

3. **Whether the decision of the learned trial judge was based on assumptions, conjecture and personal opinions.**

4. **Whether the disqualifications under Article 80(2) (f) of the Constitution was the ex ante evaluation or ex-post evaluation to be determined on the basis of the out come of an election.**

Representation

At the hearing of the appeal, the appellants were represented by Mr. Mohammed Mbabazi, (counsel for the appellants). The 1st respondent was represented by Mr. Patrick Kasuba, (counsel for the 1st respondent). Mr. Brian Kabeiza (counsel for the 2nd respondent) represented the 2nd respondent.

The appellants' case

Counsel for the appellants submitted that this case was about conviction. He argued that the learned trial judge, having stated the law, began analyzing it, erroneously applying the standard of a flexible reasonable man thus coming to the wrong conclusion contrary to **Article 80(2)(f)** of The Constitution.

Counsel submitted that the learned trial judge's liberal approach in stating that the 1st respondent was overwhelmingly voted for and therefore his community did not treat the offence he was convicted of as involving dishonesty and moral aptitude was wrong.

He thus prayed that the appeal be allowed, the judgment set aside and the reliefs prayed for granted.

The respondent's case

In opposition to the appeal, counsel for the 1st respondent submitted that the crime of which the 1st respondent was convicted of did not involve moral turpitude. He stated that in **Article 80(2)(f)** of the Constitution, the catch words are *offence involving moral turpitude.* He pointed out that there is no judicial authority in the Ugandan jurisprudence defining what amounts to a crime involving moral turpitude (CIMT).

He noted that the only authorities available are from the Malawian and the American jurisdictions. He referred to **Black's Law Dictionary, 7th Edition** and submitted that moral turpitude, (MT) must be understood in relation to dishonesty, elements of a corrupt mind and reprehensible conduct vicious in nature so as to be shocking to the community where the person lives.

He argued that the definitions as stated are absent from S.236 of the Penal Code Act. Further, in his view, not all crimes of assault causing bodily harm are offences involving moral turpitude. To counsel, in the circumstances of the instant case the learned trial judge was right in resorting to the standard of a flexible reasonable man to find that the crime the 1st respondent was convicted of did not involve moral turpitude.

Counsel submitted that this was a crime committed within the Council Hall, was publicized on radio and the 1st respondent was prosecuted for it within his community. His conviction was well known. He presented himself to the district electorate and not merely at a sub-county but a district level and he was overwhelmingly voted with 80.324 votes, an equivalent of 84.3% against the 1st and 2nd appellants who polled 12.790 and 2997 votes respectively.

Counsel thus submitted that the learned trial judge correctly held on all the issues and he prayed court to dismiss the appeal with costs.

In further opposition to the appeal, counsel for the 2nd respondent largely associated himself with the submissions of counsel for the 1st respondent. He argued that counsel for the appellant submitted deliberately avoiding the context and the difficulties of determining what amounts to MT. He contended that in such circumstances, resort had to be made to foreign jurisdictions and to be guided by definitions in the **Black's Law Dictionary** as the learned trial judge did. Counsel cited the case of **J.Bawalick v The Commonwealth of Pennsylvania (NO.799 C.D.2003)** where "MT" was defined to mean:

> **"shameful wickedness so extreme a departure from ordinary standards of honest, good morals, justice or ethics as to be shocking to the moral sense of the community**"

Counsel further addressed **Article 80(2)(f)** of the Constitution under which this matter falls and argued that this article does not apply to just any crime but rather to crimes that fit in the key words of

'involving moral turpitude'. He contended that the instant case did not fall into that category. Counsel further observed that this is a constitutional provision that has the effect of limiting other constitutional rights of a citizen that may be involved. It takes away certain rights, for instance the right under **Article 38** of the Constitution in regard to participating in civic action, and the right under **Article 58(1)** of the Constitution, the right to vote which includes the right to stand and be voted for.

He argued that these rights that may be limited are fundamental, and therefore, the framers of the Constitution found it wise not to give a definition of CIMT. To counsel, the fact that no legislation offers such a definition means that it was intentionally left to courts of law to examine each crime guided by its judicial wisdom and decide whether or not it is a CIMT.

Counsel also referred to the case of **Rev. Mutikila v Attorney General of Tanzania (Civil Case No.5**

of 1993) which was quoted with approval in **Attorney General v Maj.Gen.David Tinyefuza (Supreme Court Constitutional Appeal No.1 of 1997)**. He noted every restriction on basic rights must pass the test of reasonableness and overriding public interest. That the restriction can be imposed and the freedom may be curtailed provided it is justified by the clear and present danger test enunciated in **Saia v New York 1948 334 US 558**. To counsel, the substantive evil must be extremely serious and the degree of imminence extremely high.

Counsel contended that court must be slow and cautious in curtailing people's constitutional rights and **Article 80(2) (f)** of the Constitution should be given a generous and liberal interpretation. He also argued that the authority of **The State and Electoral Commission Ex parte Yeremiah Chihana Misc.Civil Cause No.41 of 2009** is emphatic that the constitution must be interpreted in general as opposed to a strict, legalistic and pedantic manner. He too prayed court to dismiss the appeal

Court's consideration of the appeal

To resolve the controversy between the parties to this appeal I frame the following issue.

The Issue

Whether the learned trial judge, on the evidence before him erroneously found that the offence of assault causing actual bodily harm the appellant was convicted of was not a crime involving dishonesty or moral turpitude.

The gist in this issue is whether the offence of assault occasioning actual bodily harm **c/s.236 PCA** of which the 1st respondent was convicted amounted to a CIMT under **Article 80(2)(f)** of the Constitution.

Article 80 (2) (f) of the Constitution provides:

"...a person is not qualified for election as a Member of Parliament

if that person has, within the seven years immediately preceding the election, been convicted by a competent court of a crime involving dishonesty or moral turpitude."

Neither the constitution, nor any Act of Parliament or judicial decision in Uganda defines a CIMT.

Black's Law Dictionary, 7th Edition on page 1026, however, defines moral turpitude as:

"Conduct that is contrary to justice, honesty, or morality…Moral turpitude means, in general, shameful wickedness-so extreme a departure from ordinary standards of honest, good morals, justice or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which

one person owes to another or to society in general, contrary to the accepted and customary rule of right and duty between people."

This definition was referred to in the case of **Bawalick** (supra) where court held that because a person is convicted of simple assault in the context of a *"scuffle entered into by mutual consent",* the elements of the crime do not necessarily satisfy the definition of moral turpitude as set forth in the regulations.

As can be seen from the above authorities, for conduct to qualify as moral turpitude, it must be extreme and so heinous as to shock the moral sense of the community. This has nothing to do with whether one thinks the crime is bad enough and what kind of punishment was imposed. There being no laid down definition of CIMT in Uganda, this is left to courts to determine.

To determine whether a crime amounts to a CIMT, it is important to consider the facts of each case because the definition or examples of crimes or even actions that amount to moral turpitude may never be exhausted or the same in all situations.

However, what seems key in all the authorities mentioned above and cited by counsel is that for a crime to qualify as one involving dishonesty or moral turpitude, it calls for some measure of gravity, absolute wickedness and must be shocking to the particular community in which it has occurred.

By Ugandan standards, in my view, the act of a man slapping another, as the appellant did, during a heated local council meeting debate, though largely frowned upon, is not extremely shocking to community.

The learned judge, in my view, was justified, in all the circumstances of the instant case to go by the tested standard of a reasonable man. This is especially so because, even in the same society, while some people would consider certain behavior

abominable, others may see it as nothing out of the ordinary.

Going by the **Black's Law Dictionary** definition which shows that the act must be shocking to the morals of the society, it is hard to comprehend how a man who is being castigated as having done something vile and an extreme departure from ordinary standards of honest and good morals, could garner the highest votes in a hotly contested election through which he became the LC.V Chairman of his District.

I find that the offence of which the 1st respondent was convicted does not qualify to be a CIMT and does not fall under the crimes envisaged under **Article 80(2) (f)** of the Constitution I, therefore, find in the negative on the framed issue and consequently, the appeal would fail for lack of merit. I would dismiss it.

Costs

This appeal involves, in my view, a large degree of public interest litigation. In order, therefore, to

avoid the effect of possible stifling of litigation honestly and in good faith intended to enhance a culture of maturity, honesty and fair play in the public affairs our society, I would order that each party bears its own costs.

I would so order.

Dated at Kampala this…**24th** …day of … **May** …2012

……
S.B.K.Kavuma
Justice of Appeal

JUDGMENT OF A.E.N.MPAGI-BAHIGEINE, DCJ

I agree with the judgment of my brother S.B.K.Kavuma, JA.

The appeal lacks merit. Since my sister A.S.Arach Amoko, JA also agrees, the appeal stands dismissed with each party to bear own costs as stated in the lead judgment.

…….
A.E.N.Mpagi Bahigeine,
DEPUTY CHIEF JUSTICE

JUDGMENT OF M.S.ARACH AMOKO, JA

I have had the benefit of reading in draft the judgment of Kavuma, JA.

I agree with him that the appeal must fail for the reasons he has given. I also support the orders given.

Dated at Kampala this …**24th**…day of …**May**…2012

M.S.ARACH AMOKO
JUSTICE OF APPEAL