THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO. 07 OF 2011

(Arising out of consolidated Election Petition No. 17 OF 2011)

BETWEEN

HON. KIPOI TONNY NSUBUGA::::::::::::::::::::::APPELLANT

VERSUS

1. RONNY WALUKU WATAKA
2. MWISAKA GODFREY KABOOLE
3. PATRICK NAMATITI AND 800
OTHERS:::::::::RESPONDENTS

CORAM: HON. JUSTICE S.B.K KAVUMA, JA
HON. JUSTICE A.S NSHIMYE, JA
HON. JUSTICE REMMY KASULE, JA

JUDGEMENT OF COURT

Introduction

This is an appeal against the judgment and decision of the High Court (*Mike J. Chibita J*.), given on the 30th day of June 2011 at Mbale.

Background

The background to the appeal is that during the parliamentary elections held on the 18th Feb 2011, the appellant and the 1st respondent, among others, contested the elections for the seat of member of Parliament for Bubulo West Constituency in Manafwa District. The appellant won the elections and was declared and gazzetted as the duly elected Member of Parliament for the constituence.

Being dissatisfied with that declaration and gazetting of the appellant, the respondents filed into court petitions that were eventually consolidated into one, being Election Petition No. 17 of 2011.

At the conclusion of the hearing of the consolidated petition, the learned trial judge held that the appellant's nomination and election was invalid on the ground that at the time of the two events, the appellant lacked the required academic qualifications. The trial judge further held that the Certificate of equivalence that had been issued to the appellant by the National Council For Higher Education, (NCHE), had been based on a certificate of recognition of the appellant as a person who had passed

the Makerere University Mature Age Entry Examinations which examinations he had not sat. He ordered the cancellation of the appellant's certificate of recognition and declared the seat of the Member of Parliament for Bubulo West Constituency vacant. He, further, ordered a by-election to take place. The appellant now appeals to this court.

There are 6 grounds of appeal set out in the Memorandum Of Appeal thus:

1. **The learned trial judge erred in law and fact when he held that the appellant did not sit the Mature Age entry examination in person but by a nonexistent person.**

2. **That learned trial judge erred in law and fact when he held that the appellant was not qualified for nomination and election as Member of Parliament.**

3. **The trial judge erred in law and fact by invoking the provisions of the Evidence Act Cap 6 and subsequently relying on the**

evidence obtained by invoking of the said provisions during cross examination.

4. **The trial judge erred in law and fact in holding that Election Petition No.32 of 2011 was properly filed and good in law.**

5. **The trial judge erred in law and fact in relying on the testimony and evidence of a witness who was in court as other witnesses were testifying and was never availed to the appellant for cross examination.**

6. **The trial judge erred in law and fact when he failed to properly evaluate the evidence on record but rather resorted to summaries and conjecture.**

Representation

At the hearing of the appeal, Mr. Wycliffe Birungi, appearing together with Mr. Sam Serwanga, represented

the 3rd Respondent and Mr. Patrick Mugisha represented the 1st and 2nd respondents. (Counsel are collectively hereinafter referred to as counsel for the respondents). Mr. Micheal Okecha, appearing together with Mr. Hassan Kamba (counsel for the appellant), represented the appellant. The appellant and the 1st respondent were present in court.

Issues

We have framed the following issues from the above grounds of appeal for the resolution of the controversy between the parties in this appeal.

1. **Whether the learned trial judge erred in law and fact when he held that it was not the appellant who sat the Mature Age Entry Examinations of Makerere University on the 20/02/2010.**

2. **Whether the learned trial judge erred in law and fact when he held that the appellant was not qualified for nomination and election as a member of Parliament.**

3. **Whether the learned trial judge erred in law and fact in invoking the provisions of S.72 of the Evidence Act and in relying on the evidence thereby obtained.**

4. **Whether the learned trial judge erred in law and in fact when he held that Election Petition No. 32 of 2011 was good in law and was properly before court.**

5. **Whether the learned trial judge erred in law and fact in relying on the testimony of a witness who was in court when other witnesses were testifying and who was never availed to the appellant for cross examination.**

6. **Whether the learned trial judge failed to properly evaluate the evidence before him.**
7. **Remedies**

The case for the Appellant

Issues 1 and 2

Arguing the case for the appellant on these two issues, counsel for the appellant submitted that it was the appellant who sat the Makerere University Mature Age Entry Examinations on the 20th Feb 2010 at Makerere University and passed the same. He was awarded a certificate of recognition as a person who had passed those examinations by the same university.

It is that certificate of recognition which formed the basis of the National Council For Higher Education, (NCHE), issuance to the appellant of the certificate of equivalence. That certificate of equivalence supported the appellant's nomination and subsequent election as the Member of Parliament for Bubulo West Constituency. Counsel contended that unless and until Makerere University recalled or canceled its certificate of recognition, the NCHE had no power to revoke or cancel the appellant's certificate of equivalence he used for nomination and election as a member of Parliament.

According to counsel, the learned trial judge had no power to cancel the Makerere University Mature Age Entry Examination Certificate issued to the appellant.

They relied on **Joy Kabatsi Kafura vs Anifa Kawooya Bangirana & Another, Election Petition Appeal No. 25 of 2007(SC)**

Counsel prayed court to find in the affirmative on issues **1** and **2.**

Issues 3 and 6

Arguing issues 3 and 6 together, counsel for the appellant submitted that the learned trial judge was in error in invoking the provisions of S.72 of the Evidence Act and in relying on the evidence thereby obtained without sufficient caution. Counsel further submitted that the learned trial judge had failed to apply the right standard while evaluating the evidence before him. He argued that although the Police had been asked to investigate the matter, its findings were disregarded by the learned trial judge. Counsel submitted, further, that although there had been requests for the court to take expert evidence from a handwriting expert, the same was ignored by court. On the evidence of the two photographs, one of Namanda found on the appellant's application form at Makerere University and the other of the applicant, counsel faulted the learned trial judge for having

accepted the evidence from the respondents in preference to that from the appellant given the circumstances surrounding Namanda's photograph and his alleged role in the case before court.

He concluded that considering all the above, the learned trial judge had clearly erred in failing to properly evaluate the evidence before him and depended on conjecture and speculation. Counsel prayed court to find in favour of the appellant on these two issues.

Issue 4

Submitting on issue 4, counsel for the appellant maintained that the learned trial judge had erred in finding that Election Petition No. 32 of 2011 had been properly brought before court. According to him, the petition lacked the required, at least, five hundred signatures of registered voters as supporters of the same.

Issue 5

On this issue, counsel for the appellant criticized the procedure adopted by the learned trial judge in calling one, Herbert Kyobe Batamye, Assistant Academic

Registrar Makerere University in charge of Mature Age Entry Examinations by invoking Rule 15(1) of the Parliamentary Elections (Election Petitions) Rules. He pointed out that Batamye had sworn no affidavit in the matter before court. Counsel criticized the learned trial judge for denying the appellant an opportunity to cross-examine Mr. Herbert Kyobe Batamye.

In conclusion, counsel for the appellant prayed court to allow the appeal with costs here and at the court below to the appellant with a certificate for the two counsel.

The case for the respondents

Counsel for the respondents adopted their arguments contained in their scheduling memoranda and asked court to refer to them.

Arguing the case for the respondents on the application of rule 15, of the Parliamentary Elections (election Petitions) Rules, counsel submitted that the case of **Fred Badda vs Prof. Muyanda Mutebi**, **Election Petition Appeal No. 21 of 2007,** cited by the appellant did not concern itself with that rule. Counsel contended that in

that case the witnesses concerned had sworn affidavits which were on record and they were called without opposition from the opposite side and that those witnesses were cross examined.

On the power of court to cancel the academic qualifications certificate of the appellant, counsel contended that the High Court had jurisdiction to do so. They sought to distinguish **Joy Kabatsi Kafura vs Anifa Kawoya Bangirana** (Supra) from the instant appeal on the ground that the case dealt with the question of the NCHE cancelling an academic qualification certificate and not the High Court.

On the evidence of Hebert Kyobe Batamye, counsel for the respondents submitted that counsel for the appellant were on record as having had no problem with the witness being called to give evidence and they should not be heard to complain that they were not given an opportunity to cross examine him. To counsel, it was not for court to throw witnesses to parties for cross examination.

Further, counsel argued, Mr. Batamye had given evidence to show the appellant did not sit the Mature Age Entry

Examinations and that his evidence remained uncontroverted.

On the photograph of Paulo Namanda found on the appellant's application form at Makerere University, counsel submitted that according to the evidence of the Academic Registrar Kyambogo University, Namanda was a student at that university whose handwriting the witness was conversant with. He contended that the Registrar saw similarities in the various documents presented to her when she compared them with those of Namanda.

Relying on Ss43 and 44 of the Evidence Act, counsel submitted that it was in the trial judge's discretion to call or not to call a handwriting expert as a witness.

Counsel wondered why the appellant should have chosen to use more than one signature in the same transaction.

On the Police investigations, counsel wondered how, although the investigations had been requested by Makerere University, the report went to the appellant's counsel.

In counsel's view, the learned trial judge had properly evaluated the relevant evidence on record and made the right conclusions. They prayed court to dismiss the appeal with costs to the respondents with a certificate for two counsel in case of each respondent.

Counsel for the appellant in reply.

By way of reply, counsel submitted that Herbert Kyobe Batamye was called by the learned trial judge as a witness of court not available for cross examination. He contended that by being denied the opportunity to cross-examine Batamye, the appellant's right to challenge the witnesses' evidence was abrogated contrary to **Article 28(1)** of the Constitution.

Counsel faulted the learned trial judge for shifting the burden of proof to the appellant when he attributed the non availability of Namanda to testify in court to the appellant.

To counsel, S.72 of the Evidence Act concerned documents that are already admitted into evidence which

was not the case in the instant appeal. He reiterated his earlier prayers to court.

Court's consideration and decision

In resolving the controversy between the parties to this appeal, we have found it necessary and appropriate to, as we are by law indeed duty bound to do, re-evaluate the evidence on record and thereafter make our own inferences mindful, however, that we did not observe the witnesses testify.

See **Rule 30 of the Judicature (Court of Appeal Rules) Directions, S.I.13-10, Pandya V R [1957] EA 336, Okeno V Republic [1972] E.A 32 and Kifamunte Henry V Uganda SCCA NO. 10 of 1997** (unreported).

Issues 1,2, 3 and 6

In these issues, the appellant basically complains that the learned trial judge erroneously evaluated the evidence before him and wrongly concluded that it was not the appellant who sat the Makerere University Mature Age

Entry Examinations and that he was not qualified to be nominated and elected as a member of Parliament.

First, we have carefully considered the evidence relevant to the two photographs which featured prominently in the evidence at the trial of the petition and the submissions of counsel for the parties at the hearing of this appeal on the question of who sat the Makerere University Mature Age Entry examinations in issue. One of those two photographs is that of Namanda, which appears on the application form of the appellant for admission to those Examinations. The other one is that of the appellant found on the letter from the office of the Academic Registrar, informing the appellant of his examination Ref. No. 210/Mak/395(ARS) for the said examinations together with a timetable for the same.

Whereas the appellant's photograph aforesaid is duly stamped with the Makerere University Academic Registrar's office stamp, that of Mr. Namanda bears no such stamp. The stamp appearing anywhere near Namanda's photograph is at the bottom of the form, far from the photograph, and is dated the 9th February 2011, close to about a year from the time the examinations in

issue were held. The application form over which there is superimposed that photograph, according to the evidence on record, bears holes at its back, similar to those that would be left after removal of staples. The photograph itself, however, is free of any such holes. It is against this background that the appellant testified that the presence of the photograph of Mr. Namanda on the form found on the appellant's file at Makerere, is the result of the work of his political detractors. For the respondents, it is contended that there was an attempt to swap Namanda's photograph with some other person's, impliedly, the appellant. Such is the evidence surrounding the photographs.

Secondly, there is another matter relating to Mr. Namanda. The record indicates, from the point of view of the learned trial judge, that Namanda had gone missing and could not be available to help court get to the heart of the matter of his possible role in the relevant Makerere University Mature Age Entry Examinations.

The learned trial judge attributes that absence to the appellant. Counsel for the appellant, however, argues,

and correctly so in our view, that it was not the duty of the appellant to produce Namanda.

We are persuaded by the argument of the appellant that it was the duty of those who alleged that probably it was Namanda who sat those Makerere Mature Age Entry Examinations and not the appellant, to arrange for and adduce satisfactory evidence to that effect. S.101 of the Evidence Act dictates so. We also consider it evidentially unsustainable for anybody to conclude that it must have been the appellant who tried to cause a removal of Namanda's photograph from the form at Makerere University. The Academic Registrar of the university categorically stated that the university documents were securely kept and were not tampered with. That conclusion, therefore, in our view, is based on speculation and conjecture.

Thirdly, in a bid to prove that, it is Namanda who sat the Makerere University Mature Age Entry Examinations in issue, Deborah Kuteesa Mugerwa, the Academic Registrar Kyambogo University when cross-examined over the matter stated:*"...An Application form is got after paying in the bank. ...From can be filled from*

*anywhere...Authorship is not verified...*The *documents were signed by Namanda Paulo not in my presence but I can see it was in the presence of Mukama Ismail... The documents were not signed in my presence.... There was once a student called Namanda Paul but I do not know him personally... I don't know if he was a student in Makerere University. I don't know him and only know that he was a student at Kyambogo alongside thousands of others.... It is hard to tell about the handwritings. Some letters look the same like S, t. k..."*

We find little value, if any, in this evidence as far as proof of the authorship of the various relevant documents are concerned.

Further, in a bid to satisfy himself about who sat the Mature Age Entry Examinations in issue, the learned trial judge invoked the provisions of S.72 of the Evidence Act, Cap 6 of the Laws of Uganda. The section provides

72 Comparison of signatures, writing or seal with others admitted or proved

"1. The.....

2. The court may direct any person present in

court to write any words or figures for the purposes of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person.

3. ……..”

Clearly, this section concerns itself with comparison of documents already proved or admitted with others alleged to have been written by the person directed by court to write. It was not applicable to the instant case where no documents were either so admitted or proved yet.

Further, commenting on the use of comparison of signatures and handwritings, *Chief Justice M. Monir* in his book *“The Law Of Evidence” Fourteenth edition Volume 2 pages 1318 to 1319 states*.

“comparison of signatures/handwriting is a mode of ascertaining the truth which ought to be used with great care and caution-------- --------. But this section does not expressly prohibit the comparison of signatures/handwriting in the absence of expert evidence, such mode of proof of handwriting has

been regarded hazardous and inconclusive and the practice of the judge, not conversant with the subject, himself acting as an expert in hand writings has been deprecated in a series of decisions."

At pages 1320-1321 the Chief Justice observes;

"There are particular circumstances that may cause dissimilarities in formations and handwritings and among others he lists the writing posture that's whether the writer is sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a place more or less inclined-nays, the materials as pen, ink etc being different at times are amply sufficient to account for the letters being made variously at different times by the same individuals."*(sic).*

From the above quotations, caution is obviously extremely important in considering evidence under S.72 of the Evidence Act.

In his judgement, the learned trial judge stated thus:

"The handwriting on the documents written by Paul Namanda provided by the Academic Registrar Kyambogo bear some resemblance to the examination answer sheet from Makerere University. They are also markedly different from the sample provided by the 1st respondent...The Academic Registrar, Kyambogo University reached the same conclusion when asked.

Though court is not possessed with expertise to interpret handwriting, the features of the handwriting in this case are quite glaring.

The signatures on the application form, bank slip and affidavits filed in court all bear a resemblance but different from the hand in slip, the registration slip and the attendance slip. The 1st respondent contended that he has two signatures, which happens.

The only difference is that people with more than one signature usually use a consistent signature for the same transaction or place. Why would the 1st respondent or anybody else for that matter, use two different signatures for the same transaction of getting admitted into the University."

With the greatest respect, although the learned trial judge acknowledges his lack of expertise in matters concerning identifying handwritings and signatures, we do not consider that his approach to the question of comparing signatures and writings in the instant appeal reveals an exercise on his part of that great caution the law calls for . We say so not only because he lacked the expertise to conclusively handle the matter but also, and more importantly, because the learned trial judge had never seen Namanda write any of the documents he considered. Indeed there is no evidence from any witness that any of them saw Namanda write the documents. Neither the learned trial judge nor any other witness, therefore, was in law, conversant with the handwriting of Namanda.

Further, the evidence on record shows that very serious efforts were made by the parties to get the court to accept expert evidence from a handwriting expert, with a professional report ready for presentation to court for its consideration but the learned trial judge declined to admit it.

We appreciate the desire by court to expeditiously dispose of the matter before it as required by law, it being an election petition, but we consider that justice in the instant case called for a balance between expediency and the need to accord due recognition to the value of expert evidence and opinion in a highly contested and important matter concerning competition for political power and the all important question of academic qualifications of an individual.

The 1st respondent himself said he could not state with any certainty that the appellant was not at Makerere University to sit the Mature Age Entry Examinations in issue on the 20th Feb 2010. The appellant confidently testified that it was him who sat and passed the Mature Age Entry Examinations in issue.

In view of all the above, we are unable to uphold the learned trial judge's finding that it is not the appellant who sat and passed the Makerere University Mature Age Entry Examinations that took place at Makerere on the 20th February 2010. We are not persuaded that the evidence relied on by the learned trial judge in reaching his decision on who sat the Makerere University Mature

Age Entry examinations in issue passes the test of proving the matter to the satisfaction of court as understood and as required by law.

On the question of whether or not the appellant was qualified for nomination and election as a member of Parliament, we start with the provisions of S4 of the Parliamentary Elections Act which provides;

Qualifications and disqualifications of members of Parliament.

> **"(1) A person is qualified to be a member**
>
> **of Parliament if that person**
>
> **a) .....**
>
> **b) .....**
>
> **c) has completed a minimum formal education of Advanced Level standard or its equivalent.**

This section is a re-enactment of **Article 80(1)** of the Constitution.

It is clear from the evidence on record, and it is not in dispute, that the appellant attained the Ordinary Level

Standard of formal education. He, therefore, sought to sit and he sat and passed the Makerere University Mature Age Entry Examinations held on the 20th February 2010 and he was awarded, by Makerere University, a certificate of recognition as having passed those examinations. The Academic Registrar Makerere University in his evidence testified that the appellant had passed the Makerere Mature Age Entry Examinations and had been awarded a certificate which remained valid.

Further we accept the evidence of the Academic Registrar, Makerere University which goes a long way to support the evidence of the applicant himself on this matter. It is, according to the undisputed evidence on record, that certificate that the appellant presented to the NCHE for equating under the provisions of S 5(i) of the Universities, And Other Tertiary Institutions Act.

The NCHE, after consultation with the Uganda National Examinations Board (UNEB), issued the appellant with a certificate of equivalence dated the 26th June 2010. There is evidence on record from Makerere University, the Electoral Commission, the NCHE and the Uganda Police (Makerere Police Station), that allegations about the

invalidity of the academic certificates of the appellant were made. Investigations into the matter by the Police ended in a closure of the Police file on the direction of the Resident State Attorney, Buganda Road Court, Kampala. He advised that there was insufficient evidence to proceed with the matter any further.

What, therefore, comes from our careful and exhaustive analysis of the evidence on record is that there were mere allegations of invalidity of the academic qualifications of the appellant and nothing more. The certificates of the appellant were never cancelled and were valid at the material time.

Their Lordships the Justices of the Supreme Court made a very pertinent holding by a majority of 3 to 2 in **Joy Kafura Kabatsi vs Hanifa Kawooya Bangirana** (supra) where two of them concurred with Kanyeihamba JSC, as he then was, when he held thus:

> ***"...In my view, where a candidate presents a qualification which is higher than the minimum required for nomination for any post, it is not enough for his or her***

opponents to argue that the same higher qualification was based on a forgery or something irregular, nor is it sufficient for a spokesperson of the institution in which the higher qualification was obtained to suggest that had the institution known that fact they would not have awarded the said qualifications. Those who make such allegations ought to do more than merely allege. They need to show that as a result of their allegations, the awarding institution of the higher qualification or any other equivalent to 'A' level or some other classification subsequently cancelled or withdrew the award of the disputed qualification"

We find the above authoritatively binding decision of their Lordships of the Supreme Court applicable to the instant case. In accordance with that decision, therefore, and

from the evidence on record, we find and hold that the appellant was qualified to be nominated and to be subsequently elected the Member of Parliament of Bubulo West constituency when he was so nominated and eventually so elected on the 18th February 2011. If the learned trial judge had properly evaluated the evidence before him, he would not have come to the conclusions he did. We therefore, find in the affirmative on these four issues.

Issue 4

The gist in this issue is the appellant's complaint that the learned trial judge erroneously found that Election Petition No. 32 of 2011 was good in law and properly before court.

Section 60 of the Parliamentary Elections Act provides:

60 Who may present election petition

(1) **.....**

(2) An election petition may be filed by any of the following persons;

a) a candidate who loses an election; or

b) a registered voter in the constituency concerned supported by the signatures of not less than five hundred voters registered in the constituency in a manner prescribed by regulations.

(3) .....

(4) .....

The appellant's complaint is based on the argument that the petition lacked the required not less than 500 signatures of registered supporters of the petition from Bubulo West constituency.

The respondents argue that the consolidated petition over which the learned trial judge presided complied with the requirements of the law in that Namatiiti was the petitioner and the other more than 800 registered voters who were involved in the petition and whose signatures are on record, although they originally were petitioners, are far more than the required minimum of 500

registered voters from Bubulo west constituency supporting it.

The learned trial judge held on this matter thus:

"Both 1st and 2nd respondents raise the point that under section 60 (2) (b) of the Parliamentary Elections Act (PEA) a valid petition by a registered voter has to be accompanied by the signatures of not less than five hundred voters registered. They insist that the annexture "A" does not conform to the legal requirement of having the signatures of the 500 or more registered voters and /or it is not certified.

I am not aware that any of the 800 voters represented has sworn an affidavit denying involvement in the petition. This was the intention of the law that a voter should not be made party to a petition which they would rather not be associated with. Since none of the 800 or so voters has disassociated themselves from the petition, it is assumed they are in favour of it.

In my view, this is not a substantive defect but one of form and using judicial discretion and Article 126(2) (e) of the Constitution I rule that this particular defect cannot be fatal to the petition.

Even if it were, which I have ruled it is not, there are other petitioners who would still continue with the petition. I don't think Counsel for the two respondents are arguing that the consolidation of the petitions should result in what they consider a defective petition infecting the one or ones without defect. That would be a travesty."

We have no cause to fault the learned trial judge's finding on this issue. What the appellant raised, are mere technicalities which must, in the interest of substantive justice, be treated as such under **Article 126(2)(e)** of the Constitution. We, therefore, find in the negative on issue 4.

Issue 5

The gist in this issue is the appellant's complaint that one witness, Herbert Kyobe Batamye, who was in court when other witnesses were testifying was called as a witness of court and was allowed to give evidence but was not availed to the appellant for cross examination.

The appellant contends that by him not being availed the witness for cross-examination, his right to challenge the witnesses' evidence was abrogated contrary to the principles of natural justice enshrined in **Article 28 (1)**of the Constitution.

Sec 64 of the Parliamentary Elections Act provides:

64 witnesses in election petitions

(1) At the trial of an election petition

a) .....

b) .....

c) any person summoned by the court under paragraph (b) may be cross-examined by the parties to the petition if they so wish.

(2) .....

Rule 15 of the Parliamentary Elections (Election Petitions) Rules provides;

15 Evidence at trial

"(1) Subject to this rule, all evidence at the trial, in favour of or against the petition shall be by way of affidavit read in open court.

(2) With the leave of the court, any person swearing an affidavit which is before the court may be cross-examined by the opposite party and re-examined by the party on behalf of whom the affidavit is sworn.

(3) The court may, of its own motion, examine any witness or call and examine or recall any witness if the court is of the opinion that the evidence of the witness is likely to assist the court to arrive at a just decision.

(4) A person summoned as a witness by the court under sub rule (3) of this rule may be cross-examined by the parties to the petition."

Both S.64 (1) (b) of the Parliamentary Elections Act and rule15(1) of the Election Petitions (Parliamentary Election Petitions) Rules quoted above give court the power to call, examine or re-examine witnesses it thinks may assist it to arrive at an appropriate decision. Such witnesses may be cross examined by parties. In the instant case, the witness whose testimony led to the controversy at hand is Mr. Batamye. He was summoned by the learned trial judge. Prior to his being required to

testify, he had sat in court while other witnesses, particularly his superior at Makerere University, the Academic Registrar, was testifying.

This witness gave evidence that was damaging to the appellant. The witness was let go by court before the appellant could cross examine him. In fact the learned trial judge emphasized, Batamye was a witness of court not available for cross examination.

Ordinarily, a person to be called to testify in court should not sit in and listen to other witness coming before him/her, testify. It was therefore, irregular and undesirable for Mr. Batamye to have been in court when other witnesses that came before him testified. Be that as it may, however, we do not think that irregularity on its own would have been fatal. The situation in the instant case, however, was aggravated by the fact that the appellant never cross examined Batamye. This, in our view, rendered the proceedings at that stage to run contrary to the principles of natural justice enshrined in **Article 28 (1)** of the Constitution. The article provides:

28 Right to a fair hearing.

“(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.”

One of the essential ingredients of a fair hearing by a court of law, tribunal, or anybody exercising judicial or quasi judicial authority is to ensure that all the principles of natural justice, as they may apply to a matter before it, are strictly observed since **Article 28(1)** is, by virtue of **Article 44 (c)** of the Constitution, underogable. It is sacrosanct. It was argued by counsel for the respondent that the appellant’s counsel were on record as having stated that they had no problem with Mr. Batamye being called as a witness of court to testify. That may be so, but we do not understand counsel for the appellant in saying so, to have meant that they were foregoing the appellant’s right to cross-examine the witness. We say so because that statement was made before the witness testified. As it happened, the testimony of that witness was damaging to the appellant’s case. The record clearly shows that immediately the court was done with the witness, he was let go without an opportunity to counsel

for the appellant to cross-examine him. The right to cross examine a witness by the opposite party, being one of the essential ingredients of a fair hearing, it was, in our view, fatally erroneous on the part of the learned trial judge to have let Batamye, though a witness called at the initiative of the court, go without being cross examined. We say so notwithstanding the provisions of both S.64 (b) and (c) of the Evidence Act and Rule 15(1) (b) of the Parliamentary Elections (Election Petitions) Rules which may appear discretionary on whether such a witness is to be cross examined or not. The doctrine of the supremacy of the Constitution enshrined in **Article 2 (2)** of the Constitution does not permit any Act of Parliament or any rules or regulations made under any Act to be inconsistent with the provisions of the Constitution, more so where the right is underogable.

We, therefore accept the argument by counsel for the appellant that by the learned trial judge failing to avail Mr. Herbert Kyobe Batamye, though called at the initiative of the court, for cross examination by the appellant, the appellant's underogable right to challenge the evidence of that witness through cross-examination was erroneously violated contrary to the principles of

natural justice. We, further, find that such violation, having affected a right that is enshrined in the underoagable **Article 28(1)** of the Constitution, whatever decision that the court reached thereafter was no decision at law. See De **Souza Vs Tanga Town Council, Civil Appeal No. 89 of 1960** reported in **1961 EA 377** at page **388** where their Lordships the Justices of the East African Court of Appeal held;

> **"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision."**

Further, we reject the argument by counsel for the respondents that it was not the duty of the court to throw witnesses to parties for crossexamination. Given the fact that the right to crossexamine a witness by an interested party is entrenched in the Constitution to the level we

have indicated above, we consider it the duty of every judicial officer presiding over a judicial hearing to take all necessary steps to ensure the strictest adherence to all the principles of natural justice that may come into play in the process of such a hearing.

On the question of Herbert Kyobe Batamye having sworn no affidavit, our finding is that rule 15 of the Parliamentary Elections (Election Petitions) Rules covers both the witnesses who have sworn affidavits and these are either in support or against an election petition as presented to the court by the parties to the petition and the others who are those called by court. A witness called by court in our view, needs not to have sworn any affidavit on record.

The above finding notwithstanding, however, we hold that in the peculiar circumstances of this case, the learned trial judge erred in law and in fact when he relied on the testimony of Herbert Kyobe Batamye without availing the witness for cross examination by the appellant. We, therefore, find in the affirmative on issue No. 5

In the result, this petition appeal succeeds in the main, save to the learned trial judge's finding that petition No. 32 of 2010 was good in law and properly before court, which we have found no cause to fault.

We, therefore, to that extent, allow the appeal with costs to the appellant at this court and at the court below.

Counsel for the appellant prayed for a certificate of two counsel. We see no justification for this and counsel have not shown us any. We, therefore, decline to grant the prayer for a certificate for two counsel.

The effect of our decision, therefore is that:

i. **The learned trial judge's orders that the appellants certificate of recognition as a person who sat and past the Makerere Mature Age Entry Examinations issued to him by Makerere University be cancelled is hereby set aside.**

ii. **The learned trial judge's orders that the parliamentary elections for Bubulo West**

Constituency be nullified and a bye election be conducted in the Bubuulo West Constituency are hereby, too, set aside.

We so order.

Date at Kampala this…**30th**…..day of…**March**..2012.

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S.B.K Kavuma, JA

Justice of Appeal

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A.S Nshimye, JA

Justice of Appeal

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Remmy Kasule,

Justice Appeal

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