THE REPUBLIC OF UGANDA

IN THE SUPREME OF UGANDA
AT MENGO

(CORAM: ODOKI, C.J., TSEKOOKO, MULENGA, KANYEIHAMBA, KATUREEBE, JJ.S.C.)

ELECTION PETITION APPEAL NO. 11 OF 2007

BETWEEN

KAKOOZA JOHN BAPTIST :::::::::::::::::::::::::: APPELLANT

AND

1. ELECTORAL COMMISSION
2. YIGA ANTHONY :::::::::::::::::: RESPONDENTS

(An appeal arising from the judgment and orders of the Court of Appeal at Kampala (Okello, Engwau and Byamugisha, JJA) dated 19th January, 2007 in Election Petition Appeal No. 16 of 2006)

JUDGMENT OF KANYEIHAMBA, J.S.C

This is a second election petition appeal from the Court of Appeal which dismissed the appellant's appeal against the judgment and orders of the High Court at Masaka (Mugamba, J) dated the 22nd September, 2006 in election petition No. 006 of 2006.

The background and facts of the appeal may be summarized as follows:

In the Parliamentary elections that were held throughout the country on the 23rd February 2006, the appellant, the second respondent and three other candidates contested for the parliamentary seat of Kalungu Constituency in the Masaka District. The second respondent was declared the successful candidate with 9,411 votes and the appellant was declared the runner up with 8,602 votes. The appellant was dissatisfied with the declared results and particularly those from the sub-county of Kyamuliibwa. He alleged that the

elections in that sub-county were conducted contrary to the provisions of the Constitution, the Electoral Commission Act and the Parliamentary Elections Act. He claimed that non-compliance with these laws affected the outcome of the elections in Kyamuliibwa in a substantial manner. He further claimed that the total number of ballot papers counted at the end of the polling exercise did not tally with the number of the ballot papers received from the Electoral Commission at the beginning of the same election exercise. He alleged that there was non compliance with the principles of freedom and fairness in the election exercise and that the declaration of the results was tainted with fraud, intrigue and bad faith on the part of both respondents. He also alleged that he was denied representation at the polling stations during voting, counting of votes and at the declaration of the results.

The appellant subsequently petitioned the High Court at Masaka seeking an order to nullify the election of the second respondent. The respondents denied all the allegations listed in the petition and on hearing all the parties on the issues agreed between them as requiring determination, the High Court dismissed the petition. The appellant's appeal to the Court of Appeal was dismissed. Hence this appeal.

The Kalungu West Constituency consists of two sub-counties, namely, Kalungu and Kyamuliibwa. In the High Court, it was common ground between the parties that elections in Kalungu had been conducted properly and the results as declared from there were acceptable to both appellant and respondents. In relation to the conduct of elections, voting and declaration of results in Kyamuliibwa, the following issues were framed for determination by the court:

1. **Whether there was any non-compliance with the relevant laws and the principles laid therein.**
2. **If so whether such non-compliance affected the results in a substantial manner.**
3. **Whether any illegal or any offence was committed in connection with the said election by the second respondent personally or by any other person with his knowledge and consent or approval.**

4. **What remedies would be available to the parties?**

Mugamba, J. heard the petition and answered all the agreed issues in the negative, holding that none had been proved to the satisfaction of the court.

The Memorandum of Appeal in this court contains 5 grounds of appeal framed as follows;

1. **The learned Justices of Appeal erred in law and fact when they failed to hold that the events of Kyamuliibwa sub-county violated electoral laws and affected the results in a substantial manner.**
2. **The learned Justices of Appeal erred in law and fact when they failed to find that the 1st respondent did not discharge its statutory duty to hear and determine the appellant's written complaint before announcing the results.**
3. **The learned Justices of Appeal erred in law and fact when they rejected the evidence of the DR forms.**
4. **The learned Justices of Appeal erred in law and fact in holding that the Appellant's Affidavit in rejoinder was incompetent.**
5. **The learned Justices of Appeal erred in law when they failed in their duty to reevaluate the evidence on record.**

At the hearing of the petition, it was common ground again that the results from Kalungu sub-county with 38 polling stations were not in dispute. The appeal would therefore be confined to the conduct, voting and declaration of the results in respect of the Kyamuliibwa sub-county with 23 polling stations.

Counsel for the parties filed written submissions in support of and against the appeal. On ground 1 and for the appellant, Messrs. Ambrose Tebyasa and Company Advocates, contend that the Court of Appeal erred in both law and fact in failing to hold that the events during and after elections in Kyamuliibwa sub-county violated the provisions of the Uganda electoral laws. Counsel relied on the affidavits of the appellant himself, of Joseph Kakande, Rashida Nanzira, Grace Nalumaga, Andrew Kagwa Bbuye and Robert

Bballe. Counsel contend that the High Court and the Court of Appeal ignored the clear evidence that ballot boxes in Kyamuliibwa sub-county had been interfered with. This is the evidence that the said affidavits contain. Counsel further contend that the declaration of the results in Kyamuliibwa sub-county had been delayed considerably because of the misconduct of the elections and the rigging of the results as had been observed in the sub-county and as exemplified by the testimony of the deponents of the affidavits already referred to. Interference with the election exercise had been detected by witnesses who believed that there had been foul play in the election exercise and the declaration of results. Counsel contend further that following the breaches of the electoral laws, the presiding officer for Kalama polling station, David Nyombi and his assistant Nagirinya were arrested and charged together with one Karim Sendi for opening ballot boxes and interfering with election materials, contrary to Section 76 of the Parliamentary Election Act. Counsel criticised the Court of Appeal for dismissing the affidavits and other evidence in support of the appellant as unreliable or insufficient. Counsel contend that the findings by the courts below was against the weight of evidence which was overwhelming.

On ground 1, Counsel for the respondents opposed the submissions in support of the appellant's case. Counsel supported the findings and decisions of both the High Court and the Court of Appeal. According to Counsel's view, the appellant failed to justify his contentions by credible evidence. Counsel contended that the record shows that results were declared at all polling stations in the Constituency and the report of poll watchers and the candidate's agents confirm this state of affairs.

Counsel, conceded that one ballot box at Kalama polling station which was delivered to the Kyamuliibwa sub-county was found open. However, Counsel contended that no evidence had been presented to prove that either the actual results in that box or in any other in the whole Constituency had been interfered with or altered. The officials concerned gave a satisfactory explanation as to why that single ballot box had been found open and the courts below accepted the explanation. Counsel submitted that the appellant had failed to prove that either foul play had occurred or that any acts of the respondents

or their appointed agents had in anyway violated the electoral laws or altered the results in anyway or in a substantial manner. The affidavits of Wamala J.B, Nyombi, Karim Ssendi and of independent witness Rutebemberwa all confirm that whereas only one box had been opened, there is no evidence as to who, when and where that box was opened, let alone any evidence that the votes in it had been tampered with. Counsel further contended that results from a polling station for purposes of declaring a result are not those contained in a polling box but the ones already counted and certified in a separate DR Form, sealed in an envelope at the polling station and dealt with under Section 50(1) (c) of the Parliamentary Elections Act.

Counsel contend that the appellant had failed to produce any witnesses including his agents who could suggest or show that the contents of that single polling box had been interfered with. Counsel further contend that the evidence contained in the appellant's witnesses' affidavits is based on speculation and was intended to please the appellant and not satisfy the court. In consequence, Counsel contend that the courts below were right not to rely on it and to dismiss the petition.

I am constrained to observe that ground 1 of this appeal is a vague and generalized ground in so far as it requires this court to fault the Court of Appeal for failing to hold that the events at Kyamuliibwa sub-county violated electoral laws and affected the results in a substantial manner which begs the question – what events? The rules of this court on what grounds of appeal must contain are clear. Rule 82(1) provides as follows:

> *"A Memorandum of Appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make".*

Be that as it may, in so far as the conduct of the elections, the counting of votes and declaration of the results in Kyamuliibwa sub-county are concerned, I am satisfied that the learned trial Judge and the Justices of Appeal adequately considered the appellant's complaints about the same, and resolved them correctly. Thus, in his lead judgment,

Okello, J.A., as he then, was having examined the evidence and the witnesses' testimony in detail, concluded:

> *"It is interesting to note that none of these eye witnesses vouched for any change of the results from a particular figure to another in favour of the second respondent. Only Messrs Joseph Kakande and Robert Bbaale alluded to the fact that there were other open ballot boxes in another room within the sub-county headquarters. There was really no credible evidence to support this claim. The credibility of this claim was further weakened when Bbaale stated that it was dark then as there were no electric lights. In that poor lighting condition, visibility was obviously poor. Without other supporting evidence regarding the presence of other open ballot boxes in another room, it was not safe to believe the claim of those two witnesses. I therefore do not fault the trial judge for describing the evidence of the eye witnesses as cosmetic. Their evidence did not address the issue of the change of the results in favour of the second respondent as alleged"*

It is worth noting that with the declared results in the constituency, the difference in votes obtained by the respondent, the eventual winner and the appellant, one of the losers, is over 800 votes. At the polling station where the appellant claims irregularities, annexture B16 to his affidavit reveals the following: The valid votes allegedly cast at that polling station were 231. The rejected votes were 5. The total votes accounted for at this particular polling station were 236.

However, the annexture further reveals that the total number of ballot papers issued at the station was 234, an extra 2 ballot papers. The information is apparently obtained from one of the forms signed by the returning officer. It is on these figures that 2nd respondent was declared elected. Subsequently, the appellant submits that this discrepancy itself is an example of fraud. The appellant gives other examples but none of them indicate clearly whether the results were altered or indeed fraud was committed by anyone. I am therefore not persuaded by counsel for the appellant that the learned Justices of Appeal erred in law or fact or that they failed to reevaluate the evidence of events at Kyamuliibwa in order to discover that these events constituted gross irregularities which were enough to vitiate the results for the whole sub-county.

There is the evidence of a single box at Kalama polling station which was found open. This irregularity was fully explained by credible witnesses as never intended to alter the cast votes for any of the candidates. I agree with the concurrent findings of the learned trial Judge and the Justices of Appeal that that evidence alone cannot vitiate the election results of the whole constituency.

However, it must be said that tampering with sealed electoral boxes after the votes have been cast and counted is a serious offence and ought to be condemned. Nevertheless, to vitiate the results, the appellant needs to prove that the phenomenon he complains of had extended beyond one polling station and affected more than one ballot box or was of such nature as to affect the results substantially in the constituency. In my opinion, the appellant has failed to do so. Therefore ground 1 of this appeal ought to fail. In my view, the disposal of this ground disposes of ground 2. In any event, I agree with counsel for the respondent that the contents of ground 2 of this appeal did not come up for adjudication nor were they canvassed in the High Court. Lastly, the failure of ground 1 necessarily exonerates the first respondent. I do not find it necessary to consider ground 2.

On ground 3, it is the appellant's contention that the learned Justices of Appeal erred in law when they confirmed the decision of the learned trial judge rejecting the evidence of the DRForms. He contends that copies of the DRForms consisting both of those obtained by his agents and those supplied by the Returning Officer were annexed to the affidavit of the appellant and the copied forms together with appellant's affidavit were admitted at the scheduling conference in the High Court by consent of both parties. It is contended on behalf of the appellant that the annexed copies of the DRForms show clearly that there were discrepancies and irregularities relating to the voting and declaration of results in the constituency which were brought to the attention of the lower courts which should have been sufficient to vitiate the results in the constituency.

Counsel for the appellant contends that since these forms were not challenged, they

should have been accepted by the High Court and the Court of Appeal as containing the truth. Counsel contends that some of the witnesses of the respondents admit to the truth of what is contained in and the nature of these forms even though they claim they had been too busy to sign them. It is further contended that whereas the respondents relied on them to declare and accept the results those forms contained, the appellant was refused to rely on them to prove his case because it is said they were uncertified contrary to the provisions of the Evidence Act and yet the same court had held in the case of **Abdu Katuntu v. Kirunda Kivejinja**, Election Petition Appeal No. 24 of 2006 that the Evidence Act does not apply to affidavit evidence. Counsel for the appellant contended that this case was similar to that in **Life Insurance Corporation of India v.Panesar**, Civil Appeal No. 1 of 1967 where it was said that:

> *"Unless otherwise provided for by a written law, the rules of evidence do not apply to affidavit. There being no such written law, the best evidence rule does not apply to affidavit."*

Counsel for the appellant submitted in the alternative that even if there was such a law, Section 64(1)(a) of the Evidence Act should apply to the effect that since the originals of DRForms are in possession of the first respondent who is a party against whom they were sought from and who refuses to produce them, they should be held as proved against that party. Counsel cited the decision in **Bwanika & 9 Others v. The Administrator General**, S.C.C No. 7 of 2003 in which it was held that documents which are admitted in a scheduling conference will thereafter become part of the record and it is only their content that can be challenged. Counsel also cited **Amama Mbabazi v. Garuga Musinguzi**, Court of Appeal, Election Petition Appeal No. 1 of 2001 in which the Court of Appeal invalidated an affidavit for lack of signature.

For the Respondents, Counsel supported the decisions of the courts below. He contended that those courts were correct to hold that the DRForms were defective and there was no evidence to support their validation. Counsel contended that the DRForms were not only defective on the face of the record but their copies presented to court were uncertified. Counsel further contended that the Justices of Appeal were correct to rely on the

provisions of the Evidence Act. DRForms are public documents which need to be authenticated by a relevant officer. Counsel contends further that the claim for the appellant that he asked for the supply of certified copies of the DRForms, which were denied to him, entitles him to rely on the uncertified copies. However, counsel for the respondents contends that that is not the correct position as it is not supported by any evidence. Counsel submits that in the absence of such certification, the use of such forms in court cannot be justified. Counsel distinguished the case of **Life Insurance Corporation of India v. Panesar (supra)** by showing that the rule in that case is distinguishable because it was dealing with an interlocutory matter as opposed to a substantive issue as in this appeal.

The opinion expressed in **Life Insurance Corporation of India V Panesar (supra)** is that:

> *"Unless otherwise provided for by a written law, the rules of evidence do not apply to affidavit. There being no such written law, the best evidence rule does not apply to affidavit."*

In my opinion therefore, rules that apply to affidavit evidence do not necessarily apply to annextures to those affidavits. The reason for this view is that the affidavit contains the facts to which the deponent swears to be true because he or she has personal knowledge of them. This cannot always be true of annextures to affidavits. A non-certified DRForm cannot be validated by the mere fact that it is annexed to an affidavit. A DRForm is a public document within the meaning of section 73(a) (ii) of the Evidence Act. It requires certification if it is to be presented as an authentic and valid document in evidence. Consequently, I agree with Okello, J.A. where in his lead judgment he opines that Rule 15 of the Parliamentary Elections (Election Petitions) Rules, 1996, does not prohibit or indeed conflict with section 76 of the Evidence Act which provides that the contents of public documents or parts thereof are to be proved by certified copies. I also agree with the learned Justice of Appeal when he opines that the appellant could have provided the uncertified copies of the DRForms if he had given notice to the Electoral Commission to produce copies of all the declaration forms from the sub-county but it failed to do so. There is no evidence that the appellant had given such notice to the Electoral Commission nor applied through court for the Electoral Commission to produce

at the trial the DRForms for all the polling stations in Kyamuliibwa sub-county.

In my opinion therefore, the courts below cannot be faulted for holding that the uncertified copies of DRForms annexed to the affidavit of the appellant were inadmissible as evidence.

On the contention that the returning officer or his agents failed to sign declaration forms, I agree with counsel for the appellant that it is a statutory requirement for the presiding officer at an election polling station to sign the DRForms and to fulfil all the requirements contained in Section 50 of the Parliamentary Elections Act, 2005. However, I do not agree that it is obligatory that each candidate or his or her election agent must first be supplied with or receive a copy of every declaration form before all the results are declared and validated. In my view, the election results should be declared immediately after the count and the signature of the DRForms by the returning officer and other relevant persons in accordance with the relevant laws. I am not persuaded that the Court of Appeal erred in relation to the issues raised in ground 3. It therefore ought to be dismissed.

On ground 4, the substance of the appellant's submissions is that the courts below erred in both law and fact when they rejected the appellant's affidavit in rejoinder. In the Court of Appeal, the complaint was contained in ground 4 of the appeal where the appellant claimed that;

> *"The learned trial Judge erred by misdirecting himself on the law of the affidavit, striking out a competently sworn affidavit in rejoinder of the petitioner while allowing the respondents' defective affidavits to stand and be relied on."*

This ground was combined with ground 7 by counsel for the appellant and argued together in the Court of Appeal.

On the evidence and submissions by Counsel, Okello, J.A.,as he then was adequately reevaluated that evidence and considered Counsel's arguments, having said;

> *"I wish to start considering this issue by pointing out that the approach which the*

Supreme Court had adopted towards defects in affidavits evidence in election petitions was stated in ***Dr. Kiiza Besigye v. Electoral Commission and Museveni Kaguta****. Election Petition No. 1 of 2001 to be a liberal one. In* ***Mbayo Jacob Robert v. Electoral Commission and Talansya Sinani,*** *EPA, No. 07 of 2006, this court dealt with a similar situation …. We found that the trial Judge took a strict rather than a liberal view …. We found that those affidavits satisfied the essential requirements of Section 6 of the Oath Act. We followed the liberal approach adopted by the Supreme Court in Kiiza Besigye's case (supra) …. At first I thought that the trial judge in the instant case took a strict rather than a liberal approach as held by the Supreme Court. After a closer scrutiny of the record, however, I changed my mind. Section 5 of the Oath Act requires a person taking an oath to swear by saying or repeating after the person administering the oath the words prescribed by law or by the practice of the Court as the case may be."*

Thereafter, the learned Justice of Appeal analysed minutely the evidence as to when, where and how the deponent swore the affidavit in question including the remarks the deponent made during cross-examination in the trial court. The learned Justice of Appeal then concluded;

"In the circumstances I find this case differs from both the Kizza Besigye's case (supra) and the Mbayo Jacob Robert's case (supra). To condone such an unsworn statement seeking to pass as an affidavit evidence would undermine the importance of affidavit evidence which is rooted on the fact that it is made on oath. I therefore find that the trial Judge rightly rejected that affidavit in rejoinder (even) though he gave a different reason."

I would dismiss ground 4.

With regard to ground 5, it is my opinion that the issue raised in this ground was disposed of during my determination of grounds 1, 2 and 3. Therefore, nothing more need be said about it here again. In the result, I would dismiss this appeal with costs in this court and in the courts below.

Before leaving this appeal, I am constrained to observe that both Counsel for the parties violated the practice directions of the learned Lord Chief Justice regarding written submissions. These are supposed to be confined to 10 (ten) pages of double spaced and typed pages. It appears not to have dawned on Counsel that by stating that; *"we repeat our earlier submissions at pages 438-447 in the High Court and pages 499-504, 531-537, 562-563 of the record (appellant's submissions on p.11)" or "we equally adopt our submissions in the High Court at pgs 450-470 of the Record (s.c) (sic) and in the Court of Appeal at pages 518-527 (respondent's submissions on p.2)"*, those pages became part and parcel of the written submissions and made those submissions much longer, far in excess of the double spaced pages allowed by the practice directions. Counsel are reminded to adhere strictly to the practice directions.

Dated at Mengo this 22nd day of May, 2008.

G. W KANYEIHAMBA

JUSTICE OF THE SUPREME COURT

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of my learned brother, Kanyeihamba JSC, and I agree with him that this appeal should be dismissed with costs.

I have also read in draft the concurring judgments of my learned brothers, Mulenga JSC and Katureebe JSC, and I agree with their comments regarding the legal requirements for the Returning officers and candidates' agent to sign the Declaration of Results Forms (DRF) and for the candidates' agents to be supplied copies of the Declaration of Results Forms. I agree with their comments concerning the circumstances under which a Court may admit in evidence, uncertified copies of Declaration of Results Forms, as in the present case.

As the other members of the Court agree with the judgment of may learned brother Kanyeihamba JSC and the orders he has proposed, this appeal is dismissed with costs here and in the Courts below.

Dated at Mengo this 22nd day of May 2008

B J ODOKI
CHIEF JUSTICE

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in draft the lead judgment prepared by my learned brother, Kanyeihamba, JSC., and I agree that this appeal ought to be dismissed with costs to the respondents here and in the two Courts below. I have similarly read the concurring judgments of my learned brothers Mulenga, JSC. and Katureebe, JSC. and I agree with their opinions in respect of ground three of the Memorandum of Appeal which I think ought to succeed.

I wish to comment on the 4th ground of appeal. Under it, both the trial Judge and the Court of appeal are criticised for rejecting the appellant's affidavit in rejoinder purporting to have been sworn on 10th July, 2006.

The record of appeal shows that during cross-examination on that affidavit, the appellant answered that:

"I read through the affidavit and signed it before I sent it to the Commissioner".

Both the trial judge and the Court of Appeal rejected the affidavit because it was not properly sworn before a Commissioner for oath. In this Court appellant's counsel, in their written statement of arguments, attempt to play down the said answer which the appellant gave in court while being cross-examined. Counsel state that the appellant had work in court in Masaka and so on 10th July, he carried the un-sworn draft affidavit to Masaka where he actually swore it before a registrar. Learned counsel suggest that the affidavit to which the appellant referred in court is different from that which was filed in court. I am not persuaded by these arguments.

Clearly counsel for the appellant are attempting by these arguments to give evidence from the Bar about the existence of the defective affidavit. On the facts I think that both the trial judge and the Court of Appeal acted properly in rejecting the disputed affidavit. I

agree with the opinion of Katureebe, JSC., on this ground which ought to fail.

Delivered at Mengo this 22nd day of May 2008.

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

JUDGMENT OF MULENGA JSC.

I had advantage of reading in draft the judgment of my learned brother Kanyeihamba JSC. I agree that having regard to the evidence adduced, the appeal cannot succeed. In my view, the irregularities that were proved were not shown to the required standard, to have affected the election results in a substantial manner.

However, I would like to express my differing view on the third ground of appeal in which the appellant complained that –

> ***"3. The learned Justices of Appeal erred in law and fact when they rejected the evidence of the DR Form"***

In his petition and the supporting affidavit, the appellant averred that officials of the 1st respondent had interfered with the electoral results from Kyamulibwa sub-county. He sought to prove this by showing *inter alia* that the information contained in a number of the DR Forms in the possession of the Returning Officer differed from that on copies of the DR Forms the appellant received from his own agents. He annexed to his affidavit twenty uncertified copies of DR Forms, as Annexture B1 – B20, to show the discrepancies. Among the affidavits in support of the petition was one sworn by Godfrey Ntale, the appellant's agent who obtained photocopies of the DR Forms from the District Registrar. In the affidavit Godfrey Ntale narrated in detail, how he had obtained the photocopies on behalf of the appellant. He averred that the copies were made in his presence and supplied to him by the District Registrar as directed by the Returning Officer. The witness further averred that despite his request, the Returning Officer refused to certify the photocopies of the DR Forms.

Both the Returning Officer and the District Registrar swore affidavits in support of the 1st respondent's answer to the petition. Neither of them refuted those averments by Godfrey Ntale. They did not deny that the documents were true copies of the DR Forms used in determining and declaring the results, which were kept by the Retuning Officer; nor did the Retuning Officer deny the averment that he refused to certify them.

At the pre-hearing scheduling conference, no objection was raised to any of those DR Forms. According to what counsel on both sides stated at the conference, the only documents which the respondents did not admit were Annexture A to the appellant's affidavit and Annexture A to Godfrey Ntale's affidavit. The DR Forms annexed to the former affidavit as B1 – B20 were therefore admitted. Section 57 of the Evidence Act provides –

> ***"57. <u>Facts admitted need not be proved.</u>***
> ***No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."***

In my view, the most appropriate time for the court to require a party to prove an admitted fact otherwise than by such admission, would be at the pre-hearing scheduling conference, though the court may exercise the discretion later in the proceedings. Obviously, however, the requirement must be communicated in order to give opportunity to the affected party to provide proof other than the admission. There is no indication anywhere in the record of proceedings that the trial court communicated such requirement to the petitioner/appellant.

Notwithstanding that, in his judgment the learned trial judge said of the affidavit evidence of Godfrey Ntale as PW9, first that –

> ***"His efforts to secure certified declaration of results forms for Kyamulibwa sub-county from the Returning Officer, Masaka <u>is jewel in the crown of his evidence. Sadly the documents presented to the petitioner by Ntale were not copies of declaration of results forms certified by the Returning Officer. So much for their worth."</u>***

Later in the judgment, the learned trial judge stated that Annextures B1- B20 were intended to prove discrepancy in the arithmetic of the votes as an indicator of possible falsification of results in favour of the 2nd respondent. He reiterated that the Annextures were not certified as true copies of the originals and then observed –

> ***"It is not surprising that they are contested by the respondents. As I noted regarding the evidence of PW9 they have no evidential value as their [authenticity] is questioned. <u>For the same reason the petitioner is hard put to prove anything by way of declaration of results forms where it is alleged for example that the Presiding Officer did not append his or her signature to them</u>,"***
>
> (Emphasis is added)

If the respondents contested the documents and questioned their authenticity, they should have objected to their admission in evidence, yet as I have just said no objection was raised. Secondly, with due respect to the learned trial judge, in observing in effect that the petitioner could not prove anything with forms that were not signed by the Presiding Officer, he overlooks his finding that the purpose for which the forms were produced in evidence was to show discrepancies and falsification of the results. If the Returning Officer used the unsigned DR forms to declare the results, why should the petitioner not be able to use the same to show that the results were falsified?

Be that as it may, the Court of Appeal upheld the decision of the trial judge to disregard the said DR Forms, holding that DR Forms are public documents within the meaning of section 73 of the Evidence Act, and pointing out that under section 76 of the same statute the contents of public documents are proved by certified copies thereof, and he could have proved them with the uncertified photocopies if he had given to the Electoral Commission notice to produce. Section 76 has to be read with section 75. The latter imposes an obligation on a public officer having custody of a public document to give to a person entitled to inspect it, a certified copy thereof on payment of legal fees for the copy. Section 76 does not provide that the contents of a public document can only be proved by certified copy. It simply provides –

> ***"Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies"***

In the lead judgment, Okello J.A., as he then was, said –

> ***"An attempt to prove results falsification by irregularities in the Declaration of Results Forms cannot be effected otherwise than by certified copies thereof. Even if the relevant Presiding Officers were to admit failure to sign the Declaration of Results Form of his station it has to be shown that the***

said Declaration of Results Form had been relied on by the Returning Officer to tally the results. This could be possible if the Declaration of Results Forms from the Returning Officer were ascertainable. This could have been possible if they were certified. That would differentiate them from copies obtained from the appellant's agents."

With due respect, this conclusion is unduly restrictive. I am not certain if this was derived from the provision of subsection (4) of section 65 of the Evidence Act, which on the face of it prohibits the use of secondary evidence, other than a certified copy, to prove a public document, even if the notice to produce is given. That would lead to an absurd scenario where, as in the instant case, the person who has custody of an allegedly falsified public document, refuses to give a certified copy thereof and does not produce it.

In my view, the better interpretation is that any document, whether public or private, falls in the category under section 64 (1) (a) if its original is in the possession of the person it is sought to prove it. Accordingly, any form of secondary evidence may be given to prove it, if notice to produce was previously given. This is consistent with the earlier statement in the same judgment that the uncertified photocopies could have been effective if the appellant had given to the Electoral Commission notice to produce. Notice to produce is provided for under section 65 of the Evidence Act. In a nutshell, the section in effect provides that a party proposing to give secondary evidence of a document may only do so if previously the party gave to the party in possession of the original, notice to produce the original. The section then lists circumstances in which the notice to produce may be dispensed with. I need not reproduce that list. Suffice to say that it includes ***"any other case in which the court thinks fit to dispense with [the notice]".***

It is apparent that both courts below refused to consider the contents of the photocopies of the DR Forms simply because they were not certified and the appellant did not give the Electoral Commission notice to produce. They did not consider other material factors.

In my opinion, having regard to all the circumstances, particularly the fact that the respondents did not refute Godfrey Ntale's evidence that the photocopies were true copies of the DR Forms in the custody of the Returning Officer, the fact that the Returning Officer was requested to certify the photocopies but he refused to do so though he had

authorised their making and the fact that the respondents through their counsel at the pre-hearing scheduling conference admitted the photocopies, the absence of a formal notice to produce the original forms was not sufficient ground for disregarding their photocopies. On the whole I would hold that the courts below misdirected themselves in law and fact in holding that the photocopies of the DR Forms produced by the appellant had no evidential value. In my view ground 3 succeeds.

I would not have hesitated to deduce from the aforesaid circumstances that the photocopies that the District Registrar supplied to PW9 were true copies of the DR Forms in the custody of the Returning Officer and that the latter were used in tallying and determining the election results of Kalungu West Constituency. However, it was not satisfactorily proved that alleged discrepancies between the contents of the DR Forms in the custody of the Returning Officer and those handed to the appellant by his agents, were of such magnitude as to show substantial effect on the results. In his affidavit, the appellant only referred to a difference of one vote or two votes here and there. Although in submissions the appellant's counsel referred to large arithmetical discrepancies, and invited this Court to find that the DR Forms show that the declaration of results "were grossly contaminated", I am unable to say that there is sufficient evidence on which to base such finding. It is for that reason that I concur in the holding that the appeal be dismissed.

DATED at Mengo this 22nd day of May, 2008

J.N. Mulenga
Justice of Supreme Court

JUDGMENT OF KATUREEBE, JSC.

I have had the benefit of reading, in draft, the judgment of my learned brother, Kanyeihamba, JSC, and I agree with him that this appeal be dismissed for the reason that the appellant failed to prove to the required standard that the irregularities and violations of the law affected the results of the election in a substantial manner.

I would, however, wish to touch on two matters. The first is the issue of the Declaration of Results Forms and their admission in evidence as argued in ground 3.

There can be no doubt that the DRF's are a crucial part of the record of elections. They contain the data as to the votes cast at each polling station. It is the totality of these votes as contained in the DR Forms that determines the winning candidate in a given constituency.

Given their importance, it is crucial that the provisions of the law relating to them be complied with.

The first provision is section 47(5) of the Parliamentary Elections Act which states:

> 47(5):***"The presiding officer and the candidates or their agents, if any, shall sign and retain a copy of a declaration stating:-***
>
> a) ***the polling station;***
> b) ***the number of votes cast in favour of each candidate;***

and the presiding officer shall there and then announce the results of the voting at that polling station before communicating the results to the returning officer."

Clearly, the declaration of result form must be signed, at the very least, by the presiding officer, and their candidates or the agents must retain a copy. A signed declaration of result form becomes the basis for the immediate declaration of results at that polling station. An unsigned declaration of results cannot be validly used as a basis for declaring results.

Section 50 of PEA provides for the distribution of the declaration of result forms as follows:

a) One copy of the completed form must remain attached to the report book.
b) One copy must be retained by the presiding officer for display at the polling station.
c) One copy must be enclosed in an envelope of the Electoral Commission, sealed by the presiding officer and delivered to the nearest result collection centre;
d) One copy must be delivered to each of the candidates agents;
e) One copy must be deposited and sealed in the ballot box.

The section further provides in sub-section 2 that the presiding officer must then seal the ballot box. Sub-section 3 provides for the materials to be contained in the sealed ballot box, and these include one duly signed declaration of results form. Sub-section 4 provides that the declaration of results form must be signed by the presiding officer and the candidates or agents of the candidates that are present and willing to do so, and the presiding officer must then immediately declare the result. Clearly, the presiding officer has no choice in the matter. He must declare the results immediately after the declaration of results form is signed.

In this case, evidence shows that there are instances where agents of the appellant did not sign the DR Forms, and they were not given copies thereof. In my view, failure by the presiding officers to give agents copies of the form is a violation of the law. What has to be determined is whether that violation affected the results of the election in a substantial manner. It is also to be noted that under section 47(7) (e) of PEA, the absence of the candidate or an agent from signing of the declaration form does not by itself invalidate the results announced. But the presiding officer should have recorded the fact of the failure or refusal to sign or the absence of the candidate or their agents in accordance with section 47(7) (b) and (c) of PEA.

Section 52 provides for the safe keeping of election materials and records. In my view this section is important in this case so I will reproduce it:

> ***52(1)"The returning officer shall be responsible for the safe custody of all the election documents used in the district in connection with an election until the documents are destroyed in accordance with the directions of the Commission, but the Commission shall not give such directions before the settlement of disputes in any dispute arising from the election."*** (emphasis added).

What emerges from the above provisions of the law is that if the law is properly applied and election procedures followed, there should have been several centres from where copies of the declaration of results forms could have been obtained for use in court. Certainly those in the safe keeping of the returning officer as per section 52 were public documents within the meaning of section 73 of the evidence and could and should have been produced in court using proper court procedures for production of documents. That must be the reason why the section provides for safe keeping of the records until any disputes have been settled. These DR Forms would have been the primary evidence in

this case. In absence of that primary evidence, the appellant could then have proceeded under sections 64(1) (a) and 65 of the Evidence Act to produce secondary evidence in the form of copies.

The appellant and his counsel produced uncertified photocopies of DR Forms, arguing that the returning officer had refused to give then certified copies. Okello, J.A in his lead judgment dealt with this matter as follows:-

> ***"The appellant could have provided the uncertified copies of those Declaration of Results Forms if he had given notice to the Electoral Commission to produce copies of all the Declaration of Results Forms from that sub-county but did not. There is no evidence that the appellant had given such a notice to the Electoral Commission nor applied through the court for the Electoral Commission to produce at the trial the Declaration of Results Forms for all the polling stations in Kyamulibwa sub-county. In the circumstances, I agree with the trial judge the uncertified photocopies of the Declaration Forms really had no evidential value".***

This matter therefore, as far as the learned Justice of Appeal was concerned, hinged on the appellant's failure to serve on the Electoral Commission a notice to produce the DR Forms. In my view, it is necessary to examine the law with regard to notice to produce. This is provided for under Section 65 of the Evidence Act. It is discernible from that Section that before secondary evidence of the contents of documents such as these forms (under section 64 (1) (a)) notice to produce must first have been given to the party in possession of those documents. The Notice must be in a manner prescribed by law. But where the notice is not prescribed by law, it must be ***"such notice as a court considers reasonable in the circumstances of the case."*** There is also an important exception: ***"except that such notice shall not be required in order to render secondary***

evidence admissible in any of the following cases, or in any other case in which the court thinks fit to dispense with it …. (b) when, from the nature of the case the adverse party must know that he or she will be required to produce it."

This is a case of an Election Petition to resolve an election dispute. The Electoral Commission is a respondent in the case, and therefore an adverse party to the petition. In terms of section 52 of PEA (supra) the Electoral Commission is in possession of the Electoral records including the DR Forms in issue in this petition. The sole reason that Electoral Commission keeps these records is so that they may be used to resolve election disputes. In my view, by operation of Section 52, the Electoral Commission is on notice that these records may be needed. It should be obliged to produce them. But the evidence shows that the returning officer, an agent of the Commission, refused to give certified copies to the appellant, nor did he produce the forms in court. In his evidence, under cross-examination, the appellant stated thus: "*I went to the District Returning Officer seeking for all the 23 DR forms from Kyamulibwa sub-county. The letter is annexed to the affidavit of Godfrey Ntale. The District Returning Officer wrote directing the District Registrar Peter Kasozi to follow up the matter. That, he endorsed on my letter to him after that I got the DR forms I asked for. They were not certified. They are annexed to the petition as B1 to B20. I wanted DR forms from the Returning Officer because I had not got the 23 DR forms. The 7 I received looked suspect. After photocopying the District Returning Officer said he had decided not to certify them."*

The affidavit of Godfrey Ntale itself supports this evidence.

In my view, this is a case where the trial court ought to have taken into account the exceptional circumstances of the case, namely, that this is an election petition. The court ought to also have taken into account the provisions of section 52 of PEA, and the fact that the Commission and the District Returning Officer knew that these forms would be required to resolve the election dispute since the appellant had requested for certified copies thereof. The court should also have noted that by refusing to give the appellant certified copies, the Returning Officer was in breach of Section 75 of the Evidence Act. The court basing on Section 65 should then have allowed the secondary evidence in the form of uncertified copies which, in my view, are covered under Section 62 (b) of the Evidence Act.

To me it defeats justice for the Returning Officer who is an agent of the Electoral Commission to refuse to give certified copies of election records to a party to an election dispute, fail to produce the records in court, and then for the party seeking the records to be defeated on the grounds that he did not issue formal notice to produce.

In my view the courts below failed to address themselves properly to Sections 64(1)(a) and 65 of the Evidence Act, and to Section 52 of PEA. So in my view, ground 3 would succeed.

The other aspect I wish to comment on is ground 4. The appellant who testified that he is a lawyer and a commissioner for Oaths, swore an affidavit in rejoinder which was

rejected by the court because apparently he had not appeared before the commissioner for oaths. He had signed the affidavit in Kampala and, in his own evidence, sent it to the commissioner for oaths for commissioning. It turned out that it was then commissioned in Masaka. In effect the commissioner for oath did not administer the oaths and see the deponent signing the affidavit. Section 6 of the Oaths Act states:-

> "***Every commissioner for oaths or notary public <u>before whom any oath or affidavit is taken or made</u> under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."*** (emphasis added).

The practice where a deponent of an affidavit signs and forwards the affidavit to a commissioner for oaths without him being present is, in my view, a blantant violation of the law regarding making affidavits and must not condoned in anyway. The deponent of an affidavit

must take oath and sign before the commissioner for oaths as required by law. A commissioner who commissions an affidavit without seeing the deponent cannot say that the affidavit was taken or made before him, or her nor can he state truly in the jurat or attestation at what place or time the affidavit was taken or made. Equally the deponent cannot claim to have taken or made the affidavit before the commissioner for oaths. Surely the appellant as an advocate and commissioner for oaths ought to know better. This ground is totally without merit and the courts below dealt with it most appropriately and correctly, and it must fail.

Notwithstanding my conclusion on ground 3, this appeal ought to fail on grounds contained in the judgment of my learned brother Kanyeihamba, JSC.

Dated at Mengo this 22nd day of May 2008.

Bart M. Katureebe
Justice of the Supreme Court