

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS ACT 2005
AND
IN THE MATTER OF THE ELECTORAL COMMISSION ACT CAP 140
AND
IN THE MATTER OF THE PARLIAMENTARY ELECTIONS (APPEALS TO THE HIGH COURT FROM COMMISSION) RULES SI NO. 141-1
ELECTION PETITION NO.01 OF 2018

AGABA PETER----- PETITIONER

VERSUS

ELECTORALCOMMISSION-----RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGEMENT

This is an appeal by way of Petition, in which the Petitioner, Agaba Peter, is challenging the decision of the respondent, the Electoral Commission, declining to nominate him as a candidate for Ibanda Municipality Constituency Member of Parliament, on grounds that his nomination papers were not accompanied with evidence of academic qualifications as required under section 4(1)(c) of the Parliamentary Elections Act, 2005.

The said decision was communicated in a letter dated 13th June 2018 communicated by the Chairman of the Respondent, Justice Byabakama Mugenyi Simon to the appellant through his lawyers M//s KTA Advocates & Solicitors.

The above decision was made as a result of the complaint by the petitioner through his lawyers-KTA Advocates & Solicitors in a letter dated 6th June 2018 to the commission challenging the decision of the Returning Officer made on 5th day of June 2018 declining to nominate the petitioner and or refusal to nominate Agaba Peter.

The petitioner was represented by Mr Karuhanga Justus and Mr Kiiza Simon Kabundama while the respondent was represented by Mr. Lugolobi Hamidu

There are only two issues for determination;

Whether the respondent acted unfairly in upholding the decision of the Returning Officer not to nominate the Petitioner?

What remedies are available?

The petitioner's lawyer submitted that the petitioner appeared for nomination on 5th June 2018 for Ibanda Municipality Member of parliament and presented the nomination papers and had all the requisite academic qualifications. His documents were verified and ticked and he was asked to proceed to the nomination officer's table.

The Returning Officer refused to nomination the petition because he did not have his originals of his academic papers and /or that the nomination documents were not accompanied with the academic documents in accordance with Section 4(1)(c) of the Parliamentary Elections Act.

The Electoral Commission conducted a hearing in a haste mode on 12th June 2018 and upheld the decision of the Returning officer and in the letter dated 13th June 2018, which the petitioner claims to have received on 18th June 2018, the Commission upheld the decision of the Returning officer and that the petitioner did not have academic documents.

Mr Karuhanga Justus submitted that he was surprised the Electoral Commission came to such a conclusion because it is not true that there were no academic documents at the time of nomination of the petitioner.

At the hearing of this appeal on 12th June 2018, the academic documents were presented again and they looked at them and clearly the reasoning was shocking. The academic documents were attached and they were not only the originals but also the verified copies from UNEB.

He further submitted that the Commission is clothed with authority to nominate because the returning officer is executing powers delegated to him by the commission. Even if it was found that he never presented originals, the law does not specify that originals must be presented. He did present his photocopies from UNEB.

Counsel Simon Kiiza also submitted that under Section 15 of Electoral Commission Act is mandated to examine and see whether the ground of refusal to nominate was genuine. According to him, the petitioner presented originals at the hearing and in resolution 10 of the proceedings of the Electoral Commission, it was noted that in future the DR/RO guidelines should include; The need to have a Registration Book for aspirants who came up for Nominations and The need for every DR/RO to endorse on every Nomination Document, the reasons why the DR/RO has rejected or passed to ease future reference.

It was his submission that there was doubt in the minds of the Commission and hence the need to amend the guidelines and in case of any doubt, the same should have been resolved in favour of the petitioner. Counsel cited the case of ***Mukundane Vincent & Ahaisibwe Gordians vs EC & Melichadis Kazwengye Election Petition No. 04 of 2010***, for the proposition that the procedure to be followed in establishing academic qualifications with the Electoral commission was not prescribed.

The respondent opposed the petition and filed an affidavit of Mugabi Justine Ahabwa, and contended that annexure B forms the gist of the respondent's defence.

“ Agaba appeared before the DR/RO for further verification as directed by the 1st desk. He told him that he could not be cleared without the original

academic papers that had to be verified alongside the copies that he had attached. He advised him to go and urgently pick the Originals.”

Mr Lugolobi Hamidu submitted that, the rules under which this petition is brought gives the Commission room to test such evidence as was presented to it.

Rule 10 allows court to examine any witnesses presented and also be cross examined in order to test the evidence.

He further submitted that the Commission is empowered to correct any irregularity that may have occurred at the nomination stage.

According to the record of proceedings at the Commission;

(ii) Agaba Appeared before the DR/RO for further verification as directed by the 1st desk. He told him that he could not be cleared without the original academic papers that had to be verified alongside the copies that he had attached. He advised him go and urgently pick the originals.

(iii) Since, the complete set of academic papers and a copy were not attached to the nomination papers, he retained all the other Nomination papers so that when he presented the missing papers, he would be cleared without having to line up again.

(iv) The verification Team had ticked every item they verified and he endorsed with his signature on every page. However the academic papers he presented to the Commissioners had no ticks nor the DR/RO's signatures.

(v) Agaba had first told him that he had forgotten his academic papers at home in Busheshe village which is in the Municipality but after some time he came back to the DR/RO to say that the papers were in Kampala.

The finding of the Commission was that;

- *The complainant did not deny that they DR/RO was ready to assist him in complete his nomination process if he provided the originals of the academic papers.*
- *Though Agaba claimed to have had the original and copies of his academic papers, he did not present them during nomination and despite advise to pick them so that they can be verified for his clearance as a candidate.*

It is my finding that the petitioner presented copies of his academic papers but he did not have the original academic papers. The petitioner indeed presented the copies of the academic papers but lacked originals for verification with the originals.

The main question for the determination of the court arising out of the submissions of the petitioner and respondent is whether the Returning Officer was right to refuse to nominate the petitioner because he lacked original academic documents.

According to section **4(5) of the Parliamentary Elections Act** it is provided;

“ For purposes of paragraph (c) of subsection (1) any of the following persons wishing to stand for election as a member of Parliament shall establish his or her qualification with the commission as a person holding a minimum of qualification of Advanced level or its equivalent at least two months before nomination day in the case of a general election, and two weeks in case of a by election-

(a) Persons, whether their qualification is obtained from Uganda.....

In addition section **4(13) of the Parliamentary Elections Act** is also very instructive on the question of verification of academic papers/qualifications;

For avoidance of doubt, if a candidate has an advanced level certificate obtained in Uganda or qualifications higher than the prescribed qualification obtained in Uganda or from the former University of East Africa or any of its

constituent colleges, then, there shall be no need for the verification of his or her qualifications by the National Council for Higher Education.

The court's understanding of these provisions is that persons who have qualifications from Uganda are supposed to establish their qualifications with the Electoral Commission two months before nomination in case of a general election and two weeks before nomination in case of a by election.

This means that the petitioner's academic papers should have been established by the Electoral Commission two weeks before nominations and it is wrong to establish academic qualifications through the Returning Officer who may not have the competence and expertise in establishing the qualifications of the candidates.

This process would avoid the situations like the present case where the Returning Officer would be sole person to establish the qualifications. Therefore, the Electoral Commission is supposed to establish the qualifications two weeks before the nominations date since it was a by election and it was erroneous to establish qualifications on the nomination day.

I'm buttressed by the decision of this court in the case of ***Mukundane Vincent & Ahaisibwe Gordians vs EC & Melichiadis Kazwengye Election Petition No. 04 of 2010*** where the court held that; the procedure to be followed in establishing the qualifications with the Electoral Commission was not prescribed.

Secondly, the demand for original academic papers on the nomination day would not arise if the Electoral Commission has established the academic papers prior to the nomination day. By the date of nomination the Electoral Commission would have made the necessary inquiries about the academic papers presented by the intending candidates.

The provision that requires establishing academic qualifications does not require production of the originals as the returning officer demanded from the petitioner. It is also very possible to prove academic papers without originals through the issuing authority or institution. *What if my academic originals are lost or misplaced, should it mean that I cannot stand in elections?* That would be very absurd and I do not think that is what was intended by the law.

In the case of **Ongole James Micheal vs Electoral Commission & Ebukalin Sam HCEP NO... 0008..of 2006**. The learned Judge Stephen Musota (as he then was) held as follows;

“The law relating to nominations and election of Chairpersons as quoted above has been put into perspective. It is true as submitted by learned Counsel for the respondents that it is not mandatory for a prospective candidate for nomination to contest LC. V elections to produce original ‘O’ and ‘A’ Level Certificates as a basis for nomination. What the law requires is proof or evidence of completion of a minimum advanced level qualification or its equivalent. I agree with the submission of Counsel Ssekaana that proof of this can be done in a number of ways which can be determined by the Electoral Commission. Statutory Declarations and/or affidavits are the methods outlawed in proof of an academic qualification. (See section 111 3E).

*When the second respondent appeared for nomination, the returning officer stayed the same because he did not present both his ‘O’ and ‘A’ Level original Certificates. I am of the view that this rejection and requirement had no basis in law. Since the Electoral commission has the discretion to determine what satisfies it as proof of ‘A’ Level qualification in cases where there is no ambiguity, and then it was right to nominate the second respondent on production of an original Academic Transcript for a Diploma which is a higher qualification than ‘A’ Level. Given that the Diploma was obtained from Uganda after ‘A’ level, it did not require any verification by the National Council for Higher Education. As rightly pointed out by learned Counsel for the respondents, if photocopies presented by the second respondent on his first appearance were rejects as if it was a legal requirement, then this was done in error because, as stated earlier, the law does not prescribe ways in which proof of qualifications must be made. This can be by presentation of originals or otherwise and it leaves options open to the Commission to even accept or rely on photocopies. Evidential details may be left for trial sessions like the instant one. Of course there could be a fear that some unscrupulous people could present fake papers but this was dealt with by my brother D.K. Wangutusi J. in a similar case of **Kabaale Kwagala Olivia vs. Beatrice Zirabamuzaale Magoola and Electoral Commission, Electoral Petition No. 3/2006 at Jinja**. In this petition which was premised on academic qualifications, it was held inter alia that:*

*“To completely rely on photocopies was to run a risk of Forgeries and all sorts of inaccuracies. The best procedure Would be for the intending candidate to have the documents Certified at their sources as authentic documents. The Question is, would non- authentication render the nomination Proceedings null. To get the answer to this question one has to look at the purpose for authentication. Un-authenticated Documents cause suspicion especially where there are no originals. . The absence of originals does not necessarily render them false. But authentication removes suspicion..... The Petitioner’s fears are well understood. **This however would not render the presenter of the photocopy unqualified or lacking in Requisite qualifications if he or she could prove that she or he was Indeed a holder of requisite qualifications.**”*

I agree with this preposition.”

The presentation of photocopies does not render a person holding them unqualified and I equally agree with the said decision.

The respondent has always abdicated its responsibility as provided under the Parliamentary Elections Act and ordered the intending candidates to verify their results with UNEB. But it is the duty of Electoral Commission to establish the qualifications of intending candidates and not to direct them to verify results with UNEB.

In the present case, the petitioner has attached a letter dated 7th May 2018 addressed to the Chairman-Electoral Commission-titled **LETTER OF VERIFICATION OF RESULTS**. The said letter certifies that Agaba Peter sat Uganda Advanced Certificate of Education with the said results.

This confirms that the petitioner was qualified to stand and the procedure used by the Electoral Commission although it was erroneous, it cleared the petitioner and he did not need to present any original academic papers for nomination.

This court finds that the commission was erroneous in upholding and confirming the decision of the Returning Officer who refused to nominate the petitioner because of failure to present original academic papers.

In the final result this Petition succeeds and the respondent is ordered to nominate the petitioner.

The petitioner is awarded costs of this petition.

It is so ordered

SSEKAANA MUSA

JUDGE

11th /07/2018