

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

ELECTION PETITION No. 003 OF 2016

5 **OPIO JOSEPH LINOS ::: PETITIONER**

VERSUS

1. OKABE PATRICK

2. ELECTORAL COMMISSION

3. NATIONAL COUNCIL FOR HIGHER EDUCATION :::::::::::::: RESPONDENTS

10

BEFORE HON. MR. JUSTICE B. KAINAMURA

JUDGMENT

a) Introduction

The petitioner and 1st respondent contested for Parliamentary seat for Serere County, Serere District
15 together with 5 other candidates. The elections were held on the 18th day of February 2016 and
these were the results;

- a. Makhalu Richard Okodel who got 564 votes
- b. Ochola Stephen who got 18,091 votes
- c. Odongo Francis who got 948 votes
- 20 d. Okabe Patrick who got 23,,949 votes
- e. Opolot Daniel who got 564 votes
- f. Opio Joseph Linos who got 0 votes.

The petitioner being dissatisfied with the declaration of the 1st respondent as the winner by the 2nd
respondent filed this Petition.

In the Petition the petitioner prays for a declaration that; a) the 1st respondent's Certificate of completion of formal education equivalent to a Diploma verified by the 3rd Respondent is a nullity b) the 1st Respondent's diploma alleging he sat and passed a Diploma majoring in Bible and Theology issued on 7th August 2015 from the Pentecostal Theological College, Mbale be declared
5 fake, unauthentic and a nullity, c) the National Council of Higher Education failed in their duty to effectively verify the academic documents, d) the 1st Respondent at the time of election was not qualified to be elected as a Member of Parliament, e) the elections were conducted in non-compliance with the provisions of the law for which they should be set aside , f) the elections of the Member of Parliament of Serere County, Serere District 2016 be directed to denovo and the
10 petitioner be awarded costs.

The 1st respondent filed an answer to the Petition supported by affidavits deposed by the 1st Respondent, Imede Ketty, Rev Ongaro Yakobo, Rev Abilet Mesulam and Adepo Justine Aweikin denying each allegation of fact contending in particular that the 1st respondent used the names
15 **Ochen Oliba Patrick** and **Okaba Patrick** interchangeably. The 2nd respondent filed an answer to the Petition denying the allegations raised by the petitioner and contended that the elections were done in accordance with the provisions of the Electoral laws, and that the 1st respondent was qualified for nomination, lawfully elected and gazetted as the winner of the election. The 3rd respondent filed a response and in the affidavit deposed by Professor Opuda-Asibo John who deposed that the 3rd respondent did not issue any certificate of completion of Formal education of
20 Advanced Level standard or its equivalent to the 1st Respondent as the 1st respondent possesses a qualification higher than the Advanced level of Education.

The petitioner's case is that the 1st respondent does not hold the requisite qualifications for a Member of Parliament, and the elections were not conducted in accordance with the law since his rights and the rights of his supporters were disenfranchised, that their right to participate in the
25 electoral process was denied through a willful deliberate omission of his identity and symbol with photograph, name and party symbol by the 2nd respondent.

At the hearing of the Petition, the petitioner was represented by Mr. Deogratious Odokel Opolot while the 1st respondent was represented by Mr. Moses Kimuli and Mr.Nabende Isaac, the 2nd respondent was represented by Mr. Patrick Wetaaka while Mr. Wagabaza Benon together with Ms
30 Bukiirwa Faridah appeared for the 3rd Respondent.

b) Issues

The following issues were framed for determination;-

1. Whether the petitioner has locus standi to bring the Petition
2. Whether the 1st respondent was validly nominated by the 2nd respondent
- 5 3. *Whether the 1st respondent was qualified to be nominated and elected for the Parliamentary elections*
4. *Whether the petitioner has a cause of action against the 3rd respondent*
5. *Whether the 3rd Respondent validly verified the academic papers of the 1st respondent*
- 10 6. *Whether the elections of Member of Parliament Serere County, Serere District were carried out in compliance with the law*
7. *Whether there are any remedies available for the Parties*

c) Burden and standard of proof

15 It is now trite law that the burden of proof in election Petitions lies with the petitioner because it is him who seeks to have the election nullified. (***Mbowe Vs Eliafu [1967] EA 240***). Ugandan courts have followed this position which was reaffirmed in **Col (RTD) Dr. Kiiza Besigye Vs Yoweri Museveni Kaguta Petition No.1 of 2001** where Odoki CJ (as he then was) said;-

20 “*In my view the burden of proof in an election Petition as in other civil cases is settled. It lies on the petitioner to prove his case to the satisfaction of the court.*”

The standard of proof in an election Petition is also now settled. **Section 61(3)** of the **PEA** provides;-

“*Any grounds specified in subsection (1) shall be proved on the balance of probabilities*”

25 *However though the standard of proof is on a balance of probabilities, it is higher though lower than beyond reasonable doubt. (See Mukasa Anthony Harris Vs Dr. Bayiga Michael Philip Lulume S.C.C.A No.18 of 2007).*

Resolution of Issues

I will handle the issues in the order in which they were framed.

Issue 1:- Whether the petitioner has a locus standi to bring the Petition

5 Learned Counsel for the 1st respondent argued that to determine if one has a *locus standi* in an election petition one has to look at **Section 60 (2) PEA**, that the petitioner must be either a candidate who lost an election or a registered voter in the constituency supported by the signatures of at least 50 voter registered in the constituency. Counsel submitted that the petitioner brought the petitioner as a candidate and yet he was not validly nominated in accordance with the law. Counsel further submitted that the petitioner was not nominated in accordance with **Section 11 PEA**.
10 Further that even the alleged nomination under **Section 16 (b) PEA** was not legal since the time lines given in the section were not adhered to and further that the Commission which is alleged to have handled the matter was not properly constituted in accordance with **Section 8 ECA** and that the appearance of the petitioner's name in the Uganda Gazette and Tally Sheet does not in itself confer lawful candidature to the petitioner.

15 On his part Counsel for the petitioner submitted that **Section 16 PEA** provides for the right of a candidate to petition the Commission against refusal by a Returning Officer to nominate him or her.

Further that by his letter (Annexure C to Affidavit in Support) the petitioner complained to the Electoral Commission against the decision of the Returning Officer in rejecting his nomination and the Electoral Commission duly nominated the petitioner on 15th January 2016.

20 It is not in dispute that the petitioner submitted his application for nomination to the Returning Officer and was slated for nomination on 3rd December 2015. It is also not in dispute that his nomination was rejected by the Returning officer ostensibly because the people who had supported his nomination were not registered voters. Upon rejection the petitioner, on 9th December 2015, lodged a complaint with the Electoral Commission. This was in accordance with **Section 16 (b) PEA**. The section provides:-
25

16 “Where a nomination paper of a person has been rejected or has been regarded as void by virtues of **Section 13**

a).

b). *the person shall have the right to complain against the decision to the Commission within seven days from the date of rejection and the Commission may confirm or reverse the decision of the Returning Officer within seven days from the receipt of the complaint”.*

5

It is evident that the petitioner lodged his complaint within the timeline prescribed by law. It is further evident that the Commission reversed the decision of the Returning Officer and nominated the petitioner on 15th January 2016 well after the seven days prescribed by **Section 16 (b) PEA**. In my view the Electoral Commission acted within the law since **Section 50** of the **Electoral**
10 **Commissions Act** vests in the Commission special powers to enlarge time.

Further the 1st respondent took issue with the fact that the petitioner stated in his evidence that he appeared before the Chairman and two members of the Commission when the decision to nominate him was made.

According to the 1st respondent the decision should have been made by the full Commission.
15 However I agree with Counsel for the petitioner that **Section 8 (5) ECA** empowers the Commission to act notwithstanding the absence of a member of the Commission. Accordingly the decision to nominate the petitioner under **Section 16(b) PEA** was within the law.

It is therefore my finding that the petitioner was validly nominated candidate for election for Member of Parliament for Serere County. Issue one is therefore answered in the affirmative.

20 **Issue two: Whether the 1st respondent was validly nominated by the 2nd respondent.**

The petitioner alleged that the 1st respondent did not consent to his nomination and as such he was illegally and unlawfully nominated by the 2nd respondent. Attached to his affidavit in rejoinder filed on 20th April 2016 is annexure “A” which is a back page of the statement under oath allegedly filed by the 1st respondent in accordance with **Section 11(i) (d) of PEA**. Interestingly the copy filed by
25 the 1st respondent with his further affidavit in reply filed on 11th May 2016 and marked annexure “A” is signed. The petitioner apparently did not pursue this issue exhaustively and has in my view not proved his case to the satisfaction of court.

Accordingly the issue fails and is answered in the affirmative.

Issue Three: Whether the 1st respondent was qualified to be nominated and elected for the Parliamentary elections.

The petitioner alleged that the 1st respondent was not qualified for nomination as Member of Parliament since he did not have the minimum qualification of formal education prescribed by the law. **Section 4(1) (c) PEA** provides that for one to be qualified to be a Member of Parliament, that person should have completed a minimum formal education of Advanced Level standard or its equivalent. The 1st respondent relied on the following academic qualification to be nominated:-

- a) Ordinary level certificate of education from Ayer College obtained in 1976.
- b) Certificate in Church Ministries obtained from Pentecostal Theological College (PTC) obtained in 2013.
- c) Diploma in Bible and Theology obtained from PTC obtained in 2014.

The petitioner alleged that the 1st respondent did not graduate from PTC as claimed and that even then the 1st respondent did not have the basic qualification to be admitted at PTC for the Certificate Course in Theology. To support his case that the 1st respondent did not graduate from PTC as he claimed, the petitioner relied on the evidence of Bishop Franco Onaga stated to be the General Secretary of Pentecostal Assemblies of God and the chairperson of the Board of Directors of PTC. In his letter dated 16th April 2016 Annexed to the petitioner’s affidavit in rejoinder to the 3rd respondent filed on 20th April 2016, he stated:-

“I am in receipt of your communication in which documents were purportedly issued by Pentecostal Theology College to Mr. Patrick Okabe. On behalf of the Pentecostal Assemblies of God which is a parent church organization to the college, I would like to state categorically that that is a classic case of forgery. We therefore disassociate ourselves with these forged documents and the contents thereof”

Further in his affidavit in rejoinder to the answers of the respondents filed on 27th May 2016, Bishop Onega deponed that he knew the 1st respondent personally and asserted that he did not see the 1st respondent among the students whom he graduated in 2013 at the college and further that the 1st respondent’s name is not on the graduation list of 2013 (annexture D to his affidavit). Bishop

Onaga further deponed that the signature on the certificate in Church Ministries (annexture D 1st respondent's further affidavit in reply filed on 11th May 2016) purporting to be his, is a forgery as he did not sign it. Based on the above, Counsel for the petitioner submitted that the 1st respondent did not have the said qualifications.

5 The second line of attack by the petitioner on the 1st respondent's qualifications was on the "O" Level Certificate relied on by the 1st respondent during his nomination. The 1st respondent is alleged to have obtained his "O" Level Certificate in 1976 from Ayer College in the names of **Ochen Oliba Patrick**. The petitioner made a two prolonged approach to this issue. He first alleged that Ayer College where the 1st respondent is alleged to have obtained his "O" Level Certificate was none
10 existent. To prove this, the petitioner referred to the list of Government Secondary Schools (Annexture D to petitioner's affidavit in rejoinder to 1st respondent's affidavit in support of 20th April 2016). I agree with Counsel for the 1st respondent that since annexture 'D' is only in respect of Government Secondary Schools and it is not indicated anywhere by the 1st respondent that Ayer College was a Government School this line of attack cannot be sustained. The other line of
15 approach was that the impugned "O" certificate is in the names of **Ochen Okabe Patrick** and that the 1st respondent has not adduced sufficient evidence to show a nexus between **Ochen Okabe Patrick**, the one awarded the "O" Level Certificate and **Okabe Patrick** the Parliamentary Candidate for Serere County.

Counsel for the petitioner submitted that the 1st respondent upon change of name if at all, did not
20 follow **Section 36 of Registration of Persons Act 2015** which is in *pari materia* with **Section 12** of the now repealed Births and Deaths Registration Act cap 309 which is to the effect:-

36 Change of name of an adult

- 25
- 1) *Any person being over the age of eighteen years or a widower, widow, divorced person or a married person who wishes to change his or her name, shall cause to be published in the **Gazette** a notice in the prescribed form of his her intentions to do so.*
 - 2) *Not less than seven (7) days after the publication of the Notice, the person intending to change his or her name may apply in the*

prescribed form to the registration officer of the registration center in which his or her birth is registered.

3) *The registration officer shall upon being satisfied that the requirements of this section have been carried out and upon payment of the prescribed fee, amend the register accordingly and shall sign and date the amendment.*

5

Counsel for the petitioner further submitted that the other option available to those who wish to change their names or add to their names is to proceed by way of a Deed Poll (see ***Hasbury's Laws of England 4th Edition Vol. 14 para 1279***) Counsel further took issue with the credibility of the witnesses of the 1st respondent. Counsel argued that Rev. Abilet Meshulam's affidavit in support of the 1st respondent's answer to the Petition was full of lies, falsehoods and inconstancies. Rev. Abilet Meshulam, the father of the 1st respondent, stated under paragraph 3 of his affidavit in answer to the Petition filed on 5th April 2016 that the 1st respondent used the names **Okabe Patrick** and **Ochen Oliba Patrick** interchangeably and yet in cross examination he stated that he has never seen any of his son's certificates and further that he did not have the 1st respondent's baptism certificate. In relation to Rev. Ongaro Yakobo who is stated to have attended Ayer College with the 1st respondent, Counsel for the petitioner submitted that his testimony was full of contradictions as it was not in tandem with the evidence of the 1st respondent relating to, for example, subjects studied and how he was able to recall the 1st respondent's index number.

On his part Learned Counsel for the 1st respondent submitted that the "Letter of Verification of Results" (annexture "B" to the 1st respondent's affidavit in support) from Uganda National Examination Board (UNEb) is sufficient proof that Ayer College was in existence in 1976. Further that the evidence of the 1st respondent, i.e that of Rev. Albilet Mesulam and Rev. Ongaro Yekobo provides the nexus between the 1st respondent's name and the name on the "O" Level Certificate. Further that by a statutory declaration deponed by the 1st respondent on 23rd June 2015 contained in group Annexure "A" to his affidavit in support, the 1st respondent clearly stated that in 1976 he obtained "O" Level Certificate from Ayer College in the names of **Ochen Oliba Patrick** and that both **Ochen Oliba Patrick** and **Okabe Patrick** are his names. Further that the 1st respondent's evidence was that he has used both names interchangeably since birth.

Counsel further submitted that other than the 1st respondent no evidence has been led that there is another person going by the name **Ochen Oliba Patrick**. Counsel further submitted that consequently the petitioner has not discharged the burden of proving that the names **Ochen Oliba Patrick** are not the names of the 1st respondent.

5 On the Certificate in Church Ministries and Diploma in Bible and Theology, Counsel for the 1st respondent submitted that the petitioner had failed to impeach them. Further that the evidence of Imede Ketty the Academic Registrar of PTC and Amos Isale the Academic Dean of PTC testify to the fact that the 1st respondent held the necessary qualifications when he was admitted to the Certificate Course in Church Ministries and that upon completing the Certificate Course he was
10 admitted to undertake a Diploma Course.

Further that the affidavit evidence of Bishop Onega relied upon by the petitioner is not admissible in evidence since the deponent had not deposed to any affidavit that was replied to in the first place. Further that even if court was to rely on it, Bishop Onega has no expertise in documents to determine if a document was forged or not, and that Bishop Onega had not proved that indeed he
15 was Chairperson Board of Directors PTC, that Bishop Onega admitted that the purported graduation list (Annexure D to his affidavit) is in fact a graduation programme, further that the claim that the 1st respondent's certificate bore a forged signature of Bishop Onega had not been sufficiently proved in evidence. In conclusion Counsel for the 1st respondent submitted that the 1st respondent had established through his witnesses that he was a true student of PTC, was awarded
20 the certificate and Diploma, PTC is a credited by NCHE and as such the 1st respondent did not have to establish academic qualifications with the 2nd respondent for purposes of nomination under **Section 4(5) (a) PEA**.

In further reply, Counsel for the 2nd respondent submitted that on the basis of documents from NCHE dated 13th August 2015 and 25th November 2016 showing that the 1st respondent was a
25 holder of a diploma from PTC, a qualification higher than the prescribed qualification obtained in Uganda (see **Section 4 (1) (c) and (13) PEA**) there was no need for verification and as such the 1st respondent was qualified and validly nominated candidate for position of Member of Parliament for Serere County

In further reply, Counsel for the 3rd respondent submitted that no credible evidence had been adduced to challenge the 1st respondent's academic documents, that Bishop Franco Onega is not a credible witness as matters he testified to were not in his domain as Chairperson of the Board, further that graduation is a mere ceremony which does not have to take place before a person can enroll for another course (see *Ntambazi Margret Nabagalla & Anor Vs Kintu Florence & EC EP No. 4 of 2011*). On the alleged failure by the 3rd respondent to properly verify the 1st respondent's "O" Level results, Counsel argued that the petitioner had failed to prove that Ayer College does not exist as he was relying on a non existing website.

As earlier stated, the petitioner raised two questions for resolution under the issue Viz- whether the 1st respondent in fact obtained the Certificate in Church Ministries and subsequently Diploma in Bible and Theology from PTC as alleged and whether the 1st respondent possessed an "O" Level Certificate from Ayer College as alleged. I will deal with the latter question first. The 1st respondent contended that the names appearing on the "O" Level Certificate **Ochen Oliba Patrick** were also his and that his full names were **Okabe Oliba Ochen Patrick** right from birth and that he used them interchangeably. **Black's Law Dictionary 9th Edition** defines the word **name** (pg 1119) to mean:-

*"A word or phrase **identifying** or designing a person or thing and **distinguishing** that person or thing from others (**emphasis added**).*

Essentially a name should have the effect of distinguishing the person from others. The 1st respondent contended that he used the names interchangeably but at no time did he show where he had in fact used the names together. If as shown above the purposes of a name is to identify and distinguish a person from others, a random use of names from a set of many names does not in my view have the desired effect. The 1st respondent relied on the evidence of Rev. Abilet Meshulam his father and Rev. Ongaro Yakoso who is stated to have been his classmate at Ayer College. Rev. Abilet Meshulam during cross examination clearly indicated that he did not know the names his son, the 1st respondent, was using at any given time from the time he went to school. On the other hand Rev. Ongaro the classmate of the 1st respondent testified under cross examination that while at school the 1st respondent used all the four names interchangeably but could not explain how he got the precise details of the names and index number of the 1st respondent as appears on his certificate.

In my view both witnesses were not helpful and appeared untruthful and I will put little weight on the testimony.

Counsel for the petitioner relied on the decision in **Serunjogi James Mukiiba Vs Lule Umar Mawiya EP Appeal No. 15 of 2016**. In that case a similar issue was decided i.e whether the academic qualifications (“O” and “A” Level Certificates) the basis of the nomination and election of the applicant belonged to the appellant. The appellant appeared as **Serunjogi James** on the “O” Level Certificate and registered as **Serunjogi James Ssemogerere Mukibi John** for “A” Level and the certificate was made in the names **Serunjogi James SMJ**. After analyzing the evidence that was before the trial court and the submissions of Counsel, Byamugisha JA (RIP) had this to say:-

10 *“The trial judge was therefore right to reject the testimony of the appellant and those of his witnesses who claimed they attended the same schools with him. The rejection was justified by the evidence on record. I would like to state that for a person who is an adult to effect change of name he/she has to comply with the provisions of Section 12 of the Births and Deaths Registration Act.*

15
.....
.....
.....

20 *There is no dispute that the appellant did not comply with the above provisions. It goes without saying that he did not change his name legally and his attempt to do so through the affidavit of 13th July 2006 was in my view of no legal consequence.*

25 *Considering the evidence as a whole, the respondent proved on a balance of probabilities that the certificates the appellant relied upon for his nomination and subsequent election as Member of Parliament did not belong to him. He therefore lacked the requisite academic qualifications to be nominated and to be elected as a Member of Parliament”*

As indicated earlier I am not persuaded that the 1st respondent was using the names interchangeably as alleged, that his father Rev. Abilet Meshulam, who according to his testimony studied up to

Junior Secondary School, did not at any one time follow which name his son was using in the schools he attended and that 1st respondent's classmate at Ayer College could vividly recall the name and index number on the 1st respondents "O" Level Certificate and yet forget practically all other questions of fact asked of him relating to the period they were in school together. Accordingly

5 I am inclined to agree with the petitioner that the names **Ochen Oliba Patrick** have not been proved to the satisfaction of court that they belong to the 1st respondent.

I should fault the Returning Officer of the 2nd respondent who on nomination of the 1st respondent chose to rely on an affidavit to explain the nexus between the 1st respondent and the name of the person appearing on the "O" Level Certificate without further interrogation. It is therefore my
10 finding that there is no nexus between the owner of the name **Ochen Oliba Patrick** who sat and was awarded the "O" Level Certificate which the 1st respondent fronted for nomination and **Okabe Patrick** the 1st respondent who was nominated and eventually elected Member of Parliament for Serere County.

As my finding above effectively resolves issue 3, I will not go into whether or not the 1st respondent
15 was indeed awarded a Certificate and Diploma by PTC.

In the result issue 3 is answered in the negative.

I propose to handle issue 4 and 5 together

Issue 4: *Whether the petitioner has a cause of action against the 3rd respondent and whether the 3rd respondent is properly joined as a party to the petition*

20 **Issue 5:** *Whether the 3rd respondent validly verified the academic papers of the 1st respondent.*

Learned Counsel for the 3rd defendant submitted that for there to exist a cause of action, the plaintiff must have a right which right must be violated by the defendant Counsel cited **Section 4(13) PEA** which states:-

25 *"For the avoidance of doubt if a candidate has an advanced level certificate obtained in Uganda or qualifications higher than the prescribed qualifications obtained in Uganda or obtained 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 qualification by the National Council for High Education”.

Basing on the above provision, Counsel argued that the 3rd respondent did not owe a statutory duty or obligation to the petitioner to verify the 1st respondent’s qualification. However Counsel further submitted that the 3rd respondent actually did verify the authenticity of the 1st respondent’s transcript and awarding institution, the provisions of the law notwithstanding. Counsel further submitted that the 3rd respondent was not properly joined as party since under the electoral law the 3rd respondent is not a “Respondent” within the meaning of Rule 3 of the **Parliamentary Elections (Interim Provisions) Rules** which defines “Respondent” to mean:-

“The person of whose election a complaint is made in a Petition and where the Petition complains of the conduct of the Commission or the Returning Officer includes the Commission or the Returning Officer”

Counsel further relied on the decision in **John Patrick Amama Mbabazi Vs Yoweri Kaguta Museveni & Others EP No. 1 of 2016** where the Supreme Court agreed with the Attorney General that the **Presidential Elections ((Election Petition) Rules** rule 3 thereof (which is along the lines of Rule 3 set out above) does not envisage the Attorney General as a respondent. In conclusion Counsel prayed that the 3rd respondent be struck off the petition with costs.

On his part Learned Counsel for petitioner submitted that the petitioner’s rights were violated when NCHE failed in its duty to verify the 1st respondent’s academic qualifications thereby allowing unqualified candidate to participate and be voted as duly elected Member of Parliament.

A close look at **Section 4(13) PEA** (supra) clearly shows that once a candidate professes to hold an “A” Level Certificate obtained in Uganda or a qualification higher than the “A” Level obtained in Uganda or obtained from the former University of East Africa or any of its Constituent Colleges, then that person does not need to verify the qualifications with NCHE. Accordingly the position stated by the Executives Director of NCHE in his letter of 25th November 2013 was the correct legal position, their overzealous meddling in the whole saga notwithstanding.

Based on the above I am of the view that it was not necessary to join the 3rd respondent as a party to the Petition as the petitioner has no cause of action against the 3rd respondent. Accordingly issue 4 and 5 are answered in the negative.

Issue 6: Whether the elections for Member of Parliament for Serere County were carried out in compliance with Electoral Laws

Counsel for the petitioner submitted that the 2nd respondent is enjoined to conduct free, fair, transparent and credible elections in accordance with the law. Counsel stated that under **Article 38(1) and 59(1)** of the Constitution, every citizen of the age of 18 and above has a right to vote and that every citizen has the right to participate in the affairs of the Government. Counsel further submitted that the petitioner and his supporters, were denied the right to vote for a candidate of their choice when the petitioner who was duly nominated by the 2nd respondent did not appear on the ballot paper. The petitioner relied on his evidence which was backed by that of Steven Ochola a fellow contestant in the same elections and for the same sit who stated in his affidavit in support of Petition at para 4 and 5 that:-

- 15 4. *That when I looked at my ballot paper, I noticed that details of only five contestants were inclusive but I couldn't quite locate those of the petitioner who contested on UPC candidate.*

5. *That upon closer scrutiny I confirmed that surely they were missing so I proceeded to vote and waited for my wife behind who followed me from*
20 *behind to confirm if it was the same with hers of which she affirmed it was.*

Further at para 7 he stated:-

7. *That after two days when copies of declaration forms were served to me I noticed that the name of the petitioner was inclusive with a score of 0 votes.*

And further at para 9 he stated

- 25 9. *That upon learning from my friend Chemisto Esther Madalyn who had contested for Woman Member of Kween District that their elections were cancelled and postponed because party symbols were interchanged in the*

ballot paper I wondered why the Returning Officer Serere District didn't do the same for ours given the fact that our conditions were more of the same.

Counsel submitted that clearly the petitioner and his supporter's right to vote for a candidate of their choice were violated by the 2nd respondent.

5 Counsel for the 2nd respondent submitted that the petitioner did not adduce substantial evidence like tendering in the ballot paper that was used, that Counsel for the petitioner should have proceeded under the CPR to make an application for inspection and discovery of the ballot paper used, further that there was no evidence by a voter that they were constrained from exercising their right to vote. Counsel pointed out that the petitioner had not lodged a complaint with the Electoral Commission
10 either before or during polling and neither did his agents. Counsel in conclusion called for the issue to be resolved in the affirmative.

Counsel for the 1st respondent submitted more or less along the same lines as Counsel for the 2nd respondent only that he took the line- wrongly in my view – that the petitioner's name appeared on the ballot paper and it was only his photograph missing. This position is not backed by any
15 evidence and I will not delve into it any further.

In resolving this issue, I should state from the outset, that from the evidence before me I am satisfied that the petitioner's name and other particulars did not appear on the ballot papers for election for Member of Parliament for Serere County notwithstanding the fact that he was dully nominated.

20 Learned Counsel for the 2nd respondent submitted that the petitioner had not lodged a complaint with the 2nd respondent about the matter and to him this exonerated the 2nd respondent. I beg to disagree.

Section 12 (1) (b) of Electoral Commission Act provides:-

25 12(1) The Commission shall subject to and for the purpose of carrying out its functions under Chapter Five of the Constitution and this Act have following powers:-

a)

b) to design, print, distribute and control the use of ballot papers.

My reading of this is that it is the Electoral Commission which has a duty to ensure that the ballot papers so printed contain all the particulars about the candidates duly nominated by itself including the particulars set out under **Section 17 PEA**. The Electoral Commission is also vested with special powers under **Section 50 of ECA** which provides:-

50(1) Where during the course of an election it appears to the Commission that by reason of any mistake, Miscalculation, emergency or unusual or unforeseen circumstances, any of the provisions of this Act or any law relating to the elections other than the Constitution, does not accord with the exigencies of the situation, the Commission may by particular or general instruction extend the time for doing any act, increase the number of election officers on polling stations or otherwise adapt any of those provisions as may be requested to achieve the purpose of this Act or that law to such an extent as the Commission considers necessary to meet the exigencies of the situation.

It is therefore not, as Counsel for the 1st and 2nd respondents submitted, the duty of the candidate to ensure that his name or symbols or photograph appear on ballot paper. Indeed as again testified by Ms. Dora Kayondo a legal officer with the Commission, there were incidents during the last elections where elections were deferred where candidates symbols were interchanged, candidate names misspelt or candidates photographs interchanged. She could remember of Buyende and Kisoro- Bufumbira but stated the number of constituencies to be about 9. I believe the Electoral Commission in differing the said elections did so by virtue of its powers under **Section 50(1) ECA** as set out above.

Based on the above, it is therefore my finding that the petitioner and his supporters were indeed disenfranchised and in doing so the Electoral Commission was in breach of **Section 61 (1) (a)**.

What has to be determined now is whether the non compliance stated above affected the result in a substantial manner. Counsel for the 1st respondent submitted – and I agree entirely with him- that in

dealing with parliamentary election petitions, a finding of non compliance *per se* is not enough to overturn an election. It must be shown that the non compliance was so significant as to substantially affect the results of the election (***Muhindo Rehema Vs Winfred Kiiza & EC EPA No. 29 of 2011***).

5 However it is now acknowledged that although the idea of affecting the result of an election has revolved around the number of votes gained or lost by one candidate, case law shows that other factors can and do affect election results. In ***Morgan Vs Simpason (1975) IQB 151 Lord Denning*** while considering the question of substantial non compliance with the law held that:-

10 *“If the election was so conducted that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not”*

As we have seen above, the petitioner has proved to the satisfaction of court that though duly nominated his name, photograph, and symbol did not feature on the ballot paper. This in my view was a gross violation of the electoral law by the election officials and should in my view lead to the
15 avoidance of the election.

Accordingly it is my finding that issue 6 is answered in the negative.

Issue 6: *Whether there are any remedies available to the parties*

Based on my findings on issue 4 and 5, this Petition is dismissed with costs against the 3rd respondent.

20 Based on my findings on issues 1,2 and 6 this Petition is allowed with costs and I make the following orders:-

- i. *The nomination and subsequent election of the 1st respondent as Member of Parliament for Serere County is hereby nullified and the seat of the 1st respondent is declared vacant.*
- 25 ii. *The 2nd respondent is hereby directed to arrange for fresh elections for Member of Parliament for Serere County.*
- iii. *Costs to the petitioner are to be paid as follows:-*

- a) *Two thirds (2/3) by the 2nd respondent due to its dereliction of duty as discussed under issue 6.*
- b) *One third (1/3) by the 1st respondent*

Before I take leave of the Petition, I wish to note and caution that the 2nd respondent especially
5 through its Returning Officer for the area acted in a cavalier manner as borne out in the evidence
before court which largely led to this Petition. The 2nd respondent is enjoined to do its work
independently and without favour to anyone.

I so order

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B. Kainamua

Judge

30.08.2016