THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

ELECTION PETITION APPEAL NO.11 OF 2011

(Arising from HCT-01-CV-EP-0002 of 2011)

CORAM: HON. LADY JUSTICE A.E.N. MPAGI-BAHIGEINE, DCJ;

HON. LADY JUSTICE C.K. BYAMUGISHA, JA.

HON. MR. JUSTICE REMMY KASULE, JA.

BUTIME TOM :::APPELLANT

VERSUS

MUHUMUZA DAVID
THE ELECTORAL COMMISSION } ::::::::::::::::RESPONDENTS

JUDGEMENT OF REMMY.K. KASULE, JA

The appellant, Butime Tom, appealed to this court against the judgement of Byakama Mugenyi J; of the High Court at Fort Portal dated 07.07.2011 whereby election petition No. HCT-01-CV-EP-0002 of 2011 with the appellant as petitioner against both respondents was dismissed.

The 1st respondent filed a cross-appeal.

Background:

On 18.02.2011 Parliamentary Elections were held in Uganda. In Mwenge North Constituency five candidates, including the appellant and first respondent, contested the election. The 2nd respondent declared and gazetted the 1st respondent the duly elected Member of Parliament with 26,701 votes. The appellant, the runner up, got 23,274 votes.

The appellant through Election Petition No.0002/2011 petitioned the High Court, at Fort Portal, to annul the election of the 1st respondent and have the appellant declared the successful candidate; or in the alternative, order that a fresh election be conducted.

Appellant contended that the 1st respondent did not possess the requisite minimum academic qualifications set by the law to stand as a Member of Parliament.

The trial court held that the appellant had failed to prove the petition and dismissed the same. Hence this appeal and cross appeal.

GROUNDS OF APPEAL:

The appellant's grounds of appeal are that:

1. ***The learned trial judge erred in law and in fact in the interpretation of section 4 (1) (c) of the Parliamentary Elections Act 17 of 2005 which is a replica of Article 80 (1) (c) of the Constitution, 1995.***

2. ***The learned trial judge failed to define and interpret what constitutes completion of formal education in section 4 (1) (c) of the Parliamentary Elections Act of 2005 which is a replica of Article 80 (1) of the Constitution, 1995, thereby resulting in wrong determination of the issues raised in the petition.***

3. ***The learned trial judge erred in holding that it could not have been the intention of the legislature that for one to be said to have attained "A" level education, that person had to prove a string of prior qualifications leading to the "A" level education.***

4. ***The learned trial judge erred in holding that completion of primary education (PLE) is not a requirement legal or otherwise for a person to attain "O" level and "A" level education under the formal education structure in Uganda.***

5. ***The learned trial judge wrongly evaluated the evidence adduced by the petitioner thereby coming to wrong determination of issues raised in the petition.***

6. ***The learned trial judge erred in holding that public policy is unenforceable.***

7. ***The learned trial judge erred in law and in fact in holding that the petition does not disclose a cause of action against the 2nd respondent.***

8. ***The learned trial judge erred in law and fact to rely on the evidence and submissions of the 1st respondent when he had struck out the answer to the petition of the 1st respondent.***

10 9. ***The learned trial judge erred in law and fact in awarding costs to the 1st respondent when he had struck out the respondent's answer to the petition and to the 2nd respondent when the issue in contention is a matter of great public interest.***

The 1st respondent cross appealed on the grounds that:

(i) The learned trial judge erred in law and in fact when he held that the 1st respondent being a non-christian, Jew or a muslim, could not make an oath
20 ***or swear affidavits.***

(ii) The learned trial judge erred in law and fact when he found that the 1st Respondent's answer to the

petition was not supported by valid affidavit (s) and that the same could not be relied upon by court.

(iii) The learned trial judge erred in law and fact when he misinterpreted Rule 8 (3) (a) of SI 141-2 in coming to a conclusion that the 1st Respondent's answer to the Petition was not supported by any valid affidavit as required by law.

The framed Issues:

In conferencing five issues were framed as arising out of the grounds of appeal and the cross-appeal:-

1. ***Whether or not the 1st respondent was qualified to be elected as a Member of Parliament at the time of his election.***
2. ***Whether the petition disclosed a cause of action against the 2nd respondent.***
3. ***Whether the 1st respondent who is neither a Christian, a Muslim nor a Jew can swear a competent affidavit.***
4. ***Whether the trial judge was right to strike out the 1st respondent's answer to the petition with all its affidavits in support.***
5. ***Whether the Trial judge was right to condemn the appellant to pay costs.***

I find that issues 4 and 5 were properly worded at conferencing. However, issues 1, 2 and 3, were, in my view, not properly worded as they do not question the specific findings of the trial judge. A ground of appeal ought to indicate the wrong in the Judgement that is complained of: See: ***Court of Appeal (Uganda) Civil Application No.2 of 1988: Adonia Nakudi V Chrisant. K. Mukasa.*** I have thus rephrased the said issues as follows:

Whether or not the trial judge reached the right conclusion in the judgement as regards:

1. ***The qualification of the 1st respondent to be a Member of Parliament.***
2. ***The Election Petition of the appellant disclosing a cause of action against the 2nd respondent, and***
3. ***The 1st respondent being neither a Christian, a Muslim or a Jew, could swear a competent affidavit.***

Issues 1, 2 and 5 arise from the grounds of appeal; while issues 3 and 4 arise from those of the cross appeal.

Legal Representation:

Senior Counsel Godfrey Lule, assisted by Muhumuza Kaahwa and Peter Allan Musoke represented the appellant. Learned Counsel Ntambirweki Kandeebe appeared for both respondents.

Submissions of appellant's Counsel:

1st issue: It was submitted that the 1st respondent was not qualified to stand as a Member of Parliament as he had not completed a minimum formal education from primary level to secondary ("O" level) and then to Advanced ("A" Level) standard as by law prescribed. Therefore his nomination and being declared an elected Member of Parliament were contrary to **Article 80 (1) (c) of the Constitution** and **section 4 (1) (c)** of the **Parliamentary Elections Act 17 of 2005**.

The 1st respondent, had admitted that he had not fully studied primary level education and sat for Primary Leaving Examinations. This was contrary to the then Government policy contained in the **"EDUCATION FOR NATIONAL INTEGRATION AND DEVELOPMENT REPORT, 1992".**

The 2nd issue: Appellant's counsel submitted on this issue that appellant had a cause of action against the 2nd respondent because **Article 80 (1) (c) of the Constitution and Section 4 (1) (c) of the Parliamentary Elections Act** imposed a duty

upon the 2nd respondent as the Electoral Commission, to first find out whether the 1st respondent possessed the requisite qualifications to stand as a Member of Parliament before accepting his nomination. The second respondent failed to do so and thus he became answerable to the appellant in the petition. Therefore the trial judge erred in holding otherwise.

3rd and 4th issues (from cross-appeal):

Appellant's counsel maintained that the trial judge came to the right conclusion that the 1st respondent's answer was invalid in law as it was supported by an incompetent 1st respondent's affidavit(s) that had been sworn on oath. Yet in court the 1st respondent had affirmed and had objected to the Bible and the Koran. Learned counsel however, also found the trial judge to have erred, when after striking out the 1st respondent's answer to the petition, he relied on some annexures to that reply in reaching the conclusions that he reached in his judgement.

The 5th issue: Appellant's counsel contended that when the 1st respondent had had his answer to the petition struck out, and the issues in contention being of great public importance, the trial judge was not justified to punish the appellant with costs being awarded to both respondents. The proper order was for each party to meet its own costs.

Submissions by cross-appellant's Respondent's counsel on issues 3 and 4 arising from the cross-appeal:

The 3rd and 4th issues of the cross-appeal were argued together:

Cross-appellant (Respondent)'s counsel submitted that the trial judge ought not to have struck out the 1st respondent's answer to the petition because, apart from the 1st respondent's affidavit that the trial judge found to be incompetent (wrongly though, according to counsel), the reply was also accompanied, by two other competent affidavits of Mr. Dan Odongo and Pastor Mutabazi. Any one of these affidavits was enough, on its own, to support the answer to the reply to the petition. Thus the 1st respondent's reply to the petition was competent, even after the striking out his personal affidavit(s).

Counsel for cross-appellant further submitted that the trial judge also erred in holding that the 1st respondent not being a Christian, a Jew or a Muslim could not make an oath or swear an affidavit. **Section 5 (1) (b) of the Oaths Act** does not limit taking an Oath to only those professing the Christian, Jewish or Muslim faiths. Any one professing some other faith is allowed to take an oath in any other manner which is lawful under any other law, custom or otherwise in Uganda.

Submissions of Respondent's counsel by way of reply in respect of issues 1, 2 and 5 arising from the Appeal.

As to the first issue of the appeal, counsel for respondents, urged this court to uphold the trial judge's holding that the 1st respondent had the requisite academic qualifications under the law to stand as a Member of Parliament. This is because at the material time, there was no law requiring one to have completed primary level of education before enrolling into senior one to pursue lower secondary "O" level and then higher secondary "A" level. The alleged Government policy on the issue was not law at the material time.

In respect of the 2nd issue, respondents' counsel supported the decision of the trial judge when he found that the appellant had no cause of action against the 2nd respondent. The 2nd respondent's responsibility at nomination was only to receive and ascertain the genuiness of the "A" level certificate submitted by the 1st respondent. This had been done.

On the 5th issue of award of costs, counsel for respondent contended that the award was justified. The defences of both respondents were inseparable. There were arguments of law and fact covering both respondents even when the 1st respondent's reply to the petition had been struck off.

Respondent's Counsel prayed for the dismissal of the appeal, and allowing of the cross-appeal with costs to both respondents.

Findings of Court:

The crust of the 1st issue is whether or not the learned trial judge made the right decision in his conclusion that the 1st respondent had acquired the necessary academic qualifications to be nominated and elected a Member of Parliament at the time of his election. The learned trial judge held on this issue that:

"Reverting to S.4 (1) (c) of the PEA, I am of the considered opinion that the plain or literal meaning of the provision is that a person qualifies to be a Member of Parliament, on proof of having completed or gone through A-level education or its equivalent, as the minimum level of education. It could not have been the intention of the legislature, that for one to be said to have attained A-level education, that person had to prove a string of prior qualifications leading to the A-level standard.

The learned trial judge considered **Article 80 (1) (c) of the Constitution and Section 4 (1) (c) of the Parliamentary Elections Act 17 of 2005** in detail.

The **Article** and **section** both provide that a person is qualified to be a Member of Parliament if that person has completed a minimum formal education of Advanced level standard or its equivalent.

The judge analysed **section 2 of the Education (Pre-Primary, Primary and Post-Primary) Act 13 of 2008** which defines **"Formal Education"** as a package of learning made available by recognized schools and institutions, following approved curriculum standards and guidelines. The Act also under its section 10 sets up the levels of Education as being pre-primary, primary, post primary and tertiary/university education.

The judge found that the preceding **Education Act, Cap.127 of 1970**, had been silent on the structures of the different levels of education and what it required one studying to move from one level of schooling to another. No subsidiary legislation relating as to how one moves from one level of education to another had been enacted under the Act. The **Uganda National Examinations Board (UNEB) Act, Cap.137**, was also equally silent on the issue.

The trial judge examined the “Policy documents that ultimately resulted in the respective legislations about education. In the **Uganda Education Commission Report, 1963** and the **Government white paper** on it, that resulted in the enactment of the **Education Act, Cap.127,** the trial judge found that there was silence on the passing of primary leaving examination as a mandatory pre-requisite for joining post-primary institutions. As to the **Education Policy Review Commission Report of 1989** also known as **“The Kajubi Report”** from its Chairperson, Professor Senteza Kajubi, the judge found that this report itself regretted that Government had not as of 1989 come up with legislation as regards the structures of the different levels of education.

The trial judge examined the **Regulations and syllabuses** made **under S.4(1) (a) and (l)** of the **Uganda National Examinations Board (UNEB) Act, for 1996-2000 and 2006-2010,** covering the period the 1st respondent pursued schooling for General and Advanced Certificates of Education. He found that in the **1996-2000 Regulations and syllabuses**, there was no requirement by UNEB for a candidate to sit 'O’level examinations to first have undergone and passed Primary Leaving Examinations (PLE) whereas in the 2006-2010 Regulations and syllabuses this is specifically stipulated as a necessary requirement. Regulation 1 thereof provides:

" 1. Entry Requirements

(i) There is no age limit for candidates taking the examination of the Uganda Certificate of Education.

(ii) ***Only candidates who have passed the P.L.E (grades 1, 2, 3 or 4) or equivalent and have attended a full lower secondary, (that is, Ordinary Level) may enter for the examination."***

The trial judge then concluded that in 1997 when the 1st respondent completed his schooling for and obtained a general Certificate of Education i.e. Senior 4 education, "O" level there was no law in place requiring that, one must have undergone Primary Level Schooling and obtained a Primary Leaving Certificate before joining senior one and sitting examinations for general Certificate of Education. Therefore in absence of a specific legal provision, the 1st Respondent had properly pursued his "O" and "A" level schooling and had been legitimately awarded the General Certificate "O"level and Advanced "A" level of Education certificates.

The trial judge also found the term **"formal education"** having been given the force of law only with the enactment of the 2008, **Education (Pre-Primary, Primary and Post-Primary) Act No.13 of 2008.** He refused to apply the said Act retrospectively stating in the judgement:-

"Accordingly, the court will not ascribe retrospective force to new law affecting rights, unless by express words or necessary implication it appears such was the intention of the legislature"

He then concluded that the 1st respondent did not have to prove a string of prior qualifications leading to the **"A"** level certificate and that the nomination and election of the 1st respondent as a Member of Parliament was proper.

I have carefully considered the submissions of respective counsel, the reasoning of the learned trial judge and the way he considered the evidence before him as well as the position of the law. I am in agreement with the conclusions the learned trial judge arrived at.

I agree with the learned trial judge that while policy proposals were in place since 1963, there was no law that required one to undergo a course of study in a structured manner until when the **Education (Pre-Primary, Primary and Post Primary) Act, No.13 of 2008,** was enacted with specific legislation as to what **"formal education"** is.

I do not accept the submission of senior counsel Godfrey Lule, that even though there was no such a law, what was stated in the various reports, memoranda and practices on the matter should be regarded as the Policy of Government having the force of law and that the same should be applied against the 1st respondent. To do that would amount to overlooking the notorious fact that, other people in the category of the 1st respondent, acquired education in Uganda, at the material time, without any objection from the Government of Uganda. This went on until 2008 when the Government enacted **The Education (Pre-Primary and Post Primary) Act 13 of 2008** setting up the structures of formal education and defining what actually **"Formal Education"** is. To now apply the provisions of this Act against the 1st respondent who obtained his "O" level certificate in 1997, would amount to applying the law retrospectively to his prejudice without any express legislation or necessary implication from Parliament that this law be so applied. This would be contrary to the principle of law that:

"the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication that such was the intention of the legislature." See ***PHILIPS V EYRE [1870] I LR 6 Q B 1.*** There is no such intention expressed in Act 13 of 2008.

The affidavit evidence of Mr. Dan N. Odongo, Deputy Secretary, Uganda National Examinations Board (UNEB) in charge of Secondary Education, to the effect:

"4. That in the year 1997 there was no requirement legal or otherwise for a person to have done PLE in order to sit for UCE ("O' Level) examinations." deprives the submission for the appellant of the existence of a government policy amounting to the force of law on the issue of any legitimacy.

That, according to appellant's counsel, the alleged Government policy had become a custom, on the issue in the celebrated treatise of **The elements of Jurisprudence by Sir Thomas Erskine Holland, K.C, 13th edition, page 57,** the learned author states of a custom as being:-

" A habitual course of action once formed gathers strength and sanctity every year. It is a course of action which everyone is accustomed to and followed: it is generally believed to be salutary, and any deviation from it is felt to be abnormal, immoral."

There was no evidence adduced that in Uganda for one to have attained the academic qualifications of "O" and/or "A" levels, when one had not pursued primary leaving education beginning from class one to end was regarded as abnormal and/or immoral

in 1997. When the 1st respondent completed the Uganda Certificate of Education i.e. “O” level.

Apart from the complaint that the 1st respondent did not do primary schooling and did not obtain a Primary Leaving Certificate, the appellant does not assert that the 1st respondent wrongly joined and pursued the Advanced Certificate of Education level and his being awarded the Advanced Certificate of Education “A”level.

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I therefore uphold the finding of the trial judge that the appellant failed to prove to the satisfaction of court that the 1st respondent at the time of his nomination did not have the minimum academic qualifications and that he was not qualified to be nominated and elected as a Member of Parliament.

Accordingly grounds 1, 2, 3, 4, 5 and 6 of the appeal fail.

The second issue is whether the petition disclosed a cause of action against the 2nd respondent, the Electoral Commission.

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A cause of action is said to be disclosed if in the pleadings there are averments showing the existence of the plaintiff’s right, the

violation of that right and of the defendant's (respondent) liability for the violation. See: ***Supreme Court Constitutional Appeal No.2 of 1998: Ismail Serugo Vs Kampala City Council & Another.***

When a court is considering whether a pleading raises a cause of action or not, it must only look at that pleading: See: ***Wycliffe Kiggundu Vs Attorney General: Supreme Court Civil Appeal No.27/1992.***

In the court below, the trial judge determined this issue together with the other issues that were resolved in the course of the full trial. He looked at the evidence adduced before him, and not only at the pleadings and concluded that the petition failed against the 2nd respondent.

I have gone through the petition as a pleading and find that apart from being named as 2nd respondent, it is only in paragraph 2 of the petition that the petitioner asserts of the 2nd respondent that:-

" ……..and the 2nd Respondent has declared and published in the Uganda gazette the 1st respondent as winner of the election."

The only other averment in the petition against the 2nd respondent is a prayer:

" Therefore your petitioner prays that it may be declared that:-

(a) ……

(b) ……

(c) ……..

(d) ……

(e) ……

(f) That the respondents be condemned to pay the costs of this petition."

10 In the petitioner's affidavit in support of the petition, he asserts in paragraph 4 thereof that the 2nd respondent declared and gazetted the 1st respondent the winner of the election, in paragraph 18 that the academic qualifications that 1st respondent tendered to 2nd respondent for nomination and election to Parliament are null and void.

The 2nd respondent denied the petitioner's allegations in the petition and stated that 1st respondent was nominated on the strength of the academic papers he presented.

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The petitioner filed an affidavit in rejoinder dated 19.04.2011 and just asserted that the 2nd respondent's answer to the petition as well as the affidavit of Dr. Kiggundu, Chairman of the 2nd respondent in support thereof were general denial not rebutting the evidence adduced and illegalities raised in the petition.

The above being the state of the pleadings, I have come to the conclusion that the petition in its body as a pleading and the supporting affidavits did not show a cause of action by the petitioner against the 2nd respondent in terms of the legal test set by the Supreme Court in the ***Ismail Serugo*** case (supra). Accordingly the trial judge should have struck out the petition against the second respondent before holding a full trial.

The judge however chose the approach of taking evidence, analyzing the same and coming to the conclusion that because there was no law defining what constituted ***"formal education"*** prior to the **Education (Pre-Primary, Primary and Post-Primary) Act 13 of 2008**, the 2nd respondent could not be faulted for accepting the nomination, as a candidate for election to Parliament on the strength of the "A" level academic qualifications that he presented.

I find that the way the learned trial judge dealt with this issue, though not the correct one, did not cause any injustice to any of

the parties to the petition. The final result that the learned judge arrived at is not much different from the one he would

have arrived at if he had struck out the petition against the 2nd respondent before holding a full trial. Accordingly this ground and issue does not make the appellant succeed on his appeal.

The third issue which arises from the cross appeal is whether or not the 1st respondent who is neither a Christian, a Muslim nor a Jew could swear a competent affidavit.

10 The 1st respondent deponed to two affidavits, the one in answer to the petition dated 01.04.2011 and another in rejoinder dated 20.05.2011. The court record shows that at the hearing on 21.05.2011, in cross-examination, the 1st respondent stated his religion being **"Faith of Unity"** and he refused to hold the Bible or Koran. He affirmed. He further stated that he had sworn two affidavits in the petition, one at Kampala and the second at Fort Portal and that he had not changed his faith since the swearing of those affidavits.

20 The learned trial judge, agreeing with the submissions of counsel for the appellant, that the two affidavits of the 1st respondent were contrary to **section 8** of the **Oaths Act, Cap.19,** held them inadmissible and struck them out as the jurat on both affidavits

did not conform to the statutory requirement. The 1st respondent had taken an oath instead of affirming as he did in court. The judge also held that since the struck out affidavits, were accompanying the 1st respondent's answer to the petition, the said answer was rendered void by reason of absence of an accompanying affidavit in terms of **Rule 8 (3) (a)** of the **Parliamentary Elections (Election Petitions) Rules.**

I note from the court record proceedings of 21.05.2011, that the 1st respondent stated to court his religious beliefs as being that of ***"FAITH OF UNITY".*** The record then states that he affirmed. Court then recorded: ***" Witness refuses to hold Bible or Koran."*** The cross-examination of the witness then started. In answer to appellant's counsel he stated:-

" I swore two affidavits in this petition. The first affidavit (in answer) was sworn at Kampala. The second one is the rejoinder. I have not changed my faith that subscribes to Unity."

The 1st respondent, was never asked by counsel or by court to explain the circumstances under which he swore to the affidavits of 01.04.2011 and 20.05.2011, one in Kampala before the Commissioner for Oaths and the second in Fort portal before a court Magistrate. Neither the Commissioner for Oaths nor the

Magistrate who administered the oaths testified in court. The 1st respondent was not asked to explain whether or not his faith of ***"FAITH OF UNITY"*** allows one to take an oath or affirm, whichever one chooses, and whether this could be done using some other religious book or artifice, other than the Bible or Koran, to which the 1st respondent objected.

The court record also does not show any explanation as under what circumstances the 1st respondent came to affirm before giving his evidence. It is unclear whether he is the one who requested that he affirms, or whether it was court that so guided him on his objecting to use a Bible or Koran. It was also not put to the 1st respondent that his affidavits of 01.04.2011 and 20.05.2011 were being rendered invalid by the fact that he had taken an affirmation instead of an oath

Indeed the issue of the validity of the 1st respondent's said affidavit(s) accompanying his answer to the petition, much as it was a point of law, that could be raised at anytime, had not been pleaded by the appellant and had not even been raised as an issue at conferencing. It was not raised when the 1st respondent was in the witness box. It was raised by appellant's counsel at the stage of submissions when the taking of evidence had long been closed.

The 1st respondent, in my considered view, was not, in the circumstances, afforded an opportunity to explain the personal issues of his faith before a decision to strike out his reply to the petition was taken by the learned trial judge.

To belong to a particular religious faith of one's personal choice is a constitutional right. **Article 29 (1) (d) and (c) of the Constitution** entitle every person to have the right to freedom of belief and freedom to practise any religion and manifest such practice which includes the right to belong to and participate in the practices of one's religious body or organisation in a manner consistent with the Constitution. However, the enjoyment of such a right and freedom must not prejudice the fundamental or other human rights and freedoms of others or the public interest: **Article 43.**

Taking an oath or affirmation is an act of manifestation and practice of one's beliefs and religion and as a right is constitutionally protected.

The Oaths Act, Cap. 19 is a 1962 enactment. It is therefore an **"existing law"** under **Article 274 of the Constitution**, and as

such it must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the **1995 Constitution**. See ***Court of Appeal Civil Appeal No. 32 of 2002: Attorney General Vs Osotraco Ltd .***

Section 5 (1) (a) of the Oaths Act restricts one taking the oath, if a Christian to use a copy of the gospels of the four evangelists or of the New Testament, or if a Jew, a copy of the Old testament, or if a muslim a copy of the Koran.

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Given the non restrictive language, spirit and intent of **Article 29 (1) (b) and (c) of the Constitution, Section 5(1) (a) of the Oaths Act** must be interpreted in such a way that the holy books enumerated therein are not exhaustive, so that, depending on one's faith, another appropriate holy book or artifice can be used for taking an oath or affirmation as one's religion may require.

In this case, according to the court record, the 1st respondent's objection was not against the taking of the oath, but rather to the
20 holding of the Bible or Koran. No effort was made to find out whether his faith allowed swearing by some other **"holy book"** or other religious artifice. The record does not show that the 1st respondent stated he does not take an oath, or that his faith allows either oath or affirmation or both.

Indeed **section 5 (1) (b) of the Oaths Act** ought to have been resorted to by the trial court because it is consistent with the broad spirit of the Constitution as to the right to practise and manifest one's religion. It provides:-

"5.

(1) ……

(a) ……

(b) in any other manner which is lawful according to any law, custom or otherwise, in force in Uganda."

To the extent that **Article 29 (1) (b) and (c) of the Constitution** is broad in its vesting in the individual a right to practice and manifest one's religion or faith then it follows that one may appropriately take an oath or affirmation in such a manner, not restricted to the use of only the religious books stated in **section 5 (1) (a) of the Oaths Act.** The 1st respondent was entitled under the provisions of the **Oaths Act** to have sworn to the affidavits of 01.04.2011 and 20.05.2011 in the way required by his religious faith. The appellant did not adduce evidence to show that in the manner he swore to them, he breached the law. The circumstances under which he affirmed in court on 21.05.2011 were not inquired into by court and were not

explained so as to draw a conclusion of legality or illegality about the whole situation.

In my considered view, the learned trial judge had no legal basis, in the circumstances of this case, to hold that the 1st respondent's affidavits of 01.04.2011 and 20.05.2011 were contrary to **section 8 of the Oaths Act.**

This ground of the cross-appeal is allowed.

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As to the Fourth issue, whether the trial judge was right to strike out the 1st respondent's answer to the petition I have already found that the trial judge was not justified to hold that the 1st respondent's affidavits deponed to by the 1st respondent himself, were invalid in law. It follows therefore that the 1st respondent's answer to the petition ought not to have been struck out.

However the above holding notwithstanding, the uncontroverted evidence of the 1st respondent is to the effect that his answer to
20 the petition was supported by his affidavit of 01.04.2011, that of Mr. Dan. N. Odongo dated 30.03.2011 and that of Pastor Mutabazi Alex dated 04.04.2011. The trial judge never found the affidavits

of Mr. Odong and pastor Mutabazi to be incompetent on their own.

Rule 8 (1) of the Parliamentary Elections (Election Petitions) Rules, requires that a respondent opposing the petition to file an answer to the petition. Under **Rule 8 (3)** the answer has to be accompanied by an affidavit stating the facts upon which the respondent relies.

Mr. Dan. N. Odong' s affidavit, asserts that in 1997 there was no requirement, legal or otherwise, for a person to have done PLE in order to sit for UCE (O – level) examinations, and that the lack of PLE certificate does not nullify a UCE Certificate duly issued by UNEB. He emphatically deponed in paragraph 7 that:-

"7. That I depone hereto in support of the 1st Respondent's answer to the petition."

The other affidavit of Pastor Mutabazi Alex, is to the effect that in 1991 he was a teacher of primary seven at Butumba Primary School, where the 1st respondent was a pupil and that the 1st respondent did not register nor sit for Primary Leaving Examinations that year. That it was not true that the 1st respondent was among pupils whose results were cancelled or

withheld by UNEB. He also asserted that he deponed to the affidavit in support of the 1st respondent's answer to the petition.

I find that each one of the stated two affidavits contained facts upon which the 1st respondent relied upon in support of his answer to the petition.

In ***Court of Appeal of Uganda Election Petition Appeal No.12 of 2002: Amama Mbabazi & Another V. Musinguzi Garuga James,*** Okello JA, as he then was, expounded that:-

" Under rule 8 (3) (a) of the Parliamentary Elections (election Petitions) Rules, 1996 (SI No.27/96) an affidavit accompanying the respondent's answer to petition is an essential requirement to the validity of the answer. An answer which is not accompanied by an affidavit would be void."

There is nothing in the quoted case decision and in **Rule 8 (3) (a)** that the affidavit stating the facts upon which the respondent relies in support of the answer must of necessity be deponed to by that particular respondent in person and no one else.

In my considered view, every case should be considered on its own facts. A respondent answering the petition may support his/her answer with his/her own personal affidavit. The reply to the petition can also be supported by affidavits of other deponents, who may have knowledge of the particular facts that constitute the answer to the petition, which facts may not be within the knowledge of the respondent answering the petition. A rejection or absence of the respondent's affidavit accompanying the answer to the petition need not automatically result in the rejection of the other supporting affidavits which are otherwise proper and can exist on their own. It is all a matter for decision by the court depending on the facts of each particular case.

In this particular appeal, having subjected the evidence to a fresh re-appraisal, I find that the affidavits of Mr. Dan.N. Odong and Pastor Mutabazi Alex, were capable of remaining on their own and support the 1st respondent's reply to the petition, even in the event of the rejection of the 1st respondent's affidavit. The learned trial judge thus erred in rejecting them. Since I have also found that the learned judge was not justified to reject the 1st respondent's affidavit supporting the answer to the petition, this ground of cross-appeal also succeeds.

The fifth issue is whether or not the trial judge was right in awarding costs to the respondents**.** Costs of an action follow the event unless the court for good reason orders otherwise: See **Section 27 (2) Civil Procedure Act.** The trial judge awarded costs to both respondents presumably he found that the petitioner had not proved the petition and the same had been dismissed against both respondents.

It is a fact that both respondents were represented by the same learned counsel, Ntambirweki Kandeebe who handled their respective pleadings, dealt with the witnesses at trial and made submissions for both respondents, the fact of the striking out of the 1st respondent's answer to the petition notwithstanding. All this, in my considered view, entitled both respondents to be awarded costs. The trial judge was therefore right to so award.

On appeal, I have already held, that the trial judge was not justified to strike out the 1st respondent's answer to the petition, and as such, it cannot be submitted for the appellant that the striking out of the 1st respondent's answer to the petition justified depriving the 1st respondent of costs of the petition. I therefore find no merit in this ground of appeal.

In conclusion, for the reasons herein stated the appeal fails and thus stands dismissed. The cross-appeal succeeds and the same

is allowed. It is declared that the 1st Respondent's answer to the petition was valid.

As to costs, the 1st and 2nd respondents having succeeded in defending the appeal and the 1st respondent in successfully prosecuting the cross appeal; both respondents are awarded the costs of the appeal. The 1st respondent is also awarded the costs of the cross appeal. They are also both awarded costs of the trial of the petition in the court below.

This appeal having failed, it is declared that ***MUHUMUZA DAVID*** is the elected Member of Parliament for Mwenge North, having won the Parliamentary Elections held on 18th February, 2011.

It is so ordered and declared.

Dated at Kampala this ……**21st**…day of …**May**…..**2012.**

Hon. Remmy Kasule

JUSTICE OF APPEAL

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

I have read the judgment of my brother R.Kasule, JA.

I agree the appeal must fail. Since C.K.Byamugisha, JA also agrees, the appeal fails with orders as stated in the lead judgment.

A.E.N.MPAGI-BAHIGEINE
DEPUTY CHIEF JUSTICE

JUDGMENT OF BYAMUGISHA, JA

I had the benefit of reading of reading in draft form the judgment of my learned colleague Kasule, JA.
I agree with the conclusions and the reasons he has given in dismissing the appeal.
I would dismiss the appeal with costs to the respondents.

Dated at Kampala this …**21st** …day of …**May**…**2012**

C.K.BYAMUGISHA
JUSTICE OF APPEAL