

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-CA-0035-2012
(Arising from Election Petition No. 07/2011)**

LUNYOLO JOSEPHINE.....APPELLANT

VERSUS

1. LUNYOLO JULIET CATHERINE

2. THE ELECTORAL COMMISSION.....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal from the judgment of the learned Chief Magistrate Mbale passed on the 29th day of February 2012.

The appellant **Lunyolo Josephine** is represented by M/s Madaba & Co. Advocates. The 1st respondent **Lunyolo Juliet Catherine** is represented by M/s Mutembuli & Co. Advocates.

The second respondent, the Electoral Commission is represented by its Legal Chambers.

The background to this appeal is as outlined by learned counsel for the appellant. The appellant and first respondent participated in the Busano Sub-county Woman Councilor elections in which the first respondent emerged victorious and was declared so by the 2nd respondent as having polled 1590 votes and the

petitioner/appellant emerged runner up with 1505 votes. Being dissatisfied by nomination process and subsequent election of the 1st respondent as the Busano sub-county woman councilor in the elections held on 23rd February 2011, the appellant filed a petition against both respondents challenging the validity of the nomination and subsequent election of the first respondent arguing that the 1st respondent was never lawfully discharged nor did she resign from the Uganda Police Force as mandated by the legal provisions of the Constitution, Local Governments Act, Electoral Commission Act and the Police Act.

The learned Chief Magistrate tried the petition and upon perusing the submissions of the respective parties to the petition, she dismissed the appellant's petition with costs to the respondents. This is the decision appealed against.

In her memorandum of appeal, the appellant raises four grounds of appeal to wit that;

- (1) The learned trial magistrate erred in law and in fact when she failed to properly scrutinize the evidence and legal arguments on record as a whole thus arriving at a wrong decision.
- (2) The learned trial Chief Magistrate erred in law when she held that the 1st respondent was not a public officer within the meaning of S.116 (5) of the Local Government's Act.
- (3) The learned trial Chief Magistrate erred in law and in fact in finding that the nomination and subsequent participation of the 1st respondent in the Busano Woman Councilor elections was lawful.
- (4) The decision of the learned trial Magistrate has occasioned a miscarriage of justice.

As a first appellate court, I am enjoined to study the lower court's record, re-evaluate the evidence and reach my conclusion. It is this duty that each of learned counsel for the parties have to persuade me to do in line with their respective positions.

I have done exactly that.

I have also studied the respective written submissions by respective counsel and related the appeal to the law applicable. I will go ahead and decide this appeal as argued by the appellant's counsel and responded to by the respondent's counsel.

Grounds 1 and 2:

According to **Mr. Mutembuli** learned counsel for the 1st respondent who argued the appeal generally, the learned Chief Magistrate properly evaluated the evidence before her and reached the correct conclusions.

Learned counsel for the 2nd respondent equally argued the appeal generally and supported the findings of the learned Chief Magistrate. On the other hand **Mr. Madaba** learned counsel for the appellant was of the view that the learned Chief Magistrate failed in her duty and did not properly evaluate the evidence before her.

On these two grounds, I agree with the submissions by **Mr. Madaba** for the appellant.

During the trial the petitioner led evidence to the effect that the first respondent was not qualified to contest in the Busano Woman councilor elections because she never resigned her office as a police constable as required by the law. The requirement of resignation prior to nominations for District Local Council

elections is mandatory as enacted under S.116 (5) of the Local Governments Act. It is legislated that:

“Under the multiparty political system, a public officer, a person employed in any government department or agency of the government, an employee of a local council or an employee of a body in which government has a controlling interest, who wishes to stand for election to a local government office shall resign his or her office at least thirty days before nomination day in accordance with the procedure of service or employment to which he or she belongs.”

Was this provision binding on the 1st respondent and was the 2nd respondent obliged to enforce the same?

According to the 1st respondent’s testimony, she was successfully recruited in the police force. She reported for training at Masindi Training School and upon completion an appointment letter dated 10th August 2007 Exhibit PW.1 was issued. This letter entitled her to a monthly salary of one hundred and sixty four thousand two hundred shillings only. The 1st respondent dully accepted the said appointment vide her letter of acceptance dated 14th October 2007 addressed to the Inspector General of Police. Since the date of issuance of the appointment letter the 1st respondent received a salary on a monthly basis paid through Post Bank account No. 0001030017007030 in the names of **Lunyolo Juliet**.

The human resource officer RW.2 attached to Police headquarters Kampala confirmed the 1st respondent’s appointment as a police officer and was registered

as Woman Police Constable No. 39290. The above evidence was further corroborated by that of **PW.2 D/IP Mawerere George** who testified that investigations into the official status of the 1st respondent revealed that **No.39290 Woman Police Constable Lunyolo Juliet Catherine** was in active service at the time of her nomination and was still earning a salary as a police officer. She was attached to Jinja Road Police Station.

This evidence is not refuted by either counsel for the respondents. **Mr. Mutembuli** however submitted that the 1st respondent deserted the police.

By virtue of annexure D to the affidavit of PW.2, the status of the 1st respondent as an active serving police officer was communicated to the 2nd respondent and the Inspector General of police.

While evaluating the above evidence, the learned Chief Magistrate in her judgment at P.4 paragraph 3 states that:

“evidence from the Petitioner and the respondent indicates that the first respondent had long deserted the force.”

Having stated so, it was clear that indeed the first respondent was a public officer since desertion does not change that status. It is therefore surprising that the learned Chief Magistrate decided that the 1st respondent was not a public officer within the meaning of S.116 (5) of the Local Governments Act and was therefore lawfully nominated to participate in the elections.

I agree with **Mr. Madaba** on this point, that the learned Chief Magistrate misdirected herself both on the facts and the law and arrived at an erroneous decision which has occasioned a miscarriage of justice.

The 1st respondent was employed by the Uganda police force as a police constable. By the time she participated in the elections, she had not been lawfully discharged from the police force and was therefore a public officer within the meaning of S.116 (5). As such she was required to resign 30 days before nomination which she did not do.

As I have said before, learned counsel for the 1st respondent argued that since the 1st respondent had deserted the force she did not have to resign. Unfortunately the learned Chief Magistrate agreed with this misdirection while referring to S.17 of the Police Act and held that that provision left room for one to exit unofficially without seeking leave from the appointing authority. This is gravely wrong and if it was allowed to be, it would lead to anarchy especially in the armed forces.

Desertion can never amount to resignation.

The term ‘Desertion’ is defined in Black’s Law Dictionary 4th Edition as;

“the willful and unjustified abandonment of a person’s duties and obligations.”

The Police Act goes ahead to define deserter in S.59 thereof as one who has been absent without authority for a continuous period of twenty one days. The said act criminalises desertion and if proved is punishable for a period of one year’s imprisonment for both the deserter and his or her accomplices.

The scenario is different from resignation.

The same Black’s Law Dictionary defines resignation as;

“a formal notification of relinquishing of one’s office or position.”

It is therefore absurd for learned counsel for the 2nd respondent to argue that resignation and desertion are one and the same since they both involve relinquishing one's office or position.

The supreme law of the land i.e. the Constitution stipulates how public servants may resign under Article 252 (1) thus:

“Except as otherwise provided in this constitution, any person who is appointed or elected to any office established by this Constitution may resign from that office by writing, signed by that person addressed to the person or authority by whom he or she was appointed or elected.”

This is not the end of the process because under Article 252 (2);

“The resignation.....shall take effect in accordance with the terms on which that person was appointed or, if there are no such terms, when the writing signifying the resignation is received by the person or authority to whom it is addressed or by any person authorized by that person or authority to receive it.”

For purposes of this article office includes *inter alia*;

“(2) a public officer.”

In the instant case, since the 1st and 2nd respondents acknowledge that the 1st respondent did not follow the due process for formal resignation addressed to the appointing authority she illegally contested in the elections. Hers was not an

ordinary contract of service but one governed by strict regulations designed to ensure proper administration and discipline within the police force in the interest of national security. That is why the legislature deliberately enacted sections 15 and 17 of the Police Act. S.17 provides that;

“Subject to S.15, no police officer may terminate his or her service with the force except with written permission of the appointing authority.”

Short of this such termination would not amount to a discharge from employment with the police force.

There has been an argument about the use of the word MAY in S.17 of the Police Act. The learned Chief Magistrate agreed with the 1st respondent that that word was intended to leave room for one to exit unofficially without seeking permission from the appointment authority.

This was not a correct interpretation of that section. The word ‘may’ in that provision does not make the requirement of written permission before one can terminate his/her service with the police force optional. It only allows the officer concerned a leeway to decide whether to continue in service or not. Even then the options are limited such as attaining fifty five years of age or after twenty five years of continuous service before attaining fifty five years or if one is required to retire in public interest and/or misconduct. When the resignation is accepted, one has to be issued with a certificate of termination to confirm the termination.

Since there is no evidence on record to show that the above rigorous process was complied with then the 1st respondent is still an employee of the Uganda Police

Force. Desertion does not amount to resignation or lawful discharge from employment as envisaged by the law. Her participation in the elections after nomination was illegal which renders her election null and void. Although it was argued that the 1st respondent was not receiving salary, which was not the case, and therefore was not in actual service, I agree with **Mr. Madaba** that non-payment of salary though a fundamental requirement to the furtherance of one's employment does not necessarily determine one's employment status at law. Neither does non-payment of salary relinquish one of his/her legal obligations incidental to their contract of service. This situation is simply an administrative error or omission which can be remedied if a complaint is raised. It is not a redress for one to desert employment.

Incidentally, desertion can result into non-payment of salary. And pursuant to clause 29 (1) of the Police Disciplinary Code of Conduct;

“No pay shall accrue to any police officer in respect of any day during which he/she is absent from duty without leave.”

There is no way this court can condone desertion as one of the ways of leaving employment as suggested by RW.2. It is not only unacceptable but also criminal. Deciding otherwise would set a bad precedent which would lead to condoning indiscipline especially in the armed forces. That is why it is the duty of this court to use a judicial microscope to see any illegalities that may not have been seen by the ordinary eyes of litigants and their counsel and put matters straight.

Had the learned Chief Magistrate properly evaluated and scrutinized the evidence before her and related it to the law governing resignation of public officers, she

would have held that the 1st respondent was in fact a public officer within the meaning of S.116 (5) of the Local Governments Act who was required to follow the strict provisions of the Constitution, The Local Governments Act and the Police Act.

I will uphold Grounds 1 and 2 of this appeal.

Grounds 3 and 4:

As I have already held above, the 1st respondent being a public servant at the time of her nomination, contested in the Busano Sub-county woman councilor election in which she emerged victorious. Being a public servant at the time of her nomination, the 1st respondent was ineligible for nomination and thereby not qualified to contest in the elections for Busano sub-county women councilor elections. The 2nd respondent ought to have vetted and disqualified her right from the nomination exercise.

The 2nd respondent was aware of this position. This is borne out by the record which indicates that on 8th December 2010 the 2nd respondent was duly notified by one **Makyeme Leo** and **Masaba Aggrey** through **Umar Kiyimba** the District Returning Officer Mbale. The 2nd respondent was notified about the ineligibility of the 1st respondent to be nominated as a candidate to participate in the elections in question since she had not resigned her job as a police constable. This is evidenced in both the affidavits of **Leo Makyeme** dated 17th August 2011 and **D/IP Mawerere George PW.2** dated 17th August 2011.

It is not refuted by the 2nd respondent that the Mbale District Returning officer for the 2nd respondent forwarded the complaint to the officer in charge of political and

Elections Desk to verify the allegations and indeed it was confirmed that the first respondent was a police constable at the time of nomination. Despite the glaring evidence before the 2nd respondent it proceeded to nominate the 1st respondent as a candidate to participate in the elections for woman councilor Busano sub-county. The evidence on record is contrary to the submission by learned counsel for the 2nd respondent that the 1st respondent was nominated having fulfilled the requirements of the law relating to effective resignation from public service.

In this case therefore, learned counsel for the appellant rightly referred me to the case of *Wasike Stephen v. Aggrey Awori Siryoyi S.C. Election Appeal 5 of 2007* where the Supreme Court held *inter alia* that;

“Article 80 (4) of the Constitutional (Amendment) Act 2005 stipulates that under the multiparty political system, a public officer or a person employed in any government department or an employee of a local government or body in which government has a controlling interest, who wishes to stand in any general election as a member of parliament shall resign from his office at least 90 days before nomination day.”

Therefore the requirement for resignation before seeking any elective political office cuts across all levels of positions.

The Electoral Commission failed to execute its constitutional duty to conduct a free and fair election in this case. It failed to comply with S.12 (e) of the Electoral Commission Act by not taking measures for ensuring that the entire process

leading to the election of Busano sub-county Woman councilor was conducted under conditions of freedom and fairness. An election ought to be conducted in accordance with the law and procedure laid down by parliament in a transparent manner at each stage of election be it national or local elections.

For the reasons I have enumerated in this judgment I will find that the 1st respondent contravened Article 252 of the Constitution S.116 (5) of the Local Government Act and S.17 of the Police Act which provisions are mandatory for one to qualify to contest in an election. This was enabled by the 2nd respondent which failed to exercise its constitutional duty to disqualify the 1st respondent from nomination and subsequent participation in the Busano sub-county woman councilor elections in spite of the fact that it was notified of the 1st respondent's ineligibility to participate in the election. These dual actions were unlawful and are hereby declared null and void.

I will allow grounds 3 and 4 as well.

Consequently I will allow this appeal, set aside the judgment of the lower court and declare the appellant as the legally elected Woman Councilor for Busano sub-county who should be gazetted accordingly.

Given that this scenario was avoidable but for the complacency of the 2nd respondent, I will order that the appellant shall get the costs of this appeal and the court below payable by the 2nd respondent.

Stephen Musota

JUDGE

16.08.2012