

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
ELECTION PETITION APPEAL NO.34 OF 2016
(ARISING FROM HIGH COURT ELECTION PETITION NO.20 OF
5 **2016)**

SEMBATYA EDWARD NDAWULAAPPELLANT

VERSUS

ALFRED MUWANGA.....RESPONDENT

10 **CORAM:**

HON. MR. JUSTICE ALFONSE OWINY DOLLO, DCJ

HON. MR. JUSTICE S.B.K. KAVUMA, JA ✓

HON. MR. JUSTICE RICHARD BUTEERA, JA

15 **JUDGMENT OF THE COURT**

Introduction

This is an Election Petition Appeal arising from the Judgment of the High Court of Uganda at Kampala (*Hon. Kaweesa Henry Isabirye, J*), given in Election Petition No.20 of 2016 on 28th
20 June, 2016.

Background

The background to the Appeal is that the appellant, the respondent and four others were contestants in the elections for

the seat of the Member of the Parliament, (M.P.) for Katikamu County South Constituency. The appellant was declared winner of the elections which was held on the 18th February, 2016 and subsequently gazetted as such by the Electoral Commission.

- 5 The respondent successfully petitioned the High Court against the results of the said elections. The appellant was dissatisfied with the decision of the trial court, hence this Appeal.

Grounds of the Appeal

- 10 The grounds of the Appeal were framed as follows in the Memorandum of Appeal:

15 ***1. The learned trial Judge erred in law and in fact when he held that the Appellant's Finance Officer's diploma fell short of the 2 years needed for equating it to the UACE under the University (Equating Degrees, Diplomas and Certificates) Regulations, 2007.***

20 ***2. The learned trial Judge erred in law and in fact when he held that the Appellant was obliged mandatorily to submit his academic qualifications to be inquired into by the National Council for Higher Education in consultation with UNEB so that he obtains a Certificate of Equivalence to UACE from National Council, for Higher Education.***

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3. *The learned trial Judge erred in law and in fact when he held that the Appellant's evidence regarding the duration for the Finance Officer's Diploma is contradictory.*

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4. *The learned trial Judge erred in law and in fact when he held that the Appellant changed his name and was duty bound to register his change of name and have it gazetted as per the provisions of Section 11 of the Birth and Death Registration Act.*

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5. *The learned trial Judge erred in law and in fact when he held that the academic documents presented by the appellant during his nomination belong to another person without proof that there exists another person claiming the same documents.*

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6. *The learned trial Judge erred in law and in fact when he ignored the Appellant's explanation that Ssembatya Edward Ndawula, Edward N. Sembatya and Ssembatya Eddy all refer to the same person who is the appellant.*

20

7. *The learned trial Judge erred in law and in fact when he held that the appellant's Statutory Declaration in verification of his names was unreliable, an afterthought and legally flawed.*

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8. *The learned trial Judge erred in law and in fact when he failed to evaluate the evidence on the court record thereby coming to the conclusion that at the time of nomination and the subsequent election, the appellant did not have the minimum academic qualification for nomination and election as a Member of Parliament as required by law.* (SIC)

Representation

At the hearing of the Appeal, Mr. Katumba Chrisestom and Mr. Mpenje Nathan, (counsel for the appellant), appeared for the appellant, while Mr. Bakole Simon and Mr. Mpata Khalid, (counsel for the respondent), appeared for the respondent.

The case of the appellant

Grounds 1, 2 and 3 were argued together first, 5 and 6 second, 4 and 7 next and lastly ground 8 separately.

Submissions for the Appellant

Grounds 1, 2 and 3

The three grounds relate to the applicant's duration of study for his Finance Officers Diploma (FOD), the requirement to submit the same to the National Council for Higher Education (NCHE) for equating and contradictions in the appellant's evidence.

Counsel for the appellant submitted that his client was awarded the, FOD, on the 28th July 2006 by the Uganda Management

Institute (UMI). That at the time of the award, the law applicable was the University and Other Tertiary Institutions (Equation of Degrees and Diplomas and Certificates) Regulations, S.I 84 of 2005, which, under Schedule II Part II, R.4, provided for a six to
5 nine months duration of study.

Counsel referred Court to a letter authored by Dr. Mary Basaasa Muhendo, the Institute Registrar, UMI, which confirmed the duration of study as such and submitted that the appellant rightly acquired the FOD having completed the six months
10 duration of study.

With regard to the duty of the appellant to submit his FOD to the NCHE for equating, counsel referred Court to a circular titled "*Call to Politicians*" issued by NCHE to the effect that politicians holding diplomas were not obliged to apply for the same. He
15 further submitted that the said circular is in tandem with Section 4(13) of the Parliamentary Elections Act (PEA). Counsel considered the alleged contradictions in the appellant's evidence as inconsequential to these grounds.

Grounds 5 and 6

20 Counsel referred Court to page 152 lines 27-29 of the Record of Appeal where the trial Judge found that the academic documents presented by the appellant at his nomination belonged to a person other than him. He argued that the findings of the trial Judge were not backed by any tangible evidence.

25 He further referred to Para. 6, 7, and 8 of the appellant's Affidavit in Reply at pg. 46-48, the appellant's Supplementary Affidavit at

pg. 59-60; and his cross examination at page 127-128 of the Record of Appeal where he briefly gave his educational background. He submitted that although the academic documents presented by the appellant bore different names, to
5 wit; Sembatya Edward Ndawula, Edward Sembatya and Eddy Sembatya, they all referred to one and the same person, the appellant.

He cited Sections 101, 102 and 103 of the Evidence Act, Cap 06 and argued that the respondent ought to have produced in Court
10 another person claiming to be the true owner of the documents presented by the appellant.

Grounds 4 & 7

Counsel argued that the appellant adopted the name 'Ndawula' from his father but it was not indicated on his transcript. He
15 relied on **Kizito Deo Lukyamuzi Vs. Kasamba Mathias & Another, Election Petition No. 003 of 20011.**

He further argued that the name 'Eddy' was erroneously indicated on his academic transcript from UMI.

He submitted that this does not, *per se*, mean that he changed
20 his name because it was not registered under Sections 11(1), (2), (3) and 12(1),(2), (3) of the Registration of Births and Deaths Act or the Registration of Persons Act, and that as such, he did not have to swear a Deed Poll for a change of a name.

It was also submitted that the Statutory Declaration sworn by the
25 appellant was sufficient to explain his names.

Counsel faulted the learned trial judge for subjecting the appellant's names to the provisions of the Births and Deaths Act, which had been repealed by the Registration of Persons Act of 2015 by the time of the filing and the hearing of the Petition. He
5 cited **Namuju Doniazio Cissy and EC vs. Martin Kizito Serwanga and Mutembuli Yusuf vs. Magomu Moses; Election Petition No.13 of 2016.**

Ground 8

Counsel based on his submissions in grounds 1-7 above to argue
10 and conclude that the learned trial Judge erred in failing to properly evaluate the evidence on Record, thus arriving at the wrong conclusion.

He prayed that the Appeal be allowed with costs.

15 The submissions for the respondent

Grounds 1, 2 and 3

Counsel for the respondent submitted that the FOD presented by the appellant at his nomination fell short of the required minimum duration of 2 years as set out under Part 2, Schedule 3
20 of the Universities and Other Tertiary Institutions (Equating of Degrees, Diplomas and Certificates) Regulations of 2007.

Regarding the legal regime under which the equating of the appellant's diploma should be considered, counsel submitted that, contrary to the appellant's arguments, the law applicable is
25 the 2007 Regulations, not those of 2005.

He stated that this Court pronounced itself on the question of equating of documents in **Election Petition Appeal No.33 of 2011 Electoral Commission and others Vs Chelimo Nelson Kaprokuto**, where it was held that *“the applicable Regulations for any person who is having their documents equated after 2007 are the 2007 regulations.”*

Counsel downplayed the letter authored by the Institute Registrar UMI, arguing that R.5 (1) of the Universities and Other Tertiary Institutions (Equation of Degrees, Diplomas and Certificates) Regulations, 2007 requires a Certificate of Equivalence for a diploma presented at the nomination of a candidate.

Counsel argued that the appellant was well aware of the requirement to obtain a Certificate of Equivalence from NCHE but instead he applied to Uganda National Examination Board, which is not mandated to issue the same.

He relied on **E.P.A. No. 06 of 2011 Paul Mwiru Vs Nathan Igeme Nabeta** to argue that in the absence of a Certificate of Equivalence from the NCHE, the appellant was not qualified to be nominated or elected a Member of Parliament.

With regard to the duration of study, it was argued that the Universities and Other Tertiary Institutions (Equation of Degrees, Diplomas and Certificates) Regulations, 2007 require that a diploma which is equivalent to A' level certificate should run for a minimum duration of study of two years. He contended the appellant's FOD fell short of that period.

In reference to the letter issued by UNEB, counsel argued that the authority to equate qualifications is vested with NCHE and not UNEB.

Grounds 5 and 6

5 With regard to the different names that appear on the appellant's academic documents, it was argued by counsel that the appellant's explanation of the same was "simply unbelievable". Counsel prayed that this Court maintains the position of the lower Court that these names are totally different and they do not
10 belong to the Ssembatya Edward Ndawula who is the appellant.

Grounds 4 and 7

It was argued by counsel for the respondent that the appellant ought to have registered his Statutory Declaration as required by the law before submitting it to the Electoral Commission.

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Ground 8

Counsel cited **Article 80 (1)(c)** of the Constitution and argued that the appellant did not have the minimum academic qualifications required for nomination as contestant for a seat of
20 a Member of Parliament. He referred Court to the Affidavit at pg. 64 to support the argument that it is the mandate of the NCHE and not the UNEB to equate academic documents. He submitted that the trial court rightly found as it did and prayed that the Appeal be dismissed.

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Court's consideration

It is the duty of this, as a first appellate Court, to re-appraise the evidence on record and come to its own conclusion bearing in mind, however, that it did not see the witnesses testify. See **Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I. 13-10** and **Kifamunte Henry v Uganda SCCA No.10 of 1997** (Unreported). The standard of proof in election matters is on a balance of probabilities and the burden is on the petitioner to prove his/her case to the satisfaction of court.

Bearing the above in mind, we now proceed to resolve the grounds of appeal raised in the Appeal in the order followed by counsel for the appellant when making their submissions.

Grounds 1, 2 and 3

The gist of grounds 1, 2 and 3, is the duration of study of the appellant's FOD, the requirement for him to submit his academic documents to the NCHE for equating and the question of which University and Other Tertiary Institutions Regulations were applicable.

With regard to the duration of study, it was submitted for the appellant that he attended the course for his FOD, in 2004, and also benefited from his working experience as a Finance Officer. According to the evidence on record, that is, the letter of 27/ 04/ 2016, from UMI verifying the Finance Officer's Diploma, the Institute Registrar stated:

"1. The Finance Officers Diploma (FOD) was offered by Uganda Management Institute in the 1990s

...the low cadre staffs were already serving in Public Institutions but lacked formal training...in essence, the Finance Officers Diploma course constituted 6 months of full time teaching (8:00am to 5 pm- Monday to Friday) while experience accounted for three (3) months totalling to the duration of nine (9) months.

2. The Finance Officers Diploma was approved by UMI Senate which is the highest Academic Organ of the Institute and at the time, NCHE had not yet come into existence.

3. Once the 2001 Universities and Other Tertiary Institutions Act (UOTIA) was amended in 2006 that classified UMI as "Other Degree Awarding Institutions", UMI stopped conducting FOD and complied with the NCHE guidelines." (Emphasis added)

From the above uncontroverted evidence, and without falling into the temptation of equating the appellant's FOD, we note that the approved duration of study at the time the applicant studied for his FOD was 9 months made up of 6 months' full time teaching on one part, and experience accounting for three months.

It is abundantly clear from the record that the learned Trial Judge deeply probed the details of the appellant's FOD to such an extent that he actually sought not only to show that the qualification did not belong to the appellant but also that it was

not a qualification that was up to the minimum academic requirement of a formal standard of education of advanced level or its equivalent, a duty, as we shall show later, that is preserved by law for another body. We, therefore, find that the learned trial
5 judge was in error when he finally held that the duration required by law relevant to the appellant's FOD was two years and that, therefore, the appellant lacked the minimum academic qualifications for nomination as a candidate for parliamentary elections. In the absence of a law providing that the FOD was to
10 be conducted in 2 years and not 9 months as the UMI evidence reveals, we find that the learned trial Judge erred in finding as he did.

Next we consider the question of whether the appellant was mandatorily required to submit his FOD from UMI to NCHE for
15 equating. It is on record that when the appellant approached NCHE for purposes of having his FOD equated he was given a circular entitled, "NATIONAL COUNCIL FOR HIGHER EDUCATION CALL TO POLITICIANS". The circular provided guidelines for persons that wanted to apply for a Certificate of
20 Formal Completion of 'A' Level or its equivalent from NCHE. The same circular had a note that is of particular interest to this Court. It reads:

"N.B: Holders of diplomas, degrees, postgraduate certificates, postgraduate diplomas, masters degrees or doctoral degrees from Uganda or the former university of East Africa or any of its



constituent colleges shall not apply."(Underlining added).

The appellant was certainly a politician holding his FOD awarded to him by UMI a recognised Institute of Higher Education. That
5 circular by NCHE was never denied or withdrawn by NCHE and it was based on the provisos of S.4 (13) of the PEA.

Still anxious, however, about sorting out the position and status of his FOD, the appellant approached UNEB which equated it to a formal education of advanced level standard or its equivalent.
10 Whereas it is trite that the NCHE has the mandate to equate academic qualifications, that mandate is limited to the qualifications obtained from outside Uganda or where a person alleges that his other qualification is higher than the prescribed qualification.

15 S. 4 (13) of the PEA is illustrative:

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

(Emphasis added)

S. 5 (k) of the Universities and other Tertiary Institutions Act, under which NCHE is established, provides for the functions of the Council as, *inter alia*:

5 **“(k) to determine the equivalence of all types of academic and professional qualifications of degrees, diplomas and certificates obtained elsewhere with those awarded by Uganda institutions of Higher Education for recognition in Uganda”**

10 It is our strong view that the appellant’s FOD fell under the category of those qualifications that did not need to be equated by the NCHE. More so, a look at the affidavit of Kagaba Peter, the Executive Secretary of UNEB, speaks to that exact effect. He averred, *among other things*, that:

15 **“3. That I wrote a letter dated 21st December, 2015 referenced CF/UNEB/50 to the Chairman Electoral Commission equating Ssembatya Edward Ndawula’s Finance Officers Diploma to Uganda Advanced Certificate of Education (UACE) upon a request by**
20 **the 1st respondent.**

4. That this letter was written with the full knowledge and understanding that ~~equating~~ any award to UACE is a Sole Prerogative of UNEB and not any other institution.

25 **5. That the Finance Officers Diploma of Ssembatya Edward Ndawula was awarded before National**

Council for Higher Education came into existence and therefore the only institution that could equate the same to UACE is UNEB.

5
6. That UNEB has full mandate to equate all those qualifications that were awarded before the coming into force for the NCHE and therefore laws governing the establishment of NCHE cannot apply retrospectively.”

10 The above evidence to the effect that it is the duty of UNEB to equate any award to UACE is the sole prerogative of UNEB and not any other Institution, was not controverted. As such, it stands and this Court finds no reason to disregard the same.

15 A look at S 5.4 of the UNEB act read together with Section 23 of the Interpretation Act, Cap 3, Laws of Uganda, lends support to his assertion by the UNEB Secretary.

20 Having found as we have that UNEB rightly equated the appellant's FOD, we find the contention over whether it was the 2005 or 2007 Regulations that were applicable in the process of equating the appellant's FOD naturally resolved. NCHE had no business in equating the qualification and it is no wonder that it issued a circular guiding the politicians accordingly.

25 We consider it appropriate to, now, consider the question of the status of the appellant's FOD he relied on for his nomination to stand and contest the Parliamentary Elections for Katikamu South Constituency. The said diploma was awarded to the appellant by UMI a recognised institution under the University

and Other Tertiary Institutions Act and the Regulations made thereunder as an institution of Higher Education. The validity or authenticity of the appellant's FOD is not disputed. The controversy about it revolved around the equating process that it was subjected to and the same has been clarified by this Court's finding that it is only UNEB with the mandate to equate any award to UACE, and not the NCHE.

In these circumstances, we are unable, on the evidence before us, to find that the appellant's FOD which he presented to the EC for his nomination to contest in the elections for the seat of MP for Katikamu South Constituency was invalid and that, therefore, he did not possess the necessary minimum qualifications for nomination as such.

In the particular and peculiar circumstances of the instant Appeal, to hold otherwise, would be either delving into equating the appellants FOD or condemning it without subjecting it to the equating process. We are not, about to usurp the powers of equating qualifications which we certainly do not have. These are by law the preserve of another body. We are also not about to cancel the appellant's FOD without a hearing to those who awarded it to him. As such, without evidence that the appellant's award was cancelled by the awarding institution, the same stands and can be utilised for any lawful purpose, including pledging oneself for election to Parliament, as was the case with the appellant.

We are fortified in the view, we strongly hold over this matter, by the binding decision of the Supreme Court in **National Council for Higher Education and Anifa Kawooya Bangirana, Constitutional Appeal No. 4 of 2011** where court held:

5 **“Clearly it would be improper for courts of law to usurp the powers that are explicitly set out for an institution in an Act of Parliament. Courts can only intervene if the appellant in exercise of its powers fails to observe the**
10 **correct procedures and in case of the constitutional court, if there is failure to observe the provisions of the constitution. The aggrieved party would then proceed to the appropriate court for redress. That would, in**
15 **itself, constitute usurpation of the functions of the mandated institution. The NCHE should be left to perform its functions in consultation with the relevant bodies.”**

In the particular circumstances of the instant case, therefore, it was, in our view, erroneous for the trial judge to assume the role and powers of equating the appellant’s FOD and eventually declaring that his FOD which he submitted for his nomination, was not a qualification of the standard of one who had completed formal education of Advance level or its equivalent. The
20 appellant’s FOD awarded by UMI was and is still intact, since it has never either been recalled or cancelled by the issuing Institution. We are fortified in this view by the authoritative

decision of the Supreme Court in **Election Petition Appeal No.25 of 2007, Joy Kabatsi Kafura v Anifa Kawooya Bangirana & Another** is very instructive in this matter. Kanyeihamba JSC,(as he then was)had this to say;

5 **“In my view, where a candidate presents a qualification which is higher than the minimum required for nomination for any post, it is not enough for his or her opponents to argue that the same higher qualification was based on a forgery or something irregular, nor is it sufficient for a spokesperson of the Institution in which the higher qualification was obtained to suggest that had the institution known that fact they would not have admitted the candidate or awarded the said qualification. Those who make such allegations need to do more than merely allege. They need to show that as a result of their allegations, the awarding institution of the higher qualification or any other equivalent to “A” Level or some other classification subsequently cancelled, or withdrew the award of the disputed qualification.”** (Underlining added)

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On grounds 5 and 6 which relate to the verification of the appellant's names, we are of the view firm view that the appellants evidence adduced in this regard offers sufficient explanation about the apparent discrepancies in is names on his various academic documents especially in the absence of any evidence adduced by the respondent to prove that the said academic documents belong to a person other than the appellants. We are persuaded that the same belong to him. We are not persuaded by the mere assertion by the respondent that the appellant's explanation is "*simply incredible.*" We find that explanation plausible. See **Kizito Deo Lukyamuzi vs Kasamba Mathias** (Supra).

Further, we, with respect, do not agree with the learned trial Judge findings that the Statutory Declaration relied upon by the appellant to verify his names was untenable. We rely on this Court's recent decision in **Mandera Amos v Bwowe Ivan E.P.A No.91 of 2016** where it was held:

"...the appellant relied on a statutory declaration to clarify the discrepancy between the two names. We are fully aware and are ready to take judicial notice of the fact that a statutory declaration is one mode through which discrepancies in names in a document may be clarified. Section 2 of the Statutory Declarations Act Cap. 22, Laws of Uganda, provides:-

"After the commencement of this Act, no affidavit shall be sworn for any purpose, except—

(a) where it relates to any proceedings, application or other matter commenced in any court or referable to a court; or

(b) where under any written law an affidavit is authorised to be sworn.”

5 **Section 3 of the Act states that:**

“(1) In every case to which section 2 does not apply, a person wishing to depone to any fact for any purpose may do so by means of a statutory declaration.

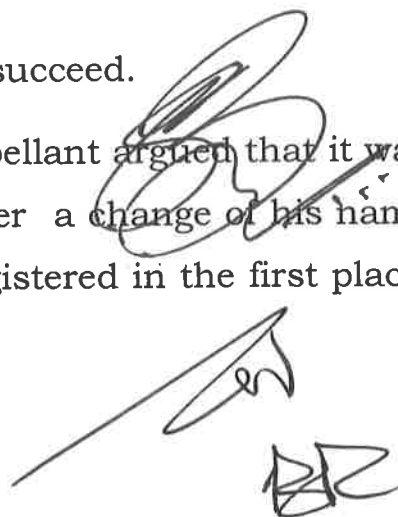
10 *(2) Where any person has sworn to an affidavit for any purpose other than a purpose referred to in section 2, that affidavit shall, nevertheless, be taken for all purposes to be a statutory declaration. (Emphasis added)”*

15 *We are satisfied that in the instant Appeal, the use of a statutory declaration was sufficient to prove and explain the misspelling of the appellant’s name. With that statutory declaration, and having found that the Certificate in issue was authentic, the learned trial Judge should have found that that Certificate belonged to no other person than the appellant. Notably, no evidence had been adduced to prove the existence of another person named Nandera Amos.”*

20 **See also Namujju Doniozio Cissy and EC vs Martin Kizito Serwanga (Supra).**

Accordingly, grounds 5 and 6 therefore, succeed.

25 On grounds 4 and 7, counsel for the appellant argued that it was not necessary for the appellant to register a change of his name and have it gazetted since it was not registered in the first place.

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We are persuaded by the appellant's argument in that regard basing on the provisions of Section 12(2) of the Births and Deaths Registration Act, Cap 309 which provides as follows:

Section 12(2):

5 (2) **Not less than seven days after the publication of the notice, the person intending to change his or her name may apply in the prescribed form to the registrar of the births and deaths registration district in which his or her birth is registered.**

10 From the above cited provision, it is clear that for one to register a change of name, one should have, in the first place, registered it under the Act. See: **Namujju Doniozio Cissy & Electoral Commission Vs Martin Kizito Sserwanga. (Supra)**

Grounds 4 and 7 accordingly, succeed.

15 **Ground 8.**

In the process of our resolving grounds, 1 to 7 herein, we have dealt with the 8th one. Had the learned trial judge properly evaluated the evidence before him, he would have come to a different conclusion from that he did.

20 In the result, we find and hold that at the time of his nomination for contesting the Katikamu South Constituency seat in the parliamentary elections held on the 18th February 2016, the appellant had the necessary academic qualifications to be so nominated and was, subsequently validly elected MP for that
25 Constituency.

We, therefore allow the Appeal, set aside the judgment and the orders of the trial court and declare that the appellant is the validly elected member of Parliament for Katikamu South constituency.

- 5 The respondent shall pay the costs here and at the Court below.

We so order.

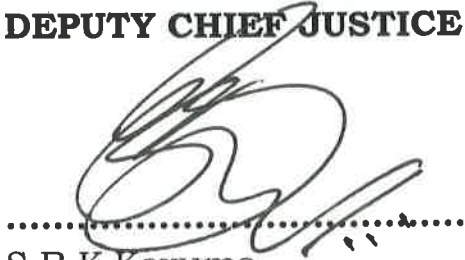
Dated this.....19th.....day ofJAN. 2018.....2017

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Alfonse Owiny Dollo,
DEPUTY CHIEF JUSTICE

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S.B.K Kavuma
JUSTICE OF APPEAL

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Richard Buteera
JUSTICE OF APPEAL

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