

Re RWAMUCYO (PETITION FOR NULLIFICATION OF ELECTIONS)

[Rwanda SUPREME COURT – RS/SPEC/0001/13/CS (Rugege, P.J., Kayitesi Zainabo, Mugenzi, Mutashya, Mukanyundo, Kayitesi Rusera, Hatangimbabazi, Kanyange, and Mukandamage, J.) September 26, 2013]

Electoral law – Procedures for filing petitions with regard to disputes raised in parliamentary elections– Hierarchy of norms – The instructions which are inconsistent with Organic Law or Law – Courts apply the instructions or regulations when they are consistent with the Constitution and other laws – No conditional petition before the electoral commission in case it is not provided for by other laws – The Constitution of the Republic of Rwanda of June 4, 2003 as amended to date article. 141 paragraph 3 – Organic law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, articles 65, 66, 67 and 68.

Right to electoral campaign – Grounds for nullifying elections – Use of short message service in electoral campaign is not itself forbidden – The fault is committed, considering the way it was used, its implication and the time short messages were sent – Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date, articles 29bis, 30.

Evidence Law – The plaintiff has the burden to prove with sufficient evidence, in case of failure, he/she loses the case.

Facts: On 18th September, 2013 the National Electoral Commission held elections for the position of Member of Parliament representing disabled persons. Only two candidates competed for the position and Rwamucyo was dissatisfied with the results of the elections. He argues that his opponent used his position as the Chairman of the National Council of Persons with Disabilities for his own interests and that he used the Executive Secretary of the National Council of Persons with Disabilities to campaign for him. He alleged that there were short messages that he sent to the Electoral College and money that he gave to the latter to vote for him. For all these grounds, Rwamucyo filed a petition to the Supreme Court requesting for the election results to be nullified and be held again.

In his submissions, the winning candidate states that the petition was filed contrary to the procedure established by article 82 of the National Electoral Commission instructions which stipulates that disputes arising during the campaign process should be taken first to the National Electoral Commission before being filed in the competent courts. Thus, he requests the Court to dismiss the petition.

Held: 1. The admissibility of the petition should not be based on the National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing legislative elections, chamber of deputies, because it is contrary to the Organic Law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court and the Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date since there is no provision under those laws providing such a petition be submitted to the National Electoral Commission before being filed to the courts. Article 141 of the Constitution provides that the courts apply the regulations or instructions when they are not contrary to the Constitution and other laws. Therefore, this Organic Law should be the applicable law.

2. The petitioner did not produce any evidence that the winning candidate had used his power in his own interests and that there is money given to the Electoral College to be elected. The applicant is the one who has the burden of proof, when he fails, he loses the case. Therefore the elections cannot be nullified.

**Petition without merit.
Elections not quashed.**

Statutes and statutory instruments referred to:

Constitution of the Republic of Rwanda of June 4, 2003 as amended to date articles 93, 141 and 145(5).

Organic Law n° 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court, articles.67, 71-79.

The Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date, articles 29bis, 30.

National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing Legislative Elections, chamber of deputies, articles 80, 82.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 18th September, 2013, the National Electoral Commission held elections for the seat of Deputy Representative of Disabled Persons¹. Some of the candidates who campaigned for the seat are Rusiha Gastone and Rwamucyo Gisaza Séverin. On Election Day, the National Electoral Commission temporarily announced that Rusiha Gastone had won that seat of Deputy Representative of Disabled Persons. On 20th September, 2013, Rwamucyo Gisaza Séverin filed a petition to the Supreme Court contesting the election results held on 18th September, 2013 for the seat of the Deputy Representative of Disabled Persons, and requested for nullification of the election's results for it to be held again.

[2] Pursuant to article 66 of the Organic Law n° 03/2012/OL of 13th June, 2012 determining the organization, functioning and jurisdiction of the Supreme Court on Monday 23rd September, 2013, the Supreme Court President wrote to the Minister, who has election in his attribution and to the President of National Electoral Commission, informing them that the Supreme Court has received a petition from Rwamucyo Gisaza Séverin requesting that the election held on 18th September, 2013 for the seat of Deputy Representative for Disabled Persons be nullified and held again. The following day, the National Electoral Commission and Rusiha Gastone were summoned to the Supreme Court registry and were given the submissions including the petition filed by Rwamucyo Gisaza Séverin; they were requested to make remarks about it in a written form.

¹ See article 76 (4) of constitutional law “.....The Chamber of Deputies shall be composed of eighty (80) members who shall include the following... one (1) member elected by the Federation of the Associations of the Disabled Persons”.

[3] On 25th September, 2013, the Supreme Court received the submissions from the State attorney, Rubango Epimaque, demonstrating the views of the National Electoral Commission on the petition filed by Rwamucyo Gisaza Séverin. The Supreme Court also received the submissions from Rusiha Gastone demonstrating his stance on the petition.

[4] The hearing was scheduled on 25th September, 2013, at 3 p.m. As article 71 of the Organic Law n° 03/2012/OL of 13th June 2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court provides, the case was heard in public, and the Court tried the case based on the document only. The judgment was delivered on 26th September, 2013.

II. ANALYSIS OF THE LEGAL ISSUE.

A) Whether the petition filed by Rwamucyo Gisaza Séverin must be rejected because he did not refer it first to the National Electoral Commission.

[5] In his written submissions to the Supreme Court, Rwamucyo Gisaza Séverin argues that he filed the petition to the Court based on article 145 of the Constitution which gives the competence to the Supreme Court to adjudicate on cases related to the elections of Members of Parliament.

[6] In his defence submissions, on the petition filed by Rwamucyo Gisaza Séverin, Rusiha Gastone requests the Court to dismiss the petition because the one who filed it, did not first refer it to the National Electoral Commission as provided for by article 82 of the National Electoral Commission instructions n° 03/2013 of 23rd July 2013 regulating election of the parliament, Chamber of Deputies.

THE VIEW OF THE COURT

[7] Article 145, 5^o of the Constitution stipulates that the Supreme Court has special hearing for election petitions to referendum, and presidential and legislative elections. This article of the Constitution shows that the Supreme Court has jurisdiction to hear elections cases for members of parliament, and it is complimented by other laws that explain in details how to file the petition, those entitled to file it, and how it is tried by the Supreme Court.

[8] Article 82 of the National Electoral Commission instructions n° 03/2013 of 23th July, 2013 governing legislative elections, chamber of deputies, stipulates that if a dispute arises during the campaign process, candidates should take the matter to the National Electoral Commission and if the matter is not resolved, then the candidate should refer the case to the competent courts of law.

[9] Even if article 82 of the National Electoral Commission instructions provides that disputes arising during campaigning should be taken firstly to the commission before referring it to the competent courts, the Organic Law n° 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court, does not stipulate that the election dispute should be taken to the National Electoral Commission before taking it to the Supreme Court.

[10] Article 67 of that Law stipulates that in the event of a dispute relating to the registration of candidates for election to the office of President of the Republic or to

Members of Parliament, the fairness of such elections or the conduct of presidential, parliamentary or referendum elections, those who have the right as mentioned in article 66² of this Organic Law may, within forty-eight (48) hours from the time the list of candidates or provisional election results are published, petition the Supreme Court seeking to strike the decision as prejudicial to their interest or may seek nullification of the election results. This article shows that the Supreme Court has the jurisdiction to try the petitions regarding election disputes, and to regulate the procedures for filing this petition. This article of Organic Law does not stipulate that before filing a petition to the appropriate court, it should be referred to the National Electoral Commission.

[11] Apart from the Organic Law determining the Organization, Functioning and Jurisdiction of the Supreme Court, also the Law n° 27/2010 of 19th June 2010 relating to elections as amended and complemented to date, from articles 71 to 79, determines the applicable modalities for the case regarding, referendum, presidential, and legislative elections. This Organic Law does not state that the petitions in these cases must first be submitted to the National Electoral Commission before being filed to the Court.

[12] Article 93 of the Constitution of the Republic of Rwanda of June 4, 2003 as amended to date, determines the modalities for how the laws are voted and their hierarchy. In the last paragraph of that article, the Ordinary or the Organic law may not contradict the Constitution, nor may an Ordinary Law or Decree-Law contradict an Organic Law, nor may a Decree or other regulations contradict an Ordinary Law. This article also completed by article 141, paragraph 3, stipulates that Courts may apply orders and regulations only where they are not inconsistent with the Constitution and other Laws. The Supreme Court basing their view on these articles, finds that the admissibility of the petition submitted by Rwamucyo Gisaza Séverin must be based upon the Organic Law n° 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court, instead of being based on article 80 of the National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing Legislative Elections, chamber of deputies.

[13] Rwamucyo Gisaza Séverin submitted the petition before the expiration of the 48 hours time limit outlined in article 67 of Organic Law n° 03/2012/OL of 13/06/2012 determining the Organization, Functioning and Jurisdiction of the Supreme Court because he submitted it on 20th September, 2013. It was not necessary to refer the petition to the National Electoral Commission first. The Supreme Court finds that he filed the petition through the proper procedures provided by the law; therefore the petition he filed should be admitted.

B) Whether there are grounds for nullifying the elections held on 18th September, 2013, for the position of Deputy Representative for disabled persons

[14] Rwamucyo Gisaza Séverin who filed the petition, requests that the election results for the seat of Deputy Representative of isabled persons, held on 18th September, 2013, be nullified because the candidate announced as the provisional winner of that seat, Rusiha Gastone, won by using his leadership position for his own interests, by giving out briefings “instruction” and also through excessive corruption.

[15] Rwamucyo Gisaza Séverin states that Rusiha Gastone used his current position as the Chairman of the National Council of Persons with Disabilities for his own interests and that

² The article 66 stipulates, “The right to petition the Supreme Court shall be limited to citizens, candidates, political organizations or the National Electoral Commission.....”

he also used Ndayisaba Emmanuel, the Executive Secretary of the National Council of Persons with Disabilities to campaign for him. Rwamucyo Gisaza Séverin continues arguing that Ndayisaba Emmanuel called the coordinators of the National Council of Persons with Disabilities for the North province, the South province and Kigali city, and told them that they must support and campaign for Rusiha Gastone.

[16] He continues stating that there are short message services (sms) sent by those coordinators requesting the Electoral College to vote for Rusiha Gastone, and that this occasion was characterized by corruption manifested by a cheque given to Sekamonyo Venuste amounting to 500,000 Rwf, given to the Electoral College using MTN mobile money and TIGO Cash.

[17] The State attorney, Rubango Epimaque, representing the National Electoral Commission, argued that Rwamucyo Gisaza Séverin did not produce evidence for his allegations. Furthermore, he feels that the campaigning process for the candidates with disabilities went smoothly. There was no action occurring contrary to article 80 of the National Electoral Commission instructions. Moreover the Commission received any petition in that regard.

[18] Rusiha Gastone states that Rwamucyo Gisaza Séverin has never demonstrated that Ndayisaba Emmanuel was engaged in acts contrary to the law while campaigning for him. Furthermore, sms are not prohibited as a means of communication by the Law for campaigning. Rusiha Gastone adds that he did not request Ndayisaba Emmanuel to campaign for him. Concerning the cheque, Rusiha Gastone states that he did not give it to those who voted for him and also the applicant did not produce evidence establishing this.

[19] Rusiha Gastone argues also that he did not use his position of the Chairman of the National Council of Persons with Disabilities because when the election was held, he had temporarily his duties for that position.

THE VIEW OF THE COURT

[20] Rwamucyo Gisaza Séverin states that the modalities used by Rusiha Gastone in campaigning violated the law. Article 80 of the National Electoral Commission instructions stipulates how the electoral campaigns process for the candidates with disabilities should be executed, and the Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date, in article 30 demonstrates the specific prohibitions during electoral campaigns.

[21] Article 80 of the National Electoral Commission instructions n° 03/2013 of 23/07/2013 governing legislative elections, Chamber of Deputies states that “the candidates on post of deputy with disabilities campaign on polling day before members of Electoral College, they are gathered together on National level at the place determined by National Electoral Commission. But before the polling day, the candidate who wishes may plan his/her special program of electoral campaigns before the member of Electoral College, he/she informs it in written form the District leadership of where he/she wishes to conduct electoral campaigns at least twenty four hours (24) before his/her electoral campaign. The branch of the National Electoral Commission at District level of where he/she wishes to campaign must get the copy for it to attend the electoral campaign”. This article clearly demonstrates the modalities for how the candidate on post of deputy with disabilities should carry out the

electoral campaigns. Rwamucyo Gisaza Séverin argues that it was not done as this article provides because there were electoral campaigns and campaigning for Rusiha Gastone before the gathering of the Electoral College on national level at a place determined by the National Electoral Commission.

[22] The Court cannot rely on the statement made by Rwamucyo Gisaza Séverin that Ndayisaba Emmanuel, the Executive Secretary of the National Council of Persons with Disabilities called the coordinators of the National Council of Persons with Disabilities from the North Province, the South Province and Kigali City, before the gathering of the electoral college, and requested them to vote Rusiha Gastone and to sensitize others to vote him, to decide whether or not the electoral campaigns for Rusiha Gastone began before the time stipulated in article 80 of instructions in presiding paragraph, because except his statements, he did not produce any evidence to the Court, to prove that those things happened.

[23] Concerning the fact that Rusiha Gastone used the position he held for his own interests as the Chairman of the National Council of Persons with Disabilities and that he campaigned before the gathering of members of the Electoral College on the national level, as determined by the National Electoral Commission, the Court finds that apart from statements, no single evidence produced by Gisaza Séverin demonstrating the reliability of his statements. Moreover, on 22nd August, 2013, Rusiha Gastone wrote to Vice President of the National Council of Persons with Disabilities, informing him that he had decided to temporarily suspend his duties as President of that council.

[24] Concerning Rwamucyo Gisaza Séverin's argument that there was sms sent to the Electoral College, it must be analyzed basing on the provisions of the Law. Article 29 bis of the Law n° 27/2010 of 19/06/2010 relating to elections as amended and complemented to date stipulates that "in all elections, the candidate has the right of posting the campaigning posters and any other campaigning materials". Article 30 of this law stipulates also "during the electoral campaign, it is prohibited to influence or attempt to influence voter's choice through the following: illegal use of State property, wherever it is; abuse or defamation in any manner whatsoever another candidate; and based on any other kind of discrimination and division".

[25] The court finds that, basing on the provisions of articles mentioned in the preceding paragraph, to use sms during electoral campaigns and to campaign are not prohibited. However, the issue may be the modalities of how sms were used, the message they convey and the time when they were sent. Concerning this case, the sms produced by Rwamucyo Gisaza as the evidence, was not clear. They were sent to him after the elections were held, and were neither meant to campaign Rusiha Gastone nor sensitize people to vote him. They do not even demonstrate that Rusiha Gastone was voted by force, and who played the role. They solely demonstrate the meaningless messages such as "it's unfeasible", "they want us to lobby for your uncle RG, but we have abstained we are waiting for the ones from the click", "he has as a weapon to storm away if not voted", "this is the source", "Sorry, for what they did for us".

[26] Regarding the corruption that may have occurred through the cheque in the amount 500,000 Rwf that Rwamucyo Gisaza Séverin argues to have been given to Sekamonyo Venuste to be given to a member of the Electoral College; the cheque was not produced to the Court. Except the above information, Rwamucyo Gisaza Séverin does not submit any further information about the cheque, such as the Bank that was used to withdraw the money, the amount on the cheque, its number, the name of the sender, nor any other evidence that it

was or would be given to a member of the Electoral College. All of those would have served the Court to analyse the evidence he produces.

[27] The court finds that neither the use of the position someone holds in his/her own interest nor the cheque in the amount of 500,000 Rwf Rwamucyo Gisaza Séverin argues that was meant for the Electoral College, the defendant does not produce any evidence. As for his request for the Court to investigate for him, the Court finds that the information he submitted is not sufficient to facilitate it to know who sent the money, to whom it was sent and the reason why it was sent. Furthermore, the applicant has the burden to produce the evidence to the Court. When he/she does not do so, he/she loses the case.

III. THE DECISION OF THE COURT

[28] Admits to receive the petition filed by Gisaza Séverin.

[29] Decides that the petition is without merit.

[30] Decides that elections held on 18th September, 2013 for the seat of Deputy Representative of the persons with disabilities in parliament are not nullified.