IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: Mustafa, J.A., Mwakasendo, J.A., Makame, J.A., Kisanga, J.A. and Lugakingira, Ag.J.A.)

CIVIL APPEAL NO. 11 OF 1981

B E T W E E N

SOLOMON ALEXANDER OLE SAIBULL . . . . . APPELLANT

A N D

1. HUBERT HEMED MBAGA . . . . . First RESPONDENT
2. THE HON. ATTORNEY GENERAL . . . . . Second RESPONDENT

JUDGEMENT OF THE COURT

MUSTAFA, J.A.:

In the 1980 Parliamentary Election two candidates, namely, Mr. Solomon Alexander Ole Saibull and Mr. Hubert Hemed Mbaga were nominated to contest the Arusha Constituency. There were over 40,000 registered voters and Mr. Saibull polled 12,489 votes and Mr. Mbaga polled 24,038 votes. Mr. Mbaga won by 11,549 votes. Mr. Saibull filed a petition in the High Court to nullify the election and cited Mr. Mbaga as the first respondent and the Attorney General as the second respondent.

The petition was heard by a bench of three High Court judges and it was dismissed with costs. Mr. Saibull has appealed against such dismissal.

At the hearing of the petition in the High Court Mr. Saibull through his counsel alleged that the successful candidate, the first respondent, had exploited tribal differences and indulged in corrupt practices. It was also alleged that the 2nd respondent had failed to comply with the election provisions. He also alleged that the first respondent had carried out illegal practices in the form of illegal campaigns. The High Court dismissed the allegations of tribalism and corruption. The High Court however held that a number of voters were denied the right to vote because of confusion by some Registration Officers over the polling district boundaries.

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It appears that there were two polling stations, for Arusha and for Arumeru, in Nadosoito Village. A number of voters who were registered for Arusha were alleged to have been residents of Arumeru and had their cards withdrawn and were told to re-register for Arumeru. However, the High Court held that these irregularities took place due to ignorance and that the election officials did not act maliciously. The number of voters involved was small, not more than 100 voters were denied the vote, and that could not have affected the election result. However, the High Court found that there was illegal public campaigning by the supporters of the first respondent. These supporters displayed the 1st respondent's symbol "jembe" in places other than at the meetings organised and supervised by the Party. It held that this constituted illegal public campaigning in terms of the provisions of section 66(1)(b) of the Elections Act, 1970, (hereinafter called the Act). On this issue the High Court stated:-

> "We have very carefully considered the public canvassing by the supporters of the 1st respondent and believe that the effect, if any, on the electors was minimal as we are satisfied that no substantial number of votes were obtained as a result of it. Also considering the wide margin of votes cast for the successful candidate as against those for the Petitioner we are wholly satisfied that the contravention of the Act did not in the least affect the result of the election.".

Although the High Court did not say so, we think that it must have considered that this contravention was non-compliance in terms of section 123(3)(c) of the Act, which reads:-

> "123(3) The election of a candidate ... shall be declared void ...
> (a) ...
> (b) ...
> (c) non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;".

Mr. Mkude argued the appeal on behalf of the petitioner before us. He submitted that the High Court erred in not finding that the first respondent had, during the election campaign, made statements with intent to exploit tribal differences pertinent to the election or relating to the appellant; that it also erred in not finding that the first respondent had acted corruptly.

He also referred to the non-compliance with the election provisions on the part of the second respondent. He submitted that the finding by the High Court of illegal public campaigning by the supporters of the 1st respondent would offend the provisions of Section 123 (3)(a) or section 123(3)(d) of the Act. Section 123(3)(a) reads:-

> "123(3) The election of a candidate ... shall be declared void ...
>
> (a) that by reason of corrupt or illegal practices committed in connection with the election, or other misconduct, or other circumstances whether similar to those before enumerated or not, the majority of voters were, or may have been, prevented from electing the candidate whom they preferred;".

Section 123(3)(d) reads:-

> "that a corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of his agents.".

On the issue of incitement of tribalism, Mr. Mkude submitted that at an election meeting at Kimandolu the first respondent had made a speech which inflamed or was intended to exploit tribal differences pertinent to the election. The High Court had found that in that area it was apparently public knowledge that the Wapare and Wachagga were buying land and that there were problems arising from these land transactions. In the course of his speech the first respondent was found by the High Court to have uttered this sentence or proverb:-

> "Usipoanika unga mchana utashindwa kupika ugali usiku ukiingia.",

which loosely translated means "unless you dry your maize flour in the day time you won't be able to cook stiff porridge when night comes". The first respondent was alleged also to have said that if there was any complaint about such land transactions, the matter should be referred to the [illegible] courts for decision. He was alleged to have said "if you elect me these problems would cease". Mr. Mkude submitted that the first respondent was a Mpare, and he was addressing an audience which included Wapare and Wachagga in a Waarusha area, and he knew or must have known of the problems arising from the sale of land. Mr. Mkude contended that the 1st respondent was in fact appealing to tribal sentiments when he spoke about land at that meeting.

In his petition the petitioner had alleged that the first respondent had referred specifically to Wachagga and Wapare. The High Court found that there was no mention of such tribes at all. However, Mr. Mkude submitted that even if the Wachagga and Wapare were not mentioned, yet with the background and in the context of the difficulties arising from purchases of land by the Wachagga and Wapare, the first respondent's reference to the land problem was directly or indirectly designed to incite tribal differences. The High Court found that there was no basis or justification for that contention and held that the phrase used by the 1st respondent was innocuous. The High Court accepted the evidence of defence witness Letawo who was the Arusha District Party Chairman who chaired the campaign meetings and who was the Chairman of the Kimandolu campaign meeting on this matter.

It is common ground that the land issue was exercising the minds of the electorate. It was unexceptional for the first respondent, as a parliamentary candidate, to advert to it in his election campaign. Mr. Mkude has submitted that in view of the fact that Wachagga and Wapare were the purchasers and Waarusha the sellers of land, tribal confrontation would be stirred up by referring to such land problems. We think that it would depend on the terms and circumstances in which such a reference was made. The first respondent spoke on the land problem without any reference to tribes. He promised that if elected he would solve it. He advised parties who had purchased land to cultivate it and keep it clean. He also advised parties in the land disputes to refer their problems to the courts for decision, if difficulties were created in such land deals. If the implication of any tribal conflict was there at all, it would have been merely a peripheral incident attaching to any land dealing in that area. The first respondent could not be held responsible for that situation. There was no evidence that the first respondent was inciting tribal animosities in any way. We are not satisfied that the petitioner has established that the first respondent incited or intended to incite tribal differences.

As regards the issue of corruption, two witnesses had given evidence, that is, Samwel (P.W.36) and Solomon (P.W.60).

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Samwel alleged that one Hussein Tumbo at a campaign meeting at Sombetini approached him and took him to his car and there gave him shs. 40/=, and asked Samwel to buy registration cards from potential voters and give such cards to Hussein Tumbo. Samwel said that this took place in the motor vehicle. He and Tumbo and another person were present. He said he thought that Hussein Tumbo was campaigning for the first respondent because Hussein Tumbo had told him so. This witness admitted in cross-examination that he had lied about who first addressed the campaign meeting at Sombetini. He admitted that he did not tell the truth when he said that he had attended all the campaign meetings.

Solomon alleged that he left the Sombetini meeting with Samwel. They were given a lift in a car by Hussein Tumbo. There were about six of them and they talked about the election campaign. When they reached the town centre they got out and when they got out Hussein Tumbo gave Samwel shs. 40/= in his presence. He said that Hussein Tumbo told Samwel to "vuruga" Saibull's campaign. He promised to give Samwel shs. 3,000/= if he could make Saibull lose the election. He told Samwel that Mbaga had given him shs. 100,000/- for buying up election cards. He said that Hussein Tumbo and Samwel moved about 20 paces away and he Solomon remained in the car. This witness alleged that when he went to vote the officials who conducted the election tried to force him to vote for the "jembe" symbol which was Mbaga's. He also said that the election officials further ordered him out because time was up. He also said that he did not know that it was wrong to compel a voter to vote for a particular candidate.

The High Court analysed the evidence given by these two witnesses and found their evidence "most unreliable and not worthy of any consideration". The trial court concluded that there was no evidence to sustain the allegation that Tumbo distributed money to the voters. It then went on to say "These findings make superfluous the question whether Hussein Tumbo was an agent of the first respondent.".

We ourselves, despite Mr. Mkude's valiant efforts, do not think that the evidence of Samwel and Solomon is worthy of credit. We need much more credible evidence than that given by these two unrealiable witnesses. We think that the High Court was justified in rejecting that evidence. However, in our view the High Court

should have made a finding whether Hussein Tumbo was an agent of the first respondent. In this case we have agreed with the High Court that there was no creidible evidence to support the allegation that Hussein Tumbo corruptly gave shs. 40/= to Samwel. However, if we had found that such money did pass then the question whether Hussein Tumbo was an agent of the 1st Respondent would be crucial. In that event we would not have had the benefit of the finding of the High Court on this issue. We trust that a trial court will make all the necessary findings on issues put before it.

In order to complete the matter, we find that there was no evidence to show that Hussein Tumbo was the first respondent's agent. In view of our finding that it has not been proved that money was paid to Samwel by Tumbo, it will not be necessary for us to deal in detail with the submissions of Mr. Mkude concerning the issue of agency.

There was an allegation that the first respondent's son had run up a bill of about shs. 20,000/- during October, 1980, at the Mount Meru Hotel, Arusha, where he worked. It was submitted by Mr. Mkude that that indebtedness was sufficient to establish that the first respondent had treated voters at the Mount Meru Hotel in contravention of the Elections Act. We are surprised that an allegation of treating has been submitted on such flimsy grounds. Treating is a serious offence, and requires substantial credible evidence to support it. There was also an allegation by the appellant that on 10th, 11th, and 12th October, 1980, the first respondent was entertaining a large number of persons at his house. The first respondent has denied it. No other witness has testified to such alleged prolonged entertainment. If there was such entertainment or treating, one would have expected some independent witness or witnesses to have noticed it. We are not satisfied that the allegation of treating has been established.

In respect of non-compliance with the election provisions we agree with the High Court that a number of voters were deprived of the right to vote. This was due to the confusion and uncertainty over the boundaries of the polling districts. Mr. Mkude informed us from the Bar that the total number of voters deprived of the right to vote due to such non-compliance was ninety-three.

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Even if the ninety-three votes were added to the votes cast for Mr. Saibull, it would make no difference to the election result. This ground was not pursued in the circumstances.

The last ground of appeal was in respect of the illegal campaigns which the High Court found were carried out by supporters of the first respondent. This issue has caused us some anxiety. Mr. Mkude submitted that this was an illegal practice and would be caught by the provisions of section 123(3)(a) or section 123(3)(d) of the Act. He submitted that the election campaign lasted from the 1st of October to the 25th of October, 1980. On the 15th October, 1980, as a result of the Party's direction at a meeting at Mlerai, the displaying and carrying of 'jembes' and all election symbols was stopped at all campaign meetings. However, there was evidence from P.W. 59 Senare, that on the 25th October, 1980, while he was at a bus stand at Arusha, he saw a landrover carrying about nine people stopping some distance from him. They were carrying 'jembes'. He heard them say "this is the symbol to choose tomorrow". Again P.W.66, Loy, on the 16th October, 1980, at Arusha, saw a passenger in the front seat of a landrover asking him if he was a supporter of "Nyumba", the petitioner's symbol. That person was shouting "Nyumba ni zii". It would seem, therefore, that after the official ban on exhibiting or displaying election symbols on the 15th October, supporters of the first respondent continued with illegal campaigns as witnessed by Sanare and Loy.

We have duly considered, in terms of section 123(3)(a), whether by reason of such illegal practices or campaigns "the majority of voters were, or may have been prevented from electing the candidate whom they preferred". We are of the view that these two incidents on the 25th October and the 16th October were isolated or sporadic instances involving an insignificant number of people. In view of the size of the electorate and the large number of people who actually voted, we **are not** satisfied that the majority of voters were, or may have been prevented by this illegal practice from electing the candidate whom they preferred.

We now consider the provisions of section 123(3)(d). In regard to the illegal public campaigning by the supporters of the first respondent, the High Court stated, inter alia:-

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> "We are satisfied that the first respondent must have been aware of such campaigning and it is irrelevant that he approved or consented to it".

As we have stated earlier, the High Court apparently held that this infraction offended the provisions of section 123(3)(c) of the Act. It dealt with the illegal campaigning as non-compliance with the provisions of the Act relating to elections and directed its attention to whether non-compliance with the provisions affected the result of the election. It decided that the election result was not affected. However, the finding of the High Court is that the first respondent was aware of such illegal public campaigning. There is no finding that he approved or consented to it. We accept this finding as it stands.

To bring illegal campaigning under the provisions of section 123(3)(d) of the Act it must be shown that such illegal campaigning was committed with the knowledge and consent or approval of the first respondent. There is no finding that it was committed with the consent or approval of the first respondent. We do not think that knowledge or awareness necessarily imports or implies consent or approval. One may know of an act and disagree with or disapprove of it. We have to be satisfied that this was done with the consent or approval of the first respondent. There is no such finding, nor was such evidence adduced. We do not think that the illegal campaigning was within the ambit of section 123(3)(d) of the Act.

In our view, the appeal fails. We dismiss it with costs.

DATED at DAR ES SALAAM this 21st day of August, 1981.

A. MUSTAFA
JUSTICE OF APPEAL

Y. M. M. MWAKASENDO
JUSTICE OF APPEAL

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

K. S. K. LUGAKINGIRA
ACTING JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(C. G. MTENGA)
REGISTRAR