IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MFALILA, J.A., LUBUVA, J.A., And SAMATTA, J.A.)

CIVIL APPEAL NO. 32 OF 1997

BETWEEN

PETER MSEKALILE . . . . . APPELLANT

AND

LEONARD NEWE DELEFA . . . . . RESPONDENT

(Appeal from the Judgement and Decree of the High Court of Tanzania at Tabora)

(Mapigano, J.)

dated the 14th day of February 1997

in

Miscellaneous Civil Cause No. 5 of 1995

JUDGMENT OF THE COURT

SAMATTA, J.A.:

This is an appeal from a decision of the High Court (Mapigano, J.) dismissing an election petition filed in that Court, under Sections 108 (2) and 111 (a) of the Elections Act, 1985, by the Appellant, Mr. Peter Msekalile, and one Mr. Gerald Mwanga.

The background to the appeal may, we think, be stated fairly shortly. The appellant and Mr. Mwanga were registered voters in the parliamentary constituency of Shinyanga Urban in the general election held in this country on October 29, 1995. Ten political parties fielded parliamentary candidates in the constituency. These included the respondent, Mr. Leonard Newe Delefa, Mr. Bob Nyange Makani and Mr. Peter D. Majola Balele,

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who were sponsored by Chama Cha Mapinduzi (CCM), Chama Cha Demokrasia na Maendeleo (Chadema) and the National Committee for Constitutional Reform (NCCR-Mageuzi) respectively. The results of the election as announced by the Returning Officer were as follows:

Votes cast	:	34,917
Spoilt votes	:	2,393
CCM Candidate	:	20,108
Chadema Candidate	:	10,894
NCCR-Mageuzi Candidate	:	394

The remaining seven candidates shared the rest of the votes - 1128 - between them. The appellant and his co-petitioner, Mr. Mwanga, were dissatisfied with the way the election had been conducted; hence their petition filed before the High Court. In the petition the two men complained of nineteen acts of misconduct, including bribery, treating, intimidatory campaign statements and defamatory statements. A total of fifty five witnesses gave evidence at the trial. At the end of the day, although he found that certain acts of misconduct had been committed, the learned trial Judge reached a settled conclusion that there was no sufficient warrant for the election of the respondent as a Member of Parliament for Shinyanga Urban constituency being avoided. It is only the appellant who has elected to appeal against that decision on the following grounds:

1. The Honourable Judge erred on point of fact and law in holding that the acts of bribery and treating complained of were not sufficiently established to the required standard.

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2. /T/he Honourable Judge erred on point of fact and law in holding that the intimidatory statements made by C.C.M. against the opposition parties were established in connection with four C.C.M. campaign rallies only (i.e. at Lohumbo B, Mwamala, Jomu Primary School, and Sokomjinga).

3. /T/he Honourable Judge erred on point of fact and law in holding that the defamatory statements complained of were not proved and/or did not constitute defamation against CHADEMA candidate.

4. /T/he Honourable Judge erred on point of fact and law in failing to nullify the election results of Shinyanga Urban Constituency against the weight of evidence.

We propose to deal with these grounds in the same order. At the hearing of the appeal Mr. Mahuna, who was assisted by Mr. Makani, appeared for the appellant, while Mr. Mtaki, who was assisted by Mr. Masalu, represented the respondent.

In the First Ground of Appeal Mr. Makani, who argued the ground on the appellant's behalf, abandoned the issue of bribery, thus leaving only the question of treating. It was the case for the appellant at the trial that at seventeen campaign meetings addressed by, among others, the respondent, food was given to the members of the public who attended those meetings and that this was done to promote the respondent's chances in the election.

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The appellant sought to persuade the learned trial Judge to hold that the acts of giving the food were not acts of normal or traditional hospitality, rather, according to him, they constituted treating in terms of Section 98 of the Elections Act, 1985 (the Act). The respondent sought to meet that case by adducing evidence to the effect that the food which was served out at the meeting was prepared on supervision of CCM branch officials and eaten by the respondent's campaign team members who were about twenty in number and that that was done in accordance with a directive issued by the CCM headquarters. Quite rightly, some of the witnesses being partisan, the learned trial Judge said he had found it necessary to approach the evidence on both sides with "a great measure of circumspection". He analysed the evidence in the scales and length and arrived at the conclusion that the appellant, on whom lay the onus of proof, had failed to establish that treating did take place. He gave four principal reasons for reaching that conclusion:

(1) the allegations were inherently improbable in that it was difficult for one to believe that any sensible person (the learned trial Judge found the respondent to be such person) could go around treating voters in the reckless manner described by the appellant's witnesses;

(2) the presence of some of the appellant's witnesses at some

of the campaign meetings of CCM was highly questionable as material inaccuracies existed in their evidence;

(3) the bearings of some of the appellant's witnesses were pathetically poor. One of these witnesses, PW.23, could not tell the names of the local CCM leaders and her forgetfulness was so severe that she could not recollect her husband's name; and

(4) there were discrepancies in the evidence of the appellant which could not be regarded as being minor in nature.

The learned trial Judge's conclusion that treating had not been established in this case was vehemently criticised by Mr. Makani as being contradictory of an earlier "finding". The learned advocate's mainstay for that criticism is a passage in the learned trial Judge's judgment preceding the conclusion. Because of the importance of the passage on the learned advocate's contention, we consider it necessary to quote the passage (to be found on p. 214 of the record) in extenso. It reads as follows:

> "I think it is altogether wrong to suggest that Delefa /the respondent/ would not be responsible for the treating. I would take Mr. Mahuna's view. It would not matter in the least that Delefa did not invite the crowds. I would in the circumstances hold that the treating was given with his knowledge, connivance or approval.

Not only that. I would agree that the treating had reference to the ballot box and that Delefa did thereby obtain a substantial number of votes".

Mr. Mtaki submitted that this passage ought to be read together with the passage immediately preceding it and that when it is so read, Mr. Makani's criticism of the learned trial Judge's conclusion must be found to be unwarranted. The passage referred to by the learned advocate reads:

"I deem it appropriate at this stage to consider and dispose of one point in respect of which counsel have expressed differing views in their final submissions. It proceeds from a supposition that the evidence adduced by the petitioner in regard to the treating is reliable. On behalf of the second respondent it has been tepidly suggested that he Delefa would not be answerable for treating since the thrust of the evidence shows that he did not personally give the invitations. Counsel for the petitioner has, as indicated, made the contrary submission that complicity would reasonably and legally attach to him on the grounds that he was present at those places, he heard the invitations being announced by people who must be described as his agents, and he did nothing to stop or dissociate from the treating." (the emphasis is supplied)

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We must say at once that in our opinion there is merit in Mr. Mtaki's contention. Plainly, what the learned trial Judge was saying in the passage on which Mr. Makani grounded his criticism of the learned trial Judge's finding that treating was not established in this case is that, assuming that the evidence before him proved the appellant's allegations on treating, the respondent, for the reasons the learned trial Judge gave, would, in law, be answerable for the misconduct even if he did not personally invite the members of the public to eat the food. In that passage the learned trial Judge was dealing purely with a question of law. Having stated the legal position on the matter, he proceeded to consider whether the required proof on factual matters existed. Contrary to the meaning which Mr. Makani asked us, in effect, to ascribe to the passage, there is nothing in the passage, in our opinion, which can properly be used to fault the learned trial Judge's final conclusion on the issue of treating. In our considered opinion there is no contradiction whatsoever between that conclusion and the passage in the learned trial Judge's judgment which Mr Makani invited us to use, so to speak, as a peg on which to hang the conclusion that the learned Judge's finding that no treating had taken place in this case was indefensible.

Mr. Makani also criticised the learned trial Judge's findings on the credibility of the appellant's witnesses, but we can see no warrant for holding that those findings

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were not justified. While we recognise that as a first appellate court it is our duty in this case to review the evidence on the record, we think it right to apply the principles admirably adumbrated by Viscount Simon in Watt (or Thomas v Thomas [1947] 1 All E.R. 582 as regards the duty of an appellate court in determining an appeal. His Lordship said at pp. 583-584:

> "... an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side

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> is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

Mr. Makani criticised the learned trial Judge's rejection of the evidence of PW14 and PW15 regarding treating! But in assessing that evidence, like the rest of the evidence, the learned trial Judge made some allowance for the vagaries of human memory, and yet he felt compelled by the respondent's side's evidence which, on the relevant points, was corroborated by documentary evidence, to reject the evidence of the two witnesses. With the best will in the world and in spite of the forceful way Mr. Makani put forward his argument we are unable to say that the learned trial Judge formed an unbalanced or unjustified view of the evidence before him. Before we part with the First Ground of Appeal we wish to quote a passage in the judgment of the Supreme Court of India in D.V. Reddy v Sultan [1967] 3 S.C.R. 452 which the learned trial Judge quoted in his judgment as, like the learned trial Judge, we think it is greatly relevant to the determination of election petitions in this country:

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> "In a democracy the purity and sanctity of elections, the sacrosanct and sacred nature of the electoral process, must be preserved and maintained. And the valuable verdict of the people at the polls must be given respect and candour and should not be disregarded or set at naught on vague, indefinite, frivolous or fanciful allegations or evidence which is of shaky or prevacating character."

For the reasons we have given, we find no merits in the complaints in the First Ground of Appeal and we dismiss them. We turn now to a consideration of the Second Ground of Appeal.

Were intimidatory statements made at thirty (30) CCM campaign rallies? The learned trial Judge was invited by the appellant's counsel to answer that question in the affirmative. The respondent's counsel, on the other hand, asked the learned trial Judge to answer it in the negative. What was the learned Judge's answer? It was that only at four (4) rallies were such statements made. Through Mr. Mahuma the appellant now says that the learned trial Judge erred in so finding. Mr. Mtaki, on the other hand, supported the finding. The appellant's case at the trial, in so far as the issue concerning intimidatory statements was concerned, was that at 30 CCM campaign meetings various district leaders of the Party, including the District Chairman, made intimidatory statements. The alleged

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statements, it was asserted, were intended to instil fear in the minds of voters that the election of opposition parties into power would result in the occurrence of the type of grave public disorders experienced in Burundi and Rwanda. The attendance at the meetings ranged from 100 to 1000 people. According to the appellant's case, a large section of the electorate was, as allegedly intended by the speakers and the respondent, so intimidated by the speakers that the electoral chances of the candidates of the opposition parties, especially the Chadema candidate, were adversely affected. The evidence established that when the CCM District Chairman addressed the Party's campaign meeting held at Lohumbo B he said, among other things:

> "You will suffer if you elect the opposition. Rwanda and Burundi are in great turmoil and distress. There it has come to a stage when the belly of a pregnant woman can just be ripped open, the foetus wrenched from the womb, chopped up, and the pieces thrown at the dogs. This is not idle talk. I have seen it on the video screen. Mwendapole /the CCM District Youth Chairman/ has just told you that our companions have started killing. Those who kill are those in the other camp, not CCM. We in CCM cherish and crave for peace and security. Wherever we have stated this those in the Opposition have given up their membership cards."

The respondent and his witnesses (save for the CCM District Chairman who admitted to have made some reference to the Burundi and Rwanda ugly situations at Lohumbo B and Mwamala campaign meetings) denied that intimidatory statements were made at the CCM campaign meetings. The learned trial Judge subjected all the evidence to a close and careful examination and in the end he arrived at a conclusion that only at four (4) CCM campaign meetings (at Lohumbo B, Jomu Primary School, Mwamala and Sokomjinga) were intimidatory statements made. Mr. Mahuma has strenuously attacked this finding, but we feel unable to say that the learned trial Judge was not, upon the evidence in the scales, entitled to so find. The matter was essentially one concerning credibility of witnesses. Applying the principles enunciated by Viscount Simon in the passage (we have already quoted) in the Watt's case supra, we do not consider ourselves entitled to reverse the learned trial Judge's finding on the point. In our opinion that finding is supportable by the evidence before the learned trial Judge. This view brings us face to face with the question whether the learned trial Judge was wrong to hold, as he did, that the intimidatory statements he found to have been made at the CCM rallies at Lohumbo B, Jomu Primary School, Mwamala and Sokomjinga did not substantially affect the result of the election in the constituency.

Mr. Mahuma submitted that those who heard the statements were likely to pass on the information to other people

in the constituency. According to the learned advocate, the intimidation must have been spread widely in the constituency and the learned trial Judge should therefore have found that a legal basic for avoiding the election of the respondent as a Member of Parliament for the constituency did exist. The decision of this Court in (1) The Hon. Attorney General (2) Radio Tanzania Dar es Salaam and (3) Azim Suleman Premji v Dr. Aman Walid Kaborou, Civil Appeal No. 32 and 42 of 1994 (unreported) is the cornerstone of the learned advocate's argument in this regard. In that case this Court had the occasion to reenunciate, among others, the principle of free and fair elections. In so far as they are relevant to the instant appeal, the facts of that case may be stated very shortly. The respondent, Dr. Aman Kaborou, challenged before the High Court the validity of the results of the parliamentary bye-election held in Kigoma Urban Constituency in 1994. One of his principal complaints was that four national leaders, Mr. Ali Hassan Mwinyi, the then National Chairman of CCM and President of the United Republic of Tanzania, the late Mr. Horace Kolimba, the then Secretary General of CCM, Mr. Augustine Lyatonga Mrema, the then Minister for Home Affairs and Deputy Prime Minister, and Mr. Nalaila Kiula, the then Minister for Communications, Transport and Works, made, at CCM campaign rallies in the constituency, intimidatory statements somewhat similar to the ones made at the four CCM campaign rallies in the instant case. According to the evidence which was accepted by both the

High Court and this Court, the rallies in question in that case had huge attendance of people. Describing the size of the crowd at the rally addressed by Mr. Mrema one witness, it will be recalled, said: "Almost the whole town was there ..." Another witness estimated the attendance at the meeting addressed by the late Mr. Kolimba as being between twenty (20) and twenty five (25) thousand people. Mr. Premji had been declared by the Returning Officer to have defeated Dr. Kaborou by 4,109 votes. Mr. Mtaki submitted that this case is distinguishable from the instant case. We agree. We do so mainly for the following reasons. First, the CCM rallies in question held in the Kigoma Urban Constituency were, unlike the rallies in the case now before us, very huge, indeed. As will be recalled, according to one of the witnesses in the case almost the whole of Kigoma town had turned up at one of those rallies, and the rally addressed by the late Mr. Horace Kolimba was attended by between 20 and 25 thousand people. In the four rallies in the instant case the attendance was between 70 and 1000 people. Secondly, unlike in the instant case, the speakers there were far much senior and influential. Thirdly, the size of the victory there was far much smaller than in the present case. In Azim Premji's case supra this Court did not lay down a general rule of law that mere utterance of intimidatory statements justifies nullification of an election. The Court considered in that case the effect on the election results of, among other things, the

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intimidatory statements. The following passage from the Court's judgment (see p. 46) clearly demonstrates that position:

> "... Presidential and Parliamentary elections are required to be conducted not only with the observance of the Constitution and the Elections Act, but also with due observance of the general law of the land. We are further satisfied that because of the large number of people who attended these campaign rallies and the respect the people of this country usually give to their President and his ministers, the defamatory and intimidatory statements in question must have affected the election results."

The learned trial Judge in the instant case reached, after a careful consideration of the matter, the conclusion that there was no proof that a substantial number of votes were obtained as a result of the intimidatory statements made at Lohumbo B, Jomu Primary School, Mwamala and Sokomjinga. We share that finding. Bearing in mind the contrast we have, we hope, amply shown between this case and Azim Premji's case supra and taking into account, as we think we ought to, the size of the respondent's declared victory, we feel justified to conclude, as we do, that the learned trial Judge cannot be faulted for refusing to avoid the election of the respondent on the basis of the proved intimidatory statements. Having reached that conclusion, we feel bound

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to dismiss the complaints in the Second Ground of Appeal, which we hereby do. We proceed now to deal with the Third Ground of Appeal.

The following statements, which were said to be defamatory of the Chadema candidate, were alleged to have been made at various CCM campaign rallies by some of the respondent's campaigners:

(1) the candidate had no fixed abode in the Shinyanga Urban Constituency and that situation compelled him to stay in guest-houses while on visits to the constituency;

(2) the candidate had exhumed the remains of his late father and reburied them in Dar es Salaam, thus he had effectively abandoned his homeland; and

(3) the candidate had disposed of his late father's property.

It is only the first statement which was pressed before us. The learned trial Judge carefully examined the evidence relating to the question of residence and concluded, rightly in our view, that at various CCM campaign rallies it was asserted that the Chadema candidate had no house in the constituency and that, as a result, he used to stay in guest-houses when visiting the constituency. Both these assertions were shown at the trial not to be true, the true position being that the candidate had a house in the constituency and used to stay there when on

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visits to the constituency. The learned trial Judge asked himself whether the false statements constituted a defamation in law and answered the question in the negative. On behalf of the appellant, Mr. Mahuma now says that that conclusion was erroneous in law. We do not find it necessary to determine whether Mr. Mahuma's contention is well-founded. We are prepared to assume, without deciding, that the learned advocate's criticism of the learned trial Judge's finding is valid. Having done that, we proceed to consider whether, in the light of the evidence in the scales, the defamation was capable of constituting a legal basis for nullifying the respondent's election as Member of Parliament for the constituency. As we apprehend the law, it is not every defamation which can in law constitute a sufficient basis for nullifying an election. To attain such a status the defamation must be inexcusable or indefensible: See Azim Premji's case supra. Were the law otherwise, election campaigns would have been intolerably risky undertakings. We think there are no public interests which demand that the law should be otherwise than as stated in Azim Premji's case. Being of that view, we proceed to ask ourselves whether the proved defamation of the Chadema candidate was inexcusable or indefensible. Having given the matter a careful consideration, we are of the opinion that the question must be answered in the negative. The Chadema candidate can, in our opinion, rightly be said to have opened himself to the charge of houselessness, because

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on the specimen ballot papers he provided no Shinyanga address of his; his address given on those documents was that of Dar es Salaam. All his opponents gave their Shinyanga addresses. In those circumstances, we think it would not be correct to hold that the defamation was inexcusable or indefensible. Since the candidate was seeking the parliamentary seat in the constituency it was quite reasonable for his opponents to expect him to disclose on the election documents his strong ties with the constituency. One way of doing so was to disclose his residential address in the constituency. His failure to do so made the petitioners' complaint relating to the alleged defamation quite weak. We can see no merits in the complaints in the Third Ground of Appeal. We dismiss those complaints.

If there is one question better settled than any other in our electoral law, it is that the onus of proof in an election petition is on the petitioner and that that onus is discharged only when there is proof beyond reasonable doubt. While recognising that a democracy runs smooth on the wheels of free and fair elections, we have, for the reasons we have given, reached the settled conclusion that the learned trial Judge was perfectly right to hold, as he did, that the appellant had failed to discharge the onus lying on him in this case. Accordingly we dismiss the appeal with costs.

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DATED at DAR ES SALAAM this 13th day of October, 1997.

L. M. MFALILA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

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

(M. S. SHANGALI)
DEPUTY REGISTRAR