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. 83 OF 1998

BETWEEN

SEBASTIAN RUKIZA KINYONDO ..... APPELLANT

AND

DR. MEDARD MUTALEMWA MUTUNGI ..... RESPONDENT

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

(Lugakingira, J.)

dated 27th May, 1998

in

Miscellaneous Civil Cause No. 12 of 1995

JUDGEMENT OF THE COURT

MFALILA, J.A.:

In the 1995 general elections, the appellant, Sebastian Rukiza Kinyondo, hereinafter to be referred to as the appellant, was a candidate in the Bukoba Rural Constituency sponsored by Chama cha Mapinduzi, otherwise popularly known by its acronym, CCM. The respondent, Dr. Medard Mutalemwa Mutungi, also contested the same seat sponsored by Chama cha Demokrasia na Maendeleo, popularly known by its acronym "CHADEMA." There were other candidates sponsored by other political parties but these are not relevant in these proceedings. The final result as announced by the National Electoral Commission, showed that the appellant won the poll by an overwhelming majority of over thirty thousand votes. He polled 42,169 votes as against 10,116 votes polled by his nearest rival, the respondent. The appellant was accordingly declared the winner. Despite the appellant's huge margin of victory,

the respondent was not satisfied with the result, he petitioned the High Court seeking to avoid the election on a number of grounds which included various instances of non-compliance with the law, corruption and defamation on the part of the appellant. The Attorney-General was cited to answer the allegations of non-compliances by Election Officers. At the end of the trial, the learned trial judge dismissed all the allegations of non-compliances either because he found them not established, or where he found them established, that such non-compliances did not affect the result of the election. He however found that the allegations of corrupt practices and defamation by the appellant had been established to his satisfaction, he therefore allowed the petition and declared the election of the appellant void. He also ordered, in view of his finding the appellant guilty of corrupt practices during the election, the issue of a certificate to the Director of Elections to the effect that the appellant had been found guilty of corrupt practices. The appellant was also ordered to pay the costs of the petition to the respondent. We would like to add that in addition to the above two grounds, the learned trial judge also avoided the appellant's election on the additional ground that the appellant appealed to tribal sentiments in his campaign. This last ground was a subject of a vigorous protest at the hearing of this appeal.

The appellant was aggrieved by this result, he therefore lodged this appeal supported by an eight ground memorandum of appeal filed on his behalf by Galati Law

Chambers of Mwanza. At the hearing of this appeal, the appellant was represented by advocates Rweyongeza and Galati, whereas the respondent was represented by Messrs Magafu and Swai. The Attorney-General, the first respondent at the trial, was not made a party in this appeal as all the allegations against him had been dismissed. Ground No. 1 was successfully resisted and struck out at the preliminary stage of the hearing of this appeal, and ground No. 2 was abandoned, hence we were left with only six grounds to deal with.

In ground No. 3 the appellant complained as follows:

> That the learned trial judge erred in fact and in law by holding that the appellant had a campaign meeting at Bwizanduru on 25th October, 1995, while:
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> (i) There was a lot of contradictions from the respondent's witnesses regarding the said meeting.
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> (ii) There was enough evidence from the appellant and his witnesses that there was no such a meeting.

As to whether there was or rather the appellant held a campaign meeting at Bwizanduru on 25/10/95, several witnesses testified for the respondent. His own campaign manager, Sweetbert Eustace Ndebea, (PW1) told the trial Court that he personally attended the CCM campaign meeting by CCM on 25/10/95. He told the trial Court that according to the campaign programme, Kinyondo should have held his

campaign meeting at Bwizanduru on 17/9/95, and that on 25/10/95, he was supposed to hold his own campaign at Nyakibimbili. He added that on 25/10/95, Kinyondo held a campaign meeting at Bwizanduru because he saw him, although he was not sure whether on his part Kinyondo also saw him. Another witness who testified on the appellant's campaign meeting at Bwizanduru on 25/10/95, was Chadema's Director of Elections and campaign Secretary, Herman Rumanyika, (PW3). He told the trial court that he was responsible for the preparation of the campaign programme and recording all activities and events at campaign meetings. He started with the Chadema campaign meeting at Bwizanduru on 25/10/95. He had personally made arrangements for this meeting in conjunction with the local Chadema Chairman and other campaigners. They arrived at the campaign meeting grounds at 5 p.m., only to find "Hon. Kinyondo addressing a meeting at our venue." Finding their venue occupied, they moved to another spot, a short distance away and the meeting started at 5.15 p.m. The speakers at this meeting included the Campaign Manager, Sweetbert Ndebea (PW1), the respondent and the witness no no doubt in his capacities as director of election and campaign secretary. Their meeting ended at 7 p.m. when he headed for home, but the CCM meeting had ended earlier at between 5.30 and 6 p.m. Another witness who testified on the CCM Bwizanduru campaign meeting on 25/10/95 was Deogratius Mboje (PW4), This was a voter at Makonge "A" Polling Station. He told the trial court that he attended two CCM campaign meetings at Makonge on 18/9/95, and at Bwizanduru on 25/10/95. He added that there were two

meetings at Bwizanduru that day, one for CCM and the other for Chadema. But when re-examined, the witness stated that "on 25/10/95 there were two meetings at Kihwa-Bwizanduru, CCM's and Chadema's. I attended both." The next witness who testified on the CCM Bwizanduru campaign meeting on 25/10/95 was Francis Rugaimukamu (PW6). He told the trial court that he attended all campaign meetings mounted by all political parties. That on 25/10/95, he attended a CCM campaign meeting at Bwizanduru, which was addressed by the appellant among other leaders. Two campaign meetings were scheduled to be held at Bwizanduru on the same day. The CCM meeting started at about 3 or 4 p.m. The two meetings were about 200 metres apart. Joyce Francis (PW15) was another witness who testified on the CCM Bwizanduru campaign meeting on 25/10/95. She told the trial court that she was secretary of a local women social and self held group, whose tongue-twisting name we shall not even attempt to write. Fortunately, the learned trial judge comes from the region, so, he easily accomplished the task. Suffice it to say that the group's purpose is to unite local women carry out socially beneficial and self help activities in the locality. The witness added that on 25/10/95, she had been to a meeting of this group and that after this meeting, she proceeded to Bwizanduru where she arrived at 4.30 p.m. and found a CCM campaign meeting in progress. It was being addressed by the appellant. This meeting ended at 6.30 p.m. She added that along-side the CCM campaign meeting, there was also the Chadema meeting, which was addressed

by "the doctor" i.e. the respondent. The last witness who testified on the CCM campaign meeting at Bwizanduru on 25/10/95, was Thomas Rugumamu, (PW17) who told the trial court that on a day Mutungi was supposed to address a meeting at Bwizanduru, he arrived at the venue late and found both the CCM and Chadema meetings had ended, but the appellant was still at the scene surrounded by a crowd of people. Of course it is not clear what the witness meant by the expression - "on a day Mutungi was supposed to address a meeting," but when cross-examined by Mr. Galati, the witness said that the occasion he was talkinng about was 25/10/95. We have endeavoured to examine the evidence of each witness regarding the alleged CCM campaign meeting at Bwizanduru on 25/10/95, because one reason for the complaint in this ground is that the learned trial judge held that this meeting did take place at the place and date despite the contradictions in the respondent's witnesses on this point.

The appellant had of course denied this allegation, telling the trial court that he could not have held another campaign meeting at Bwizanduru on 25/10/95 as this would have been outside the approved campaign programme, Exh. D2 and that he had already held a campaign rally at Bwizanduru which was conducted at Maiga Primary School on 17/9/95. That, having completed his campaign programme on 24/10/95, he spent the whole of 25/10/95 resting at Izimbya Health Centre Hostel where he had been staying since 27/9/95. He called the Medical Assistant in-Charge of Izimbya Health Centre who also doubled as Manager of

the Hostel, one James Rwegasira Kato to come and confirm that he did not leave the hostel on 25/10/95. The appellant called other witnesses to come and testify on whether he had addressed any public rally at Bwizanduru on 25/10/95. Joseph Ndyetabula (RW11) said he was CCM Chairman for Maruku Ward, but that he lives in Bwizanduru which is within Maruku Ward. He said he was in Bwizanduru throughout the campaign period and that he attended the CCM campaign meeting at Bwizanduru which was addressed by the appellant. He told the trial court that he could not remember the date of the meeting but said when cross-examined that it was sometime in September at Maiga Primary School. Theonestina Kitagoija Mwoleka (PW12) also told the trial court that she lives in Bwizanduru and that at the time she was UWT Chairman. She told the trial court that during the campaign in 1995, she attended the CCM campaign meeting in Bwizanduru and that although she could not remember the date, it was in September.

After reviewing the evidence on the point, the learned trial judge held that he was satisfied beyond reasonable doubt that the appellant addressed a meeting at Bwizanduru, Kitongoji, Kihwa on 25/10/95. This is the subject of complaint in this ground.

At the hearing of this appeal, Mr. Galati tried to highlight the contradictions in the evidence of the respondent's witnesses in an effort to show that the respondent had not proved the allegations that the appellant held a campaign meeting at Bwizanduru on 25/10/95.

On his part, Mr. Magafu, learned Counsel for the respondent, urged us to accept that he had led sufficient evidence to prove that the appellant had held a campaign meeting at Bwizanduru on 25/10/95.

In our view, the contradictions pointed out by Mr. Galati are not substantive, we think the most serious contradiction in the respondent's case on this point, was provided by the respondent himself. As we have already indicated in our summary of the evidence of the various witnesses on this point, the respondent's campaign manager, Sweetbert Ndebea (RW1) told the trial court:

> "I personally was present at the meeting held at Bwizanduru on 25/10/95."

And later in his evidence in chief he said:

> "Another problem arose in the campaign. There was confusion in the time table. On 25/10/95, at Bwizanduru Village, ... the CCM candidate called a meeting at Bwizanduru. After the meeting, the CCM Division Chairman (who was the meeting chairman) left with the group who (sic) who had attended Mr. Kinyondo's meeting. The CCM Chairman was flying the Party Flag. They were over 30. They passed near the Chadema meeting going on at the same village. There was beer and rubisi waiting for them. When the group passed at our meeting some of us got attracted and joined them. We were over 60 now. We went to the CCM Chairman's house ..."

The immediate question which came to our minds, was, which meeting did this witness attend? CCM's as he stated at the beginning or Chadema's as he now seems to say? If he attended both, when did he leave CCM's meeting to go to his own Chadema meeting which he soon abandoned to rejoin the CCM group because it had beer and rubisi waiting for it? We understand "rubisi" is a popular local brew in the area. It must also be remembered that this witness was the respondent's campaign manager!

The respondent himself had the following to say on this point, i.e. the appellant's campaign meeting at Bwizanduru on 25/10/95.

> "I don't recall when Kinyondo held a meeting at Makonge or Maruku. We had a campaign programme approved by the Returning Officer. This is my copy. According to this programme Kinyondo should have held his meeting at Bwizanduru on 17/9/95. On 25/10/95 Chadema was supposed to have its meeting at Nyakibimbili. According to the pr gramme, again Chadema was supposed to have its meeting at Bwizanduru on 30/8/95. This programme, could not be adhered to. For various reasons we could not be at some of the places when expected to, so we applied to the Returning Officer for rescheduling and he agreed. In fact we could not hold any campaign meeting on 30/8/95, for on that day we were required to meet the Returning Officer and harmonise

> our programme. The changes were made in the copies. As for me, I noted them in my diary. Kinyondo's meeting of 25/10/95 at Bwizanduru was a campaign meeting. I saw him. I don't know whether he saw me. I did not hear what he was saying at his meeting. My campaign manager (PW1) did ..."

We thought this evidence was significant on a number of points. Firstly contrary to what PW1 stated, the respondent does not say that he had a parallel meeting at Bwizanduru on that day. He only saw the appellant addressing his campaign meeting at Bwizanduru although he could not say whether the appellant also saw him. He added that he did not hear what the appellant was telling his audience but he said his manager (PW1) did. This evidence clearly shows that the respondent did not hold any meeting at Bwizanduru on that day, he was only a spectator (and a disinterested one at that) at the appellant's meeting. Where then did PW1 get the notion of a parallel Chadema meeting at Bwizanduru on 25/10/95 of which his boss the respondent was not aware? Secondly, the respondent said that his Party, Chadema, was supposed to hold a campaign meeting at Bwizanduru on 30/8/95, but that they could not adhere to this programme because on that day they were called to a meeting by the Returning Officer for harmonising their campaign programmes, and that any changes to the programme which were made on that day, were recorded in their own copies of the programme, but that he himself did not do this but did so in his diary. The respondent did not say why he chose

to put these changes in his diary rather than on the programme copy, and he did not see it fit to produce the diary to show to which date his Bwizanduru meeting was rescheduled from 30/8/95 and if at all, to what date was the appellant's Bwizanduru meeting rescheduled from 17/9/95? Indeed the respondent did not even tell the trial court whether and when he addressed a campaign meeting at Bwizanduru. All he did was to tell the trial court that he was supposed to hold a campaign meeting at Bwizanduru on 30/8/95. We thought therefore that there were very material differences between the respondent's evidence and that of his campaign manager PW1 regarding the date of the appellant's and their meeting at Bwizanduru.

On his part, Herman Rumanyika (PW3) who described himself as the respondent's campaign secretary, told the trial court:

> "My duties were to prepare a campaign programme and to record all activities and all events in the campaign. There were certain incidents I recall. First at Bwizanduru, on 25/10/95, Dr. Mutungi was to hold a meeting there. Arrangements had been made by me and the Bwizanduru Chadema Chairman and other campaigners. We arrived there at 5 p.m. and found Hon. Kinyondo addressing a meeting at our venue. Finding this, we held our meeting a short distance away. I invited Dr. Mutungi to address the meeting. That was about 5.15 p.m. Sweetbert was present He was just a listener. Sorry, he was one of the speakers, as was myself.

> The meeting was near my home. When it was over I headed home. The CCM meeting was first to end at about 5.30 or 6 p.m. Ours ended at 7 p.m. On my way home, I came upon some villagers who had attended the meeting at Kihwa. That was about 200 yards from where we had held our meeting. It was at the home of the Maruku CCM Chairman ..."

This evidence does not find support in the evidence of the respondent who said nothing of the sort. He did not say that on 25/10/95 there was a Chadema campaign meeting at Bwizanduru or Kihwa which he attended and that Herman Rumanyika (PW3) invited him to address that meeting. All he said was that he was near a CCM campaign meeting on 25/10/95, at Bwizanduru and that he saw the appellant addressing it. We do not think the respondent could have omitted to mention his own meeting on 25/10/95 and only remember the appellant's. Indeed if the respondent had a parallel meeting on 25/10/95, where did he get the time to attend the appellant's, as he seems to have done? We were thus left in considerable difficulty to comprehend what meeting this witness, the Bwizanduru Chadema Chairman and other campaigners had arranged at Bwizanduru on 25/10/95. We were further perplexed by the introduction of a completely new place - Kihwa. Whereas in the early part of his evidence, PW1 had said that he and his colleagues had arranged a Chadema campaign meeting at Bwizanduru on 25/10/95, later in his evidence, he said that after the meeting, as he was going home, "he came upon some villagers who had attended a meeting at Kihwa." What

was the meeting at Kihwa? A CCM meeting? Yet the same witness had told the court that on arrival at their pre-arranged meeting at Bwizanduru, they found the appellant addressing a rally there, hence they moved a short distance away and held their own Chadema campaign rally. We also wondered as to the efficacy of holding two campaign rallies simultaneously in the same area within a short distance of one another. Both PW4 and PW6 told the trial court that they attended both rallies arranged by CCM and Chadema on 25/10/95 which were held within a short distance of each other (estimated at 200 metres). Both said the meetings were arranged at Bwizanduru village although PW4 re-stated in his re-examination that the meetings were at Kihwa - Bwizanduru. In our view the differences or contradictions in the respondent's case regarding the CCM campaign rally at Bwizanduru on 25/10/95, called for resolution. The learned trial judge apparently was not troubled by them, accordingly he never referred to them after stating in summary form what PW1, PW3, PW4 and PW6 had said on the subject, omitting completely what the respondent himself had said on the matter. These differences and contradictions remained unresolved, they could not be resolved by the lies of the appellant's witness, namely the Medical Assistant in-Charge at Izimbya Health Centre, James Rwegasira Kato (RW14). We think it was very simple for the respondent to demonstrate, using the programme which was reorganised at the meeting of 30/8/95 that the appellant's scheduled campaign meeting at Bwizanduru on 17/9/95, was rescheduled to 25/10/95 and if as it was stated by the appellant and his witnesses that he did

indeed hold a campaign rally at Bwizanduru as originally ~~at Bwizanduru as originally~~ scheduled on 17/9/95, then it would have been up to the appellant to explain why he did so and then take advantage of the altered programme to organise a second campaign meeting on 25/10/95 in the same village. Since the programme which was produced in evidence with the concurrence of the respondent showed no change, and indeed the respondent himself said he was according to that programme Exh. D2 supposed to be holding a campaign rally at Nyakibimbili on 25/10/95, it was not enough for him simply to say the programme was not being adhered to as proof that not only did the appellant go outside the programme, but that he also broke the rule that a candidate should not hold two meetings in the same area. Accordingly, we agree with the complaint in ground No. 1 of the memorandum of appeal and hold that it was not established beyond reasonable doubt that the appellant held a campaign meeting at Bwizanduru on 25/10/95.

This finding automatically affects the complaints in grounds 4 and 5 of the memorandum of appeal. Since the complaint in ground 4 is pegged to the corrupt practices allegedly committed after the appellant's Bwizanduru campaign meeting on 25/10/95, our holding that the existence of such a campaign meeting was not proved to our satisfaction, makes the trial court's finding that such corrupt practices did take place untenable. The corrupt practices of 25/10/95 at Bwizanduru, could not take place without the campaign meeting because one followed the other. Accordingly, we also agree with the complaints in grounds 5 and 4 and hold that since the existence of the appellant's meeting

at Bwizanduru on 25/10/95 had not been proved, equally the allegation that the appellant had indulged in corrupt practices after that meeting cannot be said to have been proved beyond reasonable doubt.

In Ground No. 6 the appellant complained as follows:

> That the learned trial judge erred in law by holding that the appellant defamed the respondent during his election campaign meeting while:
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> (i) The respondent and his witnesses did not prove the allegations of defamation to the required standard.
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> (ii) there was enough evidence by the appellant and his witnesses which was not taken into account by the trial judge, to the effect that the alleged defamatory statements were not spoken by the appellant.

In paragraph 6 (p) of the last amended version of his Petition, the respondent stated:

> (p) That on diverse dates in the months of September and October, 1995 at his election campaign meetings at Makonge, Maruku, Kibona, Ibwera, Nyakibimbili, Kashozi, Kijongo, Ilango, Ntoma, Kanyangereko, Kihwa - Bwizanduru, Kilima, Kitahya, Bundaza, Karonge, Rubale and Ibarazibu the 2nd respondent (the present appellant) falsely and maliciously

used defamatory statements and vulgar abuses against the Petitioner (present respondent) and published the same to those who attended his election campaign rallies. The said words are:

(i) The Petitioner is a thief and he stole electric generators belonging to Lyamahoro and Rubara Secondary Schools.

(ii) The Petitioner stole from an unnamed shoe company and as a result he was sacked from employment therein.

(iii) That the Petitioner had been expelled from school because he did unnatural things to young children. The said words imputed by innuendo that the Petitioner sodomised young children.

(iv) That the Petitioner had occasioned loss to Lornho (T) Ltd and as a result he was sacked from employment.

(v) That the Petitioner was an academic failure and whatever certificate he has are either forged or stolen.

(vi) That the Petitioner had separated with his wife because she was a prostitute. The 2nd respondent intended to be understood to mean that the Petitioner's family

was not stable and was immoral and as such he was not fit to be given public office.

(vii) That the Petitioner is a drug-trafficker.

At the trial, the respondent did not lead evidence from all the places where he alleged the defamatory statements were uttered during the election campaign. He led evidence from the campaign rallies in two divisions in the constituency. These divisions are Kyamtwara and Katerero. In Kyamtwara division, he led evidence from campaign rallies at Bwizanduru, Makonge, Ntema, Ibaraizibu and Maruku. As we have already held that the campaign rally at Bwizanduru on 25/10/95 was not proved to have taken place, we shall not consider the alleged defamatory statements at the meeting.

With regard to the rallies at other places in the division, the appellant called witnesses to testify as to what the appellant had allegedly stated at those places. For instance, at the Makonge rally, the appellant is said to have told the audience that the respondent was a thief, who had stolen shoes from his employer, a generator belonging to Nyamahoro Secondary School, a drug trafficker and sodomiser of young children while he was at Ihungo Secondary School, and that his alleged educational qualifications were not genuine as he had either forged or stolen them. These statements were related in more or less the same terms by PW4 Deogratius Mboje, PW5 Bartholomew Bulamu and PW11 Simon Daniel Kabatilaki.

Defamatory statements in more or less the same vein were alleged to have been uttered by the appellant against the respondent at his campaign rallies at Ntoma and Ibaraizibu and were testified to respectively by Stanslaus Kagasheki (PW7) and the old man Wedslaus Tibangayuka (PW10). Kagasheki added that at Ntoma campaign rally, the appellant repeated the defamatory statements despite an earlier warning by the Returning Officer at a joint meeting on 12/10/95 to stop such practices. In view of his earlier finding on the rally at Maruku after evaluating the evidence of the relevant witness Cleophas Rugumora, (PW16) the learned trial judge found the allegation at this rally not established.

From Katerero division, the respondent called witnesses to testify on the campaign rallies at four villages, namely; Kibona, Kiijongo, Nyakibimbili and Kitahya. Ladslaus Muhamba (PW8) was at the Kibona rally and heard the appellant utter defamatory statements against the respondent. The witness told the trial court that he heard the appellant call the respondent uneducated because his certificates were fake and similar to papers picked from a toilet, that he had been expelled from Ihungo Secondary School because he was sodomising other children, that he was a thief who had stolen an electric generator belonging to Lyamhoro Secondary School and that the respondent was a conman who had ganged up with Chaggas in Chadema and NCCR to traffick in drugs. Khalid Ibrahim Mabaare (PW9) related what had taken place at Kiijingo campaign rally. The defamatory statements at Kibona appear to have been repeated at this rally. The witness

narrated largely the same statements about fake or stolen certificates, sodomising, thieving, as well as drug trafficking in league with Chadema and NCCR Chaggas.

What happened at Nyakibimbili campaign rally was testified to by Athumani Abdallah Byabato (PW13). He narrated the same litany of abusive, derogatory and on the whole the defamatory statements told to the audience by the appellant against his opponent, the respondent.

The same litany came out of the Kitahya rally as narrated by Tito Kaiza (PW14). According to this witness, the appellant embarked on the tirade against the respondent being a thief, uneducated with forged or picked certificates and that to all appearances, the respondent was a hotel worker.

On his part, the appellant called witnesses to support his denials that he uttered such defamatory and abusive statements against the respondent. In his evidence, the appellant explained why he had referred to the respondent's educational attainments, namely to emphasize the point that in comparison to his own degree, the respondent's was honorary. As to the family photograph, the appellant said he simply drew the attention of the audience to the anomaly that the respondent did not refer to his own wife. Apart from these admissions or explanations, the appellant denied calling the respondent a thief, a rapist and a drug trafficker in league with Chaggas. He called witnesses who supported his denials that he had uttered defamatory statements against the respondent at any of the meetings at Makonge, Ntoma, Ibaraizibu, Maruku, Kibona, Kiijongo,

Nyakibimbili and Kitahya as alleged by the respondent's witnesses.

The learned trial judge after carefully analysing the evidence led in support of the allegations and in rebuttal, was clearly of the view that apart from the campaign rally at Maruku which he found not established, the appellant had uttered the defamatory statements against the respondent at his campaign rallies at the above mentioned villages. Having so found, the learned trial judge held that even after giving allowance to the risks that are inherent in the game of politics with regard to the right of candidates to exploit each other's weaknesses, it was not open to the appellant to accuse the respondent of all sorts of crimes without any justification, i.e. that the respondent was a thief, a sodomiser, conman and a drug trafficker. These are serious crimes to impute to any one. The learned judge also found as defamatory statements to the effect that somebody is an irresponsible family head or that he does not take part in social activities such as consoling the bereaved because such statements tended to lower somebody's esteem in the eyes of the community. He was therefore satisfied that as a result of the appellant's defamatory statements which in his view were widely publicised, his campaign was one big scandal which went to the root of a free and fair election and that it was sufficient to avoid the election, This then was the subject of complaint in this ground.

At the hearing of this appeal, Mr. Galati on the appellant's team, attacked the judge's finding on defamation, saying, he did not take into account the contradictions

it would be miraculous to expect people at two different gatherings to give the same account, unless there is evidence to the effect that the appellant was reading the same written speech at every campaign rally.

In multi-party elections, as opposed to one-party elections of yesteryears, the fight is not on personalities, but on contending Party policies, there is therefore very little room for campaigns characterised by character assassinations. In this case, there was no basis at all for the appellant to launch such vile and foul attacks against his opponent. We are of course aware of the saying that politics is a dirty game, but if this saying has any truth, it is meant to be at general not personal level, so as to make it possible for gentlemen and of course gentlewomen to take part in politics. The appellant's defamatory utterances against the respondent at his various campaign rallies, were legally indefensible and inexcusable, they were poisonous to free, fair and civilised campaigning. In our view, a victory however large, obtained following such a campaign, cannot be sustained, the uncalled for defamations are grounds to avoid the election in question. Accordingly we dismiss the complaint in this ground.

In Ground 7 the appellant complained as follows:

> That, in the alternative to paragraph 6 above, the learned trial judge misdirected himself on the question of wide publication of defamatory statements, if any, in that there was no evidence at all that there

was a wide publication as pointed out by the trial judge.

At the hearing of this appeal, Mr. Galati in support of this ground, submitted that there was no evidence of wide publication of the defamatory statements, because out of 90 campaign centres, evidence shows that the defamatory statements if at all were made at only five centres. In the circumstances, he said, these defamatory statements could not have affected the result as only a small portion of the constituency was affected.

In reply, Mr. Magafu for the respondent, submitted that contrary to what his learned colleague had stated, there was wide publication because the defamatory statements were made in two out of four divisions in the constituency.

In our view, the position is more complicated where defamatory statements which amount to criminal conduct are made against a political opponent in an election campaign. It cannot be reduced to a simple arithmetical problem of adding and substracting the campaign centres where this took place from the total number of centres in the constituency. Candidates at elections, must be effectively protected by law from such unjustified and ego motivated attacks as was the case in the Bukoba Rural Constituency in the 1995 general election. If a candidate at an election chooses as his election tactics to vilify his opponent by accusing him of criminal conduct, and it is proved that he did so, then, he will have done so at his own risk. The courts will assume that the allegations

adversely affected the other candidate's election campaign unless the person making the allegations proves that they did not. This is the only way the courts can clean up election campaigns so as to give the electorate clean and fair elections. The dirty and unusual tactics which were revealed in Bukoba Rural Constituency during the 1995 election campaigns, should have no room in our electoral process. The courts will protect the victim of proved defamatory statements imputing criminal conduct by assuming that they hurt his election, they will not protect the perpetrator by assuming in his favour that they did not. But in this case, the learned trial judge found that there was wide publication in that more than half of the constituency was affected. We have no reason to depart from his reasoning. Accordingly we dismiss the complaint in this ground.

Lastly, in Ground 8 the appellant complained as follows:

> That, learned trial judge erred in law and in fact by embarking and giving his decision on the issue of tribalism while:
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> (i) In the course of trial he had made a ruling that the issue of tribalism would not be entertained.
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> (ii) The said issue was not among the issues which were pleaded and prayed for.
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> (iii) The respondent introduced the issue without seeking leave of the court.

At the hearing of this appeal, Mr. Rweyongeza learned Counsel for the appellant, submitted in support of this ground that the proviso to Rule 6 should be limited only to those situations and grounds which can legally be brought in, i.e. that they are not time-barred as the issue of tribalism was in this case. He added that the parties having been denied the opportunity to deal with the point of tribalism, the learned judge should not have raised it in his judgment. In any case he argued, Rule 6 of the Election (Election Petition) Rules, 1971 was ultra vires Section 115 of the Elections Act.

In reply, Mr. Magafu learned Counsel for the respondent, supported the action of the learned judge in raising the issue of tribalism in his judgment. He said that the learned counsel for the appellant should not confuse Rule 6 and Section 115 of the Elections Act 1985 as the two deal with different matters. Whereas Section 115 deals with limitation, Rule 6 deals with the conduct of the trial. He added that the present case is similar to Civil Appeal No. 5/82, William Bakari and Another vs Chediel Mgonja and that in the present case, not only did counsel for the appellant fail to object to the introduction of evidence on tribalism, but he went ahead and cross-examined the witnesses on the issue and he led the appellant to deny the allegation that he had said the respondent was dealing in drugs with Chadema Chaggas.

In dealing with this point, the learned judge painstakingly gave the background to it, the balated attempt to make it one of the issues, and why he had

The short back-ground to the appeal in that case was that at the trial, counsel for Petitioners had sought to put in an amendment to the Petition to include an allegation of corrupt practices by the first respondent Chediel Yohane Mgonja. Counsel for the first respondent successfully resisted this attempt on the tround that it was time-barred. The court agreed with him and rejected the application for amendment. On appeal, Counsel for the appellants challenged the decision of the High Court which had refused him permission to amend to enable him introduce the allegation of corrupt practices. This court held that the High Court was wrong to reject the application for the reasons it gave, it therefore decided itself to consider the application and invited Counsel to address it. After hearing counsel, this court dismissed the application on the ground that counsel had not adduced sufficient reasons to justify the delay. However, in the course of the hearing in the High Court, evidence had been introduced without objection showing that the second respondent had indulged in corrupt practices at two schools. Indeed not only was this evidence not objected to, but the relevant witnesses were cross-examined on it and the respondent himself gave evidence refuting the allegations. On this scenerio this court said:

> "Both CHIPETA, J. and MAGANGA, J. found that the first respondent, but not the others, used government transport to conduct unauthorised campaigns of himself at Parani and Jitengeni Secondary Schools. They believed evidence from PW 29,

PW30, PW31 and PW32 that the first respondent visited Parani School sometime in August, 1980 and that the first respondent in the campaign meeting gave out footballs and promised his audience jerseys and other game and sport equipment if he was elected and that he asked for their support in the coming election. We accept this finding.

Once this evidence is accepted then the first respondent would be guilty of corrupt practices. We have earlier referred to the failure of Mr. Jonathan to amend with a view to bringing in this element of corruption. However, this evidence was introduced without objection from Mr. Mahatane or the court, and is clearly admissible evidence. The evidence itself indicates an unauthorised campaign in the school coupled with illegal or corrupt practices. The first respondent gave evidence to rebut these allegations, and he also called a witness IR.W.23 Amon Mbwana to refute it. IR.W.23 Amon was a pupil at the Parani School during 1980. From the unsuccessful attempt at amendment by Mr. Jonathan, the first respondent must have been aware that efforts to accuse him of corrupt and illegal practices were very real. However, the failure of the application to amend had not ruled out the introduction of such

evidence, unless such evidence was objected to and such objection upheld. Once such evidence has been introduced, we, on appeal, must deal with it. Mr. Mahatane has submitted that the first respondent would be prejudiced in such an event as he had not directed his mind to this aspect of the case owing to the failure of Mr. Jonathan to obtain amendment to include corruption. The first respondent had assumed that he was safe from such an attack.

Indeed CHIPETA, J. in his judgment (p.588 of the record) held that the promises by the first respondent amounted to an illegal practice as defined in section 123 (3)(d) of the Act. He however felt that he was precluded from considering this aspect of the evidence, in view of MROSO, J.'s ruling on the application for amendment. MAGANGA, J. similarly held (p.799 of the record) that Mr. Jonathan was estopped from inviting the court to address itself on the ground of corruption because of the ruling of MROSO, J. and also because it was not pleaded.

We think that the two judges had erred in holding that they were precluded from dealing with the charge of corrupt or illegal practices because of the ruling of MROSO, J. The evidence concerning such charge was not inadmissible, and did not depend

on the amendment application. Such evidence, that is, concerning the promises made, could have been objected to, in view of the ruling of MROSO, J., and if the objection was upheld, this evidence would not have been introduced at the trial. But once it was introduced it was perfectly good evidence. The trial court was not precluded from dealing with a ground of complaint which has not been pleaded, see Rule 6 of the Election Rules.

The only point we have to consider is whether the first respondent might have been prejudiced. Counsel for the first respondent had full opportunity to cross-examine on this evidence, and did so thoroughly. The first respondent himself gave evidence on this matter, denying that he had visited the Schools in August, 1980 or made the statements alleged against him. He called IR.W.23 Amon to challenge this evidence. The evidence of the unauthorised ca campaign meeting and the promises made in the meeting form an integral piece of testimony, and the first respondent clearly directed his mind to this evidence and made vigorous efforts to refute it. Indeed, Mr. Mahatane in his final submission to the trial court expressly referred to this charge of corruption (p.511

> of the record). We are satisfied that this matter was clearly in issue at the trial between the parties and that the first respondent did not suffer any prejudice by default or otherwise."

Mr. Rweyongeza urged us to limit the application of the proviso to this Rule only to situations where the ground or matter sought to be introduced could at the trial be legally admitted.

We are satisfied that this proposition is untenable. If allowed, it would kill the whole purpose behind the proviso to Rule 6, namely to untie the hands of the court when dealing with election petitions. We believe this was done in the public interest and the courts will always exercise the power in this Rule in the public interest, namely, in defence of a public good. Furthermore, as every ground is time-barred after 30 days, there would be no occasion for the court to use their power under this Rule. In any event, this proposition is not in accord with the decision of this court in Civil Appeal No. 5/82 quoted above. The learned judge was therefore right in feeling that there were no fetters in his use of Rule 6 to take up the matter of tribalism at that stage.

We were only surprised that a person of the appellant's political stature could have lowered himself to the level of appealing to tribal sentiments. Having made a lot out of his educational accomplishments during the election campaigns, it is inconceivable that in

spite of these educational achievements, the appellant should have let himself to be a slave of such low level political thinking. We join the learned trial judge in expressing horror at such conduct which of course apart from its being despicable, is also contrary to the provisions of Section 108 (2)(a) of the Elections Act. Accordingly we see no merit in this ground of appeal and we dismiss it.

In sum total and for all these reasons, the end result of the appeal is as follows: We allow the appeal in grounds 3, 4 and 5 and since these grounds pertain to corrupt practices, we grant the prayer in (iii) and order that the certificate issued by the High Court notifying the Director of Elections that the appellant was guilty of corrupt practices, be and is hereby reversed and set aside. To the limited extent as set out above, the appeal is otherwise dismissed with costs.

DATED AT DAR ES SALAAM THIS 28TH DAY OF JUNE 1999.

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.

(A.G. MWARIJA)
DEPUTY REGISTRAR