IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., BWANA, J.A., And JUMA, J.A.)

CONSOLIDATED CIVIL APPEALS NO. 1 & NO. 5 OF 2013

1. **THE HON. ATTORNEY GENERAL**
2. **JUSTUS ATHANAS KASLAMA**
   (ASSISTANT RETURNING OFFICER
   KATANDALA WARD)
3. **VISTUS KAPUFI**
   (ASSISTANT RETURNING OFFICER
   MATANGA WARD)
4. **AESHI HILLARY**

..... APPELLANTS

VERSUS

NOBERT YAMSEBO..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania
At Sumbawanga)

(Mmilla, J.)

dated the April 30, 2012
in
Misc. Civil Cause (Election Petition) No. 1 of 2010

JUDGMENT OF THE COURT

19th April, & 6th May, 2013

JUMA, J. A.:

On 19th April 2013 when two appeals, CIVIL APPEAL NUMBER 1 OF 2013 and CIVIL APPEAL NUMBER 5 OF 2013 came up for hearing;

Court of Appeal as provided in this Constitution or any other law."

The functions of the Court, as spelt out in sub-article (3), "shall be to hear and determine every appeal brought before it arising from the judgment or decision of the High Court or of a magistrate with extended jurisdiction."

One of those enabling laws envisaged under sub-article (1) above is the Appellate Jurisdiction Act, Cap 141, R.E. 2002 (the Act). It is provided as follows in section 6-(2) of the Act:-

> "Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order, as the case may be, on any ground of appeal."

points of objection and the hearing of the consolidated appeals should depend on the outcome of the objection. The law is clear, where a preliminary objection is raised against the hearing of appeal, same must be taken first. We ordered the preliminary objection to be heard together with the consolidated appeal to expedite the process, but we shall give a Ruling on preliminary points of objection before deciding whether to proceed on to determine the appeal on merit.

At the hearing Mr. Luena assisted by Mr. Karim Rashid learned State Attorney, appeared for the first three appellants. Mr. Richard Rweyongeza assisted by Mr. Juma Rashid learned counsel, appeared for Mr. Aeshi Hillary (the 4th Appellant). Mr. Victor Mkumbe, learned counsel appeared for Mr. Nobert Yamsebo (the respondent).

The background leading up to this appeal, may be traced back to the 31st October 2010 when the General Elections were held throughout Tanzania. Norbert Joseph Yamsebo was sponsored by CHADEMA political party to contest Parliamentary seat for Sumbawanga Urban Constituency. He lost the contest to Mr. Aeshi Hillary of the CHAMA CHA MAPINDUZI (CCM). Dissatisfied with the outcome of the election and the results, Mr. Yamsebo filed an

election petition, the Misc. Civil Cause (Election Petition) No. 1 of 2010 in the High Court of Tanzania at Sumbawanga, to avoid the election of Mr. Aeshi Hillary. In his election petition, Mr. Yamsebo cited Mr. Aeshi and the Attorney General as 1st and 2nd respondents to the petition. Mr. Justus Athanas Kaslama (Assistant Returning Officer, Katandala Ward) and Vistus Kapufi (Assistant Returning Officer, Matanga Ward) were joined in that petition as the 3rd and 4th respondents respectively. On April 30, 2012, the High Court (Mmilla, J.) allowed the petition and declared the election of Mr. Aeshi Hillary null and void.

Following the nullification of his election, Mr. Aeshi Hillary and the Attorney General filed two separate appeals to this Court. Mr. Aeshi lodged his CIVIL APPEAL NO. 55 OF 2012 on May 28, 2012 citing Mr. Norbert Yamsebo, the Attorney General, Justus Athanas Kaslama and Vistus Kapufi as respondents. On July 3, 2012, the Attorney General filed the CIVIL APPEAL NO. 65 OF 2012 and cited Mr. Norbert Yamsebo as the respondent. For purposes of hearing and their determination, CIVIL APPEAL NO 55 OF 2012 and CIVIL APPEAL NO. 65 OF 2012 were consolidated by this Court to become CONSOLIDATED CIVIL APPEALS NO. 55 OF 2012 and NO. 65 OF

2012 between, Aeshi Hillary, Attorney General, Justus Kaslama and Vistus Kapufi; and Norbert Yamsebo as respondent.

The CONSOLIDATED CIVIL APPEALS NO. 55 OF 2012 and NO. 65 OF 2012 did not proceed beyond the first day of hearing in this Court. This Court, on its own motion found that the record of proceedings in relation to the application for determination of the amount payable as security for costs were missing in the records of the consolidated appeals. As a result, on 3rd October 2012 this Court struck out the two appeals, as consolidated.

The setback following the striking out of the CONSOLIDATED CIVIL APPEALS NO 55 OF 2012 and NO 65 OF 2012 did not deter Mr. Aeshi Hillary and the Attorney General. Mr. Aeshi Hilary returned back to the High Court of Tanzania at Sumbawanga with Chamber Summons application (Misc. Civil Cause No. 15 of 2012) to seek an extension of time within which to lodge their Notice of Appeal to this Court. Similarly, the Attorney General, Justus Kaslama and Vistus Kapufi filed their Chamber Summons application at the High Court (Misc. Civil Cause No. 16 of 2012) seeking an extension of time to lodge their Notice of Appeal. In a Ruling delivered on 30th November

2012 by Khaday, J., the High Court of Tanzania at Sumbawanga (Kaduri, J.) granted fourteen (14) days within which to file their Notice of Appeal. The Attorney General, Justus Kaslama and Vistus Kapufi filed their Notice of Appeal on 7th December 2012 and slightly over a month later on 10th January, 2013 they lodged Civil Appeal No. 1 of 2013. Mr. Aeshi Hilary lodged his Notice of Appeal on 5th December 2012 and on 21st January 2013 he filed Civil Appeal No. 5 of 2013.

After appreciating the background we move on hear the preliminary points of objection first. As we noted earlier, the points of objection which Mr. Mkumbe raised on behalf of the respondent are in essence based on two broad grounds. In the **first** broad ground it is contended that the Notice of Appeal which the ATTORNEY GENERAL, JUSTUS KASLAMA and VISTUS KAPUFI filed on 7th December 2012 suffers from three defects, namely:

(a) That the appellants lodged their Notice of Appeal with the Court of Appeal, Sumbawanga Sub-Registry instead of High Court at

Sumbawanga thereby infringing Rule 83 (1) of the Tanzania Court of Appeal Rules, 2009;

(b) The appellants did not serve on the 1st respondent with their Notice of Appeal which appears on pages 455 and 456 of the record of appeal, and the different copy of the Notice which was later served is undated with no indication as to when it was lodged. These defects contravene Rule 84 (1); and

(c) The fee of Tshs 8,000/= for filing of the Notice of Appeal was paid on 8th December 2012 instead of 7th December 2012 when the Notice of Appeal was lodged. This violated Rule 119 (1) of the Court of Appeal Rules.

In the **second** broad grounds of objection the respondent contended that:

(a) The appellants have not paid the Tshs 15,000/= fee for lodging their appeal contrary to Rule 118 read together with item 8 (ii) of the 2nd Schedule to the Court of Appeal Rules;

(b) The appellants have not paid the Tshs 2,000/= as security for costs thereby contravening Rule 120 (1); and

(c) Appellants' initial appeal to this Court having been struck out, the High Court had no jurisdiction to allow the issuance of a new "Notice of Appeal" to this Court.

Mr. Mkumbe, Mr. Luena and Mr. Rweyongeza basically adopted the written submissions they had filed in support of their respectively positions on preliminary points of objection.

Regarding the defects allegedly apparent in the Notice of Appeal, Mr. Mkumbe for Mr. Yamsebo (the respondent), submitted that the record of appeal shows that Notice of Appeal was admitted by the DISTRICT REGISTRAR COURT OF APPEAL SUMBAWANGA SUB-REGISTRY on 5th December 2012 who acknowledged the filing by affixing his rubber stamp. This was wrong. According to Mr. Mkumbe, Rule 83 (1) required the Attorney General and two other appellants to lodge their Notice of Appeal with the High Court.

In the 1st, 2nd and 3rd Appellants' reply submission, the Attorney General invited us to first determine the question whether in law the grounds mentioned in the Notice of Preliminary Objections meet the threshold of pure points of law capable of disposing of the consolidated appeal without going into the merit of the appeal. According to the Attorney General, the points of objection which the respondent raised are inseparably mixed questions of facts and law and are not pure point of law.

Regarding the contention that the Notice of Appeal was lodged with the District Registrar of the Court of Appeal, the Attorney General submitted that the Notice of Appeal appearing on page 456 of the record of appeal indicates that the Notice was in fact addressed to the Registrar of the High Court and that in terms of Rule 3, the term Registrar of the High Court includes Deputy Registrar. It was submitted that the Notice was first properly lodged, and was only later endorsed with a rubber stamp.

After hearing submissions on the appropriateness of Notices of Appeal which initiated this consolidated appeal; it seems to us that Mr. Mkumbe has made a big issue out of the rubber stamp appearing

on the Notice of Appeal which reads **"COURT OF APPEAL SUMBAWANGA SUB-REGISTRY"**. We think that the content of the Notice appearing on page 456 shows that when the appellants filed their Notice of Appeal, they clearly addressed it to the Deputy Registrar in the High Court of Tanzania at Sumbawanga. The Notice was not addressed to the "COURT OF APPEAL SUMBAWANGA SUB-REGISTRY." The very last paragraph of the notice states: **"Lodged in the Sub-Registry in the High Court of Tanzania at Sumbawanga this 7th day of December 2012."** We cannot but agree with the appellants that they sent and lodged their Notice of Appeal with Deputy Registrar in the High Court of Tanzania at Sumbawanga who is a proper officer to receive the Notice under Rule 3.

The position we are taking is not different from the position we took earlier in CIVIL APPEAL No. 44 of 2004, EDSON MBOGORO VS 1. OC-CID SONGEA DISTRICT and 2. ATTORNEY GENERAL (unreported) where we said that it was wrong to send and lodge the Notice of Appeal with the DEPUTY REGISTRAR OF THE COURT OF APPEAL at Songea. In the consolidated appeal before us, Notices of Appeal were properly addressed to the Deputy Registrar in the High

of Tanzania at Sumbawanga. We are prepared to say for the poses of Rule 83 (1), since the Notices of Appeal were addressed o the Deputy Registrar of the High Court and lodged in an appropriate registry of the High Court, it shall be presumed that Rule 83 (1) was complied with. We do not think after lodging Notice of Appeal, a rubber stamp was administratively affixed reading a sub-registry of this Court. The only duty an appellant has in so far as a Notice of Appeal is concerned; is to address, send and lodge his written Notice of Appeal in duplicate with the Registrar of the High Court. There is no further duty to verify the nature of rubber stamp affixed after lodging.

The second ground objection centres on lack of service of the Notice of Appeal. Before abandoning this ground of objection, Mr. Mkumbe had contended in the written submissions that this consolidated appeal should be struck because of the failure by the appellants, to serve the 1st respondent or Mr. Mkumbe, his learned advocate with their Notice of Appeal. This, according to Mr. Mkumbe, violated Rule 84 (1). According to Mr. Mkumbe, what was served on the respondent was only a copy of the Notice but not a copy of the Notice which appears on pages 455 and 456 of the record of this

appeal. To attest to the dissimilarity between the copy of Notice on pages 455-456; and the copy of Notice that was served on the 1st respondent, Mr. Mkumbe attached to his written submissions a copy of Notice that was allegedly served on the respondent.

In the replying submissions, the Attorney General argued that the question whether the respondent was served with a copy of Notice, is a question to be ascertained from facts and does not qualify to be regarded as a pure question of law for purposes of preliminary points of objection. Further, the Attorney General submitted that attaching to the written submissions of the respondent of a copy of the Notice of Appeal that was allegedly served, was akin to surreptitious introduction of evidence through back door.

From submissions of the learned counsel on service of Notice of Appeal upon the respondent, we shall be guided by what is actually reflected in the record of appeal and not on evidential matter which the Mr. Mkumbe attached to the written submissions. The applicable Rule 84 (1) obliged the appellants to serve upon the respondents with a Notice of their appeal within fourteen days after lodging a

notice of appeal. We agree with the Attorney General that page 7 of the record of this appeal show service by dispatch to confirm not only that the respondent was duly served with the Notice of Appeal, but also that that Notice was served on him within the stipulated fourteen days of its being filed. The ground of objection contending that Rule 84 (1) governing service of Notice of Appeal was not complied with, clearly lacks merit.

Another ground of objection is based on Rule 119 (1) which provides that the fees payable on lodging any document shall be payable at the time when the document is lodged. Mr. Mkumbe for the respondent, has submitted that by failing to pay the filing fee of Tshs 8,000/= when the Notice of Appeal was lodged on 7th December 2012; the appellants contravened the applicable Rules, warranting the striking out of that Notice. According to Mr. Mkumbe, the record of appeal on page 846 confirms that the fee was in fact paid on 8th December 2012 which was a day after the lodging of the Notice of Appeal.

In reply, the Attorney General submitted that this is yet another example of a preliminary point of objection that does not raise pure

point of law. It was further submitted that this Court would need further evidence to prove whether in fact a fee of Tshs 8,000/= for filing a Notice of Appeal was paid on 8th December instead of 7th December 2012. And that if Rule 119 (1) is to be read together with Rule 14 governing the power of the Registrars to accept or reject documents, the payment of the fees a day after the lodging of the Notice did not violate any provision of the Rules. According to the Attorney General, the Rules envisage situations where documents like the Notice of Appeal are first accepted and scrutinized by the Registrar for any defect before being accepted or being rejected. It was further submitted that as long as the fee has been paid and no one disputes the fact of that payment, Rule 14 (7) takes care of any fee that is paid a day after lodging of the Notice of Appeal.

It seems to us that the explanation why the filing fee for the Notice of Appeal was paid a day after the lodging of the Notice of Appeal does not lend a situation where this Court can sustain the preliminary point of objection without requesting further evidence in form of explanation from the Registrar. Power of the Registrar to reject or accept documents invisiged under Rule 14 are administrative powers. We are not therefore in a position to

determine what administrative matters prevented the receipt of the fee together with the Notice of Appeal on 7th December 2012 without further evidence. Predicated as it is on further evidence, the objection that the fee for Notice of Appeal was paid a day after the lodging of the Notice cannot be regarded as a pure point of law for purposes of preliminary points of objection.

Mr. Mkumbe also raised points of objection to contend that the present appeal is not properly before this Court. It was submitted that the appellants did not pay the Tshs 15,000/= fee for lodging their appeal violating Rule 118 read together with item 8 (ii) of the 2nd Schedule to the Court of Appeal Rules. It was also submitted that the appellants did not pay Tshs 2,000/= as security for costs. The learned Advocate submitted that the record of this appeal do not show when the appellants paid Tshs. 15,000/= for lodging their appeal and Tshs 2,000/= as security for costs.

It goes without saying that we have scrutinized the record of the consolidated appeal to see whether fee for lodging their appeal and security for costs had been paid. We do not think that this objection qualifies as pure point of law. Records of this appeal bear

out the submission by the Attorney General that both the filing fees as well as security for the costs of appeal were respectively paid and duly furnished.

There was also an interesting point of objection where the respondent questioned the legality of filing of Notices of Appeal on 7th December 2012 which was done after this Court had struck out the CONSOLIDATED CIVIL APPEALS NO. 55 OF 2012 and NO. 65 OF 2012. According to Mr. Mkumbe, High Court of Tanzania at Sumbawanga (Kaduri, J.) lacked requisite jurisdiction on 30th November 2012 when it allowed the filing of new Notice of Appeal after CONSOLIDATED CIVIL APPEALS NO. 55 OF 2012 and NO. 65 OF 2012 had been struck out by this Court. The Attorney General in reply submissions did not agree with this view of the law as advanced by Mr. Mkumbe. The Attorney General submitted that in the first place, the Ruling of the High Court (Kaduri, J.) granting an extension of time to the appellants to file their Notice of Appeal has not been overturned on appeal by this Court. And as long as that Ruling still stands, the appellants had all the rights to file their Notice of Appeal precipitating this present consolidated appeal. The Attorney General drew our attention to our past decision in CIVIL APPLICATION NO.

128 OF 2004 C/F NO 69 OF 2005, **PITA KEMPAP LTD VS MOHAMED I.A. ABDULHUSSEIN** (unreported) where we laid down the law on the fate of appeals or applications that have been struck out and whether they bar fresh recourse to courts. We said:

> *"... When a court strikes out a matter that does not mean that the matter has been refused. All that the court says is that for some reasons the matter is incompetent and so, there is nothing before the court for adjudication. So, the proper cause of action is to rectify the error and to go back to the same court as Abdulhussein has done."*

The principle of law we restated in **PITA KEMPAP LTD VS MOHAMED I.A. ABDULHUSSEIN (supra)** applies to the present consolidated appeal. After we had on 3rd October 2012 struck out the Consolidated Civil Appeals No. 55 of 2012 and No. 65 of 2012, there was no appeal before us to determine. The appellants were fully

entitled to rectify the error in the record of their appeal that had been struck out and come back to this Court in a fresh appeal taking into account the prescribed periods of limitation. We found no illegality of the filing by the appellants of a new Notices of Appeal initiating the present consolidated appeal.

In the event and for the foregoing reasons, all the grounds of the preliminary objection have no merit and are accordingly dismissed.

Having dismissed the preliminary points of objection we are left with the consolidated appeal against the Judgment and Decree of the trial High Court. The trial court was satisfied that the petitioner/respondent had beyond reasonable doubt, proved that the election was not free and fair because of disruptions of the petitioner's campaign meetings at Kisumba and Mtimbwa villages. According to the trial Judge, these disruptions violated the provisions of paragraph (b) of section 108 (2) of the Act. The trial Judge was similarly satisfied that the same provision was violated by the corrupt practices that took place on 29/10/2010 at Kantalamba Primary School.

With regard to the merit of the appeal against the decision of the trial High Court, the appellants have in this consolidated appeal filed a total of eighteen (18) grounds for consideration by this Court. These grounds of appeal overlap considerably and can conveniently be crystallized into three major grounds of complaint. The **first** major ground of complaint arises directly from the judgment and decree of the High Court. The trial court was satisfied that the election of the Member of Parliament, for Sumbawanga Urban Constituency, was not free and fair because of the two chaotic campaign incidents that took place on 5/9/2010 at Kisumba village, and on 22/10/2010 at Mtimbwa village. The **second** major ground of complaint similarly arises from the decision of the High Court where that election petition court had expressed its satisfaction that on 29th October, 2010 Mr. Aeshi acting through his agents convened a meeting at Kantalamba Primary School where money was corruptly distributed to voters. The **third** major ground of complaint centres on proceedings at the trial High Court before the petition was set down for hearing. This ground contends that the trial court erred in fixing the date for the hearing of the petition before the respondent had deposited security for costs. It invites this Court to determine whether the trial

court first determined the amount payable as security for costs as provided by section 111 of the Act, before the election petition was set down for hearing.

On corrupt distribution of money to voters, the grounds of appeal fault the finding of the trial court that DW2, Anosisye Thomas Kiluswa; and DW3, Charles Victor Kabanga -were Mr. Aeshi's agents who were seen by PW16, Karani Kameme distributing money to a group of voters gathered at Kantalamba Primary School. The alleged corrupt practice was according to the grounds of appeal, not proved beyond reasonable doubt.

Contesting the finding that campaign meetings at Kisumba and Mtimbwa villages were disrupted hence affecting the results; the grounds of appeal contend that contradictions and discrepancies in the evidence of PW1, Nobert Yamsebo; PW9, Justin Mwanandenje; PW12, Anjelu Ngua; and PW17, Salvatory Kasikila- were not minor, as concluded by the trial court. They went to the root of justice. That the trial court erred by holding that the disturbances of the two campaign meetings prevented the campaigns from taking place and affected the election results.

Submitting on the chaos leading to alleged disruption of campaign meetings at Kisumba and Mtimbwa villages, Mr. Luena urged us to find and hold that there were serious and material contradictions and discrepancies on the evidences of PW1, PW9, PW12 and PW17. With these contradictions and discrepancies, submitted Mr. Luena, it cannot be said that the petitioner had proved that there were chaos that led to disruptions of campaign meetings at Kisumba and Mtimbwa villages. Even if there were chaos, submitted the learned Principal State Attorney, there was no evidence that the chaos affected the on-going electoral processes and the final results which declared the 4th appellant the winner. Mr. Luena referred us to page 419 and 421 of the record of this appeal, where the trial judge conceded that there were discrepancies contradictions which according to the trial court were not material.

Mr. Luena disagreed with the learned Judge by submitting that these were discrepancies contradictions were in fact material contradictions going to the root of the matter. According to Mr. Luena, the question whether, despite the alleged chaos, the campaigns still went ahead is a material question. And that contradictory evidence of material witnesses cannot answer the

question whether campaign meeting went ahead as planned. The learned Principal State Attorney referred us to the evidence of PW1, Mr. Yamsebo (the petitioner/respondent herein), PW9, Mr. Mwanandenje and PW12, Mr. Ngua testifying that after reporting the disruption to police, the police officers came over and the meetings went ahead as planned. Mr. Luena urged us to find a major contradiction and discrepancy in the evidence that was offered by PW17, Mr. Kasikila a member of PW1's campaign team. As to whether the campaign meetings went ahead despite disruptions, PW17 claims that no campaign meeting took place at two villages following the disruptions.

Mr. Luena submitted that the evidential position by PW17 to the effect that campaign meetings did not go ahead is very material. And if as claimed by the petitioner himself that indeed the campaigns still went ahead despite the disturbances, the trial court should not have found as he did that the alleged disturbances had affected the election results on 31st October 2010. According to Mr. Luena, to resolve the discrepancy and contradiction between on one hand, the evidence of the petitioner (PW1), PW9 and PW12, and on the other hand, the evidence of PW17, regarding the question whether

campaign meetings went ahead; the evidence of the police officers who calmed the situation should have been sought. And since PW17 had reported the disturbance to a police officer, Mohamed Mbonde (OCD), that officer should have testified as a key witness to resolve the question whether campaign meetings went ahead or were cancelled after the disturbances. Mr. Luena invited us to draw an adverse inference on the failure of the Petitioner/respondent to summon the police officers. The learned Principal State Attorney referred us to our decision in AZIZI ABDALAH v REPUBLIC 1991 TLR 71 (CA) where we made similar adverse inference.

On the evidential link between the disruptions of campaign meetings and the results of parliamentary election, Mr. Luena submitted that the disruptions at campaigns did not affect the results since the principle of law laid down in the case of **AZIM SULEIMAN PREMJI V. A.G. and Another [2000] TLR 359** cannot be resorted to support the contention that the chaos at campaign meetings affected the results. Mr. Luena was quick to point out that in Premji's case; chaos took place on the Election Day. In addition, the police officer who witnessed the chaos on Election Day was in AZIM SULEIMAN PREMJI (supra), called in to testify as an independent

witness. According to Mr. Luena, in this consolidated appeal, the alleged chaos took place before the Election Day and the police officers who were called in were not summoned to testify.

In submitting on behalf of the 4th Appellant that the disruptions if any did not affect the campaign meetings, Mr. Rweyongeza referred us to page 108 lines 11 to 13 where the petitioner himself (**PW1**) during examination in chief states the following with regard to a campaign meeting at Kisumba village on 5th September 2010:

> ***"...Un-intimidated, we reported the incident at Central Police Station here in town and policemen came here. They calmed the situation after which we continued with the meeting."***

Mr. Rweyongeza further referred us to the same page 108, lines 16 to 21 of the record of this appeal where **PW1** again testified in chief about the campaign meeting at Mtimbwa village:

> ***"...We found a group of people who, like in the previous occasion at Kisumba, were carrying flags of CCM and were dressed in the official dress of that political party. They caused serious disturbance which forced us into reporting the incident at Sumbawanga Central Police Station. The***

police came there promptly and calmed the situation after which we continued with the meeting."

Mr. Rweyongeza has urged us to re-evaluate the evidence and find the campaign meetings at the two villages went ahead and the chaos if any had no effect on the campaigns and on the election results.

Mr. Victor Mkumbe, on behalf of the respondent adopted his two sets of written submissions already filed since 28th February 2013. Mr. Mkumbe urged us to find that the learned trial Judge had made a correct conclusion after evaluating relevant evidence regarding disturbance of the petitioner's campaign meetings at the villages of Kisumba and Mtimbwa. And since it is the trial judge who had the opportunity to see and hear witnesses testify, he is better placed than this Court to assess the credibility of witnesses. The learned counsel also supported the trial Judge in his finding that any discrepancies, contradictions or inconsistencies in the testimony of material witnesses were minor and in the circumstances of the petition were unavoidable. Mr. Mkumbe also expressed his deep surprise why the appellants' counsel submitted that the failure by

the petitioner to file complaints to the relevant Electoral Code of Conduct Committee over the alleged disturbances of his campaigns in the two villages created doubt on petitioner's claims. According to Mr. Mkumbe, it was quite sufficient to report the incidents to police.

Mr. Mkumbe finally asked us to consider the alleged disruption of campaign meetings in a closely fought election where a slim margin of 196 votes separates Mr. Aeshi, the declared winner from Mr. Yamsebo, the respondent.

Before we move on to discuss and determine the next substantive grounds of appeal, we propose to first dispose of the ground of appeal on disturbances and chaos at the two villages and determine whether these disturbances affected the results of the election of the 4th appellant to Parliament. The general principles which should guide the determination of this appeal are well established. With regard to the decision of the High Court, the established principle is to the effect that this Court is a court of first appeal. As a court of first appeal we respect the initial duty of the trial court to evaluate evidence. This means that the trial court after receiving evidence determines its probative value or weight of the

evidence. The law similarly obliges us as a Court of first appeal, to re-evaluate the entire evidence that was presented before the trial High Court and come to our own decision. CRIMINAL APPEAL NO. 70 OF 2012 AT TANGA, **JUMA KILIMO VS THE REPUBLIC** (unreported) is one of many of our decisions wherein we articulated our legal obligation to re-evaluate evidence as a court of first appeal. We said:

> *".....This is a first appeal. It is trite law that it is in the form of a re-hearing. The appellant is entitled in law, to have our own consideration and views of the entire evidence and our own decision thereon: see,* ***D.R. Pandya v. R.*** *[1957] E.A 336. All the same, we can only interfere with a finding of fact by a trial court where the Court "is satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises",* ***(Salum Bugu v. Mariam Kibwana,*** *Civil Appeal No. 29 of 1992, CAT, (unreported))****.*** *Do we have good cause to interfere in this appeal as urged by Mr. Sangawe?"*

In the consolidated appeal before us, we are going to re-evaluate the entire evidence with regard to the grounds of appeal. We are mindful of the caution that we cannot unrestrictedly interfere with the finding of fact by the trial High Court unless we believe that

the trial court misapprehended the evidence or there are misdirections and non directions on the evidence, or there was any miscarriage of justice or a violation of some principle of law or practice.

Statutory grounds for avoidance of an election play an important role in evaluation and re-evaluation of evidence in an election petition. The grounds for that avoidance are set out in Section 108 (2) of the **National Elections Act, Cap. 343** [hereinafter referred to as the **Act**]. In its totality, Section 108 of the Act states:

> *108.-(1) Pursuant to the limitation imposed by sub-article (7) of Article 41 of the Constitution, the provisions of this section shall apply only in relation to the election of a candidate as a Member of Parliament.*
>
> *(2) The election of a candidate as a Member of Parliament shall be declared void only on an election petition if the following grounds is proved to the satisfaction of the High Court and on no other ground, namely-*
>
> > *(a) that, during the election campaign, statements were made by the candidate, or on his behalf and with his knowledge and consent or approval, with intent to*

exploit tribal, racial or religious issues or differences pertinent to the election or relating to any of the candidates, or, where the candidates are not of the same sex, with intent to exploit such difference;

(b)-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; or

(c) that the candidate was at that time of his election, a person not qualified for election as a Member of Parliament.

It is clear from the judgment of the trial court on pages 449 and 450 of the record of this appeal; the election of the 4th appellant as the Member of Parliament was avoided for non-compliance with paragraph (b) of Section 108 (2) of the Act. The trial court held that this provision had been violated in two distinct areas. **First** violation occurred during campaign meetings in the two villages of Kisumba and Mtimbwa. **Second** violation of the provision occurred at Kantalamba Primary School when money was corruptly distributed. It is important to note here that the questions whether there were disruptions of campaign meetings, and whether these disruptions

prove that his campaign meetings in the two villages were disrupted; and also that there were incidents of corrupt practices at Kantalamba Primary School. In addition, in the second layer the law requires the petitioner concerned to prove that such non-compliance (in this appeal the disruptions of campaign meeting and corrupt practices at Kantalamba Primary School); affected the result of the election on 31st October 2010. For purposes of evaluation and re-evaluation of evidence, these two distinct layers of proof are closely inter-related and both must be proved beyond reasonable doubt. It is therefore fair to say that from totality of section 108 of the Act, not every failure to comply with the provisions of the Act relating to an election must necessarily lead to an avoidance of the election of a Member of Parliament. And it is not sufficient to prove only non-compliance, without in addition proving that the non-compliance concerned was of such a magnitude, significance, kind or character that it affected the election result. Therefore, the two layers of proof shall guide our re-evaluation of evidence which was relied upon to prove violation of paragraph (b) of section 108 (2).

In his finding of fact that indeed there were chaotic interruptions in the campaigns at Kisumba village on 05/09/2010 and

at Mtimbwa village on 22/10/2010; the trial court had to explain the significance of discrepancies and contradictions apparent in the evidence of material witnesses who testified on the alleged chaos. The judgment of the trial court on page 420 of the record of this appeal illustrates how the learned trial Judge dealt with the discrepancies and contradictions apparent in the testimonies of PW1, PW9, PW12 and PW17 over chaos at campaign meetings. The trial court searched for common features of the witnesses' evidence to determine whether the chaos or disturbances at the two villages were proved to its satisfaction. The trial court stated:

> *"...the group of persons who interrupted those campaign meetings were dressed in CCM uniforms; and they had CCM flags, on top of that they were armed with sticks and stones. Also, those witnesses said in common that the groups were restraining the petitioner and his campaign team from holding campaign meetings in those villages... and in both occasions chaos ensued which necessitated the petitioner and his team to contact the police for assistance. They further testified in common that upon arrival of the police in those villages and in both occasions, the groups which caused the chaos and the members of the public who had gathered at those meeting places respectively ran away, thus undermining or weakening the said meetings."* ***[From page line 22, on 420 to line 9 on page 421]***

On the basis of the above-quoted "common-features," discerned from the evidence, the trial court concluded that these contradictions and discrepancies of the evidence of witnesses were minor and did not go to the root of justice. He was able to conclude that witnesses had proved beyond reasonable doubt that campaign meetings at Kisumba and Mtimbwa villages were undermined and weakened. Having made a finding that there were chaos, the trial court had to also deal with the second layer of proof under paragraph (b) of section 108 (2) of the Act. This layer is, whether the disturbed campaign meetings affected the results. To address this second layer of proof the learned trial Judge placed reliance on decision by this Court in the case of **AZIM SULEIMAN PREMJI V. A.G. and Another** (supra) which he described as providing a guiding precedent in matters such as this. In that decision we stated on page 377 that: ***"In this case, the situation is different irrespective of whoever caused the chaos, the acts causing chaos and confusion rendered the election not free and fair."*** In our instant case, the trial Judge applied that same principle, to conclude that the chaotic campaign meetings several days before the election

had affected the results of the election of the Member of Parliament for Sumbawanga Urban Constituency.

We next propose to determine whether there are any justifications for us to interfere with the finding of fact by the trial High Court that the election was not free and fair on account of two chaotic incidents at Kisumba and Mtimbwa villages? The first crucial question here is whether disruption of campaign meeting if proved amounts to a non-compliance with paragraph (b) of section 108 (2) of the Act. We think so. The phrase "non-compliance with the provisions of this Act relating to election" appearing in above-mentioned paragraph (b) should be read together with other provisions of the Act to properly appreciate the scope of the word "non-compliance." requires some exposition for the purposes of our re-evaluation of evidence. Section 51 is relevant for purposes of the right of candidates in contested elections to hold campaigns free of disruptions. The relevant Section 51 (1) of the Act states:

> *51.-(1) Where there is a contested election in a constituency the election campaign shall be organised by the candidate, the candidate's political party or by his agent.*

The Act also criminalises disruptions of campaigns through Section 103 of the Act which states:

> *103. Any person who, at a lawful public meeting held in connection with the election of any person between the day of publication of the notice appointing nomination day and the day on which the result is published, acts or incites others to act, in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called, commits an offence and shall be liable on conviction to a fine of not less than fifty thousand shillings and not exceeding two hundred thousand shillings or to imprisonment for a term of not less than six months and not more than twelve months or to both.*

The above cited provision in their totality state that any proved violation of the right of a candidate to conduct his election campaign, shall amount to a non-compliance with the Act. Having said thus, we think that the evidence on record clearly establish that despite the disturbances at his campaign meetings, the petitioner/respondent was still able to conduct his election campaigns in Kisumba and Mtimbwa villages. We think that the "common-feature" question which the trial court should have sought from the evidence of PW1,

PW9, PW2 and PW17 should have been whether the petitioner/respondent, despite the interlude of disruptions was able to continue with his campaigns as he had planned.

We propose to show why we think that the discrepancies and contradictions in the testimonies of these material witnesses with regard to the question whether respondent was completely denied a chance to campaign; were not minor as concluded by the trial Judge, but went to the root of the question whether the petitioner was completely denied a chance to campaign as is alleged. First, there is evidence of **PW9**, Justin Mwanandeje who testified on what transpired at the campaign meeting at Kisumba village. According to this witness, following the chaos, the meeting stagnated and all the people who had attended that meeting dispersed. After a while policemen came. PW9 ran away. Under cross examination by Mr. Nassoro, for Mr. Aeshi, PW9 said that he did not know if the campaign meeting went ahead or did not.

Next evidence is that of PW12, Anjelu Ngua who, during his examination in chief, testified that by the time the policemen came over and calmed down the situation, but PW12 and all those who had

attended the campaign meeting ran away, leaving children. He implies that no campaign meeting took place at Kisumba village on 05/09/2010. Significantly, this same witness under cross examination by Mr. Nassoro; testified that the meeting continued in the presence of the members of the police force. Again, when he was further cross examined by Mr. Shaidi he stated: "***All adults ran away when police arrived. Yamsebo (i.e. PW1 the candidate) also went into hiding only to come back later.***"

It is also clear to us that the evidence of PW17, Salvatory Kasikila who described himself as the leader of parliamentary campaigns; differed in material particulars with the evidence of the petitioner (PW1) who was his parliamentary candidate. PW17 had accompanied PW1 for a campaign meeting at Kisumba village on 5th September 2010. PW17 testified that fracas at Kisumba village lasted for 45 minutes. He contacted the OCD and a police contingent arrived 35 minutes later. According to this witness, all the people who had come to hear the candidate speak, including the trouble makers ran away. Only children remained. The campaign meeting could not proceed because people had already dispersed. PW17 also testified about chaos that took place at Mtimbwa during the campaign

meetings on 22nd October 2010. According to PW17 despite the arrival of the police, no meeting took place at Mtimbwa because of the chaos.

If we place the evidence of PW17 side by side to compare and contrast with evidence of the petitioner (PW1) himself; one discerns a stark contradiction on whether campaign meeting took place at all at the Kisumba and Mtimbwa villages. We do not therefore share the conclusion reached by the learned trial Judge that discrepancies in the testimonies of PW1, PW9, PW2 and PW17 were minor.

We agree with Mr. Luena in his submission that the police officers who were called upon to calm the disturbance could have as independent witnesses shed more light on contradictions and discrepancies in evidence with regard to the question whether campaign meetings in the two villages went ahead despite disturbances. We also agree with Mr. Luena that our decision in **AZIZI ABDALAH v REPUBLIC 1991 TLR 71 (CA)** is aptly relevant in so far as the failure of the petitioner to bring the policemen as his witnesses to prove that campaign meetings had to be stopped because of the chaos. This case expounded the general principle that

the prosecutor is under a *prima facie* duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution. There is no doubt in our minds that the policemen who were variously called to calm the disruptions at campaign meetings were relevant witnesses to testify on whether or not campaign meetings went continued after the situation had calmed down.

We think the trial court misapprehended the evidence regarding whether campaigns went ahead in the two villages after police had intervened and this led an incorrect finding. With above unresolved contradiction and discrepancy in the evidence of material witnesses, the petitioner/respondent herein cannot in our re-evaluation be said to have proved beyond reasonable doubt that he was denied a chance to campaign for his election to parliament. For purposes of clarity we hereby hold that the disruptions if any which took place during the respondent's meetings on 5/9/2010 and 22/10/2010 at Kisumba and Mtimbwa villages; did not prevent the respondent from conducting his election campaigns.

We should also point out that we are in respectful agreement with Mr. Luena that our decision in **AZIM SULEIMAN PREMJI V. A.G. and Another** (supra) was not applicable to the evidence that was before the trial High Court. In the present case, alleged chaos took place several days before the polling day; whereas in AZIM SULEIMAN PREMJI the ground of complaint was that on the very Election Day, voters were actually intimidated by organized groups, so much so this Court commented on page 375 that no free and fair elections can be said to take place with chaos and tear gas reigning in several polling stations.

Our finding here is that we respectfully do not agree with the conclusion reached by learned trial Judge that the petitioner proved beyond reasonable doubt the alleged non-compliance with the provisions of the Act relating to election campaigns at the Kisumba and Mtimbwa villages. With this finding, we saw no need for us to determine the second layer of proof under paragraph (b) of section 108 (2) of the Act as to whether the election result was affected by such non-compliance.

We now turn to the second grounds of complaint in this consolidated appeal, which centres on the allegation that the 4th appellant had through DW2, Anosisye Kiluswa and DW3, Charles Kabanga, convened a meeting at Kantalamba Mazoezi Primary School where money was corruptly distributed to a group of people who had assembled. On this ground Mr. Luena for the 1st, 2nd and 3rd appellants submitted that testimony of PW16, Karan Kameme is the only prosecution evidence testifying how he found around 200 people assembled in one of the classrooms to receive money. PW16 also entered the classroom together with the rest. Although he was inside the room, he did receive any money which was being dished out by Mr. Aeshi's colleagues. He could get the money because someone he could name had identified him as a CHADEMA fanatic. On side of the 4th appellant there was evidence of DW2, Anosisye Kiluswa, DW3, Charles Kabanga and the DW6, Aeshi Khalfan Hillary. Mr. Luena contends that credibility of PW16 is an important matter for this Court to consider. Mr. Luena expressed doubt on credibility of a person witnessing serious crimes of corruption being committed does not immediately report but wait to testify in an election petition.

The learned Principal State Attorney cautioned us that we should revisit the conduct of PW16 as a sole witness to alleged corrupt practices, before we rely on the evidence of this sole eye witness to prove beyond reasonable doubt such a serious matter as corrupt practice during election. Mr. Luena was also concerned that the trial court shifted the burden to Mr. Aeshi (the 4th appellant) when the court made much about the words "other things" alleged to have been said when he left the meeting to attend an election campaign meeting at Mazwi. Lastly, the learned Principal State Attorney submitted that there was no link between those who the 4th appellant left behind and the 4th appellant.

On his part, Mr. Rweyongeza submitted on shortcomings of the evidence of PW16, Karani Kameme which formed the basis of allegation of corrupt practices. The learned counsel wondered not only about how so many people could packed in a classroom of 50 but also how those allegedly participating in corrupt distribution of money which was a crime, could still allow PW16 to watch them transact without fear of being reported to police. He further submitted that the failure of PW16 to identify any of the 200 people who received the bribe should also be a matter of concern. Mr.

Rweyongeza was surprised how PW16 could identify (DW2 and DW3) distributing money but not similarly identify and mention fellow villagers who were receiving that bribe or even a fellow villager who had recognized him as a staunch CHADEMA member. Mr. Rweyongeza submitted that the evidence of PW16 should not be trusted.

Mr. Mkumbe for the respondent, submitted in support of the conclusion reached by the trial court to the effect that DW2 and DW3 were the 4th appellant's agents for the purposes of corrupt transactions subject of this appeal. According to the learned counsel, the learned trial judge was fully entitled to believe PW16 because the trial judge was in a better position to see and hear the witnesses than this Court on appeal is. Finally, Mr. Mkumbe does not agree that PW16 stumbled onto an internal meeting of CCM members.

In his considered judgment, the learned trial Judge concluded that paragraph (b) of section 108 (2) was applicable to the evidence alleging corrupt practices at Kantalamba Primary School. There is no doubt that corrupt practices constitute non-compliance with the provisions of the Act in terms of section 94. This provision states:

94. Any person who commits the offence of bribery, treating or undue influence commits an offence of corrupt practice and shall be liable on conviction to a fine of not less than five hundred thousand shillings or to imprisonment for a term of not less than one year and not more than three years or to both.

From submissions of the learned counsel, there are certain evidential gaps on the alleged corrupt practice involving the 4th appellant, DW2, Kabanga and DW3, Kiluswa, which makes us doubt whether that serious allegation was proved beyond reasonable doubt. First, the main eye witness to the incident, PW16, Karani Kameme did not identify any of the youths were assembled at the meeting. Secondly, while the pleadings alleged that those who had gathered were "youth voters," DW2, Mr. Kiluswa, DW3, Mr. Kabanga and the 4th appellant who testified as PW6, all claimed the meeting on 29/10/2010 was for only CCM members attending a civic education meeting. DW2 explained that he was at time Regional Secretary of Economic and Finance of CCM in Rukwa Region and non-CCM members were not allowed into the meeting room. DW2 denied that any bribes were given.

According to DW2, while that meeting was going on, Mr. Aeshi came, greeted those in the gathering, asking them to vote for him. DW3 was the District Chairman of CCM in Sumbawanga District. He too explained that that the meeting was an internal CCM meeting designed for members from Kantalamba Ward. Mr. Aeshi testifying (PW6) does not deny that he visited Kantalamba Mazoezi Primary School where he was invited to attend a civic education meeting exclusively for CCM members. He left early to attend a campaign meeting at Mazwi.

There is no doubt from the record of this appeal that a meeting indeed took place on 29th October 2012 at Kantalamba Mazoezi Primary School. What is disputed is whether it was an internal meeting of CCM of members convened for purposes of civic education or whether it was a meeting convened by the 4th appellant for purposes of corrupting youth voters to vote for him.

In CIVIL APPEAL NO. 56 of 2012, **Lawrence Surumbu Tara vs. 1. The Hon. Attorney General, 2. The Returning Officer, 3. Jitu Vrajlal Soni** (unreported), this Court said that a trial election petition court must be satisfied that the candidate was privy

personally or though his agents, any illegal practices or violations that are alleged in the petition. In the instant appeal, the evidence on record does not, with due respect support the finding of fact by the learned trial Judge that the 4th appellant committed acts of corruption through his two agents, DW2 and DW3. There should have been cogent evidence that DW2 and DW3 were in fact his agents for purpose of that meeting. We do not think that the words **"to do the rest of the things"** which are attributed to the 4th appellant amounted to authorization to dish out of money on his behalf. There must be clearer linkage between the 4th appellant and the corrupt conduct (if any) of DW2 and DW3 on the basis of which an election can be nullified.

There is no doubt in our minds that corrupt practices during elections are very serious electoral offences which can attract not only avoidance of an election but also deletion of names from the register of voters under section 114 of the Act. To prove non-compliance with the Act in the nature of corrupt practices, a petitioner needs evidence that is clear cut, credible and reliable. Having carefully considered the submissions advanced on behalf of the parties and examining the record of this appeal, it seems to us

of the petition before the respondent had deposited security for costs.

This consolidated appeal is hereby allowed with costs. The Judgment of the High Court including the Decree therein, made on April 4, 2012, are hereby set aside. The 4th appellant is hereby declared to have been duly elected Member of Parliament for Sumbawanga Urban Constituency.

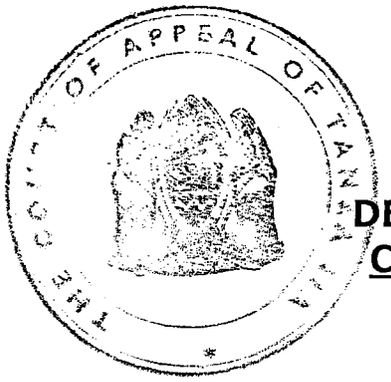
DATED at **DAR ES SALAAM** this 29th day of 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

J.S. BWANA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL