IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

IN THE MATTER OF ELECTION PETITION UNDER THE NATIONAL ACT, CAP 343, RE 2015

AND

IN THE MATTER OF THE NATIONAL ELECTIONS (ELECTION PETITIONS) RULES GN 447 OF 2015

MISC. CIVIL CAUSE NO. 2 OF 2015

ABAS ZUBERI MTEMVU .....PETITIONER

VERSUS

THE RETURNING OFFICER

FOR TEMEKE CONSTITUTENCY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

ABDALLAH ALLI MTOLEA.....3RD RESPONDENT

I. MAIGE, J

JUDGMENT

The petitioner, **Abas Zuberi Mtemvu**, contested for Members of Parliament for Temeke Constituency during the October 2015 General Elections. There were eight other

contestants including **Abdallah Alii Mtolea**, the third respondent. The results were declared on 27th October 2015 by the first respondent. The third respondent was declared the duly elected Member of Parliament having polled **103, 231** votes out of **222,465** valid votes. He was closely followed by the **petitioner** who scored **97,557** votes. The margin between them, as the results show, was **5,674**.

Being aggrieved by those results, the petitioner challenged the validity of the election on account that it was tainted with irregularities and non-compliances. He invited the Court to avoid the results of the election.

Unilateral exclusion of one of the candidates in the contest, declaration of the results without taking into account the results from 18 polling stations, inaccurate summing up of votes and improper refusal of the request for vote recounting are the main grounds unto which this petition is premised. It is the opinion of the petitioner that the irregularities and non-compliances in question have substantially affected the election results.

The petition has been vigorously opposed by the respondents. The first and second respondents have filed a joint reply to the petition whereas the third respondent has filed his separate reply. In essence, the respondents have denied most of the allegations save for the few ones which will be revealed as we go along. They claim that the election was free from any irregularities and non-compliances.

It is not in dispute that; on 27th October 2015 the first respondent declared the third respondent the elected Member of Parliament for the Temeke Constituency. Equally not in dispute is the fact that although there were nominated 10 candidates to contest for the seat in dispute, at the date of the elections, there were only nine candidates whose names appeared in the ballot papers. The areas of contention between the parties are reflected in the following issues which were framed on 24.05.2016.

1. *Whether Mr. Mwakyembe Bernard Mathew, the Chadema candidate for 2015 Temeke Parliamentary contest was unilaterally excluded from the contest.*
2. *Whether the petitioner properly requested for votes recounting.*
3. *If issue number 2 is answered affirmatively, whether the request was properly dealt with by the first Respondent.*

4. *Whether at the time of summing up of votes at summing up station for Temeke Constituency Forms 21B for 18 polling stations were missing.*
5. *Whether there is Kata ya 14 ward in Temeke Constituency.*
6. *Whether the petitioner got 97,557 votes in the elections in dispute as declared by the first Respondent.*
7. *Whether the alleged irregularities substantially affected the elections results for the Temeke Parliamentary Constituency.*
8. *To what reliefs are the parties entitled to.*

The petitioner in this matter was represented by Messrs. Mkoba and Mbamba, learned advocates whereas the first and second respondents enjoyed the service of Mr. Mabrouk, learned senior state attorney assisted by Miss. Maswi, learned state attorney. The third respondent was advocated by Messrs. Tibanyendera, Kerario and Mziray, learned advocates. At the end of the trial, the counsel filed their detailed closing submissions. I have to confess right from the outset that the submissions have been the keystone in the construction of this judgment.

In a bid to establish his case, the petitioner called four witnesses including himself who testified as **PW-2**. The

other witnesses were **IBRAHIM ATHUMAN DAUD** (PW-1), **ALLY MUSSA KAMTANDE** (PW-3) and **AFIDU JAHUSSEIN LUAMBANO** (PW-4). He also produced into evidence his voters registration card (P-**1**.).

On their part, the first and second respondents paraded seven witnesses with the first respondent, **PHOTIDAS ALOYCE KAGIMBO**, testifying as **DW-6**. Others were **BERNARD MATHEW MWAKYEMBE** (DW-1), **SANIF KHALIFAN NYOKA** (DW-2), **BERNADETHA HILARY** (DW-3), **FATUMA MUSTAFA MWAFUJJO** (DW-4), **ISACK EZEKIEL MWAN'GONDA** (DW-5) and **REHEMA FRANCIS WAMBURA** (DW-7). They also tendered into evidence a withdrawal letter of MR. BENARD MATHEW MWAKYEMBE (**D(1)1**), a list of all polling stations for the Temeke constituency **(D(1)2)** and election results Form 24B (**D(1)3**).

The third respondent opted to call two witnesses only. He himself testified as **DW-8** whereas his agent one MUSSA BAKARI MUSSA testified as **DW-9**. They did not exhibit any documentary evidence.

As pointed out herein above, the causes of action in this petition are founded non-compliances of the law. This petition is therefore regulated by the provision of section 108 (2) (b) of National Elections Act, Cap. 343 R.E. 2015 ("the NEA"). There has not been any dispute between the parties on this position.

I subscribe to the submissions of the learned state attorneys that *the* petitioner being the one seeking to avoid the results of the election, has the burden of proof. The standard of proof in election petitions, according to section 108(2) of the **NEA**, is to the satisfaction of the court. Courts have in a long line of authorities consistently interpreted the phrase "to the satisfaction of the Court" to mean that the test to be applied in election proceedings is higher than balance of probabilities applied in ordinary civil proceedings. This position was enunciated by the Court of Appeal for the East Africa in MBOWE VS. ELIUFOO [1967] EA 240.

The principle has been notoriously applied by the courts across East Africa. See for instance, CHABANGA HASSAN DYAMWALE VS. ALHAJI MUSSA SEIF MASOMO AND

ATTORNEY GENERAL, [1982] TLR 69, DANIEL NSANZUGWAKO VS ATTORNEY GENERAL CIVIL APPEAL NO. 106 OF 2012, MANJU SALUM MSAMBYA VS THE AG AND 2 OTHERS, CIVIL APPEAL NO. 2 OF 2002, NG'WESHEMI VS. ATTORNEY GENERAL [1971] H.C.D. No. 251, FRED TUNGU MPENDAZOE VS. THE ATTORNEY GENERAL AND TWO OTHERS, MISCELLENEOUS CIVIL APPLICATION NO. 98 OF 2010, HC, DSM (UNREPORTED) and HAWA NG'HUMBI VS. THE ATTORNEY GENERAL AND TWO OTHERS, MISCELLENEOUS CIVIL CAUSE NO. 107 OF 2010, HC, DSM, UNREPORTED. Admittedly, there has been a slight difference in the scope of the application of the principle within the East African jurisdiction. For instance, whereas in Tanzania, as reflected in the above authorities, the test is in the same way as in criminal proceedings, in Kenya, the test, though above balance of probabilities, is below the standard applied in criminal proceedings. (JONH VS. NYANGE AND ANOR (NO.4) [2008] 3KLR (ELECTION PETITIONS) 500).

The justification of the heaviness of the standard of proof arises mainly because election petitions, in so far as they touch on the determination of the collective democratic will

of the people, are of great public importance. Added to that is the fact that election petitions have serious repercussions on the social and economic well being of any democratic society. As observed in KIBAKI VS. MOI, CIVIL APPEAL NO. 171 OF 1999 (UNREPORTED), a successful prosecution of an election petition would lead to nullification of the election and calling for by-elections which not only cost the country colossal sums of money but more importantly disrupt the constituent's social and economic activities. I therefore respectfully agree with the submissions of the learned state attorneys that an election petition should not be lightly treated. The allegations in the elections petition have therefore to be proved by cogent, credible and consistent evidence.

It is an established position of the law, according to section 108 (2) (b) of the **NEA**, that for an election to be avoided for non-compliances, it is not sufficient for the petitioner to establish the alleged non-compliances but more so he has to establish that the same have substantially affected the results of the elections. Whether the non-compliances affected the election results is a

question of fact which may differ from case to case (See YONGOLO VS ERASTO AND ANOTHER, [1971] HCD, 259).

In PRINCE BAGENDA VS WILSON MASILINGI AND ANOTHER, [1997] TLR, 220, the High Court of Tanzania was of the view that in deciding whether the non-compliances affected the results of the election, "the *trial judge will have to take account of the cumulative effects on the election of the proved irregularities".* The Court of Appeal for the East Africa, attempted, in the case of MBOWE VS. ELIUFOO, *supra* to define the phrase "affected the results" in the following words:

> *In my view the phrase "affected the results" means not only the results in the sense that a certain candidate won and another candidate lost. The results may be said to be affected if after making adjustment the contest seems much closer than it appeared to be when first determined.*

Subsequently, in YONGOLO VS. ERASTO AND ATTORNEY GENERAL *supra*, the same Court avoided to define the phrase "affect results" for the reason that it was a question of fact which would be dealt with according to the merit of

each case. In particular, the Court had the following to say at page 185 of the report;

> *This position was subsequently confirmed in the case of BURA V. SARWATT (1967) E.A. p. 334. In that case, the previous case of Mbowe was quoted to the same learned Chief Justice (as he was then). While he did not wish to resile from the stand he took in the case of Mbowe, he exactly said that the decision in Mbowe's case should be seen in its context, here the allegations were of unlawful campaigning and undue influence. This passage seems to me to confirm that this Court did not find it expedient to define a similar phrase. Nor do I think that it is necessary in the case in hand to attempt such a definition since whether or not the results of the election were affected, would depend on the facts of the case and the allegations made. Effects on the results could be several and varied in form so that what could be said to have amounted to any effect on a case in one case may not be so in respect of another with different set of facts.*

It is also the law that where serious irregularities and non-compliances are proved, the Court would nullify the results regardless of the fact that the winning candidate was involved in. In PRINCE BAGENDA VS WILSON MASILINGI AND ANOTHER *(supra)* for instance, the election results were nullified for irregularities, illegalities and non-

compliances which went to the root of the case notwithstanding that the winning candidate was not involved.

With this brief exposition of the law, let me now venture into the real business of separating the wheat from the chaff. I will start with the 4th issue which is **whether election Forms 21B for 18 polling stations were not added in the election results Form 24B**. It is pleaded, in paragraphs 12 and 13 of the petition that at the time of summing up of votes, election results **Forms No. 21B** for 18 polling stations were missing. It is express in the petition that out of the 18 polling stations whose election results **Forms 21B** were missing, 10 stations were from Kata ya 14 and 8 stations from Miburani ward. It is further alleged that the declaration of the third respondent a winner was made without the results of the said polling stations being added in the final results. The respondents have denied the allegations and asserted that election results **Forms 21B** for all polling stations were added and reflected in the final result in election results Form **24B**.

Of the four witnesses produced by the petitioner, it is only PW-1, one **Ibrahim Athuman Daud**, who testified on this issue. He claims to have been the presiding officer for Keko Machungwani polling station during the October 2015 General Elections. He further claims that on the date of summing up of votes, he was assigned by the ward executive secretary for Miburani, to take ballot boxes and forms to his offices and later to the tallying centre. According to him, it was in the course of executing the assignment that he became aware of the absence of the election results Forms **21B** in respect of 8 polling stations from Miburani ward. He named the said polling stations as Liwati No.A4, Chan'gombe No. A3, WEO No.2, WEO No. 3, Miburani No.2, Baracks A5, Baracks C3, Likwati A1 and Likwati A4. It was his evidence that the results were announced before the said forms had been traced.

This being the only witness who testified on this issue, it can be said with certainty that the prosecution evidence on this issue, in its generality, is materially inconsistent with what is pleaded in paragraphs 12 and 13 of the petition. Whereas according to pleadings, the number of the election results **Forms 21B** which were missing at summing up of

votes were 18, in the evidence of the prosecution in totality the same were 8. The prosecution evidence in chief is completely silent on the justification for the variance between pleadings and evidence. **PW-1** is however recorded to have said, during cross examination by Mr. Mabrouk, that; while initially the missing forms were 18, other forms were subsequently traced with the exception of 8 forms. It raises many questions why such a material fact was not deposed in the affidavit.

It is interesting that even the petitioner himself who testified subsequent to PW-**1** did not make any comment on the variance. Indeed, there was no evidence adduced in respect of the results for the remaining 10 polling stations. Worsestill, the inconsistence between evidence and pleadings have not been justified in the closing submissions of the counsel for the petitioner. I have had some difficulty in understanding the silence of the petitioner to explain about the inconsistence. In normal circumstances, the petitioner would have amended the petition to reflect the correct figure of the alleged missing election results **Forms 21B**. In my view, although the variance at issue may not necessarily amount to departure

from pleadings within the meaning of order VI rule 7 of the **CPC**, I entertain no doubt that in the absence of clear explanation, the variance would affect the credibility of the evidence adduced.

The inconsistence between the evidence and pleadings aside, the probative value of the evidence of **PW-1** is very much wanting for being tainted with material contradictions. In the first place, while according to his affidavit **Barracks A5** was among the polling stations whose election results **Forms 21B** were missing, his evidence in cross examination by Mr. Mabrouk was such that there was no polling stations in Temeke called **Barracks A5**. In addition, while under cross examination by Mr. Mabrouk, the witness strongly maintained the position that **Miburani No. 2** and **Miburani Street Office No. 2** were different polling stations, in his cross examination by Mr. Tibanyendera the witness changed his position by asserting that there was no polling station called **Miburani No. 2**.

Yet, there is another point which discredit the evidence of **PW-1**. His deposition in the affidavit is that he was

assigned by the ward executive officer for Miburani to take some ballot boxes and forms to his office and eventually at the tallying centre. This would mean that the instruction in as much as it was made by the ward executive officer for Miburani was only limited to Miburani ward. **PW-1** is on the record to have said that he discovered about the missing of the forms when he was submitting the same to the ward executive officer. It surprising however that during cross examination by Mr. Mabrouk, **PW-1** informed the Court that with the exception of 8 forms, the missing 18 forms were subsequently traced. There is no clear explanation as to the source of information. **PW-1** is on the record saying, in the course of cross examination by Mr. Tibanyendera that he was told of the missing forms by one of the counting officers at the tallying centre. The name of the said counting officer has never been disclosed.

That is not all. The evidence of **PW-1** in paragraph 11 of the affidavit is that on the material day, he and a person called Barongo were asked by the ward executive officer to go to his office to conduct addition. This would suggest that, contrary to the law, there was conducted an addition of votes in the offices of the ward executive officer.

Conversely, **PW-1** changed the story during cross examination by Mr. Tibanyendera when he said "No addition was conducted at the offices of WEO as intimated in paragraph 11 of the affidavit".

In a serious dispute like the instant one, it is unexpected for the court to rely on such unsubstantiated and inconsistent evidence to nullify election results. In view of the apparent weaknesses of the evidence from the petitioner, and there being evidence by **DW-5** and **DW-6** that all election results **Forms 21B** were available during tallying of votes, I have no doubt that the first issue has not been established to the satisfaction of the Court.

If, however, contrary to the opinion I have expressed, the evidence of **PW-1** on missing election results **Forms 21B** was credible, that would not assist the petitioner either. The reason being that there has not been demonstrated in evidence how did the omission affect the results of the elections. It has to be observed that the Temeke Constituency had 222,465 valid votes. The petitioner has

not adduced any evidence to indicate the number of cast votes for each of the 8 polling stations.

I have had an opportunity to make a simple mathematical calculation to determine the estimated number of valid votes for each polling station. My division of the total valid votes of 222,465 by the 966 polling stations, suggested that the approximated number of valid votes for each polling station would be 231. If that figure is multiplied by 8 polling stations, the estimated total number of valid votes for the 8 polling stations would be 1,848. With the margin of 5,674, it would have not been reasonably inferred that the omission had substantially affected the results of the election. For, even if all 1,848 votes were to be allotted to the petitioner, it would have not significantly reduced the margin of victory.

As no evidence was lead in connection to the alleged ten polling stations from Kata ya 14, I desire to say absolutely nothing about the existence or non existence of the said ward. I have no doubt that the disposal of issue number 4 has rendered issue number 5 nugatory and I will so hold.

I will now consider issue number 6 which is ***whether the petitioner got* 97,557 votes in the election in dispute as declared by the first Respondent**. The factual foundation of this issue is paragraphs 14 and 15 of the petition wherein it is alleged that while the petitioner was declared to have scored 97,557 votes, copies of the available election results **Form 21B** for 925 polling stations, indicate that the petitioner acquired a total of 102,501 votes. Photocopies of the said forms were annexed as **AZM-5**. Apparent from paragraph 14 of the affidavit is the fact that the alleged inaccuracy in the summing up of votes is based on election results **Forms 21B** of the alleged 925 polling stations. There is no doubt, in my view that; unless the said election results **Forms 21B** were produced into evidence, it would be near to impossible for the allegation to be established. The instructive comments on similar issue by His Lordship Professor Juma in FRED TUNGU MPENDAZOE VS. THE ATTORNEY GENERAL AND TWO OTHERS, MISCELLENEOUS CIVIL APPLICATION NO. 98 OF 2010, HC, DSM (UNREPORTED) may be pertinent. He remarked, at page 68 of the judgment as follows:-

> *In my opinion, the prayer that the petitioner should be declared winner on the basis of his own*

projection is unattainable in law because election results declared by the Returning Officer is an aggregation of results from polling station documented as Form No. 21B for Parliamentary election. All polling agents at polling stations were given copies of Forms No. 21B. At the very least, the Petitioner should have based his projection on these copies from his polling agents. As I pointed earlier, the petitioner did not exhibit his agents' copies of Election Results Forms 21B from any of his 749 polling stations who represented him in polling stations.

Although this issue should have been framed negatively in view of the fact that the burden of proof is on the petitioner, yet, the first respondent, through **DW-6,** has exhibited Form 24B (**D1(3)**) which establishes that the petitioner acquired 97,557 votes. The correctness and accuracy of the record in exhibit **D1(3)** would have been contradicted upon the petitioner producing the alleged 925 election results **Forms 21B**. The petitioner did not produce the same and no reason for non-production has been assigned.

As the evidence in the alleged 925 election results **Forms 21B** was very material, it is my considered opinion that

this is a fit case for the Court to draw a negative inference against the petitioner for non-production of the said forms. There are many judicial pronouncements in support of this position. As for instance, in HEMED ISSA VS. MOHAMED MBILU, 1984, TLR, 113, it was held that where, for undisclosed reason, a part fails to call a material witness in his side, the Court is entitled to draw an inference that if the witness were called, he/ she would have given evidence contrary to the party's interest. A similar position was made in KIMOTHO VS. KENYA COMMERCIAL BANK (2003) E.A. 1. It appears to me that the rule set out in the above authorities is not limited to failure to call a witness. It extends to failure to produce a relevant documentary material evidence without justification.

In their written submissions, the counsel for the petitioner has blamed the first respondent to have not produced the origins of all the election results **Forms 21B** for the Constituency despite being requested to do so by way of a notice to produce. Ironically, the learned state attorneys have faulted the petitioner for not producing the photocopies of the election results **Forms 21B** into evidence after failure to procure the origins from the first

respondent by way of a notice to produce. It is the submissions of the learned state attorneys that issuance of a notice to produce under section 68 of the Evidence Act is a way of regularizing production of secondary evidence in the event of failure of the adverse party to produce the origins. With respects, there is merit in this submission. The section read:

> *68. Secondary evidence of the contents of the documents referred to in paragraph (a) of subsection (1) of section 67 shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable in the circumstance of the case.*

My understanding of section 68 of the Evidence Act is that, it imposes a precondition for production of a photocopy where the origin is in the possession or power of the person against whom the document is sought to be produced. It requires the party wishing to rely on secondary evidence to issue a notice to produce to the adverse party before producing a secondary evidence. The

entitlement to produce a secondary evidence, I will agree with the learned state attorneys, would accrue after the adverse party has refused to produce the document notwithstanding the issuance of a notice. In this case, the notice to produce was issued during pretrial stages and the respondents did not comply with it. In terms of section 68 read together with section 67 (1) (a) of the Evidence Act therefore the petitioner was justified to produce photocopies if he was not in possession of the origins of the election results **Forms 21B** for 39 polling stations or all 966 polling stations. This would have been much easier because before trial, the first and second respondents had filed a notice to produce in terms of order 13 of the **CPC** which was accompanied by photocopies of the election results **Forms 21B** for the entire Constituency. The petitioner has not adduced any evidence to explain why he didn't produce the alleged election results **Forms 21B** or part thereof. He has not justified the omission in his closing submissions either. He cannot therefore be heard blaming the first respondent for not producing the origins while the burden of proof was on his side.

It may perhaps be relevant also to observe that throughout his testimony as **DW-6**, the first respondent was not cross examined on the contents of any of the election results **Forms 21B**. Besides, there was no attempt to cause **DW-6** to produce the said Forms under section 154 of the Evidence Act (Cap. 6 R.E. 2002) with a view to contradicting him with his deposition in the affidavit as to the accuracy and correctness of the recording of the results from election results **Forms 21B** to election results **Form 24B**. Under the said provision, a witness may be cross examined on his previous statement for the purpose of contradicting or impeaching him. The provision provides for two ways of cross examining a witness on his previous statement. First, without such a writing being shown to him. Secondly, if it is intended to contradict the witness by his writing, his attention must be drawn to those parts of the document which are to be used for that purpose before the writing is proved. It would appear to me that the expression "before the writing is proved" suggests that the writing against which the witness is to be contradicted, can be produced into evidence during cross examination. In my opinion, the election results **Form 21B** is a previous statement within the meaning of section 154 of the

Evidence Act such that a returning officer and any other officer involved in its making, can be cross examined on its contents with a view to contradicting him with any of his testimony, and in the due course such form can be produced as an exhibit to support the petitioner's case.

It would appear from their submissions that, the learned advocates for the petitioner are admitting to have failed to establish the above claim beyond reasonable doubt but they are maintaining that the duty to prove the case beyond reasonable doubt arises where the allegations entails quas criminal offenses such as corruption, racism and illegal campaign. If I could reproduce part of their written submissions appearing at page 19, the learned counsel put it that:

> *Your Lordship, we are aware of the position that a Petitioner in an election petition is to prove his case beyond any reasonable doubt. We are of a humble view that this is the position where a Petitioner alleges facts of a general nature, say, corruption, racism, wrong campaigns and the like.*

The learned advocates have not referred me any authority in support of the said position. They have however

endeavored to make an analogous deduction from my ruling on submissions of no case to answer dated 25th July 2016. I will revert on that aspect as I go along. As I said elsewhere in this judgment, the standard of proof in election petitions have been statutorily set out in section 108 (2) of the **NEA** which is hereunder reproduced.

> *108 (2) The election of a candidate as a Member of Parliament shall be declared void only on an election petition if any of 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 tribunal, 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 the 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 the time of his election, a person not qualified for election as a Member of Parliament.*

It is clear and unambiguous that the provision of section 108(2) of the **NEA** which sets the standard of proof in election petitions, applies in items (a), (b) and (c) which enumerates the grounds on which an election can be nullified. There is no indication in the said provision of there being different application of the standard of proof in either of the grounds. The standard of proof set out is "to the satisfaction of the High Court" which had been judicially construed, in among other authorities, MBOWE VS. ELIUFOO *(supra) to* mean proof beyond reasonable doubt. So far, this is the settled position of law in Tanzania and I am not aware of any decision of the Court of Appeal departing there from.

The advocates for the petitioner have referred me to my ruling on the plea of no case to answer and reproduced a passage therein where I underscored the importance of the returning officer being afforded an opportunity to defend the integrity of the election process. I advanced the

principle, from instructive comments of my learned brothers Wambali, J and Khiwelo, J, in DAVID ZAKARIA KAFULILA VS. HUSNA SUDI MWILIMA AND 2 OTHERS, MISC CIVIL CAUSE NO. 2 OF 2015, HC, TABORA and ENG. CHRISOPHER KAJORO CHIZA VS. THE ATTORNEY GENERAL AND 2 OTHERS, MISC CIVIL CAUSE NO. 1 OF 2015, HC, TABORA on similar issue. Pertinent to note is the fact that neither in my ruling nor the rulings of my brother judges just referred have there been an attempt differentiate the standard of proof in petitions based on non-compliances of law from those founded on other grounds. Perhaps, the relevant discussion was on whether the standard of proof in determination of a submission of no case to answer is similar with the one in determination of the substantive petition. For the avoidance of doubt, I will reproduce the relevant part of my ruling hereunder;

> *In light of the above authorities, there is no doubt, in my view, that the standard of proof in the two stages of proceedings is quite different. Whereas at the level of the final judgment the prosecution has to prove the case in the required standard, at the stage of determining whether there is a case to answer, the trial Court is not expected to conclusively determine whether the evidence adduced has sufficiently proved the substantive claim. As correctly observed in the Nigerian case of The State (1998) 7 NWLR referred in*

CHRISTOPHER CHIZA VS. AG. (supa) at this stage "it is not the duty of the trial judge to say anything about the credibility of the witnesses (page 24).

I will therefore dismiss any contention purporting to depart from the well established principle of law that the standard of proof in election petitions is beyond reasonable doubt.

Even if it was to be assumed for argument sake that the standard of proof in petitions based on non-compliances of law was not beyond reasonable doubt, in view of the failure on the part of the petitioner to produce any of the attached election results **Forms 21B**, there would be no sufficient evidence on the record to establish the claim even on the balance of probabilities.

In my opinion therefore issue No. 6 has not been proved in favour of the petitioner. As a result, I will answer the issue against the petitioner.

I now turn to the second issue which is **whether the petitioner properly requested for vote recounting**. It is alleged in paragraph 9 of the petition that on 26th October 2015, the petitioner wrote to the returning officer

requesting for vote recounting. It is further alleged that it was not until on 30th October 2015 when the said letter was responded by the first respondent. This was after the pronouncement of the election results. In paragraph 4 of their reply to the petition, it would appear to me, the first and second respondents admit to have received a written request for vote recounting and declined to act on account that the petitioner did not follow the procedure. The decline, according to paragraph 4 of the reply, was made vide a letter which was attached in the said reply as **AGC4**.

On his part, the third respondent adopted, in paragraph 7 of his reply to the petition, the contents of paragraph 4 of the reply by the first and second respondents. In his testimony during cross examination by Mr. Mbamba, the first respondent (DW-6) conceded to have received and responded to the request for vote recounting from the petitioner. It came as a surprise to me that; when **DW-6** was asked, by way of cross examination, whether his reply letter should be exhibited, he was quick to refuse advancing reason that it was signed by another officer from his offices. This was not expected for a witness of his caliber. As I held in my ruling on no case to answer, "*the*

returning officer as the main supervisor of the elections at the level of the Constituency and custodian of election instruments and documentation, assumes the role of an impartial referee with responsibility to give relevant necessary explanations and clarifications as to compliances of the law even if the same would be injurious to his case".

There being express admission in pleadings as to the response of the request, the returning officer is estopped by the rule against departure from pleadings set out in order VI rule 7 of the **CPC** from giving evidence which depart from or otherwise inconsistent to the factuality of his pleadings. This would also apply in respect to the third respondent. With this therefore I am settled in my mind that the petitioner requested for vote recounting.

That takes me to the next issue which is **whether the recounting was properly requested**. The counsel for the petitioner has submitted that it was properly requested. He has however not explained how properly the request was. To be exactly, he did not say under which provision of the law the request was made. In their part, the learned state attorneys strongly submitted that the request was

improperly made as it ought to have been made by filling in prescribed **Form 16** as envisaged in rule 59 of the **National Elections (Presidential and Parliamentary Elections) Regulations, 2010, GN 307** ("GN 307 of 2010"). This is exactly what is asserted in paragraph 4 of their reply to the petition and is addressed in the evidence of among other witnesses, **DW-5** and **DW-6**. Mr. Tibanyendera has fully subscribed to the submissions and further contended that the returning officer was not a proper forum for recounting of votes. In his humble opinion, the request should have been entertained by the presiding officer. It was further submitted that failure to fill in the prescribed form operated as an estopel for a subsequent action to question the validity and correctness of the counting of votes.

It has however to be observed that in accordance with pleadings and evidence, the request for vote recounting was made on 26th October 2015. This was one day after the date of election. It would go without saying that the request was made while the counting was over and the presiding officer had retired. As I understand the provisions of sections 78 and 79 of the **NEA** read together with rule 59 of

GN 307 of 2010, request for vote recounting at the level of the polling station is made where the inaccuracy is discovered during counting. It is at that stage when the presiding officer enjoys the power of receiving request for vote recounting through **Form 16** and deciding whether to allow or not the recounting request.

In this matter, it would appear to me, the inaccuracy was discovered during addition and summing up of votes. The addition and summing up of votes, according to section 80 and 81 of the **NEA**, is made by the returning officer. In the course of discharging his duty, the returning officer has power, under section 80 (4) and (5) of the **NEA** to hear and determine requests for ascertainment of the accuracy in the addition of votes and may, in restricted circumstances, determine request for vote recounting. For clarity, I will reproduce the relevant provisions here below.

> *(4)The candidate or polling agent may request the Returning Officer to check on any part of the addition to ascertain its accuracy but shall not be entitled to request a recount of all the votes or all the ballot papers from any polling station, unless the accuracy of the report of the results from that*

polling station, were disputed by the polling agent or candidate present at the polling station.

(5) Where a request is made pursuant to subsection (4) the Returning Officer shall not unreasonably refuse to check the addition or to recount the ballot papers of any particular polling station.

It can be noticed that the provision just referred much as it allows a candidate or polling agent to request for, among others things, vote recounting, it does not provide for special format through which such a request can be made. The defense counsel have contended that the request ought to have been made by filling in **Form 16**. With all respects, I cannot agree with them. The reason being that **Form 16** which is made under rule 59 of **GN 307 of 2010** is relevant only where the request for vote recounting is made at the level of the presiding officer. It does not, in my judgment, apply in a situation where the request is made to the returning officer, as in the instant matter. There being no special format of lodging the request, it is my opinion that a written letter like the instant one would suffice to move the returning officer to consider the request.

Mr. Tibanyendera has submitted that the restrictions for the request of vote recounting stipulated in section 80 (4) of the **NEA** was not complied with by the petitioner. Much can be said about that. It is my opinion however that; whether the request complied with the minimum conditions set out in section 80 (4) of the **NEA** was among the factors that would have been taken into account by the returning officer in allowing or refusing the request. With this therefore, I am in agreement with the advocates for the petitioner that the request for vote recounting was properly made. Issue No. 2 is therefore answered affirmatively.

The next issue is **whether the request was properly dealt with by the first respondent.** Without spending much time, I am preparing myself to answer this issue negatively. I will assign the reasons. The request for vote recounting as revealed herein above was made on 26.10.2015. This was when the addition and summing up of votes was in progress. In accordance with the factuality of paragraphs 4 of the reply to the petition of the first and second respondents, the response to the request of the petitioner by the first respondent was made on 30.10.2015. This was hardly 3 days after the declaration of the results of the

elections. It can thus be said that the decision was made while the first respondent had already discharged his duty. The response, to say the least, was completely irrelevant and did not serve the purpose. As I understand the law, once a request for vote recounting is made by a competent person, the returning officer has a duty to respond to the request before proceeding to the next step in the addition and summing up process. In responding to the request, the returning officer is not bound to accept. Provided that he assigns good reasons, he may refuse to the request. I must confess with due humility that I am not happy with the way the first respondent dealt with this issue. The request might have been baseless, but come what may, the first respondent had a duty to respond. The first respondent assigned reasons for the refusal. Nevertheless, as revealed herein above, the refusal and the assigned reasons was subsequently upon the announcement of the results. Regardless of the correctness or otherwise of the grounds for the refusal, I entertain no doubt that the first respondent, in dealing with this issue, did not comply with the law. I will thus answer the third issue negatively.

Notwithstanding my findings on issue number 3 as aforestated, it is my considered opinion that improper refusal of a request for vote recounting cannot *ipso facto* be a ground for avoidance of election results however serious the impropriety may be. This is because the law provides for an avenue for the petitioner to enforce the request in the event that it is illegally rejected. The petitioner was entitled in law to seek for an order for recounting or scrutiny of votes in the High Court subject to the procedure prescribed in the **NEA** and its regulations. In this case, neither of the remedies were sought. The petitioner petitioned for avoidance of the election results. He would have raised and proved the inaccuracies in the petition. However, as revealed herein above, the petitioner did not produce even a single election results **Form 21B** to establish that there was inaccuracy in the addition of votes. With this therefore, the established non-compliance of the provision of section 80(4) and (5) of the **NEA** is hopelessly irrelevant as it is not for the court to speculate that the ultimate results after recounting would be different from those contained in exhibit **D(1)3**.

Let me now examine issue number one which is **whether Mr. Mwakyembe Bernard Mathew, the Chadema candidate for 2015 Temeke Parliamentary contest was unilaterally excluded from the contest**. It is common ground that Mr. Mwakyembe was among the candidates who were nominated by the National Electoral Commission to contest for the seat in dispute. It is equally not in dispute that on the date of election, his name was not among the lists of the contestants. The issue is whether the exclusion of the names of the said candidate was unilateral. On this issue, the evidence of **PW-2**, **PW-3** and **PW-4** in essence was that the name of the said candidate was omitted on the date of election without the petitioner being notified despite the fact that the said candidate was among the highly competitive contestants in the election.

In their pleadings and evidence, the respondents claim that the exclusion of the said candidate was at his own instance and not the instance of the Commission nor the first respondent. To this end, the first and second respondents have produced into evidence a letter from the said candidate for withdrawal from the contest which was admitted as **D1 (1).** It is not in dispute that in the final

ballot papers which were exhibited on the day of election, the name of Mwakyembe was not in the list of the contestants. It was submitted for the petitioner that the exclusion of Mr. Mwakyembe did not comply with the mandatory requirements of section 48 (1) and (2) of the **NEA** in so far as the notice was not issued within the prescribed time, and that it was not accompanied by a statutory declaration witnessed by a magistrate. It was further submitted that the notice in exhibit **D(1)1** was not addressed to the returning officer as required by law, and that a copy of the notice was not served on the local branch of the political party that sponsored the candidate.

On their part, the learned state attorneys submitted in the first place that, the withdrawal in as much as it was initiated by the candidate himself vide exhibit **D1(1),** cannot be said to have been made unilaterally. The learned state attorneys sought inspiration in the Black Law Dictionary as to the conceptualization of the adjective "unilateral". I entirely agree with them that the phrase "unilateral exclusion" which is the core of the first issue presupposes that the exclusion was solely made by the first respondent. In the second place, it was the

submissions of the learned state attorneys that there is sufficient evidence on the record that the exclusion was in compliance with the provision of section 48 of the **NEA**. The learned state attorneys referred the Court to the evidence in exhibit **D1(1)** which constitutes a notice and the oral testimony of **DW-1** and **DW-7** to the effect that exhibit **D1(1)** was accompanied by a statutory declaration. It is worth mentioning that the alleged statutory declaration was not tendered into evidence.

Parties are in agreement that withdrawal of a candidate from candidature is regulated by the provisions of section 48 of the **NEA**, which for easy references I will reproduce *verbatim* hereunder.

> *48-(1) A candidate may withdraw his candidature by notice in writing signed and delivered by him to the Returning Officer and a copy to the local branch of the Party sponsoring him not later than six o'clock in the afternoon of the day following nomination.*
>
> *(2) Every withdrawal notice under subsection (1) shall be accompanied by a statutory declaration in the prescribed form, made and signed by the candidate before a Magistrate.*
>
> *(3) Subject to subsection (1) where a candidate withdraws his candidature after six o'clock in the*

afternoon of the day following nomination the provision of subsection (2) of section 38A shall apply.

The provision of section 48 of the **NEA** in my reading, recognizes two kinds of withdrawal of a candidate from the candidature. The first one is under section 48(1) which is supposed to be made not later than six o'clock in the afternoon of the day following nomination. The second type is under section 48(3) which is done after six o'clock in the afternoon of the day following nomination. In this matter, the date of nomination, according to exhibit **D(1)1** was on 21.08.2015 while the withdrawal was made on 31.8.2015. Obviously therefore, the instant withdrawal is governed by the provision of section 48(3) of the **NEA**. Express in the provision is the fact that the withdrawal thereunder is subjected to the provision of section 48(1) of the **NEA**. This means that the procedural requirement under subsection (1) save only for time limitation is applicable.

Under subsection (1) of section 48 of the **NEA**, withdrawal is made by delivering a written notice to that effect to the returning officer and a copy thereof served on the local

branch of the Party sponsoring the candidate. The notice envisaged in subsection (1), which in my view is applicable also in subsection (3), is supposed to be accompanied by a statutory declaration signed by the candidate before a Magistrate. Where the withdrawal is made under subsection (3), the money deposited under section 48A (1) shall be forfeited.

In this matter, the withdrawal is challenged, among other things, for not being accompanied by statutory declaration as required by section 48 of the **NEA**. In their reply to the petition, the first and second respondents alleged that the notice in exhibit **D(1)1** was accompanied by a statutory declaration. They attached a document purporting to be a statutory declaration. During his testimony, **DW-1** attempted to produce a photocopy of the said document. It was his evidence that he could not produce the origin because the same was in the possession of the first respondent. The admissibility of photocopy of the document was successfully objected. Surprisingly is the fact that the returning officer who testified subsequently as **DW-6** did not produce the document. The exclusion of Mr. Mwakyembe being at issue, the statutory declaration, in

my view, was a material testimony in the absence of which the respondents would have not established the propriety of the notice of the withdrawal by the candidate.

The advocates for the petitioner have requested me to draw a negative inference that the same does not exist. This is in line with the authority in HEMED ISSA VS. MOHAMED MBILU *(supra)*. I have no doubt in my mind that; the statutory declaration in question was a material evidence to establish proper exclusion of Mr. Mwakyembe from the candidature. Failure to produce the document, I agree with the advocates for the petitioner, entitles the Court to draw a negative inference that if the document had been produced, it would have operated against the first respondent. I will hold as such. Since a statutory declaration duly witnessed by a magistrate was a precondition for a withdrawal of a candidate from candidature, it is my opinion that the exclusion of Mr. Mwakyembe from the candidature did not comply with the law.

I understand that the issue at hand is the exclusion being unilaterally. The respondents have submitted that it was

not unilaterally because it was initiated by the candidate himself and endorsed by the first respondent. In my view, for an exclusion of the candidate from candidature to be at the instance of the candidate, it must have been done in accordance with the law. Before excluding a candidate from the candidature, the returning officer is bound, in my judgment, to establish that he was legally moved by the candidate to exclude him from the contest. Short of that, it cannot be said that the exclusion was at the instance of the candidate. In here, the petitioner having established that the name of the said candidate was erased in the final sample ballot papers, the evidential burden shifted to the respondents. It was upon them to prove by evidence that the first respondent was legally moved by the candidate to exclude him from the contest. In this case, and for the reasons assigned herein above, the respondents have failed to establish the legality of the notice of withdrawal from the candidature by Mr. Mwakyembe. In my opinion therefore the exclusion of Mr. Mwakyembe from the contest was unilateral. The first issue is therefore answered affirmatively.

After establishing as such, the remaining substantive issue is **whether the established non-compliance affected the results of the elections**. Before going a little deeper inside to address the issue, it may be useful to note that; it is an established principle in election laws that; election processes are never perfect. In as long as they are conducted by an imperfect human being, they cannot, as correctly observed in CHRISTOPHER CHIZA VS THE RETURNING OFFICER, *supra* be absolutely perfect. The Court of Appeal of Kenya was quite right in PETER GICHUKI KING'ARA V IEBC&2 OTHERS, [2014] eKLR when it said that election processes throughout the world much as they are vulnerable to human errors and inadvertent mistakes, cannot be perfect. In the opinion of the Court of Appeal of Kenya, as long as those mistakes do not affect the overall results and the democratic will of the people, they cannot justify avoidance of the election results. This has been the position even outside the East African jurisdiction. It would perhaps suffice to make reference to the English authority in In FITCH VS. STEPHENSON & THREE OTHERS [2008] EWITC 501 QB where the English Court in construing a statutory

provision more or less similar with our section 108 of the **NEA**, has the following to say at paragraphs 43 and 44:

> *....the courts will strive to uphold an election as being substantially in accordance with the law, even where there has been serious breaches of the Rules, or of the duties of the election official providing that the result of the election was unaffected by those breaches.*

There is no better comment that I can make over the above pronouncements than saying that they correctly encapsulate the statutory position in section 108 (2) of the **NEA**. These, coupled with the instructive authorities considered elsewhere in this judgment, shall be my road toward resolving this issue.

The advocates for the petitioner have submitted that the non-compliances in question have affected the results of the election. They have relied on the evidence of **PW-2** supported by **PW-3** and **PW-4** that the petitioner had used more efforts to deal with the candidate. It is not in dispute however that in the final sample ballot papers, the name of the said candidate was excluded from the contestants. It would go without saying that the voters were aware before

casting their votes that Mr. Mwakyembe was not among the contestants. The petitioner claims that some voters might have been confused. He has not called even a single witness to testify on the effect of the alleged confusion. In the absence of concrete evidence, I submit, the asserted confusion is a mere speculation which cannot be relied upon to avoid election results. I henceforth hold that the non-compliance of law in the exclusion of Mr. Mwakyembe from the candidature did not affect the overall results and the democratic will of the people of the Temeke Constituency. Issue No. 7 is therefore answered negatively.

As **to what reliefs are the parties are entitled to**, there is nothing that I can award to the petitioner than dismissing his petition for want of sufficient evidence to establish that there has been non-compliances of the election laws that substantially affected the results of the election. The petition is henceforth dismissed.

I have been asked to award costs to the respondents. In determination of the first and third issues I have disclosed my dissatisfaction with the way the first respondent dealt with issues. I cannot say therefore that the claim by the

petitioner at least on the respective issues was frivolous. The first respondent would have perhaps prevented the institution of these proceedings if he had properly dealt with respective matters. For those reasons, and so as to serve as lesson for the future conduct in the election proceedings, I will not award costs to the first and second respondents. As to the third respondent, I do not see any reason why I should deny him costs, regard being had on the fact that the petitioner has failed to establish substantial allegations which touch the third respondent. I can reasonably imply from the failure of the petitioner to tender into evidence any of the election results **Forms 21B** that he did not have a genuine claim as to the correctness of the announced results. I will therefore award costs to the third respondent.

Finally, under the power conferred to me by section 113(1) of the **National Elections Act, Cap. 343 R.E.2015),** I hereby **CERTIFY** to the Director of Elections; that **Mr. Abdallah Alii Mtolea** was duly elected as member of parliament for Temeke Constituency, in the General Elections conducted on 25th October 2015.

It is so ordered.

I.MAIGE
JUDGE
21/09/2016

Delivered in the presence of Mr. Mkoba, learned advocate for the petitioner; Miss. Maswi, learned state attorney representing the first and second respondents and Messrs. Tibanyendera and Mziray, learned advocates representing the third respondent this 21st day of September 2016.

I.MAIGE
JUDGE
21/09/2016

Right to appeal explained.

I.MAIGE
JUDGE
21/09/2016