

**IN THE HIGH COURT OF TANZANIA
AT MWANZA**

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO. 304 OF 2004

(CF's) HC. CR.APP. NO. 305,306,307/2004

***(Original Cr. Case No. 31 of 2002 of the District Court of Mwanza
at Mwanza Before: R. L. DAVID, Resident Magistrate)***

BASHIRU MOHAMED @ BUSHUMBIRO SAID & 3 OTHERS....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

16th May & 15th June 2005

JUDGEMENT

R. M. RWEYEMAMU, Judge:

In Mwanza RM's court Cr. Case 31/2002, six people were charged with Armed Robbery c/s 285 and 286 of the Penal Code. The 4th accused was acquitted while the rest were convicted and each sentenced to serve 30 years imprisonment. The 2nd accused **Noah Edward Gwalupama** did not appeal. This is a consolidated appeal of the 1st, 3rd, 5th and 6th accused, whose names are itemized below, as per that sequence of their appearances in the trial court. That sequence is used herein below to refer to 1st – 4th appellants respectively. They are;

1. Bashiru Mohamed @ Bushubiro said – Cr. Appeal 304/2004 (1st accused)

Respondents personally and other people with their knowledge, consent and/ or approval, particulars of which are set out in paras (a) to (o) below:-

- (a) *The nomination of the 1st Respondent was made on the 19th day of August 2005 in contravention of section 49 (1) of the Elections Act 1985 Cap. 343 of the Laws, Revised Edition 2002.*
- (b) *At Iramba Ward, Isanzu, Karukekere Igundu Ward and Igundu village on diverse days during the campaign one Christopher Nyandiga, who was at the material time the District Water Engineer and who was the 1st Respondent's Campaign Manager openly told voters that he would not supply them with water if they voted for the Petitioner or his party.*
- (c) *That the said Christopher Nyandiga similarly did use his position to drill deep water wells to influence voters to vote for the 1st Respondent and CCM party. This was done at Haruzale and Chamakapo villages.*
- (d) *The 1st Respondent and/ or his agents used Government motor vehicles, to wit STJ 8090 Pick – up and SM 1305 Tipper Lorry to ferry stones and sand at Kigaga Primary School.*
- (e) *The 1st Respondent did actually use bribes for example on Saturday 10/12/2005 he did distribute shs. 500/= each to voters in Buzimbwe, Kabainja, Bulamba,*

Mwisenyi, Ragata villages, Nansimo Kibara etc. together with football's jerseys, khangas and hoes.

(f) The 1st Respondent was carrying arms, a pistol to threaten voters and local government leaders, to wit:-

(i) Between 12th December and 13th December at Kibara the OCS was threatened.

(ii) On the same date and time the Divisional Executive Officer Kibara was also threatened

(iii) Chairman of the Village Council, Kibara was similarly threatened.

As a result of such threats many voters for the opposition were prevented from casting their votes at the Polling Day.

(g) Violence was on diverse days during the campaign committed against the petitioner and his associates. This happened at Kibara where the petitioner was not allowed to open a criminal case consequently he was forced to institute one at Bunda.

(h) The 1st Respondent used derogatory words and imputed witchcraft practices at the petitioner by falsely accusing the Petitioner that he had caused the death of his young brother and had taken the heart out of the body and made flour out of it and was using the same to feed the

electorate. Such false allegations caused fear and dislike of the Petitioner.

(i) The Polling Assistants refused and/ or denied the Petitioner's polling agents to accompany the ballot boxes from the Polling Station/ Counting Stations to the Ward and/ or the District in contravention of the electoral laws.

(j) The Presiding Officer and/ or Polling Assistants neglected and/ or refused to complete Form No. 21B in contravention of the Election Regulations 2005. In particular this happened at the following polling stations, inter alia,

(i). Polling Station No. 0023191.

(ii) Polling Station No.0023176 – SM Kisoria "A"

(iii) Polling Station No. 00023190 – SM Nafuba "B"

(iv) Polling Station No. 00023192 – VEO "A"

Nambaza

(v) Polling Station No. 00023143 – VEO

Kasuguti "A"

(vi) Polling Station No. 00023196 – Haruzale SM

(vii) Polling Station No. 00023198 – Nansimo

SM "B"

(viii) Polling Station No. 00023133 – Zahanati "B"

(ix) Polling Station No. 00023182 – Karukekere "B"

- (k) The Petitioner's polling agents were denied an opportunity to vote for the petitioner in contravention of the law.*
- (l) The Returning officer did appoint over three hundred people as guides to direct voters contrary to election directions. In practice these turned out to conduct illegal campaigns and be bribery agents for the 1st Respondent and/ or Chama Cha Mapinduzi.*
- (m) The Returning officer and/ or Presiding officers and/ or Polling Assistants refused/ neglected and/ or failed to give complaint forms for the agents to show their satisfaction or otherwise on each process in the election.*
- (n) The Returning Officer and/ or Presiding Officers and/ or Polling Assistants supplied more ballot boxes at some polling stations, which were fraudulently/ or illegally used. This was the case at Nafuba and other polling stations.*
- (o) The Petitioner repeats para (j) hereinabove and states that, the Returning Officer's refusal to reconcile the votes cast for the President, Parliament, and Ward Councilor was contrary to Law.*

Wherefore the Petitioner prays for the following reliefs:-

- 1. A declaration that the Parliamentary Election for Mwibara constituency is void.*

2. *A declaration that the nomination of the person elected was invalid.*
3. *A declaration that the 1st Respondent and/ his agents committed bribery.*
4. *Costs.*
5. *Any other or further relief's as the court deems proper and fit.*

In his reply to the Petition the 1st Respondent strongly denies all the allegations in paragraph 4 of the petition and states that:

4. *It is not true that the nomination of the 1st Respondent, which was conducted on 19/8/2005, was in contravention of the Elections Act as alleged. Further that if at all the petitioner had any complaint, and then such ought or was part of his objection to NEC. A copy of the determination by NEC on his objection dated 31/8/2005 shall be produced at the hearing.*
5. *Paragraph 4(b) is strongly disputed. First it is denied that Christopher Nyandiga was the 1st Respondent's campaign manager. Secondly It is disputed that the said Christopher Nyandiga uttered any statement in the alleged manner or at all. If, which is denied, such utterances, if at all, were made, it is disputed if they had any influence on the registered voters in the respective wards to warrant interference with the final results as alleged, implied, or at all.*

6. Paragraph 4(b) is disputed that the 1st Respondent

Nyaridiga and the CCM party used their positions to drill deep water wells to influence voters to vote for the 1st Respondent as alleged or at all. To the contrary the wells, if at all, were to the best of the 1st Respondent's knowledge drilled by the District Council in accordance with prior development plans approved by the council to which the Petitioner was a member in his capacity as the incumbent Member of Parliament.

7. Paragraph 4(d) is disputed in that the 1st Respondent did not use government motor vehicles including STJ 8090 or STJ 1305 for the purpose and in the manner claimed or at all. It is denied that there is any agent of the 1st Respondent who used any such vehicles as alleged or at all. Further it is alleged that if such vehicles were used to ferry stones as alleged such was in the ordinary fulfilment of usual planned development activities by the relevant authorities. It is also disputed that carrying out the said projects was calculated and or influenced by the 1st Respondent or his party to carry votes contrary to any electoral Rules as alleged or at all.

8. Paragraph 4(e) is denied and disputed that the 1st Respondent was in Buzimbwe, Kabainja, Bulamba, Mwisemi, Ragate, Nansimo and Kibara Villages in a manner inconsistent with the prefixed timetables. It is also denied that in the course of the campaign the 1st

Respondent committed the alleged acts of bribery, in the manner alleged or at all.

9. *Paragraph 4 (f) is denied and strongly disputed that the 1st Respondent ever used his licenced firearm to threaten voters or any person in the course of the election campaigns.*
10. *Paragraph 4 (g) is disputed that acts of violence occurred in the course of campaigns as alleged or at all. To the contrary, fracasess occurred on several incidents owing to uncontrolled partisan feelings between the two major rival parties without any influence of the candidates as alleged or at all. It is further denied that such acts were deliberately engineered, designed or instigated by the 1st Respondent or any of his agents with the express purpose to harm or cause injury to the Petitioner or his followers.*
11. *Paragraph 4 (h) is denied in toto and the 1st Respondent requests further and better particulars as to which of the deceased young brothers of the Petitioner was being referred to and the time and cause of his death.*
12. *Paragraph 4 (i) is also disputed that all the ballots were counted and results posted at the polling stations with copies of the relevant forms given to the agents. It is denied that any of the petitioners polling agents were denied to accompany the ballot boxes.*

13. *Paragraph 4 (j) is also denied and the 1st Respondent states that all forms were filled in and signed by the relevant representatives of all the contestants.*
14. *Paragraph 4 (k) is disputed that any agents of the petitioner were denied an opportunity to vote or at all.*
15. *Paragraph 4 (l) the 1st Respondent denies knowledge of the 300 guides and he denies to have ever commissioned any person to engage in bribery practices either during or in the course of the campaigns or elections or at all.*

Paragraph 4 (m), (n) and (o) are denied generally and the 1st Respondent concludes by denying that there were any consequential irregularities in the conduct of the election to warrant interference to nullify the results duly declared.

The 2nd Respondent replies that the contents of paragraph 4 of the Petition are strongly disputed and that the petitioner is put to strict proof thereof. In details the 2nd Respondent states in Paragraph 4 of his reply that:-

- (i) *The contents of Paragraph 4 (a) of the petition are disputed and that the nomination of the 1st Respondent together with other contentants was made on 20th August, in accordance with the law governing elections.*
- (ii) *The contents of Paragraph 4(b) are disputed and the 2nd Respondent further states that*

Karukekere Village is at Namunira Ward of Igundu Ward. Further the said Christopher Nyandiga has no authority by himself. All council projects are planned and managed by Council management team and not the District Water Engineer on his own.

- (iii) In Paragraph 4 © of the Petition, the 2nd Respondent reiterates what is stated in (ii) above.*
- (iv) The 2nd Respondent admits the Contents of Paragraph 4(d) of the Petition save for the fact that the 1st Respondent participated in the school building project. The 2nd Respondent further avers that Government vehicles were in their daily routine duties and the school belongs to the District Council.*
- (v) The contents of Paragraph (e) and (f) of the Petition are disputed and the 2nd Respondent further states that if the said acts were committed the Petitioner ought to have reported the same to the relevant authorities.*
- (vi) The contents of Paragraph 4 (g) of the Petition are disputed and it is further stated that the allegations raised have not shown how they affect the election results.*

- (vii) *The contents of Paragraph 4 (n) are noted without any comment.*
- (viii) *The contents of Paragraph 4 (i) are denied and it is further stated that the electoral law does not allow the polling agents to accompany the ballot boxes. In addition the 2nd Respondent states that before boxes were transferred they were counted and the polling agents had participated in counting and they finally signed to accept the results, which were at the same time posted at the polling stations.*
- (ix) *The contents of Paragraph 4 (j) are denied and the 2nd Respondent further states that no Presiding Officer/ Polling Assistant in Bunda Constituency neglected/ refused to complete Form 21B of the alleged 11 polling stations.*
- (x) *The Respondent further states that the contents of forms pleaded in Paragraph 4 (j) were neither filled in by the Presiding officer/ Polling Assistants nor did they approve their contents. The Respondent further states that no polling station was registered and known as "Polling Station No. 00023198 Nansimo SM B" as pleaded under Paragraph 4 (j) (viii) in the Petition.*
- (xi) *The contents of Paragraph 4 (k) of the Petition are disputed and it is further stated that no*

Petitioner's Polling Agents right to vote was infringed and that there is a proper procedure for individuals who intend to vote out of their registration centers.

- (xii) The 2nd Respondent disputes the contents of paragraph 4 (l) of the Petition and states that the Returning Officer appointed 101 direction officers at Mwibara constituency and that their official duty was to assist voters to easily see their names in the voters list.*
- (xiii) The contents of Paragraph 4 (m) are disputed and the 2nd Respondent avers that the complaint forms were issued to polling agents who duly filled them in compliance to electoral laws.*
- (xiv) The contents of Paragraph 4(n) are disputed and the 2nd Respondent states that no boxes were supplied more than the required number to any polling station. Each polling station was supplied with voting boxes for Presidential Parliamentary and Councilor's candidates as per the law, regulations and procedure set by the National Electoral Commission.*
- (xv) The contents of Paragraph 4(o) of the Petition are strongly disputed.*

The following issues were framed before the court at the commencement of the hearing of this petition:-

1. *Whether there were non – compliances as alleged in paragraph 4(a) – (o) of the Petition.*
2. *If the answer to issue No. 1 above is in the affirmative whether the proved non – compliances affected the election results.*
3. *Whether the 1st Respondent and/ or his agents committed bribery as alleged in the Petition.*
4. *What Relief's are just?*

In this petition the petitioner called 40 witnesses while the 1st Respondent called 24 witnesses and the 2nd Respondent called seven.

On the complaint in Paragraph 4(a) the Petitioner himself, testifying as Pw¹, told this court that nomination day was 20/8/2005 but that the first Respondent was nominated on 19/8/2005. That the petitioner objected to this nomination but his objection was overruled and he was told to go to court if not satisfied. In reply to this Dw²⁴, JUSTAS MOLAY, the Returning officer told this court that nomination day was 20/8/2005. But the 1st Respondent, he agrees submitted his nomination forms on 19/8/2005. But Dw²⁴ says it was quite in order to submit those nomination forms even three days before the nomination date, 20/8/2005. Dw²⁴'s evidence was corroborated by Dw²⁵, **Richard Mwikwabi Mazira**, the Assistant Returning officer for Mwibara. The Petitioner's appeal to the Electoral commission against the 1st Respondent's nomination was dismissed.

On paragraphs 4(b) and (c) the petitioner told this court that one Christopher Nyandiga, the District Water Engineer for Bunda, who was the 1st Respondent's campaign manager, told the electorate at campaign meetings that if they did not vote for CCM candidates he would not provide them with water. This, Pw¹ says, happened at Isanzu, Karukekere, Namuhura, Igundu and Haruzare, and other wards. This engineer went to Haruzale and Chamakapo in Namuhura Ward and sent water-drilling machines and told the people those were efforts of the CCM. Candidate to help areas, which will support him. Pw¹ told this court that those two villages were not among those in the District Council's plan to have wells drilled for them.

Pw¹⁴ **Steria Buchafwe** told this court that she lives at Mwiruruma in Iramba ward. Their main problem there is shortage of water in their village. 1st Respondent called a meeting and told the people of Mwiruruma if they elected him he would build them deep water well. That was in August and the well was dug in November 2005. Pw¹⁵ **Raphael Mashaunga** is also from Mwiruruma village and a member of the village council. He says he received the well on behalf of the village chairman.

Pw⁶ **Maryciana Elias** told this court the 1st Respondent told them that he was an M.P. already, not mere contestant, and that he would be appointed Minister. He promised to build them a well at Haruzare before the election and it was build. The people were so happy that they composed a song in Kisukuma in praise of Mr. Kajege. The witness sang that song in court. She does not

remember the date of that meeting. Another resident of Haruzare is Pw¹⁷, **Anthony Masinde**. He told the court that he attended two campaign meetings of the 1st Respondent. 1st Respondent promised to dig them a well before elections. 1st Respondent came with Christopher Nyandiga and Masola. Nyandiga told the people that he would bring them water if they voted for Kajege. The well was built and Pw¹⁷ says when he saw the well he voted for Kajege.

Kulwa Mangosola, Pw¹⁸ is a villager from Chamakapo. He told this court that 1st Respondent told them in a campaign meeting that he would dig them deep water well so that they give him their votes. In November 2005 the well was dug. The well is near this witness's house and his son is the watchman of the well. Pw¹⁸ says when they were building the well the diggers gave him diesel and her gave them sweet potatoes. The villagers contributed 1000/= each to open an account to maintain the well. This witness told the court he was threatened by his village chairman he would be killed if he came and gave evidence in this court.

Pw¹⁹, **Juma Sumba** lives in Kisorya village. He was a T. L. P. polling agent. He told this court he attended 2 C.C.M. campaign meetings. The first one was in September 2005. Four people addressed the meeting. It was the Ward C.C.M. Chairman, the Ward CCM. Secretary, Mr. Christopher Nyandiga. Nyandiga said he was the water engineer and if they voted for Kajege he would dig them wells for each village. Pw¹⁹ attended another meeting at Nambubi. It was addressed by Kajege and Nyandiga. Nyandiga said

again that as a water engineer he would help dig well for the village.

Pw²¹, **Deus Muyenjwa** was a polling agent for T. L. P. for Kisorya Ward. He attended a C. C. M. campaign meeting at Kisorya Shopping Centre. Speeches were delivered by the Ward Chairman, Mr. Nyandiga, and the 1st Respondent. Pw²¹ told the court that Nyandiga told them that he was the water engineer. If they elect Kajege he would build them water wells. If not they would get no water wells. He dug them a well at Kivukoni which is not finished yet.

Pw²³, **Kanywagale Mukama**, told this court Kajege came to their area, Kisorya Village, with Nyandiga. Nyandiga told them he had been appointed by the government to campaign for the CCM candidate. 1st Respondent told the people that if they do not vote for him they would get no water and that that was why he was moving around with the Water Engineer, Mr. Nyandiga. At Mugala Village, Iramba Ward at a CCM. Campaign meeting in the presence of the 1st Respondent, Mr. Nyandiga is quoted by Pw²⁴, **Mujungu Manyunyu**, to have told the people that if they voted for Mr. Kajege they would get water. If they do not vote for him they would not get water. Pw³⁵, **Kurwijila Kulwa** of Chamakapo told the court he saw the well being built at Chamakapo and 1st Respondent visited the scene to see the construction and bring them flour. Pw³⁵ is the watchman of that well. Pw³⁵ says he heard Kajege with his own ears say he would dig them the well when he started his campaigns. It was completed a day before the elections.

The last witness on this complaint was Pw³⁸, **Venance Saka Mambi**. He is the T. L. P. Councilor or "*Diwan*" as they are called in Kiswahili, for Kibara Ward. He told the court the 1st Respondent built wells in several villages. But that the District council plans had authorized no deep wells to be built in Haruzare, Iramba or Chamakapo.

In response to the complaints alleged in Paragraphs 4(b) and (c) the 1st Respondent, testifying as the 1st Defence Witness, told this court that Christopher Nyandiga was not in his campaign team. That the 1st Respondent did not ask Nyandiga to drill wells as part of the 1st Respondents campaign. The 1st Respondent further stated that he had no information that Nyandiga built wells and told people to vote for 1st Respondent because of the wells.

His campaign team was made up of Chowaji, the CCM District Secretary, and Mashaka Magesa, his campaign manager. He tendered as Exhibit D¹ the list of his campaign team.

The defence witnesses, (most of them) who were at the campaigns allege that Mr. Nyandiga was not with them in the campaign team and that the 1st Respondent never told voters at any place that he would help them get water wells so that they vote for him.

Dw²⁰, **Robert Magesa**, told this court he lives at Chamakapo and that he is a neighbour and cousin of Kulwa Mangosola, Pw¹⁸ who said, as I have stated earlier, that the well at Chamakapo was built as part of 1st Respondents promises, and Pw¹⁸ gave the well

builder sweet potatoes and they gave him diesel. Dw²⁰ denied that there was such a promise and went further to say that Pw¹⁸ was not at Chamakapo when the said well was built. Pw¹⁸ had gone to fish in Ukerewe in October 2005 and returned in 2006, says his cousin Dw²⁰.

Dw²⁴, **Justas Molay**, the then Bunda District Executive Director and Returning Officer, told this court that wells were dug during the elections campaign period according to the District Council plan and were not part of any body's campaign. Dw²³ was **Mr. Christopher Msafiri Nyandiga** who has featured very prominently in this petition. He told this court he is the Bunda District Water Engineer. He denies to have been in Mr. Kajege's campaign team or accompanying 1st Respondent in his campaigns. He told this court that mother was sick during the election period and he took leave to attend his mother who was admitted at Bugando Hospital. So he had no time to go round and campaign for anyone. He admits however to have been the 1st Respondent's counting agent at the adding up of the final results. He was surprised to be arrested and charged at Bunda for unlawful wounding an offence he is not aware of and the case was later withdrawn for him and Dw¹⁷, **Kajumulo**, his co – accused for having no case to answer.

Dw², **Adam Kweba**, Dw⁴ **Tabu Mahelo** and Dw⁸, **Wilson Webi** told this court that all the petitioner's allegations are lies and a conspiracy made in January 2006 at the house of one **Vernice Mborwe**, Pw⁹, at Kibara Ginnery. The meeting was to conspire to open a suit and concoct evidence against the 1st Respondent.

On Paragraph 4(d) it is the petitioner's case that the 1st Respondent and his agents used motor vehicle Nos. STJ 8090 Pick – up and S.M. Tipper Lorry to ferry stones and sand to Kigaga Primary School. The pick – up, according to the petitioner, Pw¹, was used by the 1st Respondent before, during and after the campaigns to visit various places and to distribute bribes to the electorate. Pw⁶, **Ndaga Athumani** says on 18/10/2005 at Kibara center the vehicle, a Nissan double cabin written **Hesawa** was being used by 1st Respondent's party, including Nyandiga and Kajumulo to distribute money and khangas. Pw⁴⁰, **Kipunge Msabaha Mikombe** is a driver in the Bunda District Council of Isuzu Tipper S.M. 1305. He told this court he was sent by the transport officer to send sand and stones to Igaga Primary School from Mwitende, 5 trips. The diesel and his allowances were paid by the transport officer. Pw⁴⁰ does not know who sponsored the trips.

The 1st Respondent denies to have used government transport at his campaigns, be it an STJ Tipper or an S.M. Pick – up. Pw²⁴, **Justus Molay** admitted the lorry was used to send sand to Kigaga. The lorry was fueled by the Planning Department of the District Council. Though the budget says the village pays for the fuel it was a decision of the council to issue the fuel free for the village. Dw²², **Kahundi Bundara Mbondo**, was the Human Resources officer for Bunda. He was also the transport officer and Assistant Returning Officer for Mwibara. He told this court that on 4/12/2005 Kigaga village asked for transport to carry sand. He gave them a tipper lorry. The villagers contributed fuel, he said. But he does not know if the fuel was paid for by Kajege.

The complaint about actual bribing is in paragraph 4(e) of the Petition. Pw¹, the petitioner told this court he saw khangas, footballs and jerseys given as bribes. Pw¹ says that the 1st Respondent sent several people to bribe voters. For example, he says on 10/12/2005, 1st Respondent gave 500/= to each woman. Bribes were also issued in Bulamba, Mwisenyi, Lagata, Nansimo and Kibara. Footballs and jerseys were issued at Kibara, Kabainja and Nansimo. Khangas were issued at Igundu, Kabainja and Buramba.

Pw², **Ayubu Chisute Musarika** told the court that he witnessed in his house to house campaigns for a Ward Councilor seat in Butimba Ward. In Buzimbure he met men only in the houses. He was told by the men that all women were invited by the 1st Respondent to Kabainja Primary School. He met a car parked outside, a white car. Inside a classroom women were seated, full in the classroom. Pw² saw 1st Respondent seated in that classroom with three other people including Christopher Nyandiga and Mapesa Magunila. Pw² continues that finally he saw the women come out of the room holding sh.500/= each and complaining that they had been kept in the room the whole day and given only 500/= and that they would be rebuked by their husbands. Pw² says Nyandiga was the main spokesman there. Another woman, Pw³, corroborated her colleagues that all women were given 500/=. The CCM candidate was not there and when they complained they were told when the CCM candidate came he would give them more. Pw⁴, **Agnes Kusaya** told the court at the Buzimbwe Cotton Ginnery they were given 500/= each by the 1st Respondent's brother and he told them when

1st Respondent came he would give them more. She said she was taking the money knowing she had been bought and voted for Kajege because of the money. Pw⁵, **Jumanne Lukodisha**, also corroborated that they were given 500/= each by a man and a woman on behalf of 1st Respondent at Buzimbwe Cotton Godown. Pw⁶ **Ndaga Athumani** told the court he went to the Nansimo Court room where people were given money after the speeches. Pw⁶ was given the money also. But when Kajumulo saw him he informed Nyandiga and the latter called their group called Pentagon to do their work. Pw⁶ and others were beaten unconscious as we shall see again later. There were boxes on the table containing khangas which were distributed to women by Nyandiga and Kajumulo was issuing money. Pw⁷, **Charles Wegoro** went with Pw⁶ when they heard there was bribery at the courtroom of the Primary Court at Nansimo. They went and saw khangas and money being issued by Christopher Nyandiga and Kajumulo. Nyandiga was the main spokesman and Kajege's campaign manager. Pw⁷ was about to receive the money when Kajumulo noticed him and told Nyandiga that Pw⁷ was not one of them. Then the Pentagon group administered a thorough beating on Pw⁷. Pw⁷ concluded that in the campaign the campaigners were saying that they would use even bribes to resave or save that constituency.

Pw⁸, **Mugeta Wilson**, was another witness on the bribery issue. He told the court that at the invitation of CCM. Councilor he attended a CCM. Internal meeting at the Kibara Ginnery. That meeting was attended by the 1st Respondent, Kajege, Christopher Nyandiga, Mashaka Magesa, Kajumulo Gurusya, Anthony Kajege

and others. Pw⁸ says that Mr. Kajege was welcomed by Mashaka Magesa. In his speech Mr. Kajege told them that that place was where he was born. That he was working with Mr. Kikwete and later he would be appointed Minister. 1st Respondent told them that the 1st M.P. was of an opposition party and had wasted their time. 1st Respondent told the audience he had a small load for them. Then he took out money and gave them two 500/= notes to each and every participant. He asked the Councilor to distribute the money. Pw⁸ says he received the money and voted for Kajege for he had eaten his money. He said Kajege told them not to worry because the police were theirs, the courts were theirs and even the judges were theirs.

Another one is Pw⁹, **Verynice Mborwe**. She told this court she was a CCM fan and a member of the "*Pentagon Squad*". She was going round with Mr. Kajege during the campaigns. On 26/9/2005 at Kibara Ginnery Mr. Kajege was introduced by Mashaka Magesa. Those who went with 1st Respondent included Christopher Nyandiga, Mashaka Magesa, Kajumulo, and Anthony Kajege. 1st Respondent said he was asking for votes, and had to buy the votes. The councilor, Mary Bandoma, opened a bag with currency votes, which was given to her by Charles Kajege. She gave Pw⁹ and others who were at the godown 2x500/= notes each. Pw⁹ says she also went to Nansimo and Mugana with the 1st Respondent and everywhere she went as a member of the Pentagon Squad. Pw⁹ was a tenant at Kajege's house, when she was married. But when her marriage broke down she had to leave that house. But she says she is still a follower of Mr. Kajege.

Pw¹⁰, **Safi Mukama** is another resident of Kibara Village. She told this court that on 13/12/2005 Stella Julius called her and told her that women were needed by the CCM candidate at the CCM building. She went there. The CCM candidate came and told them that he was sent by the CCM. Presidential candidate to contest for they were very close and so if elected he would be appointed Minister. 1st Respondent called Mr. Nyandiga and gave him a box and Nyandiga gave each attendant ½ a bar of soap and shs. 500/= cash. Pw¹⁰ says she did not know it was a bribe. She thought it was only a present.

Pw¹¹, **Stella Julius** is a businesswoman at Kibara market. On 13/12/2005 the 1st Respondent went and asked Pw¹¹ to call women at the CCM hall. The 1st Respondent is Pw¹¹'s brother – in – law. Pw¹¹ has got a son called Kajege. Pw¹¹ called the women. Pw¹¹ told this court that Kajege was with Nyandiga, Mashaka and Mary Bandoma. The 1st Respondent told the women not to fear what he gave them. That he had been promised by Mr. Kikwete that once elected he would be made a minister. 1st Respondent told the audience that the petitioner was too poor to give them anything. Then he took out boxes of Kwanga Soap and gave them. Then he gave them salt, khangas and vitenge. Then he took out brand new currency notes of 500/= and gave them. Kajege's brother was still Pw¹¹'s husband when she testified. Pw¹¹ told this court that the 1st Respondent told them that, the petitioner had taken to Dar es salaam his brother where he was operated and died. That the 1st Respondent told them that the petitioner took the deceased's heart

and it is the heart he is using by witchcraft means in his campaigns. Pw¹¹ adds that the 1st Respondent told them he used money while the petitioner used human hearts. Pw¹¹ tendered the kitenge she was allegedly given as Exhibit P¹.

Another Petitioner's witness on this issue is one **Mary Bandoma**, Pw¹². She told this court she is a CCM member and a former councilor, special seats (Diwani Viti Maalum) She is a CCM member up to now, she says. At a meeting on 29/9/2005 at Busambara Ginnery, the 1st Respondent gave her 3 bundles of notes to distribute 2x500/= to each attendant. Then on 10/12/2005 at Kibara CCM office there was an internal meeting for women. 1st Respondent was with Mashaka, Nyandiga and his brother, Anthony. 1st Respondent distributed 500/= to every person there. On 13/12/2005 at Kibara CCM office according to Pw¹², 1st Respondent issued khangas, vitenge, soap and salt. Pw¹² says the Anti - Corruption Squad was around but they were sent to suppress opposition parties not to follow CCM meetings. Those who received bribes for those three days could add up to 1000 people according to Pw¹².

Pw¹⁴, **Steria Buchafwe**, from Mwiruruma, told this court that Mr. Kajege in a meeting he called, gave each woman 1,000/= and on the second meeting he gave them 500/= cash. And Pw¹⁶, **Mericiania Elias** from Haruzale told this court that after the meeting, the 1st Respondent sent the women into a bush and gave them shs. 1,000/= each.

The other type of bribes alleged to have been issued by the 1st Respondent is in the form of footballs and jerseys. Pw²³, **Kanwagale Mukama** of Kisoro village is the chairman of Dragon Football Club. During the campaigns for elections Kajega in the company of Nyandiga told them at the club that they should go to the CCM office at 11.00 pm. When they reached there at the CCM office Pw²³ was given 15 red jerseys to ask the youths to vote for Kajega. Pw²⁴, **Mujungu Manyunyu** told this court he is a footballer of Awamu ya Pili Football Club. During the campaigns at Mugala Village, he says accompanied by Nyandiga, Kajega brought them a football. **Jeje Bwaiye** Pw²⁹, a member of the people's militia told the court on 19/9/2005, Mr. Kajega came to their football club pitch where the Kibara Boys football club whose assistant captain Pw²⁹ is, was doing exercises and gave them 14 jerseys and one football. Before that Pw²⁹ says Nyandiga had told them Mr. Muguta would come to the pitch and give those presents and asked them to vote for him.

The 1st Respondents answer to these allegations of bribery is a general denial to every such allegation of giving money, khangas, vitenge, soap, salt, jerseys or footballs. In particular, Dw¹ states that on 10/12/ he was doing his campaigns in Nansimo Ward. He says he neither went to Kabainja that day. Nor was he in the company of Christopher Nyandiga. He denies to have given 500/= to each woman at Kabainja on that date. He continues saying that on 10/12/2005 his brother was not at Buzimbwe godown. On 18/10/2005 he was in Mwanza so he was not distributing khangas and sodas at Nansimo. On 26/9/2005 he says he was not at Kibara

Ginnery but at Isanju Centre. They did not give people money at Kibara on that date. On 13/12/2005 he denies too to have been at Kibara Ginnery giving people money and soap. On 26/10/2005, he says he was not at Kibara Ginnery, but at Kasaunga Centre. He denies too to have given Pw¹¹, Stella Julius a kitenge and 5,000/= so that she helps him in his campaigns. He denies to be related to her at all. On Mary Bandoma, Pw¹², the 1st Respondent denies that she was in her campaign team. He denies to have given people money at Busambara on 29/9/2005. He continues denying to have given Safi Mukama soap and money at the CCM building in Kibara on 13/12/2005.

On 19/9/2005 he says he did not distribute jerseys to Kibara Boys Football Club. He denies too to have given people at Haruzale 1,000/= each, or the women money at the bush. Nor did he give a football club balls at Mwiruruma, he says.

He concludes by saying he has enmity with VERNICE MBORWE, because she was a tenant in their house and they evicted her from that house. Mary Bandoma too, he says is his enemy because at the CCM preliminaries he defeated Bandomas favourite candidate, one KOMAKOMA. That he says is the reason why these two petitioner's witnesses are lying against him.

Dw², **Adam Kweba**, Dw⁴ **Tabu Mahelo**, and Dw⁸, **Wilson Webi**, told this court they were called in January 2006 by Mary Bandoma, Pw¹² at VERNICE MBORWE's house, Kibara Ginnery, and planned how to concoct evidence that KAJEGE issued bribes of khangas, vitenge, soap and money. That the main spokesman there was Venance

Kamunyole. But these witnesses say they refused to come to tell the court lies.

Dw⁵, **Silasi Lukiko** told this court that at Kabainja they were never given jerseys for and or on behalf of Mr. Kajege. Dw⁶, **Mahaye John** told this court he received jerseys as captain of Kabainja football club, but received them from the petitioner not from the 1st Respondent. Dw⁷, **Nyamara Mtobi**, was the CCM branch chairman at Buzimbwe. He denies to have called a women's meeting at Buzimbwe. He told this court the women at Buzimbwe were not given money by Kajege, but by the petitioner, Mutamwega. Dw⁹, **Zebedayo Fares**, told this court that Kajege came to Karukekere Village to campaign in October 2005, but he did not give the people anything. Dw¹¹, **Maryciana Damas**, told this court that she lives in Haruzale. On 8/10/2005 she attended Kajege's campaign meeting in the afternoon. She says that the women there were not taken into a bush and given money. Dw¹³, **Majina Kiberenge** told this court that he is the "*kitongoji*" chairman for Kisorya Kivukoni. He says he knows Dragon Football club. That its captain is Katana Bwana Maya and not Kamwagale Mukama. He says the club was not given jerseys or football by Kajege. It plays without jerseys. Dw¹⁵, **Ngalya Kahare**, told the court he is the captain of Awamu ya Pili football team at Mugala Village. He says that team has never been given a football by anyone, and that **Mujungu Manyuny**, Pw²⁴, is not one of their players. Dw¹⁹, **Stephen Magwali**, told this court he is the football coach for Kibara football club and that J. J. Bwaiye is not a football player there. The captain's name is Christopher Kabula. Pw¹⁹ says the team received

jerseys in May 2005, not from the 1st Respondent, but from the petitioner.

Dw¹⁷, **Edwin Gurusya @ Kajumulo**, told this court that he was moving around with the 1st Respondent during the campaigns. He says he was not with Nyandiga. He met and knew Nyandiga when they were jointly charged in Bunda District Court. He says they never gave voters bribes or gifts anywhere. They had no campaign meeting on 18/1/2005, he says. Dw¹⁴, **Sophia Makumulo** told this court that she is the UWT chair, CCM Bunda District.

In 2005, Dw¹⁴ was in the campaign team for the CCM candidate, Mwibara constituency everywhere. Her evidence is that on 10/12/2005 they were at Nansimo Ward between 10.00 am. and 1.00 and 6.00 pm. That date they were not at Buzimbwe, Kabainja or Kibara C.C.M. office. On 26/9/2005 they were at Isanzu not Kibara Ginnery. On 26/10/2005 she says they were at Kasaunga, not Kibara ginnery. On 13/12/2005 they were at Kibara football grounds concluding their campaigns. They were not holding secret meetings. They were not issuing bribes. They were not issuing bribes or presents at their campaign meetings. She denies that they were with Christopher Nyandiga in their campaign team.

On Paragraph 4(h) the petitioner alleges that the 1st Respondent used derogatory words that the petitioner caused the death of his young brother and took the heart out of the deceased's body and made flour out of it with which he was feeding people to win votes. On this complaint Pw¹¹, **Stella Julius** told the court that the 1st Respondent told the people that the petitioner had taken his

brother to Dar es salaam where he was operated and died. That the 1st Respondent told them that the petitioner took the deceased's heart and is the one he is using in the campaigns by means of witchcraft. Pw¹¹ says 1st Respondent said he used money while the petitioner used human hearts. Pw²⁷, **Daniel Kasula Mahendeka** told the court he lives at Nafuba. He told the court that Kajege visited Nafuba Island twice in his campaigns. On the second trip he asked the people not to vote for Mutamwega and that Mutamwega had killed his brother and took out his heart so that people vote for him. That Kajege told them he was told so by native doctors. Pw²⁸, **Prisca Zere** also told this court Kajege told them Mutamwega killed his young brother and took his heart for witchcraft purposes in order to get votes, and that the 1st Respondent told them he was told so by witchdoctors.

The 1st Respondent denies to have accused the petitioner of killing his young brother for witchcraft purposes in order to win the elections. From Nafuba, for the Respondent, came Dw¹⁰, **Valentini Makene**. He told this court he attended a CCM campaign meeting. It was in October on a date he has forgotten "*I did not hear the CCM candidate call the other witness a witch who used witchcraft to kill his brother to win elections*", said Dw¹⁰. He said he attended the meeting throughout, though he does not know if it was in the morning, afternoon, or evening.

On paragraphs 4(f) and (g) the petitioner complains against violent incidents by the 1st Respondent. Pw¹, the petitioner told the court that on 12th and 13th December 2005, at Kibara Police Station,

holding a pistol, the 1st Respondent ordered the O.C.S. in charge of station to arrest TLP. Youths and the latter refused. 1st Respondent is alleged to have then threatened the O.C.S. that 1st Respondent was a CCM candidate, who is above the government, which is over the police, and he could take steps against him. That the 1st Respondent continued threatening the Village Chairman and the Ward Secretary when they tried to interfere with the threats. Pw¹ told the court that he was personally attacked by youths in his car, prevented from passing and searched. The youths had pangas and clubs. When Pw¹ came out of the car he saw the 1st Respondent in that group. The group of about 30 people hit him with clubs thrice with his friend, Prosper and driver, Nasoro. When he went to report to the police, Kibara, they refused to open a report and he had to report at Bunda.

Pw²⁹, **Jeje Bwaiye**, told this court he was a member of the people's militia. He witnessed on 11/12/2005, 1st Respondent come to the Police Station and told Mr. Madirisha, OCS, and the Ward Secretary that they were favouring opposition parties and were arresting his party followers for assaulting the petitioner, and threatened them with a pistol. Pw³¹, **Sospeter Madirisha**, the said Ocs, denies to have been threatened by the 1st Respondent. Pw³², **Mashauri Majula**, the Kibara Division Secretary denied to too have been threatened by the 1st Respondent. He was treated as a hostile witness by the Learned Counsel for the petitioner, **Mr. Maira**.

Of the three people alleged to have been threatened it is only Pw³³, **Mutesigwa Nyanguli**, who admits it. He told the court "*there*

were harsh exchange of words. Charles Muguta Kajege was saying mbwa ninyi, washenzi mnanipiga vita. Badala ya kushirikiana na serikali ya chama cha mapinduzi mnashirikiana na watu wa upinzani. Nitawamwagia risasi. After that noise I went out to the police station. I met Inspector Madirisha at the door looking at the candidate, Charles Muguta Kajege. The Ward Secretary Mashauri was on the right hand of the Ocs, Madirisha. They were exchanging words. Inspector Madirisha said he was educated in Korea and if the Respondent played with him he would injure him. The Ward secretary told Kajege he was young by age and should behaveIf they say they were not threatened, Inspector Madirisha and Mashauri are lying in court". Pw³³ told this court that he was threatened by the District Personnel Officer not to come and testify in court, and that he has now been removed from the post of Village Chairman by the District Executive Director.

The 1st Respondent, on this denies to have threatened the Ocs, Ward Secretary or village chairman. He says he had gone to the police station to ask why they had arrested those two youths while they had agreed not to arrest political supporters due to political tentions.

It is the petitioner's case further that the 1st Respondent had started a squad of youths known as the "*Pentagon*" whose work it was to suppress the opposition parties and make sure that my all means the Mwibara constituency is returned to the ruling party. According to Pw⁹ **Verynice Mborwe** who told this court she was a member of that "*security squad*" their strategy was to win back the

constituency at any costs. The said squad was disbanded after the elections.

Pw³⁴, **Abigael Mabuba Aseri**, who is a councilor, (Special Seats CCM) told this court that on 18/10/2005 at 6.00 pm. she saw some CCM members in their uniforms going to the Nansimo Primary Court. She investigated and learned that Kajege was bringing some goods, and distributing them to the CCM. Members. She decided to put on a CCM presidential campaign khanga and went to that meeting unnoticed. She continues telling the court that Kajumulo and Nyandiga were at that meeting. The Pentagon group was also present. Nyandiga told the Pentagon people to go and buy soda after giving them money. They brought sodas and drank them with some beer. Pw³⁴ tried in vain to call the petitioner. Instead she got his driver, one Nasoro. The message was to call the petitioner so that he comes and witnesses the corruption. The petitioner was not present. His driver came with three youths who went to the scene. Later Pw³⁴ heard the youths were beaten unconscious. The driver sent the wounded youths to the hospital. Pw³⁴ says the 1st Respondent was not present at that scene Pw⁶, **Ndaga Athumani** tells the court he is one of the youths who heeded Pw³⁴'s call. They went to the police station but got no help from Inspector Madirisha, the Officer Commanding Station. They went to the scene the Nansimo Primary Court and left the car behind. They went with Mshangi Katiali, Maulidi Hamisi and Charles Magoti. There was Nyandiga, Kajumulo and the village chairman, one Mr. Juma. In the boxes there was beer, sodas and after the speech by Mr. Nyandiga, they started giving money. Pw⁶ was given 2x500/= notes by

... saw Pw⁷ he was surprised and went to tell Nyandiga. Nyandiga called the Pentagon Squad and asked them to do their work. They hit Pw⁶ with a bottle on the head and a wire and Pw⁶ fell down unconscious. Pw⁶ found himself in hospital the next day with a drip of water and blood all over. A criminal case was opened in Bunda District Court against Christopher Nyandiga and Kajumulo. Pw⁷, **Charles Wegoro**, told this court he was in the company of Ndaga, Pw⁶, and went to witness CCM corruption at Nansimo Primary Courtroom. Nyandiga and Kajumulo were issuing khangas and money to the people. Pw⁷ was about to be given the money when Kajumulo noticed him and said he was not one of them. The Pentagon, *"a group used by CCM. To protect them and harass and intimidate people throughout the constituency"*, according to Pw⁷, was ordered by Nyandiga to attack them. Like Pw⁶, Pw⁷ was beaten unconscious with bottles and iron bars. They were later sent to the hospital. Nyandiga and Kajumulo were charged in the Bunda District Court. Pw³⁰, **Richard Maganga** is the Bunda District Magistrate – in – charge. He told this court that **Criminal Case No. 275/2005** was filed in his court where accused persons were Christopher Msafiri Nyandiga and Edwin Garusya with four counts of Greivous Harm. That the case ha been withdrawn by the prosecution under **section 230 of the Criminal Procedure Act**. And that the complainants were never called to give evidence. Pw³⁹, **Thomas Nyaoro**, confirmed that CCM held their meeting at the Courtroom and some youths were severely wounded. Pw³⁷, **Inspector Rukiya Enos Rwamahe Robert**, told this court he was the Ocs, Bunda, during the general elections 2005 and in – charge – of

Security at Mwibara constituency. He admits there was unlawful wounding at Nansimo Primary Court with 4 victims. He arrested all those concerned, including "*my friend*" Christopher Nyandiga and Edwin Gurusya, both of whom he jointly charged. The case was very serious and Pw³⁷ says he does not know how it was withdrawn without calling the victims as witnesses.

The defence case is that the 1st Respondent does not know anything about the "*Pentagon*". **Christopher Nyandiga** and **Edwin Kajumulo**, Pws 23 and 17 respectively, deny to have been involved in that incident. They add that they were surprised to be arrested and charged. Pw³¹, Inspector Madirisha, told this court the case file was closed for "*n.f.a*" which he says means "*no further action*". Pw³¹ says this was because the complainants were relatives of the accused persons and did not make a follow – up of the case, or want the case to go on.

In paragraph 4(i) the petitioner complains that the Polling Assistants refused and/ or denied the petitioner's polling agents to accompany the ballot boxes from the Polling Stations/ counting Stations to the Ward and/ or the District headquarters in contravention of the electoral laws. In reply to this complaint the 2nd Respondent states that the electoral laws do not allow the polling agents to accompany ballot boxes. All the T. L. P. Polling Agents who testified in court allege to have been refused to escort the ballot boxes to the Wards and the District Headquarters, allegedly because the means of transport, the lorries, had no place to carry them. They allege it is only CCM polling agents who were

allowed to escort the ballot boxes. These polling agents include Pw¹⁹, **Juma Semba**, Pw²⁰, **Johnson Makubulo Makefu**, Pw²¹, **Deus Muyenjwa**, Pw²², **Paulo Makene**, Pw²³, **Kanwagale Mukama**, Pw²⁴, **Mujungu Manyunu** and **Monika Mwanzarubya**, Pw³⁶.

The Respondents called the Returning Officer, **Mr. Justus Molay**, Dw²⁴, Assistant Returning Officer, **Richard Mwikwabi Mazira**, Dw²⁵, and ward Assistant Returning Officers, **Choteka Golitalem**, Dw²⁶, **Hezron Magesa**, Dw²⁷, **Tito Mjwanda Magoti**, Dw²⁸, and Presiding Officers, **Baraka Vitus Manyasi**, Dw²⁹, **Sylvanus Elias Mnyampala**, Dw³⁰, and **Victor Makene Ernest**, Dw³¹. These witnesses told the court that no polling agent was refused to escort the ballot boxes, but that they could not force those who did not want to. The Returning Officers add that no complaint form was filled that any polling agent was refused to escort the ballot boxes.

In ground No. 4(j) the Respondents deny to have not filled or completed Form No. 21B. These are Election Results Forms for Members of Parliament, according to the Returning Officer's evidence. This is alleged to be in 9 polling stations:-

- (i) Polling Station No. 00023191
- (ii) Polling Station No. 00023176 – S.M. Kisorya "A"
- (iii) Polling Station No. 00023190 – S.M. Nafuba "B"
- (iv) Polling Station No. 00023192–VEO "A" Nambaza
- (v) Polling Station No. 00023143–VEO Kasuguti "A"
- (vi) Polling Station No. 00023196 – Haruzare S.M.
- (vii) Polling Station No. 00023198 –Nansimo S.M "B"
- (viii) Polling Station No. 00023133 – Zahanati "B"

As I stated earlier the 2nd Respondent's reply to this complaint is that no presiding officer or polling assistant refused or neglected to complete Form 21B. They annexed copies of the said forms duly filed, as annexures "R1 – 10", and that the polling agents signed the said forms.

Paragraph 4(k) is the complaint that the petitioner's polling agents were denied the opportunity to vote. This is not elaborated in the pleadings. This according to the evidence of the polling agents who registered in stations other than those they were polling agents in, there was absence of those service forms to enable them to vote where they were not registered. Those forms are commonly known as "*fomu or shahada za utumishi*". Where those forms were not available agents say they had to leave their polling stations for even more than half an hour to go and vote where they were registered and do not know what happened in their absence. These polling agents include Pw¹⁹, **Juma Samba**, Pw²⁰, **Johnson Makubulo Makefu**, Pw²¹, **Deus Muyenywa** and Pw²³, **Kanwagale Mukama**.

The Election Officials, from the Returning Officer down to the Polling Assistants, told this court that they had these forms and issued them whenever they were asked for.

On the appointment of over three hundred guides to direct voters and that these guides turned out to be illegal campaigners for the 1st Respondent and his bribery agents and/ or Chama Cha

Mapinduzi, the Respondents deny it. The Assistant Returning Officer PW²⁵, **Mr. Mazira**, says there were about 101 direction clerks not 300. That there was no evidence or complaint that these were not directing people to vote for Kajege or that they turned out to be his bribing agents.

On the lack of complaint forms this was alleged by the petitioner and his witnesses and denied by the Respondents and their witnesses. The Returning Officer and his team allege there was no shortage of complaint forms and that whenever they were needed or required they were supplied and filled.

Complaint 4(n) is that extra ballot boxes were supplied to polling stations especially in Nafuba. The Respondents and their witnesses again denied this. They tendered their election materials distribution list as Exhibit D⁷, to show they issued no extra ballot boxes.

The last complaint, Paragraph 4(o) literally stated that "*The Returning Officers refusal to recommend the voters cast for the President, Parliament and Ward councilor was contrary to Law.*" With due respect, this complaint does not convey any meaning. It seems that part of the petition was not proof – read and the typing errors not corrected. Perhaps what the petitioner meant was that the three categories of votes were not "*reconciled*" instead of "*recommended the voters*"

In his final submissions the Learned State Attorney Me. Edwin Kakolaki, for the 2nd Respondent, inter alia, argues that the Burden

of Proof lies on the Petitioner and the standard required is proof "*beyond reasonable doubt*". An election petition must be construed more strictly than an ordinary Civil Case. He continues submitting that courts have a duty to respect the people's conscience and is not to interfere in their choice except in the most compelling circumstances.

On the nomination date, Mr. Kakolaki submits that the Returning officer **Mr. Molay**. Dw²⁴, told this court that he nominated Mr. Kajege on 20/8/2005 and not 19/8/2005. Dw²⁴ continues saying the nomination forms can be filed some three days before the nomination day or on the nomination day itself. Under section 38(6), Mr. Kakolaki submits, the nomination form can be submitted at anytime before four o'clock in the afternoon of the nomination day.

On the not escorting of the ballot boxes. Mr. Kakolaki submits that it has not been proved because the petitioner's evidence is hearsay and inadmissible and that of the polling agents inconsistent and contradictory.

On the unsigned Result forms, the Learned State Attorney submits that it has not been proved for any unsigned Results form was tendered in court an exhibit by the petitioner. He stressed the need for tendering documentary evidence on this complaint. He concludes by citing section 85 of the Elections Act which states that the non – attendance or presence of a polling agent or counting agent or a candidate shall not per se invalidate the act or thing done.

On the non – feeling of Form No. 21B, Mr. Kakolaki submits that it was the duty of the petitioner to tender the said forms but he failed to do so.

On the denial of the petitioner's polling agents the "*utumishi*" forms to be able to vote where they were not registered Mr. Kakolaki submits that this has been denied by the Returning officer and Polling Assistants who said there were enough "*fomu za utumishi*" and that the Respondent's witnesses should be believed and not those of the petitioner.

On the direction clerks that there were 300 of them directing people and bribing them on behalf of CCM, Mr. Kakolaki submits that the list tendered by the Returning officer shows they were only 101 and there is no evidence that they were directing voters to vote for CCM or bribing anybody.

On the non – availability of complaint forms, this was denied by the Returning officer and his team and Mr. Kakolaki submits that the petitioner's witnesses are inconsistent on this.

On the supply of three extra ballot boxes at Nafuba the Assistant Returning officer states that no extra ballot boxes were issued at Nafuba. Dw² tendered as Exhibit D⁷ distribution list of ballot boxes for Nafuba Island. Only 12 boxes were issued for the 4 Nafuba polling stations. That no extra ballot boxes were issued.

On the issue of failure to reconcile the three Results Forms for President, Parliament and Local Government to see if the results

tally, Mr. Kakolaki submits that this is a mere allegation without proof, especially documentary proof.

In his closing submissions, Learned Counsel for the 1st Respondent, Mr. James Kabakama, argues, inter alia, that the burden of proof to prove allegations on corruption lies on the petitioner and it is a heavy one "*proof beyond reasonable doubt*," as corruption is a criminal offence.

On the specifics of evidence Mr. Kabakama submits that this case was cooked as an afterthought after the Petitioner had lost the election. He mentioned four witnesses, Dws, 2,3,4, and 8 who have told the court that they were invited and they participated in meetings to fabricate evidence and corroborate the petitioner's story, which meeting was engineered by Mary Bandoma, Venance Kamunyole and Velynice Mborwe.

On the allegations about water wells in Mwirutuma, Chamakapo and Haruzale villages, Mr. Kabakama submits that these allegations were well answered by Dw²³, Christopher Nyandiga, and Dw²⁴, Justus Molay that the wells were dug in accordance with the district council plan. The Learned Counsel submits that it is the petitioner who scooped more votes in the villages where the 1st Respondent is alleged to have bribed with water wells.

On the footballs and jerseys allegedly by issued to football clubs Mr. Kabakama submits that these have been negated by the Defence witnesses Nos. 13,15 and 19.

On the trips of stone and sand the Learned Counsel submits it was supplied on the village councils request.

On the witchcraft allegations in Nafuba it is alleged by Pws the words were uttered in December 2005 on the 1st Respondent's 2nd Campaign. But 2nd Respondent alleges he went there only once on 6/10/2005. And Dw¹⁰ said 1st Respondent did not utter such words.

Generally on other allegations on bribery and violence, the learned Counsel argues they were all countered. There are inconsistencies and disparities between the dating and timing of the alleged acts of bribery and campaign time – tables.

On the role of Dw²³, **Christopher Msafiri Nyandiga** the Learned Counsel submits that he was not in the 1st Respondent's campaign team. He was cleared of the Criminal Charges. He was attending sick parents. The list of the Campaign team is in Exhibit D¹. His role was counting agent after the actual voting was over. If Mr. Nyandiga did anything wrong it was acting contrary to **Public Service Circular No. 1 of 2000** which attracts disciplinary action against the public servant concerned but has nothing to do with election results. An alternative submission on behalf of the 1st Respondent that the petitioner did not furnish security for costs for each Respondent but he furnished only 5,000,000/= was filed by Mr. Stolla. He submits that the proceedings that followed were a nullity.

In reply to the Respondents' final submissions, learned Counsel for the Petitioner, Mr. Moses Maira, submits that the 2nd Respondents pleadings, Annexure "P" shows clearly that Christopher Nyandiga who was at the material time the District Water Engineer was the main agent for the CCM. Candidate. Also that Annexure "M" of the 2nd Respondent's pleadings is an admission that the 1st Respondent was nominated on 19/8/2005.

On the burden and standard of proof Mr. Maira joins hands with the Learned Counsel for both Respondents. But he adds by citing **Sarkar. The Law of Evidence 3rd Edition p.183:-**

"The rule that the burden of proving a case of corrupt practice is on the Petitioner does not absolve the respondent of the responsibility to assist the court by producing the best possible evidence".

On the conspiracy to file a suit and frame evidence against the 1st Respondent at Velynice Mborwe's house, the Learned Counsel for the Petitioner calls it a "*fable*". He submits that no agenda of such meeting was shown to the court; no minutes were kept; no report was made to anybody privy; and no vitenge were tendered as Exhibits. But none of the prosecution witnesses were cross – examined about the conspiratory meeting. He submits finally that this evidence for the 1st Respondent was just an afterthought.

On Christopher Msafiri Nyandiga, Dw²³, Mr. Maira submits that he was "*in the months of many witnesses*". He was implicated of

campaigning for the 1st Respondent giving rise to the allegation of threatening people to vote for the 1st Respondent". That on the evidence available Nyandiga was not only a counting agent for the 1st Respondent but his right hand man during the campaigns.

Learned Counsel continues to state that water is a big problem in the whole Mwibara Constituency so whoever brings the people water gets their votes.

On the campaign timetable, Exhibits D³ and D⁴, Mr. Maira submits that they are not sacrosanct. They exclude illegal campaigns for purposes of bribing voters. A candidate can be at more than one place within one day.

On nomination of candidates, Mr. Maira submits that the 1st Respondent was nominated on 19/8/2005 and not 20/8/2005. Dw²⁴, the Returning Officer, who told the court that he nominated the 1st Respondent on 20/8/2005, has misconceived the law for it is not his duty to nominate candidates. Mr. Maira continued submitting:

"My Lord, we submit all that was required was to insert 20/08/2005 in Exhibit Dw7. We further submit that the insertion of 'ieo 19/08/2005' rendered the nomination and candidature of Dw1 Hon. Charles Muguta Kajege unlawful. The purported nomination by Dw24 on 20/8/2005 did not improve things. We submit that Hon. Charles Muguta Kajege's purported nomination was null and void and of no legal consequences ab initio".

On the alleged use of derogatory words and false imputation of witchcraft. the Learned Counsel for the Petitioner submits that

most of the Mwibara people who gave evidence are rural folk and it is neither practical nor feasible for them to remember all the dates. The learned Counsel cited **Civil Appeal No. 83 of 1998 (Court of Appeal Sebastian Rukiza Kinyondo and Dr. Medard Mutalemwa Mutungi and Misc. Civil Cause No. 10 of 2005 (Bukoba Registry), Choya Anatory Kasazi Versus 1.Kasheneza Phares Kabuye. 2. The Attorney General.**

On the acts of violence, segregation to the petitioner's Polling Agents and lack of complaint forms, Mr. Maira Submits that they did not have any adverse effect on the election.

As I stated earlier before the commencement of the hearing of this cause four issues were framed. This was done under **Order XIV Rule 1(5) of the Civil Procedure Code 1966**. After conclusion of the hearing and receiving the final submissions of Learned Counsel for both parties, I think it fit to reframe the issues and add other issues to enable me to determine the matters in controversy more conveniently. I am doing this under **Order XIV Rule 5(1) of the same Civil Procedure Code 1966**, herein below:-

ISSUES

1. Whether there were non – compliances as alleged in paragraphs 4(i), 4(j), 4(k), 4(l), 4(m), 4(n) and 4(o) of the Petition?
2. If the first issue is resolved in the affirmative did the said non – compliances affect the election results?
3. Whether there were acts of violence as alleged in paragraphs 4(f) and 4(g) of the petition?

4. If the answer to issue No. 3 is in the affirmative did such acts affect the election results?
5. Did the 1st Respondent use derogatory words and impute witchcraft practices against the petitioner as alleged in paragraph 4(h) of the petitioner?
6. If the answer to issue No. 5 above is in the affirmative did such non – compliance affect the election results?
7. Was the nomination of the 1st Respondent as alleged in paragraph 4(a) of the petition null and void?
8. Did the 1st Respondent commit corrupt and illegal practices and/ or bribery as alleged in paragraphs 4(b), 4(c), 4(d), 4(e) of the petition?
9. Is the 1st Respondent's Alternate submission sustainable?
10. To what reliefs are the parties entitled?

On the 1st part of the first issue 4(j), as I stated earlier the petitioner is complaining about the polling assistants' refusal and/ or negligence to complete Form No. 21B in nine polling stations. The Respondents denied this allegation. On 4(k) the petitioner complains that about 30 of their polling agents were refused the service forms also known as "*fomu za utumishi*" to go and vote where they were not registered. The Returning officer and his team

denied this and added that they issued enough "*romu za utumishni*" to every polling station. The number of polling agents alleged to have been affected is hardly 30 and this cannot be said to have affected the results of the election where the winning margin is about 3000 votes. In complaint 4(l) it is alleged 300 guides were appointed to direct the voters. This was denied by the Respondents who allege there to have been only 101 such directors. The Respondents also deny that any of those directors acted as bribery agents for CCM, or did guide anybody to vote for CCM. apart from the allegation the petitioner brought no witness to prove this complaint.

On complaint 4(m) that the polling agents were not given any complaint forms. This was denied by the Respondents and their witnesses. And as the evidence for each party is more or less equal to that of the other on this I give the Respondents the benefit of doubt.

On the allegations of the polling agents not being allowed to escort the ballot boxes paragraph 4(i) this was again denied by the Respondents. But I do not believe that the polling agents for other parties except CCM would just decide on themselves not to escort the ballot boxes to see the end of their work and come to lie that they were denied by presiding officers to escort the boxes.

The 2nd Respondent in paragraph (viii) of his reply to the petition states:-

*"That the contents of paragraph 71 of the report
and it is stated further that the electoral law does not allow
the polling agents to accompany the ballot boxes"*

By necessary implication this is an admission that the polling agents were not allowed to escort the ballot boxes to the centre where the partial results were being added up.

Section 79A (1) (g) of the Elections Act 1985 provides:-

*"Upon the conclusion of the counting of the votes in
accordance with section 73, the Presiding officer shall
.....(g) Accompanied
by such number of polling agents as the Commission shall
direct, transmit and hand over to the Returning officer, the
ballot box together with the report of the partial results of
the elections at the polling station."*

Though the wording of this subsection shows the Commission has the discretion to direct the number of polling agents to escort the ballot boxes, the discretion has to be exercised judicially. The Commission has not to discriminate against other parties, for discrimination is against the basic rights enshrined in the Constitution. The discretion is not to discriminate other parties and allow CCM polling agents alone to escort the ballot boxes. And this is far from saying that *"the electoral laws do not allow polling agents to escort the ballot boxes."*

The evidence leaves the court with suspicious as to what may have happened to the ballot boxes on the way if they were escorted by the CCM polling agents alone. Chances of the ballot boxes/

papers, reports and/ or result forms being transferred on the way can not be ruled out.

So I hold that complaint 4(i) has been proved. But since this is one of the complaints abandoned by the learned counsel for the petitioner in his final submissions I leave it at that.

The allegation that at Nafuba Island three extra boxes were provided and used for illegal purposes (paragraph 4(n) was defeated by the Returning officer's tendering materials distribution list Exhibit D⁷ to show no extra ballot boxes were issued for Nafuba. The petitioner called no witness to prove that those three extra ballot boxes were issued or used.

On paragraph 4(o) there is no evidence adduced for the petitioner that he demanded to reconcile the votes to reconcile the votes cast and was refused. The chance to solve this would have been the prayer for a scrutiny as in paragraph 3 of the original the petition but on the first hearing date of this petition, the Learned counsel for the petitioner told this court.

"I abandon prayer 3 on scrutiny".

And in his final submissions the learned senior counsel for the petitioner stated:

"My Lord, when all is said and done, there is evidence that there were acts of violence, segregation, to the petitioner's polling agents and lack of service voting forms but we submit these did not have any adverse effect on the election".

submissions on these complaints that they did not adversely affect the results of the election.

Wherefore I resolve the first issue in the negative and the second issue's solution is that the said noncompliance's (j – o) did not affect the election results.

The third issue is whether there were acts of violence as alleged. The violence alleged is in two main incidents. First is when the 1st Respondent is alleged to have threatened the OCS, Mr. Madirisha, of Kibara Police Station, the Divisional Secretary, and the Chairman of the Kibara Village Council with a pistol that they were favouring opposition parties instead of the ruling party and that he would spray them with bullets. This allegation was denied by Inspector Madirisha, the OCS and the Divisional Secretary, the latter one of whom was, with the permission of the court, treated as a hostile witness by Mr. Maira for the petitioner. The Village Chairman admitted those threats and harassment from the 1st Respondent. His evidence was corroborated by Pw³⁷, **Inspector Rukyaa Enos Rwamahe Robert**, who said that whoever denies that there was violence in Mwibara Police Station does not know his duties.

But the impact that those acts of violence had on the election results is unknown. So I give the Respondents the benefit of doubt on this.

The second incident of violence is that alleged to have taken place in the Nansimo Primary Court where it is alleged that on the

orders of Mr. Christodner Nyandiga at East ...
beaten unconscious and Nyandiga and Gurusya @ Kajumkulo were
jointly charged with Greivous Harm in the Bunda District Court.

Again as the effect of those acts of violence denied by the
Respondents, had on the election results is unknown and the fact
that Mr. Maira has conceded this complaint that it does not affect
the results, I resolve the third and 4th issues in the negative.

On the 5th issue about the derogatory words imputing
witchcraft the petitioners side alleged it and the respondent's side
denied it. The petitioners case is that the 1st Respondent told the
people that the petitioner killed his young brother by witchcraft
means, took out the deceased's heart, ground it into flour which he
used by witchcraft means to campaign and get votes. This is
alleged to have happened at Nafuba Island according to Pws²⁷,
Daniel Kasula Mahendeka and Pw²⁸, **Prisca Zere**. Pw¹¹, **Stella Julius**,
told this court that this happened also at Kibara CCM hall on
13/12/2005. Pw11's allegation can be disregarded because it was
not pleaded and was not mentioned by any other witness of the
petitioner or the learned counsel for the petitioner in his final
submissions.

The Nafuba Island incident was mentioned by two witnesses
as I have said before. They allege it was on the second meeting of
the 1st Respondent that he uttered such words.

The 1st Respondent denied having uttered such derogatory
words. He alleges to have been at Nafuba Island only once and not

twice. His Learned Counsel's submission on this is that the petitioner's witnesses who say the words were uttered, Pw27 and 28, say they have forgotten the dates when 1st Respondent came, and the petitioner says it was on 13th or 14th October, while the timetables show the 1st Respondent was not at Nafuba on those dates. Pw¹, the petitioner's testimony on this incident is hearsay and should not be regarded.

The 1st Respondent brought in Dw¹⁰, **Valentini Makene**, who told the court that the 1st Respondent held only one meeting in October and no such derogatory words were uttered in that meeting.

As I said the petitioner's witnesses do not remember exactly the dates when the 1st Respondent held his meetings in Nafuba. On this Mr. Maira submitted that most Mwibara people are rural folk and cannot be expected to be accurate on dates. On the timetables Mr. Maira submits that they are not sacrosanct and are not necessarily followed, as illegal campaigns are not necessarily done according to timetables. In the case of **Shihobe Seni and Another Vs Republic (1992) T.L.R, 330, the Court of Appeal of Tanzania** held:

"In case of illiterate witnesses it is not fair or desirable to tie them down too closely to estimates of time."

Time includes dates.

Dw¹⁰, in his testimony for the Respondent, also told this court that he does not remember the date when the CCM campaign meeting was held. But only that it was in October. When asked further, Dw¹⁰ said he does not remember even the time of the day when the said meeting was held, not even whether it was *"in the*

morning, afternoon or evening." Such lies are dangerous to justice. Some witnesses or parties think the best way to defend themselves or someone is to deny everything, even the obvious'. In fact obvious and naked and blatant lies by one party advance the case **for the opposite party. In the case of Mathias Timothy V. Republic (1984) TLR, 86, Lugakingira, J, (as he then was) held:-**

"In testimony of a witness, where the issue is one of false evidence, the falsehood has to be considered in weighing the evidence as a whole; and where the falsehood is glaring and fundamental its effect is utterly to destroy confidence in the witness altogether, unless there is other independent evidence to corroborate the evidence."

When Pw¹⁰ told the court he does not remember whether the meeting was in the morning, afternoon, or evening I knew he was a naked liar not worth a grain of belief. His falsehood is glaring! And this is the only Respondent's witness on this issue. But I find no reason to disbelieve the petitioner's witnesses on this matter. So I find it proved beyond reasonable doubt that the 1st Respondent used those derogatory words in Nafuba Island against the Petitioner. So I resolve the 5th issue in the affirmative.

The 6th issue is whether the non – compliance in the 5th issue affected the election results. On this, Mr. Maira, Learned Counsel for the petitioner submits that imputation of witchcraft is imputation of criminality and invited this court to be persuaded by the decision of this court in **Misc. Civil Cause No. 10 of 2005 in Choya Anatory Kasazi Versus Kashemeza Phares Kabuye and the Attorney General (Bukoba Registry not yet reported)** where my brother Judge Mussa

Apenka held, citing the Court of Appeal decision **Sebastian Rukiza**

Kinyondo and Dr. Medard Mutungi Civil Appeal No. 83 of 1998 that:

"Where defamatory statements which amount to criminal conduct are made against a political opponent in an election campaign it cannot be reduced to a simple arithmetical problem of adding and subtracting the campaign centres where this took place from the total number of centres in the constituency. Candidates at elections must be effectively protected by law from such unjustified and ego motivated attacks, as was the case in the Bukoba Rural constituency in the 1995 general election. If a candidate at an election chooses as his election tactics to vilify his opponent by accusing him of criminal conduct, and it is proved that he did so, then we will assume that the allegations adversely affected the other candidate's election campaign unless the person making the allegations proved that they did not. This is the only way the courts can clean up election campaigns so as to give the electorate clean and fair elections"

In the light of the foregoing the Learned Judge was satisfied beyond doubt that the scurrilous utterances of the first respondent at the respective campaign rallies affected the result of the election.

But while in the **Phares Kabuye**, case cited above, the derogatory words were uttered at several campaign rallies, in this case they were proved uttered only at one rally in Nafuba which had about 600 voters, out of which the petitioner got 73 votes. Even if the petitioner had got all the votes in Nafuba he would not have won the elections the victory margin is almost 3000 votes. These derogatory words were therefore uttered in an isolated case and there is no evidence that they were widespread enough to

affect the results of the election. In **Solomon Alexander Saibul V. Hurbert Mbaga (1982) T.L.R**, 1 Court of Appeal held:-

"The two isolated instances of illegal practices and campaigns were isolated and sporadic involving an insignificant number of people, in view of the size of the electorate and the large number of people who actually voted, we are not satisfied that the majority of voters were or may have been prevented by these illegal practices from electing the candidate whom they preferred."

So I am not convinced that they affected the election results. Therefore I resolve the 6th issue in the negative.

The 7th issue is on the 1st Respondent's Nomination. The 1st Respondent's nomination form Exhibit D² clearly shows that *"uteuzi wa wagombea uchaguzi unatakiwa uwe leo tarehe 19/08/2005"*. Though the Returning officer, Dw²⁴, alleges he nominated the 1st Respondent on 20/08/2005, which is the official nomination date, the evidence does not show so. I agree with Mr. Maira that the Returning Officer cannot have nominated the 1st Respondent as that is not his duty.

Collins English Dictionary 4th Edition defines the word *"nominate"* as:-

"To propose as a candidate, especially for an elective office."

"Nomination": the act of nominating or the state of being nominated especially as an elective candidate."

The Law is quite clear on the definition of this word. Mr. Maira in his submissions helps us by citing S. 38(1) of the Elections Act 1985. It is undisputed that the Electoral Commission declared the

nomination date to be 20/08/2005. Even according to the Nomination Form, Exhibit D², the Returning officer is supposed "to confirm the nomination" not to "nominate". Dw²⁴ wrote in Exhibit D² paragraph F(ii).

"Nathibitisha kwamba mgombea uchaguzi amelipa Tshs. 50,000/= kwa ajili ya dhamana na kukatiwa risiti Na. 80889 ya tarehe 19/08/2005".

He does not say "*namteua mgombea.*" He says "*nathibitisha*" Nomination of a candidate is a long process. It begins with his political party's preliminaries. Then he is nominated by 25 voters in his constituency. He goes to swear before a magistrate. Then on the so – called nomination date he has to submit his nomination forms before 4.00 p.m. in the afternoon. Surely this whole process cannot take one day. The 1st Respondent's fault was to endorse that the nomination date was 19/8/2005. This is the date when he submitted the nomination forms, not the date when he was nominated. He could have been nominated even earlier in the long nomination process. But is the filling of the date "*19/8/2005*" instead of "*20/8/2005*" on the nomination form fatal to his nomination?

The date the law calls "*the nomination date*" is actually the date for confirming or approving the candidate's nomination and not the date the candidate is "*nominated*", as I have said earlier. What matters is that the candidate submits his nomination form duly filled, sworn and paid for before 4.00 p.m, on the so – called nomination date. The filling that the nomination date as 19/8/2005 is in my considered opinion not fatal to the 1st Respondents

someone "who is attending his sick mother" begs more questions than answers.

I have already held that Mr. Nyandiga was involved in two bribing instances, one for football jerseys and footballs and the other at the Nansimo Primary Court that ended up in his being charged with unlawful wounding.

Let me now reconsider whether he was at the 1st Respondent's campaign team.

There are several other glaring inconsistencies and contradictions in several important matters on the 1st Respondent's case. One of them is as to who composed the 1st Respondent campaign team. While the petitioner's case is that Dw²³, Christopher Nyandiga was at the helm of the 1st Respondent's campaign team and some even saying he was the "*Campaign Manager*" all the Respondent's witnesses denied it very strongly.

Charles Muguta Kajege, testifying as Dw¹ told this court that Dw²³, Christopher Nyandiga was not a member of his campaign team. Dw¹ tendered as Exhibit D₁ a list of members of his campaign team. These are (1) Sospeter Munubi (2) Sophia Makumlo (3) Daudi Mwanjebe (4) S. Karendero (5) Paul Choaji (6) Chacha Gimanya and (9) Joseph Manyonyi.

Dw¹², **Mazigo Lugola**, then CCM Chairman Nambubi gave a different list of the 1st Respondent's campaign team. He gave the list as (1) Anthony Msese (2) Matete Rabora (3) Sophia Makumuro (4) Mashaka @ Makaptula and (5) Mashaka King'ere who he said

was the campaign manager. The 1st, 3rd, 4th and 5th names do not even appear in the 1st Respondent's list, Exhibit D₁.

Dw¹⁴, **Sophia Makumulo**, U.W.T. Chairperson for Bunda District says she was in the 1st Respondent campaign team throughout. She gave the list of those she was with in the campaign team as (1) Sospeter Munubi (2) Chowaji Daudi (3) Manjebe (4) Chacha Ginomo (5) Joseph Manyonyi (6) Daudi Iramba (7) Mashaka Magesa (8) Mashaka Makaptula (9) Anthony Kajege (10) Musiba and (11) Edwin Gurusya Kajumulo. When cross examined by Mr. Maira on why her list was different from that of the 1st Respondent (Exhibit D₁) Dw¹⁴ first refused to read the letter, and answer the question, but when forced to read it by the court she said does not recognize the letter Exhibit D₁. When cross – examined by learned senior counsel Mr. Maira, further Dw¹⁴ said that on the list of the campaign team the court should believe her, not Mr. Kajege.

Dw¹⁷, **Edwin Gurusya Kajumulo**, who was not in the 1st Respondent's list of campaign team, admitted in this that he was moving with the 1st Respondent's campaign team always. Dw²², **Kabudi Bundara**, who was the District CCM Assistant Secretary General, told this court he is the one who wrote exhibit D₁. He told this court he does not know those Kajege appointed into his campaign team. He even says all those in the list in Exhibit D₁ were absent at Mr. Kajeges campaign meeting at Kibara.

These contradictions and discrepancies do not only show that the 1st Respondent's witnesses are lying on their campaign list, but also that the list at the back page of Exhibit D₁ was just concocted

to deceive the court. The list is contained on different type of paper from its covering letter in Exhibit D₁ and in quite different fonts or prints from that in the 1st page, besides the list being not signed. These circumstances cannot prevent one from holding that the said list was just concocted to hide the name of Dw²³ Christopher Msafiri Nyandiga therefrom. Christopher Nyandiga was named as being in 1st Respondent's campaign team by over nineteen witnesses as we have seen earlier and on the authorities I have cited hereinabove these contradictions and discrepancies are the reasons which make me reject the Respondent's case on this matter and accept that of the petitioner.

There are still more contradictions and discrepancies on the Respondent's case. Dw²³, **Mr. Nyandiga**, told this court his mother was sick during the electioneering period and he took a leave to attend her and that so he had no time to go around and campaign for someone. Dw¹⁴, **Sophia Makumulo**, the Bunda District CCM U.W.T. chair, who says she knows Nyandiga as an Executive in the Bunda District Office says he did not take a holiday that period. Dw²⁴, **Justus Molay**, the then District Executive Director, and his boss said Mr. Nyandiga took a leave because both his father and mother were sick. While Nyandiga says his mother was admitted at Bugando Hospital, Dw²⁴ says she was admitted at the DDH hospital, Bunda. Again while Nyandiga says he took 28 days leave Dw²⁴ says he took 56 days leave. These contradictions plus Dw²³'s admission that he actively participated in the election as 1st Respondent's counting agent shows not only that Dw²³ participated actively in the elections as a representative of the 1st Respondent but also makes

The petitioner was not too busy, attending his sick mother to participate in 1st Respondents campaigns. It also makes me believe the petitioner's case and reject that of the Respondents.

Besides, Dw23's participation as polling/ counting agent in the election is contrary to Government Circular No. 1 of 2000 which forbids public servants to take part in active politics. It is an electoral malpractice.

The other reason why I do not believe the Respondent's case is their failure to cross – examine, Velynice Mborwe, Pw⁹, Mary Bandoma, Pw¹², and Venance Kamunyole, Pw³⁸, on the alleged conspiracy to concoct evidence against 1st Respondent. The whole 1st Respondent's case is built upon that alleged conspiracy. But none of these witnesses was asked even a single question about that alleged conspiracy. I have to draw an adverse inference against the Respondents for that failure to cross examine. It shows their evidence was just an afterthought.

Worse till the defence witnesses contradicted each other on a very important aspect of their evidence. While Dw², **Adam Kweka** told this court that each of those called at that conspiracy was paid cash 50,000/=. Dw⁷, Tabu Mahelo, another alleged participant at that conspiracy says each of them was paid only 7,000/= Dw⁸, **Wilson Webi**, who testified a day later, says the men were given 50,000/= and the women 7,000/= for doing the same job! This contradiction again shows the alleged conspiracy is a lie.

For these reasons I believe the petitioner's evidence and reject that of the Respondents and hold that allegations of corrupt practices in paragraphs 4(b) (c) (d) and (e) of the petition have been proved. Therefore I resolve the 8th issue in the affirmative.

The 9th issue is on the petitioner's deposit of only shs. 5,000,000/= instead of 10,000,000/= for each Respondent to make up 10,000,000/= security for costs. This, according to the 1st Respondents "*alternate submissions*" is contrary to section 111(2) of the Elections Act 1985. Learned Counsel for the 1st Respondent, Mr. Stolla, submits that the proceedings that followed are a nullity as the Registrar should not have fixed a date for hearing without the petition depositing the required security. Mr. Maira, learned counsel for the petitioner did not reply to this submission.

The ruling for the application for exemption of paying security deposit dated 03/05/2006, states:

"The applicant is to pay the five million shillings deposit by the end of this month, May 2006....."

It does not state whether the amount is for each Respondent, for both Respondents or for one Respondent. Nor does it show whether it was a mere foresight or typographical error. It is ambiguous. Prudence requires that learned counsel should have sought the court's clarification on this, or raised a preliminary objection before the hearing of the case started, and not waited until at their final submissions at the end of the case. In fact section 111(5) (a) of the Elections Act 1985 states:-

Where on application made by the petitioner, the court is satisfied that compliance with the provisions of subsection (2) of (4) will cause considerable hardship, it may direct that (a) the petitioner give such other form of security the value of which does not exceed five million shillings, as the court may consider fit,"

The learned counsel for the 1st Respondent did not state whether the order to deposit cash 5,000,000/= did contravene the provisions of **section 111(5) (a)** cited above.

The first date for hearing of this case was fixed on 15/06/2006 by one L. B. Mchome, J, who happens not to be a District Registrar, but a judge.

Learned counsel for 1st Respondent wants this court to declare its own proceedings a nullity. It is *ultra vires* for me to declare my own proceedings null and void.

Besides that in **Martha Michael Wejja V. Hon. The Attorney General and three others (1982) T.L.R. 35**, where, in deciding whether the election petition was time – barred by failure of the petitioner to pay the prescribed fees within the period of one month stipulated in the then **section 130 (1) (1) of the Elections, 1970, read together with Rule 8(1) of the Elections (Election Petitions) Rules 1971, the Court of Appeal of Tanzania, per Nyalali, C.J. (as he used to be)**, after rejecting Mr. Lakha's argument that the requirement of paying court fees is not a matter of procedure but that of the substantive law, held:-

"No election shall be dismissed for reason only of a procedural irregularity unless such irregularity has resulted or is likely to result into the miscarriage of justice"

It is my humble opinion that the requirement to deposit cash shillings five million for each Respondent is a procedural one and that the omnibus order to deposit only five million shillings has not or is not likely to occasion a miscarriage of justice in this petition.

So the 9th issue is answered in the negative.

On the 10th issue the prayers are for:

- (1) A declaration that the Parliamentary Election for Mwibara constituency is void.
- (2) A declaration that the nomination of the person elected was invalid.
- (3) A declaration that the 1st Respondent and/or his agents committed bribery
- (4) Costs
- (5) Any other or further relief as the court may deem proper and fit.

I have already found out as I was resolving the 8th issue that the Respondent Committed Corrupt practices and bribery. I have also ruled that the 1st Respondent's nomination was not invalid.


Therefore I enter judgment for the Petitioner against the 1st Respondent only and declare that:

1. The Parliamentary Elections for Mwibara Constituency is void.


2. The Petitioner will get his costs from the 1st Respondent.
3. The 2nd Respondent can apply for costs against the 1st Respondent if he so wishes.

Further Reliefs:-

4. It is hereby certified for the attention and action of the Director of Elections that:
 - (a) Under **section 113 of the Elections Act 1985** this court has determined that the election of **Charles Muguta Kajege** as Member of Parliament for **Mwibara Constituency** in the 2005 General Elections was void.
 - (b) Under **section 114 (2) (a) of the Elections Act 1985** corrupt practices have been proved against the said **1st Respondent Charles Muguta Kajege**.
5. That under **section 114 (3) of the Elections Act 1985**, **Christopher Msafiri Nyandiga**, Dw²³ the then District Water Engineer for Bunda, be summoned by the District Registrar, to show cause before this court why he should not be certified by the court to the Director of Elections to have committed corrupt and illegal practices in the election.
6. Also under **section 114 (3) of the Elections Act 1985**, let the District Registrar, also issue a summons to one **Edwin Gurusya @ Kajumulo**, to show cause why he should not be certified to the Director of Elections to have committed corrupt practices in the elections


L. B. MCHOME
JUDGE
28/12/2007

Delivered this 28th day of December, 2007 in the presence of
Mr. M. Maira for the petitioner and Mr. Edwin Kakolaki for the 1st
and 2nd Respondents.


L. B. MCHOME
JUDGE
28/12/2007

AT MUSOMA
28/12/2007