IN THE HIGH COURT OF TANZANIA
AT MUSOMA

ORIGINAL JURISDICTION
(Mwanza Registry)

MISC. CIVIL CAUSE NO 4 OF 2005

In the matter of, an Election Petition under the Elections Act No.1/1985, (03/6/2005 Edition)

MUSTAFA JUMA WANDWI ..... PETITIONER

VERSUS

1. VEDASTUS MANYINYI MATHAYO ..... 1ST RESPONDENT
2. THE ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

1/10/2007 & 11/12/2007

RWEYEMAMU, J.

The 3rd multiparty elections took place countrywide on 14th December 2005, this time with an improvement in the electoral process namely, establishment of a National Permanent Voter's Register hereinafter referred to as **the PVR**. The registration process and basic characteristics of the **PVR** will be discussed later on; it suffices to state now that Presidential, Parliamentary and Councillorship elections were conducted simultaneously on each polling station using a single **PVR** of the particular station.

On that day, the petitioner **Mustafa Juma Wandwi (**hereinafter **Mr. Wandwi** or the petitioner**)** and 1st respondent **Vedastus Manyinyi Mathayo** (hereinafter **Mr. Mathayo**) were parliamentary contestants for the Musoma Urban constituency as candidates for CUF and CCM political parties respectively. Other parties who fielded candidates for the parliamentary seat of that constituency were CHADEMA, TLP, CHAUSTA and NCCR MAGEUZI.

At the end of the counting exercise, **Mr. Mathayo** (CCM) polled 22471 votes and was declared a winner while the 2nd run up **Mr Wandwi** polled 17429. The difference between them was 5042 votes**. Mr. Wandwi** was of the view that the results did not reflect the people's choice in a free and fair election because it was characterized with non compliance of counting procedures, illegal/unlawful conduct by the Returning Officer and intimidation by state cohesive apparatus.

Dissatisfied with results of the election, **Mr. Wandwi** filed a petition initially against three respondents seeking nullification of the elections, among other reliefs. The Hon. **Attorney General (AG)** and the Returning Officer (hereinafter the **RO**) were joined as 2nd and 3rd respondents respectively. The latter was later dropped, as soon to be obvious.

Appearances were as follows: The petitioner was

unrepresented at the time of filing the timely petition but before me, he was represented almost throughout by *Mr. Taslima* Advocate, that is, save for a brief period when he was assisted by *Mr.Abubakari* Advocate and another short period when the latter acted alone. **Mr. Mathayo** was represented by *Mr. Mutalemwa* Advocate throughout and most of the time assisted by *Mr. Kahangwa* Advocate. The 2nd respondent was initially represented by Mr. *Mwenempazi* assisted by *Mr. Kakolaki* State Attorneys. Before formulation of issues, representation was taken over by *Mr Mwampoma* Principal State Attorney assisted by *Mr Mzikila* State Attorney. At this juncture, I find it useful to give a brief history of the trial including matters dealt with prior to commencement of hearing.

The petitioner, vide *Mr. Taslima* applied and following consent of both respondents, was granted leave to file an amended petition and withdraw the case against the 3rd respondent. An amended petition was filed adding scrutiny as a relief. In their replies, the respondents raised preliminary objections (PO) for reason that, new causes of action had been pleaded contrary to law governing amendment of pleadings, and that, "...*the grounds raised in the amended petition did not justify the relief of scrutiny sought in the amended petition*". In a ruling dated 26/9/2006 the Preliminary Objection (PO) was partly sustained. **Ground 5 and 8** of the amended petition namely allegations of corrupt practices and cancellation of the petitioner's campaign rallies by the **RO** respectively; were found to be impermissible amendment of

pleadings because they introduced fresh matters/new causes of action -amounting to filing a fresh petition outside the prescribed time. Consequently, they were struck off. Objection in respect of ground 6 was overruled while ground 7 which was not objected to was left intact.

In the course of framing issues, *Mr. Taslima* prayed to adopt/include ground 7 of the original petition, submitting that failure to include the same in the amended petition was due to *inadvertence.* That application, strongly opposed by both respondents, was granted in a ruling dated 23/2/2007 for reasons that "... *the amendment sought could be made without injustice to the other side."* The petitioner was ordered however, to supply further and better particulars in yet another ruling dated 26/2/2007. Finally, on 27/2/2007 the petitioner's case commenced on **3 Grounds and 10 agreed Issues as indicated below,** in proof of which the petitioner called 22 witnesses. The same were traversed by the 1st and 2nd respondents vide 4 and 9 witnesses respectively.

In my opinion, the trial suffered a number of setbacks. Apart from protracted preliminary matters, it was adjourned twice due to sickness of **Mr. Wandwi** and that of his counsel; adjourned again after closure of the petitioner's case due to administrative problems and did not resume until 21/8/07. It was finally concluded on 1/10/2007 when by consent of parties; final written submissions were filed then presented in summary orally.

THE PETITION GROUNDS WERE:

1. THAT the election results were declared without the Returning Officer determining the validity of disputed votes nor announcing loudly the results of each polling station in the constituency seriatim. The petitioner is confident that had such a procedure been followed he would have been found to have a majority of valid votes. (**Amended petition para.6**)

2. THAT the Returning officer kept on changing the total number of registered voters in the constituency. That his reports were given at times where there was not more registration or change of registration stations set the National Electoral Commission (NEC). That further the number of voters kept on changing from Presidential, parliamentary and counselors at the same station. This an normality was not in no way favourable to the Petitioner. Attached hereunder are copies of form No. 21A, B and C and the packing list for voters registered collectively marked Annexture "B" and leave of the court is craved that it forms part of this petition. (**Amended petition Para. 7**)

3. That during election campaign in Musoma Constituency, the petitioner's rallies were interfered with by Government cohesive apparatus and that the said interference intimidated and scared voters from voting for the petitioner. (**Original petition para.7**) "

ISSUES THERETO:

1. Whether there were any disputed votes at any polling stations to be determined by the Returning Officer.
2. If the issue in No.1 is answered in the affirmative, whether the RO determined the validity of the alleged disputed votes.
3. Whether the RO announced loudly the Parliamentary election result of each polling station in the Constituency serials (serially-seriatim).
4. Whether,

5. if the alleged procedural irregularities could have been avoided the petitioner would have scored/obtained the majority of valid votes.
6. Whether the total number of registered voters was unlawfully changed by the Returning Officer.
7. Whether the No. of registered voters differed between the Presidential, Parliamentary and Councilors elections in Musoma urban Constituency.
8. Whether the alleged difference adversely affected the Parliamentary elections in the Constituency.
9. Whether the Petitioner's Election Campaign Rallies were interfered with by Government Cohesive Apparatus.
10. If the issue in No.8 is answered in the affirmative, whether such interference intimidated or scared away voters from voting for the Petitioner.
11. What reliefs are the parties entitled to.

For convenience, I have grouped and discussed the issues under three categories. **Category 1 covers issues 1 to 4** which relates to irregularities/non compliance with counting procedures namely that, *the RO failed to determine validity of disputed votes from polling stations and to announce loudly parliamentary results for each polling station seriatim.* The petitioner claims that were it not for such non compliance, he could have scored/obtained the majority of votes.

Under **category 2 fall issues 5, 6 and 7**. These relate to illegal/unlawful acts by election officers, namely that *the total number of registered voters was unlawfully changed by the RO, and that the number of registered voters differed between Presidential, Parliamentary and Councilors in the constituency.* The petitioner claims that such illegal and unlawful acts/conduct adversely affected parliamentary results.

The **3rd category covers issue 8 and 9** wherein malpractice

and intimidation are alleged. In brief the claim is that *the petitioner's campaign rallies were interfered with by government cohesive apparatus,* an interference which intimidated or scared away voters from voting for the petitioner. **Issue 10** will be dealt with at the end.

My decision on various aspects of the issues in this case has been guided / informed by binding principles of election law and precedents. I express my gratitude to Counsel for both respondents who referred me to some of such precedents in their submissions and supplied case copies to the court. I find it convenient to state these precedents now, indicating broad guidelines as applied in this case, and will only refer to such principles in brief in the main body of the judgment. They are as follows:

1. The underlying philosophy in election petition cases is as was stated by the CAT that "*an election is the exercise of a constitutional right and fulfillment of an obligation by the citizenry...The courts,...have a duty to respect the people's conscience and not to interfere in their choice (*at the polls) *except in the most compelling circumstances*" in **Manju Salum Msambya V. The AG &Kifu Gulamhessein Kifu,** Civil appeal 2/2002. See a discussion of the case law development of the principle in Tanzania among other cases, **Sylvester K. Masinde Vs Pius C. Msekwa & AG.** In Civil Cause No.17/1995 P.177 – 187. The court in **Manju Salum Msambya** affirming that principle

adopted the reasoning in **Reddy V Sultan** (1976) 3 S.C.R.452 that:

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

2. It is in extension of that philosophy that although the Civil Procedure Code (Cap.33 R.E.2002) (CPC) is applicable to election petition cases by virtue of rule 26 of the Elections (Election petition) Rules (the rules), the same is applicable subject to Rule 27 under which "*no petition shall be dismissed*" for reason of non compliance with the rules or any other procedural irregularity which has not resulted or is likely to result in miscarriage of justice. It was in that spirit that I did not bar admission of evidence on technicalities, (unless the same would cause injustice to the other party), lest it turned out to be material in helping the court on its <u>fundamental function – determining the true choice of the people at the polls,</u> I thus liberally granted a number of applications, (*some quite un procedural and disruptive -made in the midst of a witness's testimony*) which would otherwise be impermissible in

ordinary trial of a civil case.

3. By extrapolation, election results may be voided because of non-compliance if the same led to unfair results, that is, if the court acting on the evidence finds that if not for such non compliance, the majority might have been found to have voted for the petitioner. In the words of Section 108 (2) (b), due to: *"(b) non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election; or .."* (Emphasis Mine). In other words, not all proved electoral misconduct will lead to nullification of election results. Alleged non-compliance under Issues 1-4 if proved, would require further proof that they affected results.

4. Grounds for nullification of election results are not limited to those mentioned under section 108, they include, corrupt practice; misconduct or "*anything which renders the election un-free or unfair*" TCA in **Attorney General v. Kabourou** – 1996 TLR 156; and **Sebastian Rukiza Kinyondo v. Dr. Medard Mutungi,** (TCA) Civil appeal No. 83/1998 (Dar es Salaam main registry-unreported), among others. A misconduct of the kind alleged under category 2 of the issues if proved, would render the election unfair - a ground for nullification without proof of effect on results.

5. Unlawful deployment of government cohesive machinery (FFU) for reasons of voter intimidation during election or campaign time renders an election *not to be free and fair* – **Prince Bagenda v. Wilson Masilingi and Amos** 1997 TLR 220. Interference and intimidation alleged under category 3 of the issues if proved, would render *elections un-free and unfair,* calling for nullification of elections.

6. An election petition is "*construed more strictly than a normal civil suit"* An election may be voided only if an allegation of non compliance or misconduct is proved to the satisfaction of the court – there is a number of case law on the subject, see among others, Samata J. as he then was, in **Phillip Anania Masasi V The Returning Officer Njombe South Constituency & AG & Jackson Makweta,** Misc.Civil Cause 7/1995 HC (Songea registry): TCA in ***Gillilard Joseph Mlaseko & 2 Others v. Corona Faida Busondo & Attorney General*** **[TCA], Civil Appeal No. 57/1996,** (DSM registry,Unreported); among others.

7. Proof to the satisfaction of the court mean proof beyond reasonable doubt. See among others; ***Mbowe v. Eliufoo*** [1967] E. A. 240, George CJ, citing *Barter v. Barter* [1950] 2 All ER 458; ***Yongorola versus Erasto and The Attorney General*** 1971 HCD 259, El-kindly J.; (Un reported) SAMATTA, ***Chabanga Dyamwale Vs. Alhaji Masomo*** (1982) TLR 69 the High Court Sizya J.; principles adopted with approval by the TCA in ***Manju Salum Nsambya,***

stating that *"the burden of proof placed on the petitioner is a heavy one: he is required to prove his allegations to the satisfaction of the court, which has been interpreted as proof beyond reasonable doubt."* The court cited with approval the reasoning by the late Georges, CJ in ***Mbowe versus Eliufoo,*** *1967 EA at P.240, citing* ***Barter v. Barter*** [1950] 2 All ER 458;

> *"...the standard of proof is one which involves proof "to the satisfaction of the court". In my view, these words in fact mean the same thing as satisfying the court...one cannot be satisfied where one is in doubt. Where a reasonable doubt exists, then it is impossible to say that one is satisfied..."*

8. The onus of proof in an election petition lies with the petitioner. Section 110(2) of Evidence Act (Cap 6 R.E.2002). See Samatta ,J as he then was in **Paulo Mataka Chalamila v. Patrick Adam Pawila and AG,** Misc. Civil cause 6/1980, HC (Mwanza registry Unreported)

   i. *"If anything to be certain, it is this, that the onus of proving any irregularities alleged in an election Petition lies on the Petitioner's shoulders. The Petitioner can not be said to have discharged that onus if he proves his allegation on a preponderance of Probabilities. The law requires him to reach a higher degree of proof than that, he must prove his allegations beyond same doubt, see Mbowe vs. Eliufoo (1967) E.A. 240, 259 and Madundo Versus Nugwesheni and Attorney General (1972) HCD 18".*

The following sources will be referred to and cited as indicated: *The Elections Act*, 1985 (the Act); the *National Elections (Election Petitions) Rules* 1971 (the Rules); *Presidential and Parliamentary Elections (Registration of Voters) Regulations,* 2004 GN 357 of 2004 (the Registration Regulations); the *Elections (Parliamentary and Presidential Elections) Regulations,* GN 231 of 12/8/2005 (the Election Regulations); The National Electoral Commission (the Commission) electoral guidelines /directives titled MAELEKEZO KWA WASIMAMIZI WA UCHAGUZI –UCHAGUZI WA RAIS, WABUNGE NA MADIWANI, 2005 (Maelekezo **1**); MAELEKEZO KWA VYAMA VYA SIASA NA WAGOMBEA –UCHAGUZI WA RAIS, WABUNGE NA MADIWANI 2005 (Maelekezo **2**); and MAADILI YA UCHAGUZI (MAADILI) circulated by the Commission vide its letter of 23/8/2005.

Before commencing discussion of the issues however, I find it opportune to deal with the question of *relief of scrutiny* sought by the petitioner in the amended petition but objected to by the 2nd respondent. The petitioner pleaded that save for the non- compliance alleged in Para. 6, the petitioner could have scored the majority of votes. The PO raised was that the grounds raised in the amended petition did not justify the relief of scrutiny". I overruled that PO on 26/9/2006, without discussing the matter further because I believed the issue that the petitioner had a majority of votes was sufficiently raised to warranty overruling the PO at that early stage, waiting instead to deal with the issue at a later, now and this stage.

The law, Section 112 (d) of the Act, avails the relief of scrutiny

to a candidate who pleads that he had a majority of votes. That plea has to be specific, not a generalized pleading like "...*he could have scored the majority of votes,*" as was the position in this case. See meaning to be derived from part of the holding by the Tanzania Court of Appeal (TCA) in ***Arusha Kalwa and Five Others v. Wilbroad Slaa and Another,*** [1997] TLR 250. The relief of scrutiny therefore is justified where the petitioner specifically pleads that he had a majority of votes. Further, save with leave of the court, where the candidate intends to seek that relief, the law lays down a specific elaborate procedure to be followed under Rule 12(1) and (2) of the Rules. That procedure mandates the party seeking scrutiny, "*six days before the day fixed for hearing* to *lodge with the Registrar a list of votes intended to be objected to and ...objections to each vote...*"

The petitioner in this case neither specifically pleaded that he had a majority of votes, nor followed the procedure specified under the Rules. Further, the petitioner did not pursue the matter in the course of trial using other avenues provided under the law. **As; neither a plea with sufficient/necessary specifics was made nor, necessary procedures followed or cogent facts placed before the court by the petitioner to justify a direction for scrutiny, without hesitation, I find the relief of scrutiny unjustified.**

That done, I move on to consider the issues as framed but before doing that, an at the risk of interrupting the flow, I find it necessary to preface the discussion of the evidence by examining the

gist/value of a document admitted as court exhibit 1 (**C1).**

The document featured and was central to the petitioner's evidence particularly in respect of Issues 2, 5, 6 and to 7. Its entry in court was as follows: The petitioner applied to have the same tendered in court by the petitioner's **Pw**[22], as a relevant document in proof of facts in issue. The respondents objected on ground that **Pw**[22] was not the author of **CI**. After hearing arguments of all sides, I ruled the document admissible; to be tendered in court by its author the RO as court exhibit; and that the parties could cross examine the RO on it if they so wished. The RO tendered it, was not cross examined by the parties save after his own testimony as **Dw**[13], when he was examined and cross examined.

The value of **C1** as a report on result was controverted. What was agreed between the parties was that **CI** was a 'report' which was prepared and sent by the RO to the Commission after elections, and it deals with elections matters. The controversy was that the petitioner wished to have it in evidence as a report on the election processes and election results, arguing that it was a mandatory report under Section 81 of the Act. The respondents' position on the other hand was that **CI** was a mere administrative report, in the words of Mr Mwampoma in submission, *"By reading...CI it is crystal clear that it does not conform to all requirements stipulated under the above section (referring to section 81 of the Act) we therefore request the court to consider only form 24B, the rest should be given no weight. It was an administrative report with no value."*

(Emphasis mine)

Now, was **CI** a mandatory report of election results envisaged under Section 81 of the Act or not? According to the RO while testifying, CI was an administrative report, and not the one envisaged under Section 81, although he seemed to contradict himself when he stated in testimony that it was prepared as per directions under section 81 of the Act.

I have checked the requirements of Section 81; it provides that; "...where the result of a contested election has been ascertained the Returning officer shall-*(a)... (b)... and (c) Compile a report and submit to the commission, indicating-**(1)**.the complaints raised at each stage of the election and the measures or decision taken in respect of each.**(2)**The views of the candidates in relation to the election, and **(3)**The result of the election; and the commission shall then cause the result, recorded for each candidate in each constituency, to be published in the Gazette"* (numbering mine); and read it together with Regulation 61 (4) according to which the RO is required to forward results to the Commission immediately after declaration of results, and *Maelekezo* **(1)** number 12.4 (d) which states that "*Atawasilisha Matokeo Haraka Iwezekanavyo Tume ya Uchaguzi" then* compared them with **CI**.

The first page of **CI** is described as follows: *"Taarifa ya matokeo inaelezea –1. muenendo mzima wa zoezi la uchaguzi 2. Uteuzi wa wasimamizi wa Watendaji wa zoezi zima la Uchaguzi huo.3. Walioteuliwa kugombea na vyama vyao vya siasa **wanavyoviwakilisha**.4. Majina ya wagombea udiwani kila Kata na vyama vyao vya Siasa; kwa Ubunge majina ya walioteuliwa na vyama wanavyoviwakilisha.5. Wagombea urais na idadi yakura walizopata.6. Kura aiizopata*

kiia mgombea wa chama chake.7. Mapungufu yaliyojitokeza na pale ambapo ni lazima hatua zilizochukuliwa kuziba upungufu huo.Zoezi la uchaguzi linahitaji umakini wa aina yake na zaidi moyo wa kujitolewa.(Numbering mine)***Nakala (3)***

Kiamb. Matokeo ya Rais, Mbunge na Madiwani

Sgd. Thoens Aron Nyamhanga

MSIMAMIZI WA UCHAGUZI

JIMBO LA MUSOMA MJINI"

And its contents are indicated as:- *"**1.0.** Utangulizi p. 1; **1.10** Uandikishaji Wapiga kura katika daftari la kudumu la Wapiga kura p.1-2; **1.11.** Maandalizi ya vituo vya kupigia kua 2-3; **1.12.** Uandikishaji Daftari ia kudumu la Wapiga kura p.3; **1.13.** Taarifa ya uandıkishaji Wapiga kura katika Daftari la Kudumu ia wapiga kura kwa 2005 p.4; **1.14.** Matatizo yaliyojitokeza wakati wa uandikishaji daftari la Kudumu la wapiga kura p.4; **2.0.** Uteuzi wa Wagombea Ubunge/Udiwani Jimbo la Musoma mjini p.5; **2.10** wagombea Udiwani p 5-7; **2.11.** Pingamizi Wagombea Udiwani p.7; **2.12.** Rufaa p.7; **3.0.** Uteuzi wa Wasimamizi wa Vituo vya kupigia kura na Mgawanyo wao katika vituo p.8 na 13-20; **3.10.** Uteuzi wa Makarani Waelekezaji Wapiga kura vituoni (Directin Clerk) p.8 na 21-28; **4.0.** Upigani kura kuhesabu kura na kujumlisha kura p.8; **5.0.** Vituo vya kujumlishia kura ngazi yajimbo na Kata p.8-9; **6.0.** Matukio muhimu wakati wa zoezi la upigaji kura tarehe 14/12/2005, Jimbo la Musoma Mjini p.9-10; **7.0.** Taarifa ya Mapokezi, Ugawaji na ukusanyaji wavifaa vya Uchaguzi p.10; **7.1.** Uandikishaji wa daftari la kudumu (Mapokezi ya Vifaa) mp. 10-11; **7.2.** Maandalizi ya Upigaji kura (Mapokezi ya vifaa) p.11; **7.3.** Vifaa vya kupigia kura (Mapokezi ya karatasi za kupigia kura) p.11; Ugawaji wa vifaa (siku ya kupiga kura) p.11-12; 7.4. Ukusanyaji wa vifaa (baada ya kupiga kura) p.12; - Matokeo ya uchaguzi wa Madiwani p.29-30; - **Matokeo ya uchaguzi wa Mbung p.31-39;** - Matokeo ya uchaguzi wa Rais p.40-49; - Kivuli cha Karatasi ya Kupigia kura yenye picha 2 badala ya 3 Kata yaMwigobero 50; - taarifa ya mapokezi na matumizi ya Fedha za Uchaguzi Mkuu 2005 jumla yta Tshs.126,597,000/= p.51-53".*

A comparison of the two reveal that **CI** is different from the prescribed requirement under section 81, save for our purpose, form 24B contained therein. It contains a lot of information not prescribed under the section in question. It accordingly find that **CI** was not a report on election results envisaged by law save for the included

result forms. I do not however, totally agree with *Mr. Mwampoma's* submission that **CI** should be accorded no weight in this petition.

In my opinion, so long as **C1** was an official 'report' or 'communication' by the RO to the Commission, done in the course of his duties as a Registration officer and Returning officer of elections in Musoma constituency; pertaining to election matters some of which relate to disputed issues in this case; it is a relevant document for purpose of evaluating some aspects of the evidence, particularly comparing the RO's testimony at trial and what he stated in that report. The question of the weight to be given to that report will be discussed as the evidence on various issues is evaluated.

Further, **CI** could be misapprehended and relied on, as it was in fact relied on by the petitioner as a source of information regarding what transpired during elections, thus believing he could find a case particularly on issues 2, 5 6 and 7. I will return to this matter later on.

I now turn to the Issues which cover different phases of the election process. They begin with **category 2** which covers registration of voters and establishment of the **PVR;** followed by **category 3** -the campaign period and finally **category 1** –covering the vote counting. I proceed to discuss them as per above order beginning with **category 2**.

At the commencement of this judgment, I referred to an improvement in the electoral process vide establishment of the National Permanent Voter's Register- the **PVR.** I find it important to preface discussion of this part by a brief explanation of the **PVR.** The gist of the amendment to Section 12 of the Election Act, 1985 by Act 13/2004 was to introduce use of the national register of voters. Under the system, all Tanzanians qualified to vote under section 10 of the Act are required to register at designated registration centers (polling districts) countrywide. The registration process is done under supervision and direction of the National Electoral Commission (the Commission).

The law provides for; a fixed period for registration following which raw data of registered voters contained in forms provided by the Commission is submitted to the Commission; establishment and display of the Provisional register; receiving and determination of objections; and finally certification of the national Permanent Voter's Register **PVR.** The above process is generally provided under sections 11 to 29 of the *Election Act,* read together with the *Presidential and Parliamentary Elections (Registration of Voters) Regulations,* 2004 GN 357 of 2004 (the Registration Regulations).

Registration under the law is supervised by the Commission, carried on vide assistant registration officers at registration centers

established under each polling district, who work under supervision of the Registration Officer (who became the RO after registration exercise). All these officers work for and under supervision of the Commission.

The petitioner's complaint under this category relates to the voter registration processes which cover actual registration, preparation of the Provisional Voter's Register and finally the **PVR**. The petitioner alleged that the total number of registered voters was unlawfully changed by the Returning Officer **(Issue5)**; that the number of registered voters differed between the Presidential, Parliamentary and Councilors elections in Musoma Urban Constituency **(Issue6)**; and therefore that such illegal/unlawful conduct adversely affected parliamentary results in the Constituency **(Issue7)**.

I will deal with **Issue 5** first. From the evidence led by both sides, the fact that the number of registered voters kept on changing was on the main, undisputed by the defense. The 2nd respondent's **Dw**[6], Dr. Sisty Paul Karia the Commission IT expert and the Project Manager of the **PVR** deposed in part that: *"The number of registered voters kept on changing. The changes were legal – following the decision of the commission after consulting stake holder, No one could enter any data in the date base after scanning. All registration was completed on the last date of registration in a given note. Changes which were being effected were made on adjustment on information already sent to the commission".* (Emphasis mine)

The question for decision is; what were these kinds of changes which were being made and on what basis were they made? **Issue 5** can therefore be rearticulated as, whether changes made in the total number of registered voters were unlawful; carried on by the RO, and if so, whether elections were thereby affected.

To prove this issue, the petitioner called to testify **PW[22]** – Jumanne Magafu, who was the CUF district secretary of Musoma Urban and coordinator of the election process. To prove the 'unlawful frequent changes' that witness tendered in court exhibit 6 (**P6**), a letter dated 27/9/2005 from the RO titled *"Vituo vya kuplgia Kura."* **P6** had registered voters for each station. He went on to testify that another letter **P7** dated 26/10/05 was received from the RO this time titled *"Idadi Halali ya wapiga Kura"* indicating total registered voters as **60596 + 31 total 60627** (it was indicated on **P7** that the no. 31 stated thereon was of voters whose **OMR** was missing). According to the witness, that confused/disturbed CUF.

CUF wrote a letter dated 13/11/2005 tendered as **P8** to the RO complaining that on 31/7/2005 which was the last date for making corrections in the Provisional Register the number of registered voters was 60313 and not 60627 as per RO's letter **P7**. **Pw[22]** testified further that they received no reply to that letter. Instead on 7/12/2005 they received yet another letter from the RO **P9,**

according to which the number had gone up to 60622. That was when CUF wrote another letter **P10** dated 12/12/2005 -bitterly complaining about changes in numbers of registered voters among other matters. Again, that letter was not replied to by the RO.

In that the letter **P10** titled *"Muendelezo Wa Hujuma kupitia Daftari La Kudumu La wapiga Kura,"* the petitioner's party was also complaining that the RO had conspired and registered other people including foreigners. I should point out that the allegation constituted a un - pleaded issue, which although I am not precluded to consider, was not backed by evidence to prove it, other than the mere statement contained in **P10;** as such I consider the issue abandoned and will not deal with it further.

To contradict the allegations, the defense called three witnesses, of whom **Dw**^{5} and **Dw**^{6} were from the Commission and the third **Dw**^{13} was the RO. The gist of the evidence of **Dw**^{5} and **Dw**^{6} was to demonstrate that changes were indeed made, and to show that the said changes were in accord with the law governing voter registration; preparation of the provisional register, its display; certification and issue of the Final **PVR.** The two witnesses from the Commission admitted to, and described three phases of changes in the data of registered voters explaining reasons thereof.

The first witness on the issue was **Dw**^{5} – Moses Nelson Minga.

He introduced himself as an officer who has worked with the Commission for 13 yrs, and was the Commission registration monitoring officer in the Lake zone which included the Musoma Urban Constituency. His testimony centered on the first aspect of changes in the data of registered voters.

Both **Dw[5]** and **DW[6]** - DR Sisty Paul Karia, was the Commission IT Expert and the then Manager of the Permanent Voter's Register **(PVR)** project, deposed that the registration of voters in Musoma Constituency commenced on 12/1/2005 and ended on 1/2/2005 - a period which was not extended. After registration, the Returning Officer **DW[13]** then Registration Officer submitted to the Commission the report admitted as defense exh.1 **(DI)** which was received by **DW[6]**. (It is worth mentioning that such is the prescribed procedure under Registration Regulation 17 (3) because under Section 11 and 12 of the Act, the Commission is the custodian of both the Provisional and Permanent Voter's register).

According to both witnesses, **D1** was submitted by the RO together with the different records including Form 1 and 2 from Musoma Urban Constituency and a list indicating the total number of registered voters in the constituency to be **72921**. On receipt of those documents, they were subjected to manual verification by the Commission for correctness. After that initial verification, the number of registered voters came down to **60,683.** The first change

complained of by the petitioner's **Pw[22]** was made by the Commission, following a verification process which was not peculiar to Musoma Constituency. It was conducted on all data from other constituencies and similar mistakes, as those detected.

Dw[5] explained defects detected during the manual verification which led to the reduction in the total number of registered voters as; bad counting of form No.1 where other officers counted booklets ignoring cancelled forms; two, some officers were counting form No1 as number 2. He proceeded to explain that after verifications, the data was returned to the constituency with instructions for further corrections on the available data, adding that the last date nationally for submitting corrections from the constituencies to be made in the Provisional Register was on 31/7/2005. On being cross examined by Mr. *Taslima,* he explained that changes could be made in the Provisional register any time before the **PVR** was certified by Director of Elections, and that it was so certified on 10/11/2005, a date announced in the mass media and a fact supported by **Dw[6]** and conceded to by **PW[22].**

Dw[6] also detailed the PVR process and its procedures commencing on 7/10/2004 in the first registration zone and ending on 18/4/2005 in the last; out of the seven registration zones countrywide. He also explained the different forms used in the

process and the data processing in the Commission IT department, of which he was in charge, after received registration forms and records had been subjected to manual verification. His testimony explained the source of phase two of the changes complained of by the petitioner. He testified that after manual verification, the initial data of registered voters was 'scanned' to detect mistakes which could not be detected manually. The scanning detected mistakes like wrong affixation of RHT print, affixation of photos and then subjected the data to Optical Mark Recognition **(OMR)** (which detects minute signs on Form I like wrong shedding of characters, using pencils not authorized by the Commission etc.

It was after that exercise that **DW**[6] printed the *Provisional Register,* and returned the forms to the constituency with the figure **60683,** and mistakes detected in the data were pointed out and instructions to have them rectified were given. That letter to the RO which was tendered as exhibit **D2** stated as follows:

> ***"Katika ukamilishaji wa Daftari la Awali la Wapiga Kura, mambo yafuatayo yamejitokeza na yanahitaji kusahihishwa au kutolewa maelezo; 1.****Mhusika 'kujiandikisha zaidi ya mara moja.* ***2.*** *Alama ya Dole Gumba 'kutowekwa na sababu zake kutoelezwa* ***3.*** *Picha ya Mpiga Kura 'kutoonekana vizuri, kuonekana nusu au kutoonekana 'kabisa.* ***4.*** *Uraia wa muhusika ni wa kuandikishwa pasipo hati ya kuandikishwa.* ***5.*** *Umri wa muhusika kuwa mdogo ifikapo tarehe ya Uchaguzi.* ***6.*** *Taarifa au picha za baadhi ya wahusika*

*zilizochanganywa na waandishi wasaidizi kwenye vituo vyao **7.** Kubadilisha stika na kutumia stika za vituo vingine"*

Following that letter **D2**, Registration Officers were able to solve some of the problems. Thereafter, he printed out a Report on 6/9/2005, which indicated the figure of registered voters to have come down to **60313** after adjustment done following correction of the above stated mistakes, the figure indicated on the printout he tendered as **D3**. The above adjustments made after constituencies complied with the Commission letter **D2**, was the source of the second phase of changes complained of by **Pw[22]**; and they were done on instructions of the Commission not the RO.

DW[6] went on to explain the third phase of changes on the data of registered voters. He stated that the data of registered voters they had received suffered problems like *"under age, wrong RHT affixation, and missing photos and the immigration problems of some voters were not solved".* He also explained that voters whose data sheet had such problems were not included in the figure **60313. F**ollowing another meeting with stakeholders, (political parties), *"the Commission decided that all voters whose forms had affixation of finger print defects should be included in the database and the anomalies would be corrected at the time of updating".* The witness testified that the meetings with stakeholders during the process, was chaired by the Chair of the Commission Judge Makame but he did not produce the minutes of

the said meeting. I hasten to state that I found this witness credible –an expert who testified truthfully and coherently on a subject he had competence on.

Dw[6] further testified that adjustment following the above described agreement, the number of registered voters jumped to **60596.** He printed and sent that figure to the Constituency as per his letter **D4.** This was third phase of changes complained of, but which was done by the Commission due to the reason stated above. According to him, if voting had taken place on the initial date of 30/10/2005 registered voters for Musoma Constituency would have been **60596.** But, voting was postponed and another change complained of by **Pw[22]** took place as he proceeded to explain.

Again stake-holders raised concern and the Commission decided that registered voters whose forms had photograph problems be included in the data base together with those under age registered voters who would have attained age of majority by 14/12/2005 -the extended voting date. That adjustment pushed up the number from **60596** to **60,622,** which was the final figure. (It was not disputed by the petitioner's that the said figure indicated on their **P9** was the final figure of registered voters received).

The 3rd witness **DW[13]**- the Registration Officer **(later RO)** went on to explain that he received the Commission letter dated 24/3/2005, which he tendered in exhibit as **D9**, instructing him to put

the Provisional Register on display, he did that vide his notice to all wards in the constituency, tendered as **D.10.** The RO repeated that, the number **60622** (in the petitioner's **P9)** was the final figure on 10/11/2005, the date when the **PVR** was certified; and that no changes could be inserted by anybody after certification.

DW[13] denied the allegation that he unlawfully and frequently changed the figure of registered voters. He explained that he forwarded all data of registered voters together with other records to the Commission after registration. Explaining the **OMR** question, he termed it a mistake on his part: In short he deposed that when he received the Commission's print out dated 14/10/2005 with heading ***"orodha ya wapiga kura ambao OMR zao hazikuptikana wanaruhusiwa kupiga kura"*** he thought the figure **60,596** was not inclusive of **31** registered voters whose **OMR** had been indicated as missing, so he decided to add that number and inform the political parties.

To make sense of the evidence, I have first gone through the relevant law namely Section 11A and 12 of the Act, read together with the Registration Regulations particularly Regulation 11, and 17 to 33. Reading the said provisions, it becomes obvious to me that the way the voter registration system works (as provided under the law and explained by **DW[5]** and **DW[6]**, changes after initial registration are anticipated; that is the objective of providing for the Provisional Register, putting the same on public display and providing for time limit for changes. The system provides for verification of data

obtained at the initial registration manually and through scanning for correctness, before final certification of the **PVR** by the Director of Elections.

The decrease in the initial number of registered voters from **72,921** was to be expected after adjusting for forms of voters with non conforming data. (Except of course if the Commission was using well trained and efficient staff – which would appear not to have been the position judging from testimonies that mistakes detected in Musoma constituency were the norm rather than an exception countrywide.) The figure in Musoma constituency decreased from **72921** to **60683** after manual verification and by another **370** after scanning to reach **60313** - all during the first and second phase of changes, meaning registration forms of **2238 +370** voters were defective/had non conforming data.

The number of voters only began to increase to **60596** then **60622** the final figure following agreement to accommodate stakeholder concerns as described. (A fact not contradicted by the petitioner).

The change made by the RO of adding the number **31 on 60596 resulting** into the number **60627,** was the only illegal change which he explained as based on confusion with **OMR voters.** On the evidence however, I am satisfied by the RO's

explanation that the change was as a result of a genuine mistake. But may be more important, even if the RO's explanation was not true, on the evidence the figure given by the RO changed nothing of substance in the scheme of things- it had no effect on elections because it did not change the figures of registered voters which were with the Commission, (the custodian of the Provisional Register and the **PVR**).

Two, communication of a different figure by the RO did not change or affect the number of registered voters in the certified **PVR**, which was the total number of registered voters with the right to vote on the polling day. Based on the working of the PVR if voting had occurred as earlier scheduled, 60596 and not 60627 would have been the registered voters in the PVR. The change communicated by the RO from 60596 to 60627 was under the circumstances, more apparent than real.

That said however, I have to point out that the RO's admitted mistake involving **MNR** shows that the RO himself did not understand the way the PVR system worked, and since all ROs were admittedly given training, his addition of the **OMR number 31** and not responding to letters of enquiry by **Pw[22]** (an allegation not refuted by the respondent) when his mistake resulted into mistrust, also showed that the RO was not conscientious in performance of his duties. (A fact also revealed by his manner of preparation of **C1**

an aspect I shall next indicate). As a RO, it was not enough to be impartial but equally important, was to be seen to be impartial by all reasonable stakeholders. The manner he performed his duties would not have achieved that objective and his careless mistake further intensified an already existing unhealthy atmosphere of distrust.

Returning to the question of proof, both **Dw[5] and Dw[6]** insisted that *"It is not true that figures of registered voters was changed to favor the CCM candidate...the Commission has its procedure of making corrections in the Data Base but such corrections are made with transparency and involves all political parties. All political were given a copy of the (PVR) on CD"* (a fact not controverted by the petitioner). The two acknowledged to know the figure **60,596** on **P7** could not explain what the sentence '**31 r**egistered voters whose **OMR** was missing' meant, but given the RO's explanation above and my findings thereon; and the defense evidence that all changes in the figures of registered voters were adjustments made by the Commission on the data submitted to the commission after registration which had ended on 1/2/2005 in the Lake Zone; absence of proof that the RO changed figures in the PVR, after it was certified by the Director of Elections, I find no basis to sustain the petitioner's allegation.

To find a complaint like **Issue 5** under the described process, one would need either evidence to prove that the **RO** added or reduced the number of registered voters, obtained after closure of

the registration exercise, a fact not alleged or proved -there was no proof that the RO made or submitted a fresh list of voters after close of registration period; or that the RO made changes in the **PVR** of a specified polling station after certification; or that a polling station had a different PVR than the one issued by the Commission- a fact which would have been raised at the time the Provisional register was on display. None of those possibilities were alleged or proved by the petitioner.

It appears to me that the petitioner's complaint on this issue arose out of ignorance of the operation of the **PVR** process exasperated by an atmosphere of distrust between the CUF election coordinators and the RO arising from a number of factors, some already pointed out. Second, to comment even if in passing; it was obvious from the evidence that there was insufficient voter education on the voter registration process including the procedure and rights of voters after display and before certification of the **PVR;** on the part of voters as well as registration officers including the RO. The situation however is understandable given that the system was in use for first time the system was used. It is hoped the Commission will intensify its efforts to educate voters and all stakeholders so that this improved system will achieve its intended objective.

Be that as it may, on the evidence adduced, I find that once

the RO forwarded data of voters at the end of the registration period, no new names were submitted by him to the Commission, and that all corrections made, were legal, made on the list of registered voters whose data was already submitted to the Commission and were therefore made on its instructions and not that of the RO. **In the result, I find Issue 5 not proved.**

Issue 6 is in substance, not much disputed. The petitioner was alleging that the number of registered voters differed between Presidential, Parliamentarian and Counsellorship elections. The respondents admitted that there were differences of the number of registered voters for certain polling stations mentioned in **CI,** What was in dispute was the meaning to be derived from such differences as indicated in **C1** and consequences thereof.

The petition's evidence on the issue was based on **PW[22]'s** testimony, in turn itself based on the contents of **C1**. According to the witness, the number of registered voters for the President, Parliamentarians and Counselors for different polling stations differed. He demonstrated these differences in **CI** at some polling stations among them Nyakato, Kitaji, kigera and Mwisenge. He concluded that this difference was fatal.

Submitting on the issue, *Mr. Taslima* concluded that, *"Looking at the differences, one gathers that either there was no good record keeping or figures were played with so as to meet a certain ulterior motive. That motive*

*turned out to favour the winner and disfavour the loser. (*Although the petitioner at trial, did not demonstrate how that did happen.*)* *Our contention is that the winner who wins under these circumstances has not won legally. Otherwise what is the reason of spending a lot of people's money by preparing for various forms and training those who manned the whole exercise only to end up like this? ...This is exactly what the Petitioner is complaining about. So DW 13 confesses on the complaint. We are saying that the frequent changes of registered figures have a hearing on the results as is shown in the question at the bottom of page 484. The reply to that question on the next page – 485 and subsequent questions and replies tell it all.*

Another explanation of what happened now crops up. This time he said it was "wrong command or commanding the wrong report." From there one, all the differences at the level of registration example being Nyakato Ward where those registered for Councilors on Form 24C was 8150 but those registered for MPs were 9187; the difference being 1037. DW13 says it was due to wrong posting and human error by the Assistant returning Officer of the Ward."...

The evidence to contradict the petitioner's allegations was on the main, given by **DW[13]**. The witness testified that what was indicated as difference of registered voters in C1 arose due to error in preparation of that report. To demonstrate, I quote below part of what transpired when the witness was cross examined by counsel *Mr. Taslima:* *"**Q:** What are the mistakes in C Exh.1? **A:** I can not identify/pinpoint all the mistakes therein now. The mistakes in Court Exh.1 were committed of all levels from the polling station to Constituency, and if there are mistakes they would reach the EC because nothing gets changed in between 1. In C1, at pg 9 – 10 item 6.0, I identified 5 problem/anomalies, the words there were mine and my assistant. The Report was signed by me. I prepare it with help of my assistants" **"Q:** Our complaint is

that right from registration, there is a difference in the registered voters for the Councellor, MP & Presidential figures. Can you explain, by looking at 3rd page counting from the printed number, where it states Nyakato Ward – Form 24 (c) it has registered voters 8150 for Councellors, look at page 37 printed page, Nyakato ward, for MPs, the figure of registered voters are 9187. The difference here is 1037.

Why did this difference occur? ***A:*** *- This difference arose from wrong postings, and human error... - The error was by the assistant Returning Officer Nyakato Ward.* ***Q:*** *You as the R/O did you have power to change wrong postings?* ***A:*** *I had no such powers I know the wrong postings were an innocent mistake that is why I termed them human error". "- Yes, I sent that report as per legal requirements – the Election Act 1/1985* ***Q:*** *Is it true that the requirement you spoke about has been included in Maelekezo kwa Wasimamizi wa Uchaguzi?* ***A:*** *Yes, they were included* ***Q:*** *At page 4 of the latter booklet on 2.2 (m) – witness looks at it,* ***A:*** *It refers to preparation of a report on the whole election process and submitting the same to EC in one month. Yes, that was part of my work as per EC directives. Yes, it was my legal duty. Yes, I did that work.* ***Q:*** *Was the result of that work Court Exh.I?* ***A:*** *Ye, it was*

Q: *Do you agree form 24B is included in that report C Exh.I?* ***A:*** *Yes, I agree"* ***Q:*** *You heard Pw22's evidence; do you agree that there were defects/anomalies we appointed out?* ***A:*** *Yes, but there explanationsThe first part relates to the differences in 5 wards regarding the number of registered voters – Kitaji on Form 21 reads 4077 and Form 21 B 4067. There appears to be a difference of 10 voters. When I checked, the difference of 10 came from the following. I am giving one example to clarify what happened at Kitaji ward, (the Assistant Returning Officer the presiding officer when he was I report) the presiding officer of the station transferred registered voters 427 instead of 417. That resulted in the difference of 10 in the total registered voters – Kitaji ward. What I mean is that what happened was human error. But the actual proper number of registered voters is in the Permanent Register for a station and they do not change.*

The voting exercise took place at polling stations. The agents witnessed the voting exercise. After voting, the station became a counting station. After the exercise,

of counting, form 21 (a) (b) and (c) were filled by presiding officers at poling stations, and were witnessed by agents".(Emphasis mine)

The respondents **DW[6]** gave further elaboration of **DW[13]'s** testimony. Under cross examination on the issue, he responded as follows: ***Q.*** *"was there a possibility of registered voters to differ for voters registered for the presidential MPS and Councilors?**A.*** *That was/is not possible there is oniy one register.* ***Q.*** *"In Court Exh.1, there is indicated for Nyakato ward at Page.5 a Form 24 C, against the form at P.38, on 24 C the total registered 8150 shows at page 38, the same Nyakato Wards shows witness replied:-**A:*** ***In the Commission we know the number of registered voters. We submitted the number of registered voters back to the constituency. Since there is only one Register which does not even specify type of elections the number of registered voters in the final Report can not differ"*** (Emphasis mine)

Mr mwampoma, urging me to find the issue not proved, submitted that *"It is a common ground that three different elections i.e Presidential, Parliament and Councilor were carried simultaneously but used one register, hence it is impossible under the sun for number of Registered voters to differ between the presidential, parliament and councilors and it never happen in MUSOMA Urban Constituency".*

He submitted further that anomalies in C1 which to some extent tended to show that, the number of registered voters differed in some polling stations/wards were admitted by the RO who rightly associated them with human error and wrong positing of data in the computer. According to him, "...<u>the Petitioner could have even tendered the Permanent voters Register for comparison with the</u>

relevant forms to prove the alleged irregularity".

I concluded at the beginning that **C1** was not a 'report on result', but an administrative report which was not even properly done. It had a number of mistakes which its author the RO attributed to human error. I agree with the submission that conclusive proof of such a fact could be obtained from comparison of result forms 24A, 24B and 24C, with polling station result forms 21A, B, and C were tendered in Court. The said forms show conclusively the number of registered voters. Faced with a similar/comparable situation, the late Kyando, J. in the case cited above observed that *"For my part, while agreeing that their were typing errors in Exh. P4 as demonstrated in court, the conflict in the entries in these documents could only have been satisfactorily eliminated or resolved if the ballot papers and RF.2 (now Form 21B) forms themselves had been presented and examined they were not brought and exhibited in court".* As rightly submitted by *Mr. Mutalemwa,* the petitioner himself testified that "*...I have form 21A for the President and 21B for Member of the Parliament and 21C. If the court requires the forms they can be produced ...".* If the allegations had any truth, the petitioner could have produced the result forms but he chose not to produce them.

Instead, he said they could be produced if the court wanted them. The petitioner had the duty to prove the allegation made, as rightly observed by the late Justice Kyando in in **Matete Lazaro Joseph Kaseba V. Attorney General & Hali Meshi Kahema Mayonga**

High Court of Tanzania (Tabora registry) Misc.Civil Cause No.12 of 1995 (unreported);

> *".....it is the responsibility of the party presenting the case in court of law to marshall all the evidence necessary to prove his case...the blame for the non – production of the result forms cannot be borne by the Respondent, it has to be borne by the Petitioner who did not use the opportunity created by the law to cause them produced so that they can be used to prove the actual number of the registered voters, people who voted, disputed votes, valid and spoilt vote....."*

After consideration of the evidence in totality, I find that the petitioner failed to adduce evidence – conclusive proof that the number of registered voters differed in the **PVR** for the three positions. On the law and evidence, I find it as a fact that under the current **PVR** system only a single list of registered voters per polling station is used for presidential, parliamentary and councilor elections. Under that system, there is no possibility of a difference in a number of registered voters for the three posts. What is possible but was not alleged in this case is if there were two lists of voters at a station, but then, one of them would be a forgery not a list of the **PVR** issued by the Commission. **I accordingly find Issue** 6 **not proved, and consequently, issue** 7 **also fails.**

I noted with concern however, that the casual preparation of the report **C1** by the RO left a lot to be desired. I have already

underscored the RO's conduct like; his addition of the **OMR number 31** which ignited mistrust that he had unlawfully changed voters numbers; his failure to respond to CUF's enquiry letters thereafter, as he did to other letters written by **Pw[22]** (an allegation not refuted by the respondent); and then his manner of preparation of **C1,** while not sufficient of themselves to amount to a mishandling of the electoral process under Section 89A of the Act, they do show that the RO was not conscientious in performance of his duties.

As a RO, it was not enough to be impartial but equally important was to be seen to be impartial by all reasonable stakeholders. His conduct described above fuelled mistrust and led to the petitioner's perception that he had a case on some of the issue sufficient to petition this Court.

Before concluding this category of Issues, I should point out that evidence was led on un- pleaded issue relating to the differences between those who voted for the President, Parliamentarians and counselors at polling station. I will not dwell much on the evidence led by the respondents on this added issue.

In the absence of cogent proof on actual cause, and since; voting is a voluntary exercise; and no result forms and figures of actual differences were exhibited- at least to demonstrate that the differences of such voters was large a number as to cause concern,

Government cohesive apparatus we have the following to say. That bombings ostensibly aimed at illegal rallies were a part of a concerted strategy to paint a picture that CUF people were riotous. No any civilian was brought to court to show that he was attacked or roughed up by the procession people. Secondly the dates of the bombings were strategic. The whole story was given by Pw^{15} and Pw^{22} to the effect that things at first were normal. Later they changed as their meetings gained popularity. August, September and November no bombing but October and December 2005 were bombing months also months arranged for voting. Our argument is that bombing at the meeting places even if immediately after the meeting was geared towards decreasing the number of people to come the next meeting. Naturally they would be scared away. Secondly the picture painted to the common person on the street was that CUF were riotous. The cap it all was the 13/12/2005 bombing which was staged at CRDB and other areas beginning at 2.00 pm. CRDB was in the centre of the CCM and CUF meetings. And it was very near the Post grounds. Why wouldn't they let people complete the remaining short distance to the post grounds. After getting itches in the eyes and seeing wounded people how could a person have guts to continue to the meeting? Very few indeed. At the meeting ground Wandwi could not give his usual address like what happened at Kitaji on 13/10/2005 after the bombings at Nyasho Kebin on 12/10/2005. People told Wandwi categorically that they wouldn't came to vote on the morrow. Indeed nearly 19,000 people didn't vote while the difference of votes was only 5,000." It can be observed that all defense witnesses who were asked whether they knew the legal meaning of "procession" replied that yes they did. On explanation, they said that a person walking along with the other can be said to be on procession. This shows that either they bombed people on lack of knowledge or their bombing did not care whether legal interpretation mattered". (Emphasis mine)

The defense on the other hand, was geared at showing that elections were free and fair because; no campaign meetings were interfered with - no bombs were fired at campaign rallies, or at people going to campaign rallies, and that the bombing did not prevent people from attending campaign rallies or voting. Instead, it was their defense that the police tear gas bombs were aimed at dispersing riots and illegal assembly including illegal processions which were causing or likely to cause a breach of peace. It was their defense that processions which had no police permits were illegal- because permit before processions was required even

during the campaign period.

To be able to decide whether a particular police bombing incident was unlawful i.e. amounted to **intimidation** -defined by BLACK' LAW DICTIONARY, Sixth Edition as *"**Unlawful** coercion: extortion, duress: putting in fear...(where) Such fear must arise from willful conduct of the accused, rather than from some mere temperamental timidity of the victim..."* the petitioner had to prove that police cohesive power was used unlawfully, that is outside legal police powers. That requires first an examination albeit in brief, of when the police are legally entitled to use force in relation to assemblies, processions and riots. Such powers are prescribed under the *Police Force and Auxiliary Services Act, [Cap 322 R.E. 2002) provide;*

> *S.43.- (1) Any person who is desirous of convening, collecting, forming or organizing any assembly or procession in any public place shall, not less than forty eight hours .... submit a written notification of his impeding assembly or procession to the police officer in charge of the area specifying ...*
>
> *(4) The officer in charge of Police may stop or prevent the holding or continuance of any assembly or procession ... may, for any of the purposes aforesaid, give or issue such orders as he may consider necessary or expedient, including orders for the dispersal of any such assembly or procession as aforesaid.*
>
> *(44)The officer in charge of Police may stop or prevent the holding or continuance of any assembly or procession in any place whatsoever if in the opinion of such officer the holding or continuance, as the case may be, of such assembly or procession breaches the peace or prejudices the public safety or the*

maintenance of peace and order and may, for any of the purposes aforesaid, give or issue such orders as he may consider necessary or expedient, including orders for the dispersal of any such assembly or procession as aforesaid. [Emphasis mine]

*(45)Any assembly or procession in which three or more persons attending or taking part neglect or refuse to obey any order for dispersal given under the provisions of subsection (4) of section 43 or section 44, shall be deemed to be an unlawful assembly, within the meaning of section 74 of the Penal Code. (*Emphasis mine*)*

Under section 74 of the Penal code, where "three or more people assemble...(and) "*conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace or will, [...], provoke other persons to commit a breach of the peace, they are an unlawful assembly."*

The implication of the above provisions is that the police have powers to disperse a procession held without permit; to disperse a procession or assembly with permit "...*if in the opinion of such officer the holding or continuance, as the case may be, of such assembly or procession breaches the peace or prejudices the public safety or the maintenance of peace and order:"* and the police may issue or give orders they consider expedient to disperse a crowd considered to be in illegal assembly which is a threat to peace, security and public order.

The question of police permit during campaign time was a subject of controversy at trial. The controversy stemmed from the confusion in interpretation of the MAADILI pact, issued/circulated by

the Commission. The relevant part provide as follows:

> ***"Maadili ya Serikali -***
>
> > *(a) Serikali ihakikishe kuwa kuna hali ya usalama, amani na utulivu katika kipindi chote cha uchaguzi. Aidha, vyombo vyake vya usalama vitoe* ***ulinzi wakati wa mikutano ya kampeni, maandamano na wakati wa uchaguzi ili kuhakikisha usalama, amani na utulivu." [Emphasis mine]***

The petitioner as per his own testimony and that of his witnesses interpreted the bolded portion of the MAADILI to mean that processions during the campaign period were permitted and needed no permit. The respondents on the other hand were of the view that processions needed permit.

While it is true that the words used are on the face of it confusing, I believe the confusion clears when one reads MAADILI in light of Section 51 (5) of the Act which provides:

> *"51.(5) Every Returning Officer shall cause a copy of the* ***coordinated programme*** *to be submitted to the District Commissioner and the police officer commanding the police within the constituency and* ***such programme shall constitute a notice*** *of the proposed meetings for the purposes of the Political Parties act, 1992 and the Police Force and Auxiliary Services Act".*

That section has to be read together with Regulation 36 and 37 of the Election Regulations, which provide for preparation of a coordinated campaign programme; the RO distributing the same to

stake holders among them the police, and the coordinated programme specifying time and venue. It is the coordinated programme issued as per above provisions that constituted sufficient notice for purpose of the Political Parties Act and Police Force Ordinance. The logical conclusion thereof is that the police were required to provide security as per coordinated programme, of which they had received a copy from the R/O. Processions could be secured with no notice if they were part of the coordinated programme. How otherwise, would the police be expected to guard a procession they had no notice of?

Consequently; political parties' required usual notice and permit before holding processions which were not included in the coordinated campaign programme; the MAADILI pact did not permit processions without permit; therefore processions without permit were illegal; they could be stopped, ordered to disperse and in the event they did not disperse following the order; they could be dispersed in the manner judged appropriate by the police under the provisions quoted above.

And that also means for purpose of the Issues under consideration, dispersing such an illegal procession can not be adjudged as **intimidation.** To establish intimidation, the petitioner has to prove that the processions were legal, and the police fired teargas without reasonable basis to believe that the group fired at was in

unlawful assembly or procession leading or likely to lead to a breach of peace. Further, in deciding whether the complained of incidents was justified or not, the important question is not what gave rise to the situation necessitating police action, but whether there was a situation justifying police intervention to prevent breach/ or likely breach of peace. I should mention though in passing however, that for future election campaigns, it would be helpful for the Commission and political parties to have a dialogue on the question of processions before and after campaign meetings to avoid any confusion.

I now proceed to discuss the various bombing incidents, commencing with the first one.

The 1st incident was on **10/10/2005 at Majita road.** The petitioner's witnesses were **PW10** – Mafuru Mukama, **Mr. Wandwi PW15** and **PW21** Lucas John.

The incident occurred about 3 pm at Majita road at a CCM campaign rally. It was not disputed that the incident followed **Pw15's** arrival at that meeting venue with intention to re hoist CUF flags allegedly removed earlier by CCM youths and *"thrown in the toilet."* that morning. Generally all the three witness were agreed that following **Mr. Wandwi's** arrival, commotion ensued between his group and people at the meeting, leading to a breach of peace and FFU fired teargas to disperse the crowd. **Mr. Wandwi** was beaten on that

incident, rescued by the police who took him and had him charged. **PW[21]** who described himself as a staunch CCM supporter then, testified that he was in the CCM youth guard, deployed generally to cause commotion at CUF campaign rallies. He agreed under cross examination that *"the bombs were blasted so that Mr wandwi could be left alone."*

I wish to point out that through this witness the petitioner attempted to introduce evidence on an un pleaded issue of intimidation of CUF followers by a CCM youth group under instructions of the winning candidate- 1st respondent. The move was successfully objected to and the witness's evidence on that issue will be ignored.

The defense story, told to the court by **Mr. Mathayo- DW[4]** who was at that meeting and **DW[10]** the police OCD of Musoma was not very different on the relevant material particulars with that of the petitioner. They confirmed that the police fired tear gas bombs at the meeting to disperse a hostile crowd following a commotion caused by **Mr. Wandwi's** arrival at the meeting venue. It was undisputed that campaign rallies of all political parties had police guard and according to **DW[10]** , during campaign and election day, the whole police force was on highest alert-described as standby 1 which was ordered by the IGP.

The decision on this issue need not detain me. On the facts,

neither side disputed that there was an obvious breach of peace for this particular bombing incident and the police action was lawful to dispel the riot in terms of police powers under Section 74 of the *Penal Code* (CAP 16 R.E.2002) read together Section 43 (4) of the *Police Force and Auxiliary Services Act*, [Cap 322 R.E. 2002) and the *Police Force (Assemblies and Processions (Exempted purposes) Order* – GN 481/1972 – Made under s. 43. **I accordingly find that the bombing incident of Majita road on 10/10/2005 was lawful and not for purpose of intimidation.**

The 2nd incident was at **Nyasho Kibin on 12/10 2005.** The following witnesses testified for the petitioner: **PW6** – Mawazo Haji Kigwe, **PW11** –Moses Ibrahim, **PW13** Thomas Moni Manoko and **PW15** the petitioner. Out of them **PW6** and **PW13** admitted to have been unsuccessful councillorship contestants under CUF sponsorship during the contested election. All the above witnesses testified that this particular campaign meeting was conducted and end well, their complaint was what happened thereafter.

PW6 testified that after the meeting, the police asked the people not to leave but *"the people decided to leave by force"* that was when the police fired teargas. According to **PW11** he went to the mosque after the said meeting from where he heard the bombs. The police attempt to prevent the people from leaving the campaign venue after the meeting was also testified to by **PW13** who elaborated that; *"the meeting went well and ended about 6.00... at 6.00 FFU*

police approached the head table where the contestants were. He told us that we should not leave". According to **PW[13]**, they were informed by the police why they were being asked not to leave, that it was because of the Vice President (VP) meeting at Nyasho stand.

PW[13] added that he was not aware of the VP meeting because according to the timetable, the VP meeting was supposed to be at **Makoko Nyarigamba not Nyasho sokoni**. He went on to say that, when other people started to leave the police fired teargas. This witness admitted that CUF had a habit of having procession after campaign meeting to escort the petitioner and when cross examined by *Mr Mzikila,* he replied that processions without permit were legal during campaign time.

The petitioner **PW[15]** admitted to have been requested by the police, Insp. Fadhili **DW[9]** who was assigned to keep peace at their meetings, to tell the people not to leave. He complied, and left thereafter in a police vehicle to go home. When they were about 30 – 50 meters from Nyasho bus stand, and he was still in the police vehicle, he heard bombs and later learnt that there was a VP meeting. That surprised him because CCM was supposed to be at Makoko that day.

Perhaps it useful to point out at this juncture that all the witnesses **PW[6]**, **PW[11]** and **PW[13]** who witnessed the Nyasho kibin incident were not in fact intimidated by the incident, they all attended

subsequent CUF campaign rallies; at Makongoro the following day, and the last meeting at Posta ground on 13/12/05. Further, they all voted on the 14th save **PW6** who went to vote but did not vote due to 'alleged' police interference at polling station.

To counter the allegations, the 2nd respondent called to testify **DW9** Fadhili Hassan, **DW10** SSP Vitus Mlolele the OCD, and **DW11** ACP Mwamvura Kombo, together with **DW4** and **DW13**, although the evidence of the latter two, is more important in explaining the background to the situation leading to the police incident, I shall revert to it later.

DW9 was the police officer in charge of security at all CUF meetings. In examination in chief, he testified that the meeting went on well. The main part of his evidence was given during cross examination by *Mr. Taslima.* He explained that the OCS who was at the VP meeting, told him that the VP meeting was still on but was about to be over, so he should ask the people at CUF meeting not to leave- to avoid collision between the two groups. He then beseeched the people not to leave the CUF meeting but his advice was ignored, they left and thereafter, bombs were fired at the cross road of Nyasho primary school after the meeting.

He explained further that he attended all CUF meetings except the last and that usually all CUF meetings were followed by processions (as admitted by **PW13**); that he used to supervise/provide escort to such processions which were illegal but tolerated.

Explaining his opinion on the police bombing incidents, he testified that whenever there was a big group, it was usual police procedure to be around to keep peace. (Generally, a repeat of police powers under the law as indicated above) He added that all CUF meetings he attended/ kept watch over were peaceful but it was processions after meeting that led to breach of peace.

DW[10] – was the police OCD at the material time. He generally explained the background facts behind the various bombing incidents, and the police duty to keep peace at scheduled campaign rallies and protect people and property during the period. He testified that he was given campaign timetable so as to prepare security. He went on to testify that there was a lot of competition between CUF/CCM and he had noted problems as campaign days went by; processions which were illegal were becoming a problem and timetables were not being followed. He took steps by informing the RPC, he also called and warned party leaders that processions have become problem and police would take remedial action [This fact was not disputed by the petitioner]

Regarding the incident under consideration, he testified that he was at the VP meeting; after the meeting he escorted the VP to state lodge; that bombs were fired to disperse people who were causing commotion. Under cross examination, he stated that *"when bombs were fired, it was not easy to know if the people dispersed were CUF members. The key objective was to ensure peace and security".* This witness was vehement that no teargas bombs were fired at any campaign

meeting; that force was used only when it became obvious that there was no other way of restoring peace. According to the witness; the Commission pact with stakeholders 'MAADILI" did not legalize processions without permit.

DW[11] deposed that on 12/10/2005, he was at the VP meeting at Nyasho Sokoni, after the meeting had ended he received an order from the RPC and contacted Insp. Jongela to deploy a section of FFU to Nyasho area. According to him, that was a small operation because a section is a small FFU unit made up of about 9-12 people, followed by a squad then a full squad, which are 32 and 64 people respectively.

On this incident *Mr. Taslima* submitted generally that *"bombing at the meeting places even if immediately after the meeting was geared towards decreasing the number of people to come the next meeting. Naturally they would be scared away".* (I hasten to point out that the petitioner himself made a lie of this conclusion; he testified that with the bombings, their rallies attracted bigger crowds.) Secondly *Mr. Taslima* submitted that the picture painted to the common person on the street (by such bombing incidents) was that CUF were riotous.

In reply, *Mr. Mwampoma* urged me to find that the bombs were not fired at the meeting, that they were fired to disperse a group of CUF and CCM people who were coming from campaign rallies to prevent the two groups from colliding. The bombs were fired

between Nyasho kabin/ Magereza and Nyasho stand. Clarifying he added that "*if one goes to bus stop heading from Nyasho Magereza he/she must pass Nyasho Sokoni an area which the VP had a meeting".*

Taking an overall view of the evidence both of the petitioner and the respondents, it is clear that there was a situation which made the police anticipate; clear and imminent danger of breach of peace. From the evidence of **PW[6]**, **Pw[13]**and **PW[15]** the police feared commotion if the groups from the two meetings campaign rallies collided, they made an initial effort to prevent that obvious eventuality but it was not heeded by the people at the CUF campaign meeting-who had finished their meeting early, they admittedly left by force -as testified by **PW[6]**.

It was not in dispute that **Mr. Wandwi's** home was in the vicinity of the bombing incident- Nyasho; also the vicinity of the CCM VP meeting, and given admitted evidence that funs used to escort **Mr. Wandwi** after meetings, the likelihood of the two groups colliding was real- and when they collided having refused remedial attempts by the police, the latter had to act to prevent a bad situation from becoming worse. **In view of those circumstances, I find that the police at this 2nd bombing incident had reasonable justification to disperse the crowd. Their action was not intimidation.**

As stated earlier, the issue of bombing had two aspects, first whether there was a situation calling for police action on the ground.

The second aspect is what precipitated the condition calling for police action. On the evidence the Nyasho incident was as a result of the VP meeting whose venue was changed without following laid down regulations and procedures regarding change of venue. The concerned election officers failed to follow regulations governing change of venue. The petitioner's testimony was that they were not aware of VP meeting at Nyasho, he was right. Change of venue is governed by Regulation 35 which provides:

> *(1) Reg. 35 (1) Where any Political Party intends to change the campaign venue or schedule, it shall inform the Direction of Elections in writing stating the proposed changes and reasons, and the director of Elections shall before determination convene a meeting of political parties or candidates concerned to agree on the matter.*

The respondents vide **DW[3]** explained that CCM wrote a letter on 10/10/2005 to the R/O requesting for a change of venue to for the VP meeting. (a letter not exhibited in court.) According to the witness the R/O did not respond and they interpreted that silence to mean consent and went ahead with VP meeting. Apart from any other conclusion, CCM here acted wrongly – and with high handedness. In any case, writing a letter of change of venue two days before the intended meeting, and while knowing that their key rival (CUF) would be in the nearby vicinity was clearly inconsiderate. Apart from that, the RO testifying on the incident as **DW[13]** testified that he responded to the letter. Clearly one of them or both were lying on the issue.

The law does not provide for a coordinated campaign programme for no reason. The kind of laxity by election officers which led to the Nyasho incident is deplorable. For one, if they had acted properly, the bombing incident might have been avoided. Further the incident created a false but real impression to CUF, who were having a scheduled meeting; that they were being picked on, fuelling mistrust, such perception was unhealthy, it went on to create conditions for future unrest – in a way, almost the reason for the 3rd incident explained below.

The 3rd incident was at **Kitaji Makongoro on 13/10/2005.** The following witnesses testified on behalf of the petitioner: **PW6**, **PW9**, **PW11**, **PW12** and **PW15**. According to all those witnesses, the meeting was conducted as scheduled but was characterized by complaints about the events of the day before.

Pw6 testified that the meeting went well, the petitioner gave a short speech, left but then those who remained were fired at. He was the only one who testified that the Makongoro meeting was fired at. **PW9** Alexander Mashauri - brother of the petitioner also attended the meeting and testified to have found a lot of people there at the meeting. Both witnesses testified that **Mr. Wandwi** gave a short speech, complained about the events of the day before,(i.e. the 2nd incident) then left in a police vehicle.

After the meeting, **PW9** left and went to Kitaji bus stop

(according to him that was a popular meeting place). He heard bombs then run to **PW[15]**'s home. Police came, forced them to open then put him and his colleagues under arrest. He went to the police to bail them out. **PW[11]** – Ibrahim Moses deposed that; he arrived at this meeting about 3 pm, and a lot of people had gathered because the meeting had already started. According to the witness, **Pmr Wandwi** gave a brief speech, and informed the people that he would report the mishaps to Headquarters. In RXD by Mr. Taslima, he said he was in a group going to Nyasho, and they were bombed at reaching bus stand.

According to **PW[12]** Didi Musira Koko, **Mr. Wandwi** left the Podium about 5.30 he asked to be escorted by police home. The meeting dispersed and people were leaving in groups. That witness went to **Mr. Wandwi's** home which is near Nyasho bus stand, he heard bombs while in the sitting room and when he went out, he saw FFU vehicles passing fast – firing bombs. He returned inside; heard a voice ordering them to come out, the the police came in vide the front and back door, put them under arrested and he was later charged with **Mr. Wandwi.** In his opinion, bombs were meant to scare the crowd from going to the petitioner's home.

Under cross examination,by *Mr. Kahangwa* he admitted that they went to and left Makongoro meeting peacefully. To *Mwampoma* he said more than 2 people addressed this meeting and that the bombs were

fired to prevent people from going to Wandwi's home. RXD by Taslima, he testified that from Makongoro, there were 4 main roads and groups left by all those roads – he could not tell if other groups were fired at.

Pw[13] Thomas Moni Manoko testified that after the meeting, he went to CUF office at Kitaji and set with his friends outside the office. While there, he saw FFU vehicle chasing people throwing stones, "*the people were saying where are you taking the contestant.*" He admitted that he and four others were arrested in the commotion that was going on by FFU, taken to the police and booked for incitement. This version of the situation surrounding the bombing incident following the Makongoro meeting was similar to the defense testimony of **Dw[9].**

The defense version was testified to by **DW[9], Dw[10]and DW[11].** According **DW[9]**, when **Mr. Wandwi** left the meeting he was in a police vehicle. He passed vide Kitaji CUF office. He saw police chasing people throwing stones. The people were saying "where are you taking our contestant". After the commotion that ensued, bombs were fired and Mr. Wandwi arrested.

Elaborating under cross examination, **DW[9]** said, the meeting went on well, but **Mr. Wandwi** left emotionally saying "Chakilave" and the people responded "Kive"; to be exact he said "*The petitioner left (kwa jazba) emotionally, he said the word "chakilave" and the people responded "kive". He used that term as he left the meeting. He also said I will go with the police vehicle they will take me and lock me up, instead of my people suffering*

"Nakwenda kupanda gari la polisi – wanipeleke na kunifunga.... badala ya wananchi wangu kuteseka". He left with the police vehicle safely". ***"XXD – DW[9]***

Mr. Taslima: A: *- I remember the meeting when the Petitioner said "chakilave". It was at Kitaji C. I think the date was 13th I think of October if I have not forgotten. -On that day the meeting ended well, it ended well at the meeting grounds.* ***Q:*** *Was there any other problem?* ***A:*** *- Problems arose after the people had left the meeting. The Petitioner had given his whole speech and finished. Yes, I used to leave last at the meeting. After the meeting, that day I was not the last to leave the meeting instead I left in a vehicle together with the Petitioner. I left because the Petitioner left emotionally/angry – so we left together so he would not be injured. Yes, we left together with him partly to protect him.On that day one SP/OC CID Masawe my senior was incharge of that meeting. He was appointed to be incharge at that meeting.* ***Q:*** *What was unusual necessitating presence of Masawe?* ***A:*** *He came to formally ask the people not to participate in the procession after the meeting (wasifanye maandamano). True, since August they were in the habit of leaving in procession accompanied by jubilations (kupiga ngoma, kuimba, etc).* ***Q:*** *If procession had taken place since August, why did they seek to stop them in October?* ***A:*** *The habit was there, but was being discouraged – not permitted. The direction was for the people to leave quietly".*

DW[10] testified that he received information that the meeting was proceeding well. When he learnt of the illegal procession involving large group of people, he informed the RPC who in turn ordered FFU (as testified to by the FFU boss **PW[11]**). He explained reasons fro the bombing incident that day as: *"Because of those processions, inconvenience were caused to other road users, other vehicles, bicycles etc. could not pass through such roads and even shops alongside had to close. Those people in groups' dispersed after use of teargas bombs. The people who were not in such*

procession, and were going to meetings were not prevented to go. They went on as usual. The objective was to prevent possible criminal acts/events. Those who wanted to go to campaign meetings went there. Nothing prevented people of one party to attend campaign meetings of different parties. It was not easy to tell the party membership of those participating in the illegal procession. I can not tell whether the people in processions had registered to vote or not".

DW[11] stated that after receiving the information he deployed FFU at Kitaji. The commander there was OC CID Masawe and Jongela on part of FFU.

On the above evidence it is clear that the Kitaji Makongoro meeting went on well and was well attended. The petitioner's witnesses did not deny this fact, or that after **Mr. Wandwi** left the meeting emotionally, but went voluntarily with the police vehicle, a big crowd matched to go to his home. From testimony of the petitioner's witnesses, the crowd was also emotionally charged. Indeed, the petitioner vide **PW[6]** admitted that a crowd was throwing stones at FFU vehicle; and through **PW[13]** that the people were querying the police – crying where are you taking our contestant? The petitioner's witnesses also admitted to having illegal procession after the meets headed for the petitioner's home.

In respect of this bombing incident, the petitioner has adduced no proof that the incident was as a result of police intimidation. On the contrary, the testimony of the petitioner's witnesses supported the defense version regarding existence of a situation calling for police intervention, particularly that PW[6] and PW[13]. Further,

admittedly the petitioner was arrested and charged with incitement. **In view of that evidence, I find that the police had good cause to act, to disperse a procession/crowd to prevent further breach of peace at the 3rd bombing incident.**

The 4th incident was at Mkendo/CRDB on 13/12/05. The petitioner called **PW3**, **PW5**, **PW6**, **PW7**, **PW10**, **PW11**, **PW12**,(**PW15**) **PW19** Of all the above witnesses who testified to have witnessed the bombing incident, only Pw7 and Pw10 testified to have been prevented by that incident from attending the CUF Posta ground campaign rally. Further, they all voted on the 14th save **Pw6** who claimed to have been prevented by different reasons. That of course does not include the child **Pw.3**

PW3, the child who testified to have been injured at the place, testified that he saw a lot of people where he was injured. **PW5** testified to have seen police line up at CRDB, took alternative route and attended the Posta rally. **PW6** testified to have been beaten as he passed because he refused to turn back, but he found an alternative route to the campaign grounds, Posta. **PW7** testified to have been injured therefore prevented from attending the Posta rally although he voted. <u>This witness had no PF.3 to prove the allegation of having been injured.</u>

PW10 testified to have passed near the alleged bombing incident about 3.30, he was ordered to turn back by the police who

were on standby, he was scared to attend meeting, but **PW[11]** who passed the same place between 2.30 and 3.00 – did not see the police line up, he passed and arrived at Posta ground where a lot of other people were going. **PW[12]**, testified that has he approached the area, he saw that the area was in a state of disarray and some shops were closing (out of fear). "I saw people running amok", after hearing bombs, he used an alternative route and went to Posta ground. **PW[19]** – Kisura Marere on the other hand testified to have passed by CRDB. In his own words:- *"At CRDB I met police lined up. As I saw them, they were asking where are you going. I was allowed to pass, ... they let me pass ... I was on my bicycle – some people were being questioned".*

The defense version was described to the court by **DW[11]**. According to him, they police line up was there to disperse an illegal procession, they fired tear gas after the dispersal order was ignored and the whole operation took about 15 minutes using only a section of FFU. According to him, the people who dispersed were left alone and took alternative routes to the campaign rally. To paint a clearer picture of his testimony, I proceed to quote part of it: "*We were there in time. We made a line across the road. We were at the corner of CRDB towards the direction the Posta from town side. We just crossed Mkendo the other two juncture road were behind us. When we received an order, that there was a procession, I asked the RPC whether the precession as legal. He told me it was illegal and I was ordered to disperse it. -We dispersed the procession.-The procession had a big group of people. I think the people around here are few. They were more than 60 or 70. They had flags, drums, bicycles – the flags were of the CUF party.-We saw them coming when they were about 160 – 140 meters only. We started the operation when they were about 150 meters.-I first ordered the police with Long range to fire. Then people dispersed. We*

matched forward to the spot where the group had been gone on to CRDB – Pride – Mativila — Hussein Sokoni.-He saw bicycles we picked bicycles and handled them to the police.-We saw no one injured there.-The group dispersed after 1 teargas bomb was fired. -When the group dispersed, they went in different directions, then we saw a group passing vide Magereza road going towards the meeting ground. We did nothing to those people. We returned to the station.-The operation from when we arrived and left the ground took about 15 minutes.-I knew that CUF had a campaign meeting at Posta grounds.-I knew that CCM was at Mkendo.-From CRDB where we were to Posta – grounds where CUF were having their meeting is about 150 meters".

On the above evidence, *Mr taslima* submitted that the police had no reason to disperse the crowd, which was already near the Posta campaign ground. That therefore the said act was aimed at preventing the people from attending the campaign rally or vote the following day.

Mr Mwampoma on the other hand submitted that out of the 8 witnesses who testified, only 2 testified to have been prevented from attending the rally, he also submitted that the petitioner's side was not credible due to contradictions between witnesses testimonies; **PW**[6],[7] and Pw[12] claimed to have been prevented, but PW[11],[15] and [19] passed well. He submitted further that the defense witnesses were credible; that the police were there at CRDB for hardly 10 minutes to disperse an illegal procession, they left immediately after.

I have carefully considered the evidence of both sides. First I should point out that *Mr. Taslima*'s claim that the bombing incident was aimed at preventing people from attending the Posta Ground

campaign rally is contradicted by evidence of the petitioner. The majority of witnesses who testified stated that they found alternative routes and went to the campaign rally. If the police had really intended what the petitioner claimed, they would have blocked al access roads – using a bigger force. Further most of the petitioner's witnesses turned up to vote the following day.

The defense version that the police line up was an instant reaction to what they perceived as a big crowd, likely to lead to a breach of peace and that the operation took a short while. That is why witnesses who were not in that crowd passed safely and those who passed after the bombing incident, like the petitioner PW[15] and other witnesses, passed safely – within a short distance of each other in terms of time some saw the police line up and some did not. Further, those who passed before the large crowd which was bombed arrived were permitted to pass, like Pw[19].

On the above evidence, I find that the police action did not amount to intimidation. They acted to disperse crowd of people whom they believed were likely to lead to a breach of peace. Further that bombing incident did not prevent people from attending the Posta campaign rally or from voting the following, as per testimony of the majority of petitioner's witnesses. The minority two, who testified to have been deterred (if credible) must belong to the coward few.

That said however, I accept the submission by Mr. Taslima that the "police had no reason to disperse the crowd which was already

near the Posta Campaign ground". Between CRDB to the Posta ground is a short distance; I am of the opinion that the incident was as a result of panic and miscalculation on the part of the police – they acted inadvertently. If they had acted with due diligence and wisdom, they should have tolerated this procession or group of people who were moving in the direction of the Posta ground campaign venue and were almost there, just as they used to tolerate the illegal procession at the beginning as testified to by **Dw[9]**.

Having found that the police action was due to inadvertence, explainable under the circumstances, I find that the action was " ... *done or made in good faith through inadvertence or accidental miscalculation or some other reasonable cause of that nature"* **therefore not culpable as per the provisions of Section 109 of the Act.**

Event 5 – Posta Campaign grounds 13/12/05. According to **PW[1]** – Habiba Ally, Chairperson of CUF women wing, testified that she arrived at meeting about 4 pm and witnessed bombs fired in the middle of the campaign ground while **Mr. Wandwi** (**PW[15]**) was addressing the rally, about 4 p.m. According to her, she did not go to vote the following day because she feared she would abort from the effect of bombs of 13th. This witness admitted to have participated in CUF processions prior to 13th; after the Posta bombs when people regrouped; after bombs were fired at a procession which was going to Wandwi's home, they were fired at a place called Metropole and others at Lumumba, near the petitioner's home. She admitted under

cross examination that they used to have processions after campaign rallies and believed they were proper. This witness was contradicted by all the other witnesses of this incident, including the petitioner, who said when bombs were fired the petitioner had not yet arrived. **She was clearly not credible as against everybody else.**

PW[3] - a child testified to have been hit near CRDB, that he saw police lineup as he was about to enter the hospital. After he was fired at he fell unconscious; he came around and found himself at the posta campaign rally ground. There were many people at the rally and someone was addressing the meeting.

PW[5] James Lucas testified that he arrived at the Posta meeting about 3 p.m. After a short while, bombs were fired in the ground from the keep left (a spot between Posta ground and hospital). When bombs were fired, **Mr. Wandwi** was not yet there. [This witness like **PW[13]** contradicted the other witnesses who said that a lot of people remained after the bombings]. According to his testimony, he did not vote due to effect of bombs, he claimed to have been injured although he showed no evidence of injury – he said he did not go to hospital. **PW[6]** – Mawazo Haji Kigwe; testified that while at the ground, suddenly a police vehicle arrived and started firing tear gas. The tear gas bombs were being fired from the eastern side landing on the western side. He further testified that at the time of bombs were fired the meeting had not yet formerly started (contrary to **PW[1]** who claimed **Mr. Wandwi** was addressing the meeting, and

PW[11] who said two people had addressed the meeting before the bombs were fired).

PW[8] – Ally Omar testified that he arrived at Posta ground about 2 p.m.; saw two vehicles came, one did not stop, but was firing tear gas on campaign the ground. People scattered and he was injured. He claimed that he was treated without Anastasia [a fact contradicted by PW[20]]. Mr. Wandwi arrived after he had already left. **PW[9]** – brother of the petitioner testified that he arrived about 3.00 p.m. and found a lot of people. According to him after the bombs were fired he picked one empty bomb shell and another two pieces were picked by somebody else and given to him. He tendered these three bombs in exhibit as **P2** collectively.

PW[11] testified that at the Posta ground "as more people came – some lecture came and started addressing the meeting (contradicts PW—who said meeting had not yet started) ... we suddenly heard explosion, I turned to look and saw a police vehicle –Landrover. The police off loaded, and started firing bombs towards the crowd in the ground ... "A lot of people returned". (contradicts other petitioner's witnesses).

PW[12] testified that when he arrived at the campaign rally, the bombs had already been fired. The crowd became fewer and fewer (smaller) because of the bombs. **PW[13]** he arrived at the ground about 4 p.m. to find people running in disarray. People were saying

they had been bombed. Shortly after, FFU returned and started firing other bombs, the people dispersed generally and there was no meeting thereafter. According to him, when he arrived, he found the petitioner at the campaign ground, and the second bombing occurred in the petitioner's presence. (No other witness testified to have witnessed two incidents of bombings, one of them in the presence of the petitioner). **PW[14]** Nyakisho Ananikong was interesting. He testified that he refrained from attending CUF campaign rallies for fear of bombs but had decided to attend the last one, only to be stopped by the police at CRDB/mkendo. This witness could not explain why he did not attend CUF campaign rallies which took place before even the first bombing incident.

PW[15]- the petitioner testified that when he arrived at the Posta grounds, people were in a somber mood. They told him they had been bombed. **PW[8]** was brought, he was injured and he ordered his 'chick' and he ordered that he be taken to hospital. Shortly after **PW[3]** a child was brought in, injured on the chest and he ordered him to be taken to hospital. According to the petitioner; no bombs were fired in his presence – he only heard about it, then "knew that the mission of Mathayo (CCM) and state apparatus had succeeded ensuring that he would loose". He then pleaded with the people not to be intimidated but to turn up and vote the following day. But the CUF secretary PW[22] testified that bombs were indeed fired in the Posta ground campaign ground. That bombs were fired from the vehicle

which came from the direction of the court house – (thought name of street was Bomani road) – then he heard gun shots – confusion ensued and then **PW**[8] in injured. He ordered that he be taken to hospital, shortly after another group brought in **PW**[3] injured – he also ordered that he be taken to hospital after verification of the parents of the child. Thereafter the petitioner arrived.

The defense version was that no tear gas bombs were fired at the CUF Posta ground campaign rally. To prove that tear gas bombs were indeed fired, the petitioner's **PW**[9] (alleged to be a ballistic expert-tendered Exh. **P2 (3** objects) said to be empty bomb shells - he claimed to have picked one, and another person who did not testify had picked two following the bombs in the Posta grounds; **PW**[9] also tendered another empty bomb shell as **P3**, allegedly picked by **PW**[2] an old lady aged 101 – Bibi Nyanziga. I should make only a comment on the latter's testimony. In my opinion, **PW**[2] as a witness contradicted the key argument of the petitioner- that bombing incidents were meant to intimidate voters.

She was an old lady, (according to testimony, the bomb fell in her bucket on an unspecified date as she was taking a bath in the backyard of her house- she picked it, kept it under 'lock and key'- without knowledge of its potency- but knowing it was dangerous, and without clear connection turned up with it in court almost a year later because "she knew the empty shell must have been connected with the petitioner's case-a story clearly not credible.) The intriguing issue

however, was that at her age, she was not intimidated –she turned up at the polls and voted.

To counter **PW[9]**'s testimony the respondent called **DW[7]** Corporal Michael police of 21 years, 19 with FFU and an officer In charge of the armoury. The witness tendered **D6** an unused tear gas bomb, and testified that it was of a kind they had in the armoury and coud not recognize **P3, and P2**, he said those kinds were no longer in use in Tanzania. The witness also showed the used tear gas bombs in use tendered as **D7**, tear gas pistol **D 5A,** and Riot gun **D5B.** The ballistic expert **DW[8]**, Juma Bwire went on to demonstrate and inform the court that the objects tendered by the petitioner as used tear gas bombs were no longer in use.

This witness **DW[8]** was a forensic Bureau from the ballistic section, who had spent 12 out of his 16 years with the police in the ballistic section. He testified citing source of his knowledge that the empty shells could not have been fired from tear gas gun or pistol in the armoury.

The issue for decision now, is whether there was evidence to support the allegation that tear gas bombs were fired at the CUF campaign rally which was meeting at the Posta grounds.

I have carefully considered the evidence adduced by both sides. First, the petitioner's evidence was contradictory on material matters casting doubt on the alleged time the bombs were supposed to have been fired: some witnesses said the bombs were fired before the petitioner arrived, others said he was already on the grounds; some said at the time the meeting had not started others said some leaders had already given their speeches. The second contradiction related to the incident itself, how many police –FFU vehicles were involved and the direction they came from; also the number of firing incidents-some witness said there was one incident while another testified to two such incidents. The witnesses also differed on their description of the direction FFU vehicle which allegedly bombed the ground came from. They described opposite directions.

The other contradiction-more suspect since it was between two CUF key figures, **Pw[15]** and **Pw[22]**, according to the former, the injured two people were brought to him and he ordered that they be taken to hospital, a different version from that given by **Pw[22]**. As regards physical evidence of empty bomb shells, I find **DW[8]** a witness with clear qualifications on the aspect he testified on, more credible that **PW[9]** whose source of expertise was not disclosed, and find that there was no conclusive proof that **P2** and **P3** (the empty bomb shells), were picked following the alleged bombing incidents. In view of all such contradictions, I find the petitioner's case on the

incident at Posta ground not proved.

Before concluding **category 3**, I should discuss the evidence of **DW[6]** Mawazo Haji Kigwe which was on an un pleaded Issue. The witness testified that he was prevented from voting, at Kamnyonge market polling station, the police came and he feared a repeal of the teargas so he left without voting. To contradict the witness the defense called **DW[12]** Masale Matiku – who was the Assistant Returning Officer of the alleged polling station. He testified that he was at the polling station, but did not see firing of teargas by the police – they had usual police guard. He further testified that he made vote additions at the polling station and no complaints were raised or a petition filed against results of that station.

In view of the fact that no other person has objected to results of Kamnyonge polling station; **DW[6]** never filed a complaint form 15 as per Regulation 47, and no other cogent evidence was brought by the petitioner to substantiate the allegation of police intimidation on the polling day at Kamnyonge polling station, I find that issue not proved and dismiss it.

In the final analysis, I find that the petitioner did not prove that there were bombs fired at CUF Campaign rally on 13/12/2005, consequently I find no proof that the said campaign rally was interfered with or voters intimidated from voting for the petitioner. To conclude I find category 3 of the Issues not proved save for my

conclusion on the CRDB incident.

Category I Issue 1 – 4 After determining issues related to voter registration and campaign part of the election, I now consider the last phase of the complaints -vote counting. For ease, **1st issue** is whether there were disputed votes at any polling station to be determined by the RO.

This issue is on the pleadings and evidence adduced not contested. The gist of part of the petitioner's pleading in Para 6 of the amended petition and evidence of the petitioner- **PW15** at the trial that when he checked result forms (21B), he found in there many disputed votes and added; *"another person will come to testify on those numbers"* (although nobody did). Further, the petitioner, vide the testimony of **PW22** admitted that result forms 21B they received vide their agents had disputed votes indicated thereon. Their complaint on the issue, was that the number of disputed votes on the said result forms were different from those indicated in **C1**

The issue was also admitted by the defense; (1st respondent annexed result forms and the 2nd admitted the fact in Para 7 of the amended reply that; *"...the election results...by the Returning Officer was lawfully and rightly made after satisfaction of the validity of the disputed votes...."* Part of the testimony of **DW1** and **DW13** was admission that there were disputed votes and they were properly determined by the RO. Without wasting more time, **I find Issue 1 in the affirmative, i.e. that there were disputed votes.**

Issues 2 and 3, whether the RO determined validity of disputed votes and whether the RO loudly announced results of each polling station severally will be dealt with in unison, they relatess to what transpired in the Vote Addition Room ('Chumba cha Majumuisho', hereinafter, **the AR).**

Before examining the evidence, I should first point out that proof on these issues requires one to marshal in evidence testimony of a person(s) who were in the AR either all the time or at the material time when the complained of actions were supposed to happen but did not happen, or to prove the or omission by some other cogent evidence. This is so because the law prescribes the procedure to be followed in the AR under Section 80 (3) of the Act. Sequentially, the events in the AR are supposed to go as follows: **First** receiving report of result and ballot papers from polling stations; s**econd** resolving disputed votes; t**hird**, announcing loudly results of each polling station and **finally** addition of votes. On the main, my decision on Issue 2 and 3 depend on factual findings regarding what transpired in the AR.

The petitioner's witnesses in the AR were **PW[15] Mr. Wandwi, PW[16]** Thomas Makongo – the petitioner's agent in the AR and **PW[17]** Laurent Leonidas. While the 1st witness **PW[15]** testified that the two procedures were not complied with, but the bulk of his evidence

concentrated on explaining prescribed procedures and what the RO did and did not do in the AR in relation to such procedures. He articulated the flouted procedures in the following words: "*The R/O was not saying anything after receiving the forms and telling his assistant to enter the results. ...What I mean is Returning Officer would receive forms from wards read them, but sometimes, he would tell the assistant to go outside and make some corrections (marekebisho).... My self and my agent told him how come you are flouting procedures – his reply was that is not your job – you keep quiet. The clear impression after he ignored us was that we were not required to be in the additional room...*"

He further deposed that after the exercise was done, he examined result forms and noticed that there were a lot of disputed votes, a fact he confirmed later after reading the RO's report **CI**, This is part of what he said on that aspect "...*I have form 21A for the President and 21B for Member of the Parliament and 21C.* ***If the court requires the forms*** *they can be produced ..." we are saying the numbers of those forms is different from numbers indicated in C1 we wonder how he got the figure in C1..." (emphasis mine).* I should point out that no evidence was lead by the petitioner to establish the exact number of disputed votes, but I shall come back to this aspect shortly. Like **PW[16]**this witness testified to presence of 2 CCM party representatives in the AR contrary to governing law and regulations.

According to **PW[16]**; he arrived in the AR early although he was not specific on whether the exercise had commenced when he arrived. That the RO did not determine disputed votes nor announce results of each polling station loudly; elaborating on flouted

procedures, he testified that while receiving votes from polling stations, the RO was instructing polling station officers to make some corrections on the said forms. On being cross examined, he said could not tell what corrections were being made. It was clear from his testimony that **PW[16's]** objection to the procedure by the RO were raised at a stage when votes were being received from polling stations. This was the un procedural action he informed his principal **PW[15]** about, as soon as the latter arrived.

The witness was quiet on the aspect of boycotting the vote addition exercise (a fact admitted by the petitioner in the rejoinder to the respondents' amended reply). I find it necessary to quote a portion this witness's testimony which I find insightful on the value of his testimony in relation to the 2 contested issues: "*.....When Mr. Wandwi arrived, the exercise of receiving votes from wards had commenced. ... According to my understanding I found it wrong for the R/O to examine the result and instruct Ward officers to go outside and make corrections, as an agent, I did not know what corrections were being made. The role of the additional place was to receive results as they were. Every time I saw actions contrary to procedure like these correction, I questioned the R/O – what corrections were being made? His responses were negative. He said I was irritating him because I was the one raising questions. I knew he found me a nuisance because of his replies to me, for example he said you are beginning to be a nuisance (umeanza kuwa kero humu ndani).*

When Mr. Wandwi entered, I informed him of these anomalies. I told him just watch you will see what is going on. He also saw that process of ward officers going outside to make corrections. First he kept quiet; because I had told him of the responses I had been given. After a while he also questioned the R/O on the issue. Wandwi asked, is this the procedure? The R/O said don't be nuisance.... we did not sign

(returning to result forms) *because we had seen procedures were flauted (flouted) and the (flouting) including making corrections while we did not understand what corrections were being made"* (Emphasis mine)

According to **PW[17]** who claimed to have been an Assistant presiding officer of Kwanga primary school /Kigela ward polling station (a fact disputed by the respondents); he arrived in the AR about 11pm at night to submit his stations' election results forms and materials to the RO; stayed a short while then left after he was done. He claimed he was authorized by the presiding officer Magoti to take the station results because the Assistant returning officer who was supposed to submit them had not yet arrived. I should hasten to point out that according to the procedural sequence under section 81 of the Act, **PW[17]** was not in the AR at the material/disputed time. He did not testify to have stayed in the AR until the whole vote receiving exercise was done, or to have been present at the material time when the disputed actions/events should have taken place. The gist of this witness's testimony seems to be in respect of 'illegal Corrections' made on instructions of the RO. I will return to this aspect later.

The petitioner's allegations were traversed by both respondents first in their reply; the 1st respondent pleaded in Para 7 and 8 that *"election results were pronounced and consented to by the contesting parties in the presence the respective polling/counting agents. ..." and that, "...the petitioner boycotted the final summing up exercise and failed to register any*

complaints with the Returning Officer."(The latter fact was tacitly admitted by the petitioner in the rejoinder as pointed out above.); the 2nd respondent pleaded that *"...the declaration and announcement process of the election results of Musoma Urban constituency by the Returning officer was lawfully and rightly made after satisfaction of the validity of the disputed votes",* and that, *"the petitioner failed even to register his complaint on his dissatisfaction of the results."*

To back up their version the defense called two witnesses **DW1** - Marwa William Matayo, the 1st respondent's agent in the AR, and **DW13**Theones Aron Nyamhanga, the RO.

DW1 testified that; he arrived in the AR about 8 pm at night to find **PW16** and other counting agents by then the exercise of receiving votes from polling stations was ongoing; that he heard the RO inform them that he was going to resolve disputed votes (popularly known as *'kutatua kura zenye migogoro'*); that the RO then made decision on the disputed votes and read out station results loudly. I again hasten to point out that **Dw1** was not only the Mara Region CCM youth secretary, but also the young brother of the 1st respondent.

DW13 the RO, denied both allegations. He testified in part that after checking form 21 B, he noticed that some stations had disputed votes, ballot boxes from such station were put aside, an exercise completed about 2 pm at night. That by the time he reached the stage of asking those in attendance if there were any problems, **PW15**

and **PW[16]** had already left; that they left during the vote receiving exercise. He further deposed that he took form 5B, made a decision on the disputed votes involving party agents, that some votes were determined to be valid votes and added to results of relevant parties while other were added on (zilizokatliwa) spoiled votes. But, that thereafter, he started additions (majumuisho), speaking loudly one station after another.

I should point out that the evidence of the RO was inconsistent regarding what exactly happened after completion of the whole exercise. This is what he said:

> *"After completing the counting/additions I announced the winner.... Results of MPs are completed on 24 B – I completed it. I said, after completion of additions – which I finished at 1 pm. I completed form 24 B.* ***Mr. Mwampoma:*** *Repeats question; when did you complete form 24B?* ***Witness:*** *at 9.00 am* ***Q:*** *When did you announce (d) results?* ***Witness;*** *I announced the winner between 1 – 2 pm* ***Mr. Mwampoma:*** *I pray to show the witness C Exh.I Form 24 page15 counting one from the beginning.* ***Reads;*** *It was signed on 15/12/2005 at 2 pm. This is the form I signed it at 9.00 am. This C1 was signed by Maro William (CCM), Msangasa (CHADEMA) Makwaiya (CHAUSTA). CCM candidate had 22,471, CUF candidate had 17,429. These are the formal results which I faxed to the EC. I later sent this copy and announced* ***Mathayo 1st Resp.*** *to be the winner.* ***Mr. Mwampoma:*** *My witness has been on the stand since this morning, it is now 4.30. I am not through but I pray that we proceed with the witness tomorrow. "*

In evaluating the above evidence, I am not unaware that the impartiality of witnesses of both sides in this case can not be assumed. They were each '*a witness with an interest to serve*'. On

one side was the petitioner and his counting agent, and on the other, the RO, (whose conduct is under question) and the counting agent/young brother of the successful candidate. *Mr. Mwampoma* on submission urged me to take a leaf from an observation by Justice Mapigano in **Peter Msekalile v Leonard Newe Dalafa, Misc. Civil Cause 5/1995, (Tabora Registry unreported)** when faced with a situation of evaluating evidence of witnesses with questionable partiality advising me to *"approach the evidence in our case with great circumspection"*. He is right. I am slow to put much reliance on credibility of witnesses as a test of truth in this case.

In arriving at the decision therefore, I have evaluated the nature of the evidence in light of the law, admitted facts, evidence of each witness regarding what transpired in the AR assessing the probability and improbability of the evidence in light of surrounding circumstances, and from it, drawn logical probable and reasonable conclusion, while bearing in mind the question of burden of proof. A burden needless to state, which, lies with the petitioner, and is proof beyond reasonable doubt, as per now well established principles of evaluating evidence in election petitions as per precedents cited herein above.

I will begin by deciding whether or not the petitioner and his agent proved to have been in the AR when the disputed activities were supposed to have occurred? This is a fact strongly disputed by

both respondents. Or in the absence of that, whether there is any other cogent evidence to prove the issues either way?

First the petitioner' reply in rejoinder that "...*that his boycotting of the final summing up exercise was indicative of his disagreement of various processes in the entire polling /counting exercise",* in response to the respondents' reply that 'the petitioner and his agent were not in the AR because they boycotted the vote adding exercise', in my opinion amounted to an admission that the petitioner's witnesses were not in the AR as alleged by the defense.

Further, the evidence of **PW[15]** and **PW[16]** at the trial suggests that the two left the AR either during or after the exercise of receiving votes, after they were 'angered' by the RO's negative response at the time of receiving votes. That is a more attractive version of facts to be derived from the petitioner's evidence, particularly when viewed from the point of view of **PW[16]**'s further testimony while under cross examination that "*we remained in the room until the exercise of receiving votes. The exercise went on until 1-2 pm at night it was taking time because of the corrections".* When x-examined by *Mr kahangwa,* what time the RO finished additions, he said 1 to 2 pm at night, when asked what was going on from that time to 5 the following day when results were announced according to him, he said *"activities",* yet, on being pressed further by *Mr. Kahangwa* he responded that what was finished at 2 pm at night was the exercise of receiving votes.

In my considered opinion, the logical and reasonable conclusion to be drawn is that the two petitioner's witnesses were not present in the AR at the material time i.e. the time when resolving of disputed votes and announcement of results were supposed to occur.

Mr. Taslima has urged me in submission that the evidence of the RO was not worth of credit because of inconsistencies in his testimony, indicated in the quoted part of his testimony and clear contradictions between his testimony and information in CI. The Ro attempted to explain the difference in the time by saying that he delayed announcement of result for security reasons. That may be so or not, but that does not prove much. First the result form 24B C1 does not provide for indicating disputed votes for a simple reason that disputed votes are resolved in favour of either candidate or rejected (and indicated as such) before final results are declared and form 24B completed.

Second, I do not agree with counsel for the petitioner's submission that the RO's lack of credibility is a substitute for the petitioner's duty to prove his allegation on the required standard regarding what transpired in the AR vide present witnesses or by some other cogent evidence.

One such cogent evidence at least in respect of Issue 2 would be found in election result Forms 21B, which the petitioner admittedly had. The petitioner vide **PW[15]** thought but wrongly that result forms

could be tendered if required by the court, for he stated that "...*I have form 21A for the President and 21B for Member of the Parliament and 21C.* ***If the court requires the forms*** *they can be produced ...".* It is a trite fact of the law of evidence that the petitioner not the court which has a duty to bring evidence to prove his case, as already discussed above when I referred to the observation by the late Justice Kyando, in **Matete Lazaro Joseph Kaseba,** supra.

Further, even if it was proved that disputed votes were not resolved, which is not the position, that fact alone would not be insufficient for this court to find that the petitioner would have had a majority of votes. First, the petitioner did not to exhibit the involved number of disputed votes (which he admittedly had from result 21B) a fact which puts my mind to enquiry as regards the impact of disputed votes on the final results. In the absence of that, it is impossible to decide whether the numbers involved was higher than the winning candidate's margin of victory. The only evidence on the issue was from **DW[1]**, but the number he gave of 622 was far below the winning candidate's margin of victory.

To conclude, in the absence of proof that the petitioner and his agent were in the AR at the material time, and absence of any other cogent proof, **I find Issue 2 not proved.**

My conclusion on **Issue 3** is however different. In my opinion, there was cogent evidence on trial, regarding what actually happened in the AR, from no other than the RO –**DW[13]** himself, showing that

results from polling station were not read out aloud. Let us compare the prescribed procedure and what the RO said.

The exact words of **DW[13]** on that aspect during evidence in chief were that: " *After completing that exercise, we started additions (majumuisho) we moved one after the other. I was speaking loudly Tabu and other(s) were there. The CCM agent and Gibogo were there, as was of CHAUSTA, Makwaiya. They were there all the time. After getting data of all stations, all wards we used exel to make additions, -ensure accuracy. We finished that (majumuisho) exercise about 9 am in the morning. At the end....after completing the counting/additions, I announced the winner",* shows that step three, announcing *"loudly the parliamentary election result of each polling station in the constituency serially" (seriatim)* was skipped. The witness said, "*After completing that exercise"...* (in the record the exercise referred to is that of receiving results from polling stations*) ..., we started additions (majumuisho) we moved one after the other. I was speaking loudly ... After getting data of all stations,...all wards we used exel to make additions, - ensure accuracy.*

The prescribed procedure is first, receiving of reports of result and ballot papers from polling stations, second, determination of disputed votes, third, announcement of results of each polling station and finally Addition of Votes. The plain meaning of the words is that after the exercise, the RO started additions, which he did speaking loudly. He did not announce results of each polling station loudly before final additions. I find that to be cogent evidence in the cause which I can not ignore. In the result, I find that the RO did not read out results of polling stations seriatim before embarking on step four, final additions. **I therefore find Issue 3 in the affirmative,**

Did that established irregularity effected results in terms of Section 108 (3), subject matter of **Issue 4?** It is a fact that in the election process 'voting takes place at polling stations' and not in the AR. The principle long observed by the court regarding its "*duty to respect the people's conscience and not to interfere in their choice except in the most compelling circumstances*" (**Manju Salum Msambya) supra,** applies more so when non compliance by election officials are committed in the AR.

Election results are obtained at the polling stations and such results are indicated on form 21B of each polling station. Such results are the 'correct source of the results of every polling/counting station" as held the CAT in **Abdallah Makongoro & Others v. The Attorney General, C**ivil appeal no. 8/1996, (unreported). In view of that, it is difficult to find that the winning candidate did not get the majority of votes if there was no "*direct challenge of the results at the polling station*" as held in several cases among them, **Gillilard Joseph Mlaseko & 2 Others v. Corona Faida Busondo & AG,** *Civil Appeal 57/1996 CAT-unreported.*

In this case, there was no evidence that the petitioner challenged polling station results. The petitioner did not take any of the avenues provided by law to challenge the results. What are these? The law provides the following opportunities for a candidate to challenge results: First, by requesting a recount by the Presiding officer under s. 78(1) of the Act. It was admitted by the petitioner in evidence that he/his agents at polling stations were given result

forms 21B, as per requirement of Section 79A of the Act.

There was no evidence that the petitioner or his agents requested a recount to the Presiding Officer but the request refused. If such had been the case, the agents would have expressed dissatisfaction by completing Form 16 as prescribed under section 79 (1)(c) and Regulation 55 of the *Elections (Parliamentary and Presidential Elections) Regulations,* GN 231 of 12/8/2005, (hereinafter, the Regulations).

The second opportunity relevant here is provided under section 80 (4) of the Act, where during addition of votes a request for recount can be made to the R/O, subject to Section 79A (3) of the Act, which provides that a candidate or his agent has not disputed the accuracy of results at a polling station, he is "*estopped from raising complaint regarding...counting procedures at that particular station.*" But there was no evidence submitted to show that such a request was made and 'unreasonably refused by the RO as per S. 80 (5) of the Act.

And to repeat what I have said earlier, the petitioner was admittedly in possession of result forms 21B. If he believed it will advance their cause, the petitioner vide his counsel could have used opportunities provided by law to tender result forms in evidence, but they decided not, electing instead, to rely on discrepancies in CI. The fact that they chose not to use result forms, puts my mind to enquiry. Why would the petitioner not choose to use a document that would prove that he had a majority of votes unless, after checking

them a fact deposed by **PW[15]**, he found the contrary to be true?

Apart from a challenge of results, a decision whether the alleged non-compliance affected results depends on the nature of complaint, for example, non compliance can not be said to have affected results if it merely creates conditions which are the same for both candidates. See ***Ngwesheni v. AG [1971)*** HCD No 251. In this case, there is no reason to believe that failure to announce results of each polling station loudly affected the participating candidates differently. Such a conclusion would be sound if there was a challenge of results.

In the absence of any other evidence that failure to announce results of each polling station loudly affected the petitioner's results in a manner it did not affect the 1st respondent, and in the absence of "direct" challenge of results at the polling station, I have no basis upon which to "disregard the valuable verdict of the people at the polls" and find that the non compliance subject matter of Issue 3 affected results i.e. that in the absence of it, the petitioner would have had a majority of votes. I accordingly find that issue 3 was partly proved in that the R/O did not announce polling station results loudly, but I answer the last aspect in the negative i.e. that the said non-compliance did affect results.

I accordingly find Issue 4 in the negative i.e., I find that it has not been proved that except for the procedural irregularity in the AR, the petitioner could have had a majority of the votes.

Before leaving this category, I shall consider two un -pleaded issues, on which evidence was lead by the petitioner and I am therefore bound to consider. The first was non compliance in the AR, namely irregular/illegal "corrections" on result forms 21B, on instructions of the RO testified to by **PW[15], PW[16], and PW[17].**

Their testimony on the irregularity has already been referred to above. To repeat an example, **PW[16]** testified that: "*I found it wrong for the R/O to examine the result and instruct Ward officers to go outside and make corrections, as an agent, I did not know what corrections were being made".* And **PW[17]** testified that when he arrived in the AR, he joined the polling station result submission queue - about 2 to 3 other people were ahead of him on the line. While he was not instructed to change anything, he heard the RO instruct those in front of him to "*...go and change on the corner".* On being x-examined by all counsels' of the respondents, he stated that he could not tell what changes were being made.

On this allegation, **DW[13]**explained that at the time of receiving polling station results in the following words: "*After receiving them we would check how they have been completed. We were checking for mistakes ie if one forgot to sign. The purpose of looking at the form was to know the station and ward.After checking form 21b we discovered that on some forms there were disputed votes we would put its ballot box aside. That exercise I can not tell exactly when it was completed-we were busy, I did not look at the watch about -2 pm at night."*

On deciding the probability of the petitioner's version being true, I consider the fact there was no proof regarding what

alterations were made on the result forms. Further, the petitioner had result forms 21B of all polling stations, now having seen that changes were being made whose nature they did not understand, one would have expected the petitioner to request a check/ or recount of all ballot paper results, so as to compare the forms they had, and those received by the RO upon which changes had allegedly been made. And if such a request had been made but was refused by the RO, such a serious issue would have been part of the petitioner's pleadings.

Considering the facts that; the petitioner's agent is a legally qualified person (he admitted under cross examination to be a 1986 law graduate); that these elections were the petitioner's 3rd attempt for a parliamentary seat, such a serious misconduct, amounting to alteration of the 'sacred' result form 21B, would not have escaped the petitioner's attention when presenting pleadings, or escaped his counsel, who would have used all opportunities available under the law to bring such alterations to the scrutiny of the court. **In view of all that, I find the alleged misconduct/non compliance not proved.**

The second alleged non compliance was presence of 2 CCM candidates in the AR contrary to the provisions of Section 80 (2) which provides for presence of a candidate and one counting agent for each contestant. Both **PW15** and **PW16** testified that the CCM candidate had 2 agents in the AR, **DW1** and **DW3.** The RO **DW13**, denied this allegation but on being pressed regarding the signing of

the presidential result form 24A, (a result form included in the report C1), he admitted that the same was signed by **DW[3]** but explained that the witness was "called later" to sign the form but was not in the AR during the counting process.

The RO was not credible on that aspect, and even if he was, the regulation requires only one agent, that agent should have signed all result forms. **I accordingly find the alleged non compliance proved. But, in the absence of challenge to results however, I can not, for reasons already explained, find that the irregularity affected results.**

To conclude, I find **Issues 1, 2, 4, 5, 6, 7, and 8 not proved** and dismiss them but find **Issue 3 partly proved** to the extent indicated. What then is the reliefs' parties are entitled to? (Issue **10**). In view of; my decision on Issue 3; my observations regarding the not culpable but unsatisfactory conduct of the RO, and reservations regarding police judgment on the CRDB bombing incident on 13/12/2005, I dismiss the petition, but make no order as to costs against the petitioner. I also certify **Vedastus Manyinyi Mathayo** as the duly elected Member of Parliament of Musoma Urban Constituency.

R. M. RWEYEMAMU
JUDGE

Musoma – 11/12/2007.

ORDER: Judgment delivered today in the presence of petitioner in person, 1st Respondent is represented by Mr. Kahangwa Advocate who also holds brief for Mr. Taslima for the Petitioner and Mr. Kakolaki – State Attorney for the 2nd Respondent.

R. M. RWEYEMAMU
JUDGE
11/12/2007