

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISCELLANEOUS CIVIL CAUSE NO. 13 OF 2010

**(IN THE MATTER OF AN ELECTION PETITION UNDER THE NATIONAL
ELECTION ACT CAP 348 R.E. 2010 AND THE PETITION RULES, 2010)**

**MUSA HAMISI MKANGA 1ST PETITIONER
AGNES GIDION MOLLEL 2ND PETITIONER
HAPPY EMANUEL KIVUYO 3RD PETITIONER**

VERSUS

**GODBLESS JONATHAN LEMA 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT**

Date of last order - 30/3/2012

Date of Judgment - 5/4/2012

J U D G M E N T

G.K. Rwakibarila, J.:

The three petitioners are No.1 Musa Hamisi Mkanga, No.2 Agnes Gideon Mollel and No.3 Happy Emmanuel Kivuyo. Their major prayer is the nullification of the election of respondent No.1 Godbless Jonathan Lema as a Member of Parliament (**MP**) for the Arusha Urban Constituency on behalf of the Chama cha Demokrasia na Maendeleo (**CHADEMA**) political party in the 2010 General Elections. Respondent No.2 is the Hon. Attorney General

who was joined in this petition in his capacity as the principal legal adviser of the Government of the United Republic of Tanzania.

All the three petitioners were represented by Messrs Alute Mughwai and Modest Akida, learned Counsel. And respondent No.1 was represented by Mr. Method Kimomogoro, learned Counsel. But respondent No.2 was represented by Messrs Timolin Vitalis, learned Principal State Attorney and Juma Masanja, learned State Attorney.

There are two impressive witnesses in this petition who are using brave methods to struggle to earn their living and improve their standards of their lifestyles in this city of Arusha, irrespective of its high costs of living. One of them is PW.14 Omari Bokolo. He retired voluntarily from the Tanzania Peoples Defence Force (**TPDF**) in 1985, at the age of 35, already with the rank of the captain. After his retirement, he settled in Arusha and secured a track of land measuring 38 acres where he earns his living by cultivating maize and beans, sometimes through irrigation therein. That track of land is situated at **Luis Nduruma ya Chini** in Arumeru district

and about 36 kilometers from this Arusha city centre. He spends most of his time at his farm house there but visits his home periodically along **Makaburi ya Baniani** area, in Unga Ltd Ward, within this city.

Another typical impressive witness in this petition is PW.11 Amina Ali. She lives in a wedlock with her husband in **Sokoni I** ward in this Arusha city. During the subsistence of their marriage, she secured the capital from her husband which she uses to buy in whole sale old clothes popularly nicknamed "**mitumba**" or new ready-made clothes. From 10 a.m. up to 06 p.m. daily, she conducts shuttle trips in the Arusha city streets, selling those clothes to customers of various sources. She conducts that business like other unlicensed vendors who are countrywide colloquially termed "**wamachinga**"

And there is a terminology which was often mentioned in proceedings of this petition. It is "**malaigwanani**". According to petitioner No.3 **cum** PW.3 Happy Emmanuel Kivuyo, "**malaigwanani**" are prestigious men aged 40 years or above among

the Waarusha and Wamasai tribes. Men of that type are capable of taking care of their families and keeping enough livestock. Therefore men of those tribes who can not support their respective families or keep livestock don't fit to become "**malaigwanani**". So that men of stray are automatically ruled out from the category of "**malaigwanani**".

Five political parties sponsored **MP** candidates for the Arusha Urban constituency in the said 2010 General Elections. Their names, respective political parties in brackets plus votes scored show that Joseph M. Mafuata (**Demokrasia Makini**) scored 179 votes and Yusufu Baalamay Garib (**CUF**) scored 456 votes.

Others were Maximillian Elifatio Lyimo (**TLP**) scored 2,022 votes, Dr. Batilda Salha Burian (**CCM**) scored 37,460 votes and Godbless Jonathan Lema (**CHADEMA**) score 56,196 votes. That is why the **CHADEMA** candidate Godbless Jonathan Lema **cum** respondent No.1 was declared the **MP** for Arusha Urban Constituency.

The election campaigns in that Arusha Urban Constituency were according to an Exhibit P.1 timetable, conducted from 20-08-2010 up to 30-10-2010. PW.4 Salum Mpamba who tendered it put it that it showed merely the timetable for **MP** seats candidates in that constituency. He was, during that campaign period, a CCM District Secretary for Arusha Urban Constituency. That timetable stretched on fifteen pages, each with six columns which show the date (in column No.1), the party (in column No.II), the ward (in column No.III), the place (in column No.IV), the time (in column No.V) and finally the nature of meeting (in column No.VI).

The three petitioners in paragraph 7(a),(b),(c) and (d) of the petition averred that the election of respondent No.1 for that **MP** seat was void due to four illegalities which respondent No.1 did during that campaign period as follows.

In paragraph 7(a) of the petition, the three petitioners averred that respondent No.1 made in the first batch illegal statements at four stations calling upon the electorate to refrain from voting for the **CCM** candidate Dr. Batilda Salha Burian on the ground that

she was a woman who is married in Zanzibar and who, if elected, would go back to her husband and children in Zanzibar. Five witnesses for petitioners who testified in support of this ground are PW.1 Musa Hamisi Mkanga (petitioner No.1), PW.5 Arafa Mohamed, PW.9 Iddi Hussein, PW.11 Amina Ali and PW.12 Ramadhani Mohamed Senzige.

PW.1 in his evidence on this ground testified that, he heard respondent No.1 stating words in the scope of that paragraph 7(a) at **Cheka – Ung’atwe** station in Sombetini Ward on the date which was not disclosed throughout his evidence. Therefore it is difficult to track from an Exhibit P1 timetable about where and when that meeting took place. For the purposes of this petition therefore, what were testified by PW.1 on this ground are accredited little weight.

PW.2 in her evidence on that ground testified that she heard respondent No.1 stating words in the scope of that paragraph 7(a) at Elerai ward on 06-09-2010 at around 02.30 p.m. An Exhibit P1 timetable shows at its page 4 that, that meeting duly took place

there. It follows that during the evaluation of the petitioners' and respondents' evidence, what transpired during that meeting shall be referred to as an event No.1.

PW.9 in his evidence on that ground testified that he heard respondent No.1 stating words in the scope of that paragraph 7(a) at the same Eleroi Primary School on the same day of 06-09-2010 but at around 04 p.m. An Exhibit P1 timetable shows at its page 4 as well that, that meeting duly took place there. It follows that during the evaluation of the petitioners' and respondents' evidence, what transpired during that meeting shall be referred to as event No.2.

PW.12 in his evidence on that ground testified that he heard respondent No.1 stating words in the scope of that paragraph 7(a) at Sombetini Street in **Sokon I** ward on the date which was not disclosed throughout his evidence. Therefore it is difficult to track from an Exhibit P1 timetable about where and when that meeting took place. And for the purposes of this petition therefore, what were testified by PW.12 on this ground are accredited little weight.

On the basis of what have been clarified on allegations in paragraph 7(a) of the petition, events Nos.1 and 2 are fit for consideration and scrutiny later, during the evaluation of the petitioners' and respondents' evidence.

In paragraph 7(b) of the petition, the three petitioners averred that respondent No.1 made in the second batch illegal statements at four stations exhorting a multiple of assembled "**wananchi**" not to vote for the **CCM** candidate because she was a woman and therefore unfit to be their representative leader. Four witnesses for petitioners who testified about five election campaign meetings in support of this ground are PW.1 Musa Hamis Mkanga (on two instances at one station), PW.6 Saidi Athumani, PW.5 Arafa Mohamed and PW.13 Gabriel Maleko.

PW.1 in his evidence on this ground stated that he first heard respondent No.1 uttering words in the scope of that paragraph 7(b) at Mbauda street station in Sombetini ward on 18-09-2010 at around noon during the **CHADEMA** Presidential campaign meeting. An Exhibit P1 timetable does not cover that meeting because it was

for the **CHADEMA** Presidential candidate meeting and not in the ambit of **MP** candidates' meetings. It follows that, that meeting duly took place there and during evaluation of the petitioners' and respondents' evidence, what transpired during that meeting shall be referred to as an event No.3.

PW.1 further testified in his evidence on that ground that he heard respondent No.1 stating words in the scope of that paragraph 7(b) at **Kwa Mromboo** station in Terrat ward on 31-08-2010 at around 04.30 p.m. An Exhibit P1 timetable shows at its page 3 that, that meeting duly took place there. It follows that later during the evaluation of the petitioners' and respondents' evidence, what transpired during that meeting shall be referred to as an event No.4.

PW.5 in her evidence on that ground testified that she heard respondent No.1 stating words in the scope of that paragraph 7(b) at Elerai Primary School in Elerai ward on 06-09-2010 at around 02.30 p.m. An Exhibit P1 timetable shows at its page 4 that, that meeting duly took place there. It follows that during the evaluation

of the petitioners' and respondents' evidence, what transpired during that meeting shall be referred to as event No.5.

In his evidence PW.6 testified that he heard respondent No.1 stating words in the scope of that paragraph 7(b), again at **Kwa-Mromboo** in Terrat ward on an unspecified date at around 02 p.m. but in August, 2010. Therefore it is difficult to track from an Exhibit P1 timetable about where and when that meeting took place. For the purposes of this petition therefore, what were testified by PW.1 on this ground are accredited little weight.

PW.13 in his evidence on that ground testified that she heard respondent No.1 stating words in the scope of that paragraph 7(b) at **Makao Mapya** area in **Sokon I** ward on 28-10-2010, at around 02.30 p.m. But an Exhibit P1 timetable did not disclose a meeting of that type at that venue during that time. As a result, it is difficult to track from an Exhibit P1 timetable about where and when that meeting took place. And for the purpose of this petition therefore, what were testified by PW.13 on this ground are accredited little weight.

So that on the basis of what have been clarified on allegations in paragraph 7(b) of the petition, events Nos.3, 4 and 5 are fit for consideration and scrutiny during the evaluation of the petitioners' and respondents' evidence

In paragraph 7(c) of the petition, the three petitioners averred that respondent No.1 made in the third batch illegal statements at two stations to incite religious sentiments of the potential voters against the said **CCM** candidate on the ground that she was a muslim. Only two witnesses for petitioners who testified in support of this ground are PW.1 Musa Hamisi Mkanga and PW.6 Saidi Athumani.

PW.1 in his evidence deposed on this ground that he heard respondent No.1 stating words in the scope of that paragraph 7(c) at **Kwa Mromboo** area in Terrat ward on 31-08-2010 at around 04.30 pm. An Exhibit P1 timetable shows at its page 3 that, that meeting duly took place there. It follows that during the evaluation of petitioners' and respondents' evidence, that transaction shall be referred to as event No.6.

PW.6 Saidi Athumani in his evidence on that ground testified that he heard respondent No.1 stating words in the scope of that paragraph 7(c) at **Kwa Mromboo** area in Terrat ward on the date which was not disclosed throughout his evidence. Therefore it is difficult to track from an Exhibit P1 timetable where and when that meeting took place. So that for the purposes of this petition, what were testified by PW.6 on this ground are accredited little weight.

On the basis of what have been clarified on allegations in paragraph 7(c), event No.6 alone fits for consideration and scrutiny during the evaluation of the petitioners' and respondents' evidence.

And in paragraph 7(d) of the petition, the three petitioners averred that respondent No.1 made in the fourth batch illegal false, immoral and scandalous statements against the **CCM** candidate Dr. Batilda Salha Burian that she was an adulterous woman and therefore unfit to be elected to the high and respected office of a Member of Parliament because she had borne a child by another male person and was presently heavy with a baby by that same person. Six witnesses for petitioners who testified in support of this

ground are PW.1 Musa Hamisi Mkanga (petitioner No.1), PW.2 Agnes Gidion Mollel (petitioner No.2), PW.7 Joseph Silvesta, PW.8 Iddi Hussein, PW.10 Salvatory Christopher and PW.14 Omari Bokolo.

In his evidence on this ground, PW.1 testified that he heard respondent No.1 stating words in an ambit of that paragraph 7(d) at **JR** Street station in Sombetini ward on 21-09-2010 at around 04 pm. PW1 put it that, the meeting which took place there was for the **CHADEMA** councillors' seat candidate. It means that, that meeting is not reflected in an Exhibit P1 timetable. So that during evaluation of the petitioners' and respondents' evidence, that endeavour shall be referred to as event No.7.

PW.2 Agnes Gidion Mollel in her evidence on that ground testified that she heard respondent No.1 stating words in an ambit of that paragraph 7(d) at **Big – Sister** station in Oloirien ward on 09-09-2010 at around 04 pm. But an exhibit P1 timetable shows that, that meeting took place there previously on 01-09-2010 (and

not 09-09-2010). For the purposes of this petition therefore, what were testified by PW.2 on this ground are accredited little weight.

Then PW.7 Joseph Silvesta in his evidence on that ground testified that he heard respondent No.1 stating words in an ambit of that paragraph 7(d) at **Big Sister** station at Oloirien Ward on 01-09-2010 at around 03.55 pm. An Exhibit P1 timetable shows at its page 3 that, that meeting duly took place there. It follows that during the evaluation of the petitioners' and respondents' evidence, that transaction shall be referred to as event No.8.

And PW.8 Aggrey Shitaeni Mushi in his evidence on that ground testified that he heard respondent No.1 stating words in the scope of that paragraph 7(d) at Sekei Taxi Park station in Sekei Ward on 25-10-2010 at around 04 pm. That station was not recorded in an Exhibit P1 timetable because the campaign there, according to PW.8, was for Sekei ward **CHADEMA** counsellors' seat candidate Mr. Chrispin Tarimo. Respondent No.1 was therefore, invited there to greet and address that meeting briefly. It follows

that, during the evaluation of the petitioners' and respondents' evidence, that transaction shall be referred to as an event No.9.

PW.10 Salvatory Christopher in his evidence on that ground testified that he heard respondent No.1 stating words in an ambit of that paragraph 7(d) at Ngwero station in Sombetini Ward on 26-08-2010 at around 04.30 pm. An Exhibit P1 timetable shows at its page 2 that, that meeting duly took place there. It follows that, during evaluation of the petitioners' and respondents' evidence, that transaction shall be referred to as an event No.10.

Then PW.14 Omari Bokolo in his evidence on that ground testified that he heard respondent No.1 stating words in the scope of that paragraph 7(d) at Ngusero Mbugani station in Sombetini ward on 26-08-2010 at around 04 pm. An Exhibit P1 timetable shows at its page 2 that, that meeting duly took place there. It follows that during evaluation of the petitioners' and respondents' evidence, that transaction shall be referred to as an event No.11.

On the basis of what have been clarified on allegations in paragraph 7(d) of the petition, events Nos. 7, 8, 9, 10 and 11 are therefore fit for consideration and scrutiny during the evaluation of petitioners' and respondents' evidence.

In his defence, respondent No.2 the Hon. Attorney General (**AG**) through Messrs Timolin Vitalis, learned Principal State Attorney and Juma Masanja, learned State Attorney opted not to call any witness. These learned representatives of the Hon. **AG** opted merely to rely on the final submission at the end of hearing this petition.

On his part, respondent No.1 Godbless Jonathan Lema staged the defence which was, in most of the material facts, similar with what was testified by his three witnesses namely RW.2 Viola Lazaro Likindikoki, RW.3 Gabriel Lucas and RW.4 Maringu Samson Mwigumba.

In view of respondent No.1's version, RW.3 was, **inter alia**, during the elections campaign period, **CHADEMA** Publicity

Secretary for Arusha Urban District where Arusha Urban Constituency is situated. In course of that function, he was coordinating all sixty (60) election campaigns which respondent No.1 happened to address throughout the election campaign period, i.e from 20-08-2010 up to 30-10-2010. He was also the Master of Ceremonies (**MC**) during those meetings.

According to what both RW.1 and RW.3 deposed, the former (respondent No.1) never uttered any word calculated to exploit residence, gender or religions differences envisaged in paragraph 7 (a), (b) and (c) respectively of the petition. They put it too that respondent No.1 did not mention any scandalous words envisaged in paragraph 7(d) of that petition against the **CCM** political party candidate in Arusha Urban Constituency Dr. Batilda Salha Burian.

During that endeavour, RW.1 and RW.3 gave evidence to connote that allegations from events No.1 up to 11 where respondent No.1 allegedly stated words in the scope of paragraph 7(a), (b), (c) and (d) of the petition were not true. It is important to note here that this court did not analyse each event which RW.1

and RW.3 referred to separately because, in their evidence, RW.1 and RW.3 did not always reveal the date and venue of those events. So that they mentioned dates or venues on few instances to wit, their narration can not be caused to tally with an Exhibit P1 timetable in this format of narration.

The way RW.1 and RW.3 testified obviously cover events Nos.1 up to 11 which were referred to by witnesses for petitioners. This is the position because both RW.1 and RW.3 put it that they were jointly together, during all the **CHADEMA MP** political party election campaign meetings which RW.1 happened to address.

RW.2 was sponsored by the **CHADEMA** political party to contest for Lemara ward counsellors' seat. She deposed that she happened to attend eight **CHADEMA** political party election campaign meetings during that period. She put it that during those eight meetings, she didn't hear respondent No.1 uttering illegal words envisaged in paragraph 7(a),(b),(c) and (d) of the petition.

And RW.4 was during that period Arusha Regional Secretary for the **CHADEMA** political party. He deposed that he happened to attend five **CHADEMA** election campaign meetings during that period. He put it too that during the said five meetings, he didn't hear respondent No.1 uttering words envisaged in paragraph 7(a), (b),(c) and (d) of the petition.

There were ten issues which were framed at the commencement of hearing this petition. For convenience purposes, issues Nos 1, 2 and 4 shall be consolidated and dealt with jointly. But issue No.3 shall be dealt with alone. Then issues Nos 5, 6, 7 and 8 shall be consolidated and dealt with jointly too. As usual, issues No.9 and 10 which concern how to conclude the contentious matters in this petition and remedies for parties respectively shall be the last to be dealt with.

Issue No.1 was, **"Whether the petitioners have the cause of action against the first respondent";**

Issue No.2 was, “**Whether the petition is a representative suit, in terms of Order 1, Rule 8 of The Civil Procedure Code, Cap. 33 (Vol.1, R.E. 2002)**”; and

Issue No.4 was, “**Whether the petitioners are legally recognizable agents of the CCM candidate Dr. Batilda Salha Burian, in terms of Order III, Rules 1 and 2 of The Civil Procedure Code, Cap. 33 (Vol. II, R.E. 2002)**”.

Issues Nos. 1, 2 and 4 on the face of it directly or impliedly tend to question whether the three petitioners had the **locus standi** to institute this petition. In order to show that petitioners had no powers to institute this petition, Mr. Kimomogoro, learned Counsel for respondent No.1 put it at page 4 of 60 pages final written submission that petitioners had a duty to set out the manner in which their rights or interests were breached or interfered with by reason of the statements allegedly made by the 1st respondent against Dr. Batilda Burian. Then at pages 8 and 9 of the same final written submission, this learned Counsel for respondent No.1 emphasized that a petitioner may come to court in the capacity of a recognized agent in terms of Order III, Rule 1 of **The Civil**

Procedure Code, Cap. 33 (R.E. 2002) in terms of Rule 2(a) as recognized agents who are not advocates.

It is a considered view of this court that the parent legislation in matters of elections exhaustively deals with the criterion of people who are competent to institute election petitions. So that under Section III (1) of **The National Elections Act, Cap. 343**, it is provided that an election petition may be presented by one, or more of the following persons namely –

- “(a) **a person who lawfully vote or had a right to vote at the election to which the petition relates;**
- (b) **a person claiming to have had a right to be nominated at such election;**
- (c) **a person alleging to have been a candidate at such election; and**
- (d) **The Attorney General.”**

In the material petition, the petitioners therefore, have the statutory rights under Section III(1)(a) of **The Elections Act** (supra)

to institute this petition. Their rights to institute the same, therefore, don't necessarily rely on other legislations due to the simple reason that they averred in paragraph 2 of the petition that they were registered voters and were entitled to vote at the election to which this petition relates. Copies of their voters' cards were annexed thereto and marked A(1-3). And that paragraph 2 is in the scope of matters which were found true by both the petitioners' and respondents' sides during the preliminary hearing (**PH**). It follows that issues Nos.1, 2 and 4 are answered in petitioners' favour.

Issue No.3 was, **"Whether the petitioners had the duty to plead the actual words uttered by the first respondent during election campaign rallies specified in the petition."**

In his final written submission at page 8, Mr. Kimomogoro, learned Counsel for respondent No.1 put it that petitioners were supposed to plead actual words allegedly uttered by respondent No.1 during election campaigns. He referred this court to **Halisbury's Laws of England, 3rd Edn. Vol. 24** at page 90 where it was pointed out that:

“In order that the statement complained of as being a libel or slander may be construed or interpreted, it is essential that the actual words, not merely their substance, should be set forth verbatim in the statement of claim or indictment.”

A matter resembling what was raised in issue No.3 was previously dealt with by my brother Hon. A.K. Mujulizi, J. who was my predecessor in this petition. And in his ruling of 26-09-2011, his Lordship correctly pointed out at page 12 of his well researched and reasoned ruling that what the petitioners pleaded in the petition was quite in order as it revealed sufficient facts to enable the first respondent to structure his defence. This court has no power and reason to differ with Hon. A.K. Mujulizi, J. on the same because he was, by that time, exercising jurisdiction at the same hierarchy like this court. Moreover Section 5(2)(d) of **The Appellate Jurisdiction Act** as amended by Section 2 of the **Written Laws (Miscellaneous Amendments) Act, No. 25 of 2002** provides that:

“No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit”.

And in addition, under Section 74(2) of **The Civil Procedure Code, Cap. 33** (supra) as amended by Section 2 and the Schedule to **The Written Laws (Miscellaneous Amendments) Act, No. 3 of 2002**, it is provided that:

“No appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit”.

This petition is, up to this stage of writing this judgment, still **sub-judice** before this court because Hon. A.K. Mujulizi’s ruling did not finally dispose it. And in view of provisions in both legislations

which have just been cited above, his Lordship's decision in that ruling can not be disturbed or altered by this court. Issue No.3 is therefore also resolved in favour of petitioners' side.

Issue No.5 was, **"Whether during the election campaign rallies held in the constituency, the first respondent made statements against the CCM parliamentary candidate Dr. Batilda Salha Burian, a CCM candidate, that she was unfit to be elected as Member of Parliament for the constituency because she was married to a Zanzibari and who, if elected, would go back to her husband and children in Zanzibar;**

Issue No.6 was, **"Whether during election campaign rallies, the first respondent made statements that were calculated to exploit gender differences between himself and a CCM candidate Dr. Batilda Burian;**

Issue No.7 was, **"Whether during election campaign rallies, the first respondent made statements that were intended to**

exploit religions differences between himself and the CCM candidate Dr. Batilda Salha Burian; and

Issue No.8 was, **“Whether during election campaign rallies, the first respondent made defamatory statements against the CCM candidate Dr. Batilda Salha Burian that she was an adulterous woman who was not fit to be elected Member of Parliament because she had born a child out of wedlock and she had another pregnancy by the same man”.**

Respondent No.1 in his evidence denied uttering all illegal words which he allegedly made in paragraph 7(a) of the petition (in events Nos.1 and 2), paragraph 7(b) of the petition (in events Nos.3, 4 and 5), paragraph 7(c) of the petition (in event No.6) and paragraph 7(d) of the petition (in events Nos.7, 8, 9, 10 and 11). He was supported in his version by RW.2, RW.3 and RW.4.

In a situation like that, this court could have opined that respondent No.1's side rebutted the petitioners' version. But the same is not the position because all the four witnesses who testified

for respondent No.1's side had rampant interests to serve, subject to results of this petition due to the following grounds.

First, respondent No.1 who testified as RW.1, was also the **CHADEMA** political party Elections Campaign Manager for the Arusha Urban Constituency during the 2010 General Elections. He was, in addition, the **MP** candidate for that constituency under sponsorship of that party. Second is RW.2. She was the candidate for the counsellors' seat for Lemara ward in that constituency.

Third is RW.3 who is currently **CHADEMA** Publicity Secretary. He was a Master of Ceremonies (**MC**) during all sixty (60) election campaign meetings for **CHADEMA MP** candidate in that constituency which respondent No.1 addressed. And fourth is RW.4. He was that political party's Publicity Secretary during the elections campaign period in 2010. He is currently **CHADEMA's** Arusha Regional Secretary and simultaneously that party's Chief Accountant at its headquarters in Dar es Salaam.

Mr. Kimomogoro, learned Counsel in his written final submission at page 57 prayed on this court on behalf of respondent No.1 to dismiss this petition after he opined, **inter alia**, that there was no independent credible evidence to prove to the satisfaction of the court that the 1st respondent ever made prohibited statements at any of the nine campaign rallies in respect of which the petitioners adduced evidence. He opined further that the proven circumstantial evidence makes it highly improbable the making of such prohibited statements and, therefore the petitioners' oral evidence must have been rehearsed and fabricated lies originating from PW.1 Musa Hamis Mkanga.

And Messrs Timolin Vitalis, **PSA** and Juma Masanja, **SA** in their 30 pages final written submission added, at page 23 that, the police attended all the campaign meetings where the 1st Respondent is claimed to have made the defamatory and gender discriminatory statements. They clarified that there were no evidence to show that the 1st Respondent was ever arrested or interrogated for using discriminatory or abusive language in the campaign speeches.

This court has taken into account what all learned Counsel and Attorneys for respondents Nos.1 and 2 respectively presented to try to exonerate respondent No.1 from allegations of uttering illegal statements during election campaign rallies. In addition to that, this court has further taken into account that respondent No.1 is a reputable person who was respectfully granted sponsorship by the registered **CHADEMA** political party to contest for the Arusha Urban constituency **MP** seat. This situation suffices for this court to warn herself on the same and then proceed to look into whether a person commanding distinguished credibility in the society like respondent No. 1 could have uttered those illegal words.

Messrs Alute Mughwai and Modest Akida learned Counsel for petitioners in their 33 pages written submission at page 3 pointed out that petitioners' eleven witnesses were credible because they were ordinary people who came from different backgrounds, social status like peasants, farmers, food vendors (**mama lishe**) and a retired army officer. Both learned Counsel for petitioners further pointed out that among petitioners' witnesses, there were men,

women, party and non party members and people of different religious faiths.

In view of what were presented by learned Counsel and learned Attorneys for both sides, it is a considered view of this court that PW.1 could not have influenced all witnesses who testified for petitioners in this petition because it transpired in their examination in chief or cross-examination that he didn't know most of them before the 2010 election campaign period. After he heard those witnesses stating their grudges about respondent No.1's illegal statements, he led or directed them to the chambers of Mughwai & Co. Advocates where they voluntarily recorded their respective statements. It also transpired during cross examination of petitioners' witnesses that they recorded their respective statements on different days, after travelling from different wards in Arusha Urban Constituency. Therefore from this background, it suffices to conclude that petitioners' witnesses never got chances for joint rehearsals on what they stated at the chambers of Mughwai & Co. Advocates, when they visited there on different days from different sites for purposes of recording their statements.

The petitioners' version is added more weight by the evidence of PW.11 Amina Ali and PW.14 Omari Bokolo who were referred to earlier as impressive witnesses. On her party, PW.11 put it that she never belonged to any political party. According to her evidence, she was on a shuttle trip for purposes of selling clothes in form of a female "**machinga**", when she arrived coincidentally at Miembeni street in **Sokon I** ward on 28-08-2010 at around 04.45 pm and happened to sight and hear respondent No.1 addressing the meeting and uttering the illegal words. But PW.11's evidence was granted little weight because she mentioned the 28-08-2010 date, which was not reflected in an Exhibit P1 time table.

Then there is another impressive witness PW.14 Omari Bokolo. He put it that he never joined any political party in his lifetime, although he retired from the **TPDF** in 1985 with the rank of Captain. He spends most of his time at his 38 acres farm, situated about 36 kilometers from the centre of this Arusha city where he cultivates maize and beans. He happened to visit his sister at Ngusero-Mbugani area on 26-08-2010 but when her sister was escorting him, he passed by coincidence at the site where

respondent No.1 was addressing the election campaign meeting. This PW.14 clarified that at that juncture, when it was at around 04 pm on that day, he heard respondent No.1 uttering illegal words which constitute an event No.11. PW.14 in fact is more impressive to an extent that he disclosed that during his services with the **TPDF**, he managed to work at 42.KJ in Songea, 75.KJ in Arusha, Lugalo **TPDF** barracks, Msumbiji, Uganda and China. He sincerely disclosed that he resigned from the **TPDF** when he was briefly in Tanzania due to fear of what he stated in his own words that: **“Hapa niliona kanafasi ka kuninyemelea kwenda tena nje kangenilenga tena na mwaka 1985 nikastaafu jeshi.”**

Therefore the petitioners’ witnesses like PW.14 or PW.11 had no reason or time to waste attending rehearsals on what to record in their respective statements at the chambers of Mughwai & Co. Advocates or later to testify before this court. It is a finding of this court that they freely testified on their own will about what they happened to sight and hear in what were earmarked as events Nos.1 up to 11. The claim that respondent No.1 was not arrested and charged of offences relating to mischiefs of his words don’t set-

off what the petitioners' witnesses testified. So that up to this juncture, respondent No.1 should consider himself lucky because in criminal prosecutions the time never runs against the Republic.

In view of what were stated so far about evidence by the petitioners' fourteen (14) witnesses, it has been proved satisfactorily that respondent No.1 uttered words which featured in events Nos.1 up to 11. It follows that what were stated by four (4) witnesses of respondent No. 1 are mere afterthoughts and rejected due to simple reason that all of them were found with interest to serve depending on the results for this petition.

Next to consider is whether the words which respondent No.1 uttered in the category of events Nos.1 up to 11 suffice to reflect what were alleged in paragraphs 7(a),(b),(c) and (d) of the petition. Then the words which respondent No.1 uttered in the category of paragraph 7(a) of the petition were classified as events Nos.1 and 2.

At event No.1, PW.5 heard respondent No.1 stating at Elerai Primary School in Elerai ward on 06-9-2010 at about 02.30 pm that:

“Msichague kiongozi ambaye hayuko kwenye jimbo la Arusha. Kiongozi huyo makazi yake yako Zanzibar. Endapo mtamchagua akipata uongozi maendeleo yatakuwa hakuna katika jimbo la Arusha. Ataondoka kwenda kukaa Zanzibar pamoja na familia yake ya mume pamoja na watoto wake”.

And at event No.2, PW.9 heard respondent No.1 stating at Elerai Primary School in Elerai Ward at around 04 pm that:

“Ndugu wananchi msikubali kuletewa mtu kwa mapenzi ya mtu binafsi. Batilda Burian mimi namfahamu. Ameolewa Zanzibar. Ikifika kwenda kujifungua atatuachia jimbo na nani?

At this era, it is a pride for most Tanzanians in the Mainland to stay in Zanzibar or get spouses there and **vice versa**. So that allegations in paragraph 7(a) of the petition that the **CCM** candidate Dr. Batilda Salha Burian was married to a Zanzibari did not constitute an illegal campaign. Therefore the petitioners' allegations in paragraph 7(a) of the petition are dismissed.

The words which respondent No.1 uttered in the category of paragraph 7(b) of the petition were classified as events Nos.3, 4 and 5.

At event No.3, PW.1 heard respondent No.1 stating at Mbauda street grounds in Sombetini ward on 18-09-2010 that:

“Tangu lini nyie waarusha mkaangozwa na wanawake”.

Then at event No.4, PW.1 heard respondent No.1 stating at **Kwa-Mromboo** in Terrat ward on 31-08-2010 at around 04.30 pm that:

**“Jamani ee, tangu lini mmeona kwa mila
zetu za Kichaga na Kiarusha mwanamke
anaongoza malaigwanani?**

And at event No.5, PW.5 heard respondent No.1 stating at
Elerai Ward on 06-09-2010 at around 04.30 pm that:

**“Waarusha msije mkakubali kuongozwa na
mwanamke”.**

Then events Nos.3, 4 and 5 depict that respondent No.1
uttered words which are envisaged in paragraph 7(b) of the petition
because they exploit gender differences. Respondent No.1 is
therefore responsible for that illegality.

The words which respondent No.1 uttered in the category of
paragraph 7(c) of the petition were classified in event No.6.

At that event No.6, PW.1 heard respondent No.1 stating at
Kwa Mromboo in Terrat Ward on 31-08-2010 at around 04.30 pm
that:

**“Chungeni sana wanaovaa viremba msije
mkachagua alikaida”.**

There are currently some women in Tanzania who prefer to dress veils on their heads. Dressing in that manner mostly display that such women are decent to wit, that habit don't fit to be associated with women with specific religious motives. Therefore the petitioners' allegations in paragraph 7(c) of the petition are also dismissed.

Then the words which respondent No.1 uttered in the category of paragraph 7(d) of the petition were classified as events Nos.7, 8, 9, 10 and 11.

At event No.7, PW.1 heard respondent No.1 stating at **JR** street grounds in Sombetini ward on 21-09-2010 at around 04 pm that:

**“Dr. Batilda ameolewa Zanzibar.
Mtakapomchagua atarudi Zanzibar kulea
watoto wake na mume wake na nyie
hamtakaa mmuone”.**

Then at event No.8, PW.7 heard respondent No.1 at **Big Brother** grounds in Oleorien ward on 01-09-2010 at around 03.55 pm stating that:

“Asichaguliwe Dr. Batilda kwa kuwa ameolewa na Mzanzibari. Na hapa alipo Dr. Batilda anayo mimba ya Lowasa. Akichaguliwa Dr. Batilda atafunga radio Safina na kujenga msikiti mkubwa. Mkimchagua badala ya kuwawakilisha bungeni atakuwa matenite Zanzibar”.

At event No.9, PW.8 heard respondent No.1 stating at Sekei Taxi park ground in Sekei ward on 25-10-2010 at around 04 pm that:

“Mgombea wa CCM Dr. Batilda hafai kuchaguliwa kwa sababu ameletwa na hawara wake Lowasa na ni mjamzito. Sasa tukimchagua ataenda Bungeni au kulea mtoto”.

And at event No.10, PW.10 heard respondent No.1 stating at Ngusero area in Sombetini ward on 26-08-2010 at around 04.30 pm that:

“Ngoja niwaeleze udhaifu wa huyu mama Batilda Burian. Kwanza huyu mama sio mwaminifu. Na ana ujauzito wa Mzee wa Monduli. Mama huyu hatufai kukamata nafasi kama hii ya heshima katika jiji la Arusha. Kwa mtaji huu, nimebakizwa kuapishwa. Vyama vingine ni wasindikizaji.”

Then finally in event No.11, PW.14 heard respondent No.1 stating at Ngusero Mbugani ground in Sombetini ward on 26-08-2010 at around 04 pm that:

“Sasa ngoja niwaambieni. Huyu mwanamke anayegombea ubunge hapa Arusha mjini kwanza sio mwaminifu katika ndoa yake.

Amezaa mtoto nje ya ndoa na Mheshimiwa Lowasa.”

The events Nos. 8, 9, 10 and 11 depict that respondent No.1 uttered words which are envisaged in paragraph 7(d) of the petition because they display scandalous statements against the **CCM** candidate Dr. Batilda Burian. Respondent No.1 is therefore also found responsible for that illegality.

Then issue No. 9 was, **“Whether if issues Nos 5 - 8 or any of them are proved, suffice for voidance of election of first respondent as a Member of Parliament for Arusha Urban Constituency.”**

In fact what was established above shows that the petitioners failed to adduce sufficient evidence to prove adequately allegations in paragraph 7(a) and (c) of the petition. Instead, the petitioners have established adequate evidence to prove allegations in paragraph 7(b) and (d) of the petition.

Under Section 108(1)(a) of **The National Elections Act** (supra) it is provided, **inter alia**, that the election of a candidate as a Member of Parliament shall be declared void if any of the following

grounds is proved to the satisfaction of the High Court and on no other ground, namely –

“That, during the election campaign, statements were made by the candidate, or on his behalf and with his knowledge and consent or approval with intent to exploit tribal, racial or religious issues or differences pertinent to the election or relating to any of the candidates, or, where the candidates are not of the same sex, with intent to exploit such difference.”

In the material petition it has been proved satisfactorily that the person of respondent No.1 is the one which physically uttered statements in the scope of paragraph 7(b) of the petition (events Nos.3, 4 and 5) and paragraph 7(d) of the petition (events Nos.7, 8, 9, 10 and 11). It means respondent No.1 uttered during election rallies statements during eight events which were proved satisfactorily. Under that section 108(2) of **The Elections Act** (supra) any of those events could have sufficed to move this court

to declare his election void. On that basis this court is hereby declaring void the election of respondent No.1 Godbless Jonathan Lema as Member of Parliament for Arusha Urban Constituency during the 2010 year General Elections.

Issue No. 10 was, **“What are remedies of parties”**.

It has been proved satisfactorily that respondent No.1 alone uttered illegal statements during eight events during election campaign rallies. In fact respondent No.2 or his agents were not linked in any manner with respondent No.1's illegal statements. Therefore three orders are ultimately made as follows.

- (i) The election of respondent No.1 Godbless Jonathan Lema as a Member of Parliament for Arusha Urban Constituency in the 2010 year General Elections is declared void.
- (ii) Respondent No.1 alone is condemned in costs to wit, he shall shoulder costs for all three petitioners; and

- (iii) The Hon. District Registrar for Arusha High Court Zone should immediately facilitate communication with the Director of Elections about this court's decision in compliance with Section 114(1)-(7) of **The National Elections Act** (supra).



G. K. Rwakibarila

JUDGE

04/04/2012

Date: 5/4/2012

Coram: G.K. Rwakibarila, J.

1st Petitioner – Present in person

2nd Petitioner – Present in person

3rd Petitioner – Present in person

For the Petitioners – Messrs Mughwai and Akida, Advocate

1st Respondent – Present in person

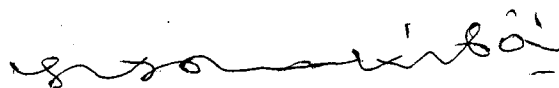
For the 1st Respondent – Mr. Kimomogoro, Advocate

2nd Respondent

For the 2nd Respondent } Mr. Masanja, SA for respondent No.2

B/C Grace Conega

Court: Judgment delivered at Arusha this 5th day of April, 2012 at presence of parties as stated in the coram for today and right to appeal in time has been explained thoroughly.



G. K. Rwakibarila

JUDGE

05/04/2012