

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

MISCELLANEOUS CIVIL CAUSE NUMBER 36 OF 2015

**IN THE MATTER OF THE NATIONAL ELECTIONS ACT, CAP 343
REVISED EDITIONS OF 2015**

AND

**IN THE MATTER OF THE PETITION FOR THE AVOIDANCE OF THE
RESULT OF THE PARLIAMENTARY ELECTION FOR LONGIDO
CONSTITUENCY**

BETWEEN

DR. STEPHEN LEMOMO KIRUSWA ----- PETITIONER

VERSUS

ONESMO KOIMEREK NANGOLE -----1st RESPONDENT

THE HON. ATTORNEY GENERAL ----- 2nd RESPONDENT

THE RETURNING OFFICER FOR LONGIDO

PARLIAMENTARY CONSTITUENCY ----- 3rd RESPONDENT

JUDGMENT

17/06/2016 & 29/06/2016

S. S. MWANGESI J.:

The petitioner herein going by the name of Doctor Stephen Lemomo Kiruswa, and the first respondent one Mr. Onesmo Koimerek Nangole, are two among the four candidates, who contested the Parliamentary seat for

the constituency of Longido in Arusha Region, in the general election, which was held in the country on the 25th day of October 2015. While the petitioner was sponsored by Chama Cha Mapinduzi political party commonly known by its acronym "CCM", the first respondent contested through Chama Cha Demokrasia na Maendeleo political party known by its acronym CHADEMA. The other contestants in the race were Julius Parteyie Syokino, who vied through Alliance for Change and Transparency "ACT" political party, and Lucas Yohana Ole Ngiiria, who was sponsored by Civil United Front "CUF" political party. The Returning Officer, who happens to be the third respondent in this petition, did declare the first respondent the winner for the seat, after he had polled 20,076 votes. The scores for the other contestants were as follows that is to say, Dr. Stephen L. Kiruswa - 19,352 votes, Mr. Lucas Y. Ngiiria 307 votes and Julius P. Syokino 253 votes.

The petitioner, felt aggrieved by the results and as a result, he has decided to challenge it by petitioning this Court to avoid the election of Mr. Onesmo Keimerek Nangale as Member of Parliament for the constituency of Longido in terms of the provision of section 112 of the Election Petition Act Cap 343. In addition to the declared successful candidate Mr. Onesmo Keimekek Nangale, who has been impleaded the first respondent, the petitioner has as well impleaded the Returning Officer for the Constituency of Longido as the third respondent, while the Honorable Attorney General, has been made the second respondent, in compliance with the requirement of law that is, the provision of Rule 6 (1) of the National (Election Petitions) Rules 2010.

The petition was lodged in Court for the first time on the 11th November 2015. Thereafter, it got amended twice, the last one, which is the one under discussion termed as the second amendment, was filed in Court on the 02nd day of February 2016. The gravamen of the petitioner's complaint is contained in paragraphs seven, eight and nine, which have been couched in the following words that is to say;

Para seven (7), that during his campaign rallies, the first respondent used indecent language intended to exploit and discriminate the petitioner.

Para eight (8), that, during the election campaigns held at various meetings in Longido constituency, the first respondent through his agents or by himself, disseminated propaganda that, the petitioner was more used to American way of life and divorced from the Maasai culture and the Swahili language and so, he would not be able to serve the Maasai society properly, matters which tended to exploit the Maasai cultural and social attitudes particularly in view of the fact that, Longido is a multicultural but made up of people whose majority are of Maasai tribe. The particular places, where the propaganda was disseminated by /or on behalf of the first respondent have been listed from sub-paragraph (i) to sub-paragraph (xxi).

Para nine (9) that, the returning Officer for Longido did fail to ensure compliance with the law and fairness. The particulars of the irregularities and the places where they were occasioned have been indicated in sub-paragraphs (i) to (viii). Additionally, it has been complained by the petitioner that, vehicles which were owned and/or managed by avid supporters of CHADEMA, were used in the election process. The particulars of the vehicles and the staff involved as well as the routes they took in transporting and/or escorting the ballot boxes have been itemized in sub-paragraph ix in items (a) to (k). And lastly, it has been the contention of the petitioner in sub-paragraph x that, some Kenyan Nationals, were permitted to vote for the Parliamentary election in the constituency of Longido at the polling stations of Namanga, Kimokouwa and Kamwanga.

As a result of the forenamed irregularities, it has been the averment of the petitioner that, the results which were announced by the Returning Officer (third respondent) in the Parliamentary election of Longido constituency for the year 2015, did not reflect the real wishes of the electorate and has therefore, requested this Honorable Court to declare it to have been laden with mismanagement and irregularities and therefore, null and void. Consequently, the relief which the petitioner has asked from this Court is an order for the conduct of by-election, so that the people of Longido, can properly and freely express their choice of the representative

they want to have, in the Parliament of the United Republic of Tanzania. He has as well, asked for costs of this petition against all the respondents.

In response to the second amended petition by the petitioner, the first respondent has vehemently disputed all the contentions, which have been raised by the petitioner. In his view, the campaign rallies which he did conduct and his political party, were in orderly manner and so was the election, which was peacefully conducted leading to his being elected as the representative of the people of Longido Constituency. This Court has therefore been humbly urged to dismiss the petition with the usual consequences as to costs. In the same vein, in their joint reply to the second amended petition, the second and third respondents have strongly resisted the contentions put forward by the petitioner and have put him under strict proof thereof. It has as well been their joint argument that, all the legal requirements pertaining to the general election held on the 25th October 2015 in the Constituency of Longido, were fully complied with and thereby, making it to have been free and fair. That being the case, the first respondent was correctly declared to be the winner after having polled more votes than other candidates. To that end, they have joined hands with the first respondent, in requesting this Court to confirm the results, which were declared by the Returning Officer (third respondent) by dismissing the petition of the petitioner with the contempt it deserves with costs.

During the hearing of the petition, the petitioner had ably been represented by Doctor Masumbuko Lamwai, who was the lead Counsel, being assisted by Messrs Daud Haraka and Edmund Ngemera learned

Counsel, while the first respondent had ably been advocated for by Messrs Method Kimomogoro (lead Counsel) and John Materu learned Counsel. On their part, the second and third respondents, initially were represented by Mr. Juma Ramadhani learned Principal State Attorney, who was assisted by Mr. Fortunatus Mhalila learned Senior State Attorney. The force was later reinforced, by introducing the services of two learned Principal State Attorneys that is, Ms Neema Mwanda and Mr. David Kawkwaya assisted by learned Senior State Attorney Mr. Fortunatus Mhalila.

In compliance with the requirement stipulated under the provision of rule 20 (1) of the National Elections (Election Petitions) Rules, 2010 as amended by The National Elections (Election Petitions) (Amendment) Rules, 2012, the following issues were formulated and agreed upon by the learned Counsel for the parties of both sides, and endorsed by the Court, to be the issues for deliberation that is,

First, whether in the campaign rallies held during the Parliamentary election campaigns for the Constituency of Longido in the year 2015, the first respondent by himself or through his agents did make some statements calculated to obtain advantage over the petitioner on the basis of Kiswahili language and Maasai cultural and social attitudes on the dates, time and at places, named under paragraph 8 of the petition.

Second, whether there were people eligible for voting, who did not vote at the polling stations of Orpukel, Engosokwan,

Loosoito, Naadare, King'una and Sokon, because the polling stations were opened late, by the election presiding Officers. And, if the answer to the second issue above is in the affirmative, then whether, the consequence thereof, was in the detriment of the petitioner.

Third, whether the presiding officers and militiamen stationed at the polling stations of Ngereyani, Eleng'ata Dapash and Kamwanga, did influence the electorate to vote for the candidate sponsored by CHADEMA political party.

Fourth, whether the first respondent did instigate chaos/altercation in the tallying room at Longido tallying center, when the exercise was in progress.

Fifth, if the answer in the fourth issue above is in the affirmative, whether as a result of the chaos/altercation, the Returning Officer, who happens to be the third respondent, did order the petitioner and his agents as well as the other candidates with their agents, to get out of the tallying room.

Sixth, whether some of the figures of the results of the polling stations appearing in forms 21B, when compared to the figures contained in the spreadsheet, which were later transferred in form 24 B are fictitious.

Seventh, whether the motor vehicles, which have been listed under paragraph 9 (ix) (b), (c), (e) and (f) of the petition,

which are alleged to belong to avid supporters of CHADEMA political party, were used by the third respondent to transport ballot boxes from the polling stations to the tallying center at Longido.

Eighth, whether the motor vehicles which have been listed under paragraph 9 (ix) (h), (i) and (j), which are said to be owned by avid supporters of CHADEMA political party, were used to perform the task of escorting ballot boxes from the polling stations to the tallying center at Longido.

Ninth, whether there were any Kenyan Nationals, who did vote at the polling stations of Namanga, Kimakouwa and Kamwanga in the Parliamentary general election of Tanzania, which was held in the year 2015.

Tenth, whether the anomalies and/or irregularities, which have been pointed out in the issues named above, if established, did affect the Parliamentary results for the constituency of Longido. And, the eleventh and last issue is to what reliefs each of the parties to this petition entitled.

The records of the proceedings in this petition will reveal that, even though the hearing of the petition did commence on the 29th day of February 2016, between the 04th March 2016 and the 18th May 2016, the hearing had to be halted for a while until late May 2016, when it resumed. The period in between, the proceedings of the case had to be forwarded to the Court of Appeal for clarification/guidance, regarding the taking of

evidence from the witnesses. This move was attributed by the discovery that, the procedure, which had been used in taking the evidence of the petitioner and part of the evidence of the second witness of the petitioner, had not complied with the requirement stipulated under the National Elections (Elections Petitions) (Amendment) Rules 2012, Government Notice Number 106 of 2012. The sought guidance on the way forward was given by the Court of Appeal vide the ruling that was delivered on the 12th May 2015 wherein, it was directed that, the anomaly which had been occasioned was not fatal. As a result therefore, it will be noted that, two procedures of taking evidence of witnesses, have been applied in these proceedings that is to say, first, by direct oral sworn/affirmed testimony in the witness box, followed by cross-examination to the witness, which has involved the petitioner and part of his second witness one Isaya Karakara Mollel. The second procedure, which is by use of sworn/affirmed affidavit of the witness, followed by cross-examination of the witness, has involved the rest of the witnesses for the petitioner and all witnesses for the respondents.

It is also worth being pointed out that, in the course of the trial, the learned Counsel for the petitioner, did drop the third issue and thereby, proceeding to establish the remaining other issues, relying on the testimonies of about twenty eight (28) witnesses, him-self inclusive and eight (8) exhibits, which did included, spreadsheet, form 24 B, form 16, one flash make PNY 166 B, three still pictures, 41 copies of form 21 B and a cell phone. On the part of the respondents, the first respondent has depended on his own testimony in defense, complemented by the

testimonies of nine (9) witnesses. He has tendered no evidence, even though in his answer to the second amended petition, he had intimated that, he would be relying on forms 21 B in his testimony. He has opted not to tender the documents on the reason that, the same documents would be tendered by the third respondent, and therefore, serving the purpose for both of them. The second and third respondents on the other hand, have relied on the testimonies of four witnesses, including the third respondent, who has testified as RW 13, and has relied on four (4) types of documentary exhibits that included, an advertisement for tender, twelve contracts, a list of hired motor vehicles and 175 original forms 21 B.

At the closure of the respondents' case, the learned Counsel for both sides, have filed final written submissions. I would wish at this juncture, first, to express my sincere appreciation to the co-operation, which has been proffered to me by all Counsel for both sides, in the course of the whole trial of this petition. Secondly, I am very grateful to their well researched written submissions, which to a great extent have assisted me and enriched this judgment, by the different authorities which have been cited therein. I comment them to keep it up.

In the course of appraising the evidence which has been placed before me from the witnesses of both sides, I consider prudent to state some principles of law, on which I will be treading, in the course of deliberating the petition at hand. First, it is the law as stipulated under the provision of section 108 (2) of the National Election Act, Cap 343 Revised Edition of 2015 that, a candidate elected by the people to be a Member of

Parliament, can be avoided on the grounds enumerated under the provision only. The said grounds bear the following wording, that is to say;

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

(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 results of the election, or

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

The decision in the case of **Manju Salumu Msambya Vs the Honorable Attorney General and Another Civil Appeal Number 02 of 2007 CAT (unreported)**, has amply clarified the application of the provision named above.

Secondly, in addition to the grounds which have been stipulated under the provision of section 108 of the National Election Act, there are other grounds that can justify nullification of an election petition as held in

the case of **The Honorable Attorney General and Others Vs Walid Amani Kabourou [1995] 2 LRC 757**, where it was held inter alia thus;

“There are other grounds other than those stated in section 108 of the National Election Act for the nullification of election results, which include anything which renders the election unfair as well as any law, which seeks to protect un-free and unfair election as such act would be unconstitutional.”

Third, an election petition also categorized as sui generis, is neither pure civil nor pure criminal and as such, its standard of proof though not high as it is in criminal, it is higher than it is, in ordinary civil suits. In that regard therefore, the duty of the petitioner to establish the claimed mismanagement and/or irregularities complained of in his petition, is beyond reasonable doubts. See: the holdings in the cases of ***Manju Salum Msambya (supra)*** as well as ***Nelson Symphorian Lutter Versus the Honorable Attorney General and Ibrahim Said Msabaha [2000] TLR 419***.

Fourth, the fact that, one of the respondents in an election petition is a person, who has already been declared by the Returning Officer to have the confidence of the electorate, a Court of law is normally very slow in interfering with such verdict, save where a clear case is made out. See: ***Phillip Anania Masasi Vs the Returning Officer Njombe North Constituency and Two Others Miscellaneous Civil Cause Number 07 of 1995 High Court Songea Registry (unreported)***. It was held further in the case of **Reddy Vs Sultan [1976] 3 S.C.R** that;

"---In 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 the respect and candor, and should not be disregarded or set at naught on vague and indefinite, frivolous or fanciful allegations or evidence, which is of shaky or casting character."

Fifth, it is a basic Constitutional right in terms of the provision of Article 21 (1) of the Constitution of the United Republic of Tanzania 1977 that, the only way in which every citizen in the Country is involved in the governance of his Country, is through his vote in the ballot box. Consonant with that, the vote of every single citizen has to be given the respect and value which it deserves. The holding of the Court of Appeal in the case of Manju Salum Msambya (supra), is very instructive on this point, when it stated thus;

"---the Courts therefore, have a duty to respect the peoples' conscience and not to interfere in their choice except in the most compelling circumstances."

Being guided by the above named principles, I will now proceed to deliberate the issues, which were formulated at the commencement of hearing this petition. Markedly, it will be noted that, of all the issues which were formulated at the commencement of hearing this petition, there are some, which have been fronted to the first respondent. These include the

first and fourth issues, while the second, fifth, seventh, eighth and ninth issues, are directed to the third respondent. The remaining tenth and eleventh issues are general, which fall onto the Court. In deliberating them, I will start with those concerning the first respondent, the first one being, whether in the campaign rallies held during the Parliamentary election campaign meetings for the Constituency of Longido in the year 2015, the first respondent by himself, or through his agents, did make statements calculated to obtain advantage over the petitioner on the basis of Kiswahili language and Maasai cultural and social attitudes on the dates, time and at places, which have been indicated in paragraph eight (8) of the petition.

The places where the alleged complained of utterances are claimed to have been made, have been named to be Uwanja wa mpira Namanga on the 20/08/15 at 1200 hours to 1800 hours. Uwanja wa mpira Longido on the 30/08/15 at 1200 hours to 1800 hours. Ofisi ya kijiji Magadini (Meirugoi Ward), on the 31/08/15 at 1600 hours to 1800 hours. Kijiji cha Wosiwosi on the 01/09/15 at 1600 hours to 1800 hours. Sokon (Eleng'ata Dapash), on the 03/09/15 at 1000 hours to 1600 hours. Olchoro Onyokie and Intaletta on the 04/09/15 at 1000 hours to 1600 hours and at 1400 hours to 1800 hours. Noondoto Madukani and Engusero on the 05/09/15 at 1000 hours to 1600 hours and at 1400 hours to 1800 hours. Ketumbeine Madukani, on the 06/09/15 at 1400 hours to 1600 hours. Matale A and Ilong'ng'wen on the 07/09/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours. Kijiji cha Kamwanga and Irkaswaa on the 13/09/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours.

Kijiji cha Lerangwa on the 14/09/15 at 1400 hours to 1800 hours. Kijiji cha Olmolog and Elerai on the 15/09/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours. Kijiji cha Tingatinga and Ngereyani on the 17/09/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours. Kijiji cha Eorendeke and Kimokouwa on the 20/09/15 at 1000 hours to 1400 hours and at 1400 hours to 1800 hours. Kitongoji cha Lodung'oro and Meirugoi on the 24/09/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours. Alailai and Gelai Lumbwa on the 25/09/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours. Kijiji cha Naadare on the 26/09/15 at 1000 hours to 1200 hours. Kamwanga on the 01/10/15 at 1000 hours to 1200 hours. Gelai Lumbwa Endirma and Meirugoi Madukani on the 14/10/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours. Engikareti and Kiserian on the 19/10/15 at 1000 hours to 1200 hours and at 1400 hours to 1800 hours. And Uwanja wa mpira Longido on the 24/10/15 at 1400 to 1800 hours.

The evidence which has been relied upon by the petitioner in establishing the utterances, which were made against him at the named places above, have come from Isaya Karakana Mollel, who has testified as PW 2, Joel Miage Lazaro (PW 3), John Kimiti Ndoipo (PW 4), Saruni Ole Kuku (PW 6), Maria Olenasha Laizer (PW 7), Noorborisho Morogo (PW 8), Winston Abie Mbise (PW 10), Chagucho Chacha (PW 11), Ndoros Kiro (PW 15), Kipulul Makesen (PW 16), Parsanga Lendapa Mollel (PW 17), Kisika Peria (PW 18), Isaya Kilusu Mollel (PW 20), Ashum Laalayok (PW 21), Elias Noah Panin (PW 22), Joseph Sidra Koreka (PW 23), Lemomo Sayalel

Laambala (PW 24), Matayo Lazaro Mellubo (PW 25) and Lengoye Lekishon Kiruswa (PW 26).

There has however been submission on behalf of the first respondent, which in my view is meritorious that, of the nineteen (19) complained of places, some have not been pleaded by the petitioner in his petition, while others have not been supported by any evidence. Indeed, it is the evidence of only four (4) witnesses that is to say, PW 4 (John Kimiti Ndoipo), PW 21 (Ashumu Laalayok), PW 22 (Elias Noah Panin) and PW 25 (Matayo Mellubo Matayo), which has been supportive to the petition. The evidence of the remaining fifteen (15) witnesses including that of PW2 (Isaya Karakana Mollel), who in addition to having heard the defamatory utterances against the petitioner, did take the trouble of recording such utterances in exhibit P 8, have referred to campaign rallies that have not been pleaded in the petition. While PW 2, PW 3, PW 6, PW 7, PW 8, PW 10, PW 11, PW 23, PW 24 and PW 26, have given evidence regarding campaign rallies, which have not been pleaded, PW 15, PW 16, PW 17, PW 18 and PW 20, bear no dates of the campaign meetings. This situation has posed a question as to what should be the way forward. In the view of Mr. David Kakwaya learned Principal State Attorney on behalf of the second and third respondents, and learned Counsel Mr. John Materu advocating for the first respondent, they have both urged the Court to do away with such evidence on the reason that, it is well settled principle in the law of pleadings that, parties are bound by their pleadings and therefore, they cannot be permitted to travel with their evidence beyond what has been pleaded in the pleadings.

On his part, the learned Counsel Doctor Masumbuko Lamwai on behalf of the petitioner has been of the opinion that, departure from what has been pleaded is not fatal. Reliance to such stance has been sought from the decision of the Court of Appeal (T) in the case of **The Honorable Attorney General Vs Reverend Christopher Mtikila Civii Appeal Number 02 of 2007 (unreported)**, wherein it was held that;

"In the TAMFA Oil Limited case, it was held and we accept that holding that, justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion miscarriage of justice."

With due respect to the learned Counsel for the petitioner, the technicalities envisaged under the above cited authority was not meant to extend to pleadings, which constitute the bases of the claim by the petitioner/plaintiff as against the respondent/defendant. To the contrary I am in full agreement with what has been submitted on behalf of the respondents that, the law on pleadings is settled as it has been amplified in a plethora of authorities. Just to mention but a few of them, it was held by the Court of Appeal in the case of **James Funkie Gwagilo Vs The Honorable Attorney General [2004] TLR 161** thus,

"The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that, his opponent will not be taken by surprise. --- In such situation, the justice of the case

demands that, the un-pleaded grounds souls be ignored and that is not subordinating justice to technicalities.”

On his part Samatta J (as he then was), in the case of **Phillip Anania Masasi Vs the Returning Officer Njombe North Constituency and Two Others (supra)**, citing Morgan’s Law of pleadings 14th Edition did state in part that,

“In an election petition, the petitioner cannot be allowed to travel beyond his pleadings and no amount of evidence can be looked into, upon a plea, which was not put forward.”

In yet another case of **National Insurance Corporation and Another Vs Sekulu Construction Company Limited [1986] TLR 15**, the Court of Appeal (T) speaking through his Lordship Mustaffa JA did hold that;

“Judgment and decree in a civil suit must be confined to pleadings as confined in the plaint, written statement of defense, a counter claim and the reply thereto.”

In the light of the above holdings, it was incumbent for the petitioner to clearly particularize the bases of his complaint to be litigated, so that his opponents (respondents) could prepare well their defense. Regard being to the fact that, the petition under discussion got amended about two times, there is no way in which, the excuse being raised by the learned Counsel for the petitioner can be accommodated by the Court. In line with such

time long developed principle of pleadings, the only evidence supportive to the contention by the petitioner under paragraph eight (8) of his petition that, there were uttered defamatory and/or demeaning words against him, is that which has come from the four named witnesses above. The testimony of the remaining fifteen (15) witnesses, which has concerned places which have not been specifically complained of by the petitioner in his petition, is hereby ignored and/or discarded.

With regard to the testimony of the four witnesses, the general import of their evidence has been that, it was averred by the first respondent himself or through those who were in his campaign team that, the petitioner was not a fit person to be elected as a representative of the electorate of Longido Constituency in the Parliament of the United Republic of Tanzania because, he was no longer conversant with the customs and traditions of the Maasai society after having been away to United States of America for a long time. To appreciate the statements, I will reproduce them as contained in the affidavits sworn by PW 4 (John Kimiti Ndopo) and PW 21 (Ashumu Laalayok) verbatim as hereunder;

"PW 4, Dokta Kiruswa ni Mmarekani hajui tena lugha yake ya asiii ya Kimasai wala Kiswahili lugha ya Taifa. Hivyo hafai kuwakilisha wana Longido bungeni."

"PW 21, --- mmesikia kuna kirusi kimeietwa na Lekuie kuja kugombea? Haoni shida zenu amekuja kutafuta nauii ya kurudi Marekani. Nimesikia passport yake ya kusafiria imeisha ndiyo maana anatafuta pesa ya

kukatia passport aondoke. Kama mnataka kumchagua mtu anayeenda kukata passport ya kusafiria basi mchagueni mpate shida ya miaka mitano.

--- Tunasikia tangu aanze kupiga kampeni amechubuka eti kwa sababu ya jua kali la Longido. Huyu Kiruswa kaoa mzungu, inamaananisha amekosa mke katika jamii ya Kimasai au anawadharau? Leo tunamshangaa anakuja kwa walewale Wamasai kuomba kura. Kama ameweza kukana uraia wa Tanzania atashindwaje kuwatelekeza watu wa Longido? Tunamwambia arudi Marekani akagombee huko ndiyo kwao.”

The above contentions, have however strenuously been resisted by the first respondent supported by the testimonies of RW 2 (Kiserian Mepukori, RW 3 (Naomi Ezekiel Mollel), RW 4 (Barnabas Petro Raphael), RW 5 (Alais Meing’arana), RW 6 (David Kelembu), RW 7 (Abel Kundael), RW 8 (Isack Joseph Copriano @ Kadogoo), and RW 9 (Jacob Silas Mollel). In the sworn/affirmed affidavits of these witnesses, which essentially have born almost similar averments, it has been contended that, in all CHADEMA political party campaign rallies, which were held in the constituency of Longido, there was no question of uttering any disparaging words against any candidate from other political parties the petitioner herein inclusive. This was in compliance with the warning, which they had been given in the seminars, which were organized and conducted by their political party prior to commencement of the campaign rallies. They have all argued, to have all the time of the campaign to have used decent and civilized language.

They have gone further to state, what was actually been preached to the electorate in addition to asking for votes. They mainly insisted on four major items that included, first, the reasons that moved the first respondent to defect from CCM political party, which he had served for many years to CHADEMA political party. Secondly, the urgent need of removing CCM from power because it had failed to ensure proper use of the natural resources of the country for the betterment of wananchi. Third, the confidence of UKAWA members in Mr. Edward Lowassa, the Presidential Candidate, who was expected to spearhead the fundamental changes in the country. And, lastly, the chronic problems of water, pastures, education and unemployment in the constituency of Longido.

My reading of the affidavits of the witnesses for both sides, as well as my observation to them, while they were responding to the questions that were put to them by the learned Counsel from either side, I have convincingly come to the conclusion that, the utterances were made in the alleged campaign meetings, aimed at dissuading people from voting for the petitioner, but not in the form in which they have been put, which in my view, they suggests to have been exaggerated. What could be grasped further the witnesses of both sides, is the fact that, the petitioner is well known almost throughout the constituency to be part of them in every aspect. Under the circumstance therefore, I would construe the alleged distasteful utterances made against him by the first respondent and his team, to have been mere ordinary political mudslinging sometimes lightly referred to by the politicians as "siasa za maji taka", which have no far reaching consequences. In my considered view, such utterances are not

among the stigmatization and/or discrimination envisaged by the wisdom of the Parliament in enacting the provision of section 108 (2) (a) of the Election Petition Act, Cap 343, Revised Edition of 2015 and the content of the Electoral Code of Conduct contained in Government Notice Number 294 of 2015, in which the stigmatization that is barred is in respect of race, religion, sex, deformity and allegations associated with criminality.

Since there has been evidence to the effect that, some of the utterances were made known to the petitioner and his party a short moment after their being uttered, the stance which was taken by the petitioner and his party, persuades me to understand and believe that, the construction which I have given to the complained of utterances above, was also the one initially given to them by the petitioner and his political party. If they were to interpret those utterances in the way they are doing now, undoubtedly the provision under the Electoral Code of Conduct (Maadili ya Uchaguzi wa Raisi, Wabunge na Madiwani), Government Notice Number 294 of 2015, would have been put into play by either the petitioner himself and/or through his political party. Paragraph 5.3 of the Electoral Code of Conduct stipulates in Kiswahili inter alia thus:

"Mgombea yeyote, Tume ya Uchaguzi, Serikali au Chama kilichosaini Maadili ya Uchaguzi na kuweka mgombea, kinachoamini kwamba Maadili ya Uchaguzi yamekiukwa, kitawasilisha malalamiko kwa Mwenyekiti wa kamati ya Maadili ya Uchaguzi katika ngazi inayohusika kwa maandishi."

It is common knowledge that Chama Cha Mapinduzi (CCM), which had sponsored the petitioner in the election at issue, was a signatory to the above named Electoral Code. Ordinarily, it would have been expected to find complaints being lodged to the committee as regards the utterances, if they were of the view that, had far reaching consequences in so far as the election was concerned. Even though it may be argued that, the failure by the petitioner and/or his political party to invoke the provision of the Electoral Code of Conduct, did not bar him from lodging petition as the one at hand, it has been held that, such failure to report the complaint, waters down the strength of the complaint in that, the lodging of the petition may be taken to have come as an afterthought. Upholding such stance, the Court of Appeal in the case of **Daniel Nsanzugwanko Vs the Honorable Attorney General and Zaituni Agripina Buyogera Civil Appeal Number 106 of 2012 CAT (unreported)**, the Court did state that;

"The appellant, who was a signatory to the Electoral Code of Conduct, was bound by the Code to report the complaints. We agree that, failure to refer the complaint to the Electoral Code of Conduct did not bar the appellant from filing the petition. However, we agree with the learned Judge that, his failure to refer his claims to the Electoral Code of Conduct watered down his case."

The totality of what has been discussed above, moves me to answer the first issue as formulated above in the negative that, the utterances

which were made by the first respondent by himself or through his agents in the campaign meetings of CHADEMA/UKAWA political party, even though on the face of them they may appear to be demeaning/disparaging, they did not fundamentally affect the election results.

The other issue, which has been directed to the first respondent is the fourth issue which reads, whether the first respondent did instigate chaos in the tallying room at the center of Longido. It has been the contention of the petitioner that, on the 27th October 2015 at about 0700 hours, while they were in the tallying room, after the tallying had been made twice and in both instances he emerging the winner by a margin of 1,377 votes, the first respondent did instigate chaos, which did frustrate the process. Clarifying on the type of chaos that was occasioned by the first respondent, the petitioner has told the Court that, after the first respondent had rejected the result in the first two instances, they had to go for the third time tallying. And while the third recount was in progress, the first respondent did move from where he was seated and went to the tallying table, where the officers of the election commission were seated with their computer, and started arguing with them that, he was not comfortable with the way they had been making their summation. In the course, the mouse did get unplugged from the computer and water from the bottle, which was being held by the first respondent in his hand, got spilt on some papers of the commission. Such incident did lead to some misunderstanding therein, a thing that did move the Returning Officer, to take action by ordering all the candidates and their teams to get out of the tallying room.

In support of the testimony of the petitioner, there has been the testimony of PW 2 (Isaya Karakara Mollel), PW 5 (Mohammed Kitia), PW 25 (Matayo Lazaro Melubo), PW 26 (Lengoye Lekishon Kiruswa) and PW 27 (Runda Kapande Panian). All the five witnesses claimed to have been inside the tallying room and therefore, did eyewitness what was done by the first respondent. Apart from PW 5 (Mohamed Kitia), who was inside the tallying room by virtue of his office that is, being the Police Officer Commanding the District of Longido (OCD), was inside the tallying room to observe peace and security, the other four witnesses, claimed to have been inside the tallying room in different capacities connected with the petitioner and his political party.

On the other hand, the first respondent has strongly resisted the contention by the petitioner and his witnesses. It has been his averment that, there was no any point in time, while he was inside the tallying room at Longido center, when he did instigate chaos or any other type of misunderstanding. He has asserted that, throughout the tallying process, he was seated calm inside the tallying room and that, the exercise of tallying the votes therein, did proceed on smoothly up to its conclusion. The first respondent has stated further in his affidavit that, initially the tallying of votes therein was being done by the use of the Result Management Information System (RMIS), which was however, complained of by the petitioner on the reason that, it was not reflecting the rejected votes. As a result, they did shift to the use of Excel spreadsheet. And, while the tallying of the votes was in progress, the petitioner and his team decided to make off without advancing any reasons. Such an act by the

petitioner and his team did however, not halt the process, which did continue to completion whereby, he was declared by the Returning Officer to be the winner after having garnered 20,076 votes as against 19,352 votes, which were polled by the petitioner, who emerged the second winner. His testimony has been seconded by RW 5 (Alais Meing'arana), RW 7 (Abel Kundaël), and RW 6 (David Kalemba), who have claimed to have also been inside the tallying room and therefore, did eyewitness what was transpiring.

I do recall to have cropped up an argument between the learned Counsel for the first respondent, and one of the witnesses for the petitioner, whether, what did arise in the tallying room was chaos or altercation. Without associating myself with such linguistic approach, as to what is meant by chaos and/or altercation, what is pertinent for me in so far as the issue at hand is concerned, is whether at any point in time, there did arise out any misunderstanding and/or squabble in the tallying room, which was commenced by the first respondent and thereby, affecting the process of tallying votes in the tallying room at Longido. The law requires every witness, who appears to testify in the witness box, to be given credence unless he has vividly exhibited not to deserve the credit, see: **Goodluck Kyando Vs Republic [2006] TLR 365**. Such fact notwithstanding, when it comes to partisan witnesses as is the case here, the evidence of such witnesses has to be treated with great care and circumspection.

Upon going through the affidavits sworn by the witnesses of both sides, as well as listening to the answers given by the witnesses in cross-

examination by either learned Counsel, it is my finding that, the evidence contained in the affidavit affirmed by PW 5 (Mohamed Kitia), has greatly tilted the balance in favor of the petitioner. This witness, who bore no allegiance to either political party, he was inside the tallying room for the sake of preserving peace and security. In his affidavit, he has categorically stated that, there did erupt chaos inside the tallying room, which was instigated by the first respondent. According to his testimony, this happened after the first respondent had moved from where he was seated to the table that was being used by the Officers of the Election Commission and started to argue with them. He has informed the Court further that, in the course of the argument, water from the bottle that was in his hand did get spilt on some papers belonging to the Election Commission. When the witness was asked in cross-examination by the learned Counsel for the first respondent as to why he did not order for arrest of the one, who instigated the chaos, if he was inside the tallying room to preserve peace and order, his answer has been that, he did not do it because there was blessing of the Returning Officer, who was the one in command of all that were transpiring therein.

The evidence of PW 5 has further found support from exhibit P 5 (c) still picture, in which the first respondent has conceded in cross-examination that, he is the one appearing to stand near the computer, which was being used by the Election Commission in the process of tallying the election votes. Even though I am reluctant to buy the idea that has been advanced by the learned Counsel for the petitioner that, the first respondent was the one, who did unplug the mouse from the computer as

observed in exhibit P 5 (c), it only suffices to hold that, it has satisfactorily been established that, the first respondent had indeed moved from where he was seated, to the table that was being used by the Officers of the Election Commission an act, which had no justification and thereby triggering scuffle. To that end, I would answer the fourth issue in the affirmative that, the first respondent did instigate chaos in the tallying room. The answer to this issue puts to rest the issues that were directed to the first respondent and thereby, paving way for issues that have been directed to the third respondent. I will start with the second issue.

It has been complained by the petitioner in the second issue that, a good number of eligible electorates, in the polling stations of Orpukel, Engosokwan, Lesooito, Naadare, King'una and Sokon did not vote on the election date, because the polling stations were opened late by the election presiding Officers. The basis of this complaint is founded on the fact which has not been resisted from the other side of the coin that, during the month of October, a greater part of Longido constituency is ordinarily dry. Regard being to the fact that, most of the inhabitants in the constituency are pastoralist, at such period of time, the task of taking the herd of cattle in the bush to graze, which during the other periods of the year is normally done by children, has to be done by adults, because they have to take the herd of cattle far away from their homes. That being the case, on the election date, which was on the 25th October 2015, many electorate did go to the polling stations early in the morning, with a view of voting early in morning, so that they could go and take their herd of cattle to graze in the bush on time. Nonetheless, contrary to such anticipation, the election

presiding Officers, did not arrive to open the polling stations early as it was expected and thereby, causing many electorate to leave the polling stations before they could exercise their right of voting, so as to go and take their herd of cattle to graze in the bush. In the view of the petitioner, such delay was deliberately occasioned by the Returning Officer and his team, so as to deny the petitioner the votes of those electorate, whom he believes, would have voted for him, because the said delay was made to the polling stations located at the area, which he was considering to be his strong base and/or castle.

Evidence in support of the contention of the petitioner has come from the testimony of Simon Mshao Mollel, who testified as (PW 12), Peter Laizer (PW 13) and Marai Oitsei Laizer (PW 14). According to the testimony of Simon Mshao Mollel and Peter Laizer, the polling stations, which they did eyewitness eligible electorate leaving before the polling station got opened so as to permit them to vote was Orpurkel Engoswan. On his part, Marari Oitesoil Laizer did eyewitnesses electorate leaving before the opening of the polling station of Lesooito Engoswan. He claimed to have tried to urge some of them to go on waiting for the presiding officers to no avail.

The story from the third respondent's side has been that, the complaint of the petitioner is unfounded and with no any basis. In the understanding and belief of the Returning Officer (RW 13), there were no any polling stations, which were opened late on the election date that is, the 25th day of October 2015 as averred by the petitioner. The voting materials for all the polling stations were distributed on time a day before the voting date, so as to enable the presiding Officers, to be at their

stations to open the polling stations within the time that had been prescribed by the National Election Commission. He has argued further that, it was from fact that, he never happened to receive any complaints from his Assistant Returning Officers (AROs), who were assisting him to supervise in each Ward and/or from any other person or political party.

The polling stations, which have been complained of by the petitioner for having been opened late on the election date as contained in paragraph 9 (i) of the petition are Orpurkel, Engosokwan, Lesooito, Naadare, King'una and Sokon. However, my perusal of the pleadings, has failed me to find the three named polling stations. And even in his testimony, Felix Kimaryo (RW 13), did inform the Court that, such polling stations did not exist in is constituency. Regarding to the remaining polling stations, which are in existence in the constituency, there has been no evidence to corroborate the contention by the petitioner that, indeed those polling stations were opened late. And as regards the evidence that has come from the three witnesses of the petitioner, their testimony has concerned polling stations, which have not been pleaded by the petitioner in his petition. In line with what was held in the case of **James Funke Gwagilo Vs the Honorable Attorney General (supra)**, the evidence of the three witnesses of the petitioner, has to be discarded. The ultimate thereof, is to answer the second issue in the negative that, there was no polling station among those complained of by the petitioner wherein, eligible electorate did not vote on the reason that, the polling stations were opened late by the presiding Officers.

The fifth issue, which to some extent is connected to the fourth issue above, is whether as a result of the chaos in the tallying room, which was instigated by the first respondent, the Returning Officer did order all the candidates together with their teams/agents to get out of the tallying room. It has been deposed by the petitioner that, while they were in the tallying room on the 27th October 2015, at about 0700 hours, after the tallying of votes had been made to its conclusion twice, and in both instances the petitioner emerging the winner by a margin of 1377 votes, and that, while they were in the third recount, the first respondent did move from where he was seated, to the table that was being used by the Officers of the Election Commission, and started to argue with them complaining that, he was not comfortable with the way they had been making the summation of the results. Since such an act by the first respondent did cause disorderly in the tallying room, the Returning Officer did require all the candidates and their agents to get out of the tallying room, an order that was complied with by all candidates together with their agents. The averment by the petitioner has been supported by the testimonies of PW 2, PW 26, PW 27 and PW 5, all of which were also inside the tallying room.

The petitioner has told the Court further that, after having been outside the tallying room, he decided to go to his home which is not far away from where the tallying was being made, accompanied by PW 27 and some of his followers, to await being called back in the tallying room by the Returning Officer to continue with the exercise. On their part PW 2 and PW 26, did inform the Court that after being outside the tallying room, they did

remain outside the fence of the Council, where the tallying room is situated. According to PW 2 and PW 26, after some time, they saw the first respondent, who also had been outside the tallying room with his team, returning inside the tallying room. And a short moment later, they did witness followers of the first respondent celebrating that, their candidate had been declared by the Returning Officer to be the winner.

The further narration of the petitioner has been to the effect that, after having remained at his home for some time without hearing anything, together with his team, did decide to return to the tallying room only to find the supporters of the first respondent celebrating, after their candidate had been declared to be the winner. And when he went to inquire from the Returning Officer as to what had happened, he was told that, the first respondent had won the race, and he was therefore required to sign the result form (form 24 B), a thing which he did strongly resist. As a result, he did ask for a complaint (form 16) from the Returning Officer wherein, he did lodge his complaint. He has tendered the complaint as exhibit P 3. The complaint of the petitioner in form 24 B reads as hereunder that is,

"Mimi pamoja na mawakaia wangu tulifanyiwa fujo katikati ya zoezi la kuhakiki kura na hivyo zoezi la kuhakiki kura kusimama na kutolewa nje ya chumba cha kuhesabia kura. Mara baada ya kutoka, Msimamizi alitangaza matokeo na mgombea wa CHADEMA akatangazwa kuwa mshindi."

The complaint was received by one Charles Selekwa, whom according to the stamp was the Returning Officer on the 27th October 2015. The advice which he did give to the petitioner (complainant) was that, he had to look for legal assistance.

The contention by the petitioner that there was a point in time, when they were ordered to get out of the tallying room has strenuously been resisted by the third respondent and his witnesses, plus the first respondent and his witnesses, who have all consistently averred that, there was no any point in time during the process of tallying votes, when the third respondent did require the candidates and their agents to get out of the tallying room, from when the exercise started, to when the winner was declared. The position in the instant matter is almost similar to what has been held in the fourth issue above that, each witness has tried to give evidence that would save his side if not skin. The evidence of the neutral witness that is to say, Mohamed Kitita (PW 5), had to be called in to resolve the tag of war between the two contesting sides. In his affidavit, the witness has categorically deponed that, following the chaos that was instigated by the first respondent in the tallying room, the Returning Officer did request all candidates together with their agents, to vacate the tallying room. I have no founded basis to change the stand, which I did earlier express regarding this witness and therefore, answer the fifth issue in the affirmative that, the Returning Officer, did order the candidates and their agents to get out of the tallying room subsequent to the chaos that was instigated by the first respondent. And following such exit, there has been no evidence to the effect that, they were formally required to return into

the tallying room for continuation of the tallying exercise until when the declaration of the winner was made.

The next move in so far as the issues pertaining to the third respondent are concerned, ought to be to the sixth issue. I will however, skip this issue for a while, and revert to it later. In the meantime, I will proceed with the seventh issue, which does concern some motor vehicles, alleged to be owned by avid supporters of CHADEMA, which were used by the Returning Officer (third respondent), to transport ballot boxes from the polling stations to the tallying center at Longido. It has been the assertion of the petitioner and his witnesses that, motor vehicles belonging to avid supporters of CHADEMA political party were used by the Election Commission, to transport ballot boxes from the polling stations to the tallying center at Longido. Regard being to the distances, which those motor vehicles had to travel from the polling stations to the tallying center, the feeling of the petitioner is that, there was great possibility for the members of CHADEMA political party, to temper with the ballots in between. In paragraph 9 (ix) of the petition, the petitioner has listed about ten motor vehicles (a –j), which were used by the Election Commission to perform such task. To fortify the contention by the petitioner, there has been the testimony of Peter Nalang’u, who has testified as PW 9, and Lengoye Lekishon Kiruswa, who has given his testimony as PW 26.

On his part, the third respondent has strongly resisted such contention from the petitioner and his witnesses arguing that, the motor vehicles which were used to transport the election ballot boxes and other voting materials, had been secured through tender, following the approval

by the National Election Commission so to do and that, in awarding the tender, they never considered any question of party affiliation by the owners of the motor vehicles to be hired. In support of such averment, the third respondent has tendered as exhibit R 1, the advertisement which was issued by the Election Commission, to invite people who had motor vehicle for hire. In the same, nothing was hinted above political party inclination to the owners. The third respondent has as well tendered as exhibit R 2 collectively, the list of motor vehicles, which were hired and used to convey the voting materials to and from the polling stations to the headquarters of the Constituency, where the tallying of all votes, was conducted.

According to the evidence from the petitioner's witnesses starting with Peter Nalang'u (PW 9), he did tell the Court to have witnessed a motor vehicle with Registration Number T 608 BBJ make Mitsubishi Fuso transporting ballot boxes from Engarenaibor Division to the tallying center at Longido, and T 730 BED make Mitsubishi Fuso, transporting ballot boxes from Ketumbeine Division to Longido tallying center. On his part, Lengoye Lekishoni Kiruswa (PW 26), claimed to have witnessed a motor vehicle with Registration Number T 730 BED make Mitsubishi Fuso, transporting ballot boxes from Engarenaibor Division to Longido, while T 238 ASL make Toyota Land Cruiser, was seen transporting ballot boxes from Enduimet Division to Longido.

Two questions do arise from the contention of the two sides above that is, first, whether there were indeed motor vehicles owned by avid supporters of CHADEMA political party, which were used by the Election Commission to transport ballot boxes. And, second, if the answer to the

first question is in the affirmative, then whether such act had any serious impact to the election result. Starting with the first question, among the motor vehicles, which have been listed by the petitioner in his petition, there are three motor vehicles that have been conceded by the third respondent to have been involved in the task as evidenced in the list that has been tendered as exhibit R 2. These are those with Registration Numbers T608 BBJ make Mitusubishi Fuso, T 730 BEP make Mitusubishi Fuso and T 747 AZT make Mitusubishi Fuso. The subsequent question however that does arise is whether the owners of these motor vehicles were indeed avid supporters of CHADEMA political party. There has been no cogent evidence from the petitioner and his witnesses, to establish that, the owners of those motor vehicles were indeed avid supporters of CHADEMA political party. The foregoing position notwithstanding, even if it could have been established that, the owners of those motor vehicles were really avid supporters of any political party, it has been testified by RW 13 that, the question of political inclination to any political by the owners was never put as a disqualification to the terms of the tender invited.

The second question, which has been posed above, has been as to whether the act of hiring a motor vehicle belonging to a member of a political party, had any fatality to the result of the election. Apart from the convincing statements that did come from RW 11 Sinyoki Melita and RW 12 Tito Mndeme, who were among the Assistant Returning Officers (AROs), who had the duty of escorting the ballot boxes from the polling stations to the tallying center that, there was no possibility for tempering with the ballot boxes on the way, there is yet another obvious fact to the effect

that, the doubted ballot boxes by the petitioner, contained ballots, which had already been counted at the polling stations, filled in forms 21 B, signed by the agents of the candidates his agents inclusive, and the results posted at the notice boards of each polling station. Under the circumstance in my view, the complaint by the petitioner could have merit, if he had lodged a complaint to the Returning Officer regarding forms 21 B having been tampered with. As there was none, the seventh issue is answered in the negative that, there were no motor vehicles owned by avid supporters of CHADEMA political party, which were used to convey ballot boxes from the polling stations to the tallying center at the detriment of the petitioner.

The eighth issue, which is a bit related to the foregoing issue above, is whether there were any motor vehicles of avid supporters of CHADEMA political party, which were used to escort ballot boxes from the polling stations to the tallying center. Even though in his petition, the petitioner has given a list of such motor vehicles, there has been no evidence from even a single witness to corroborate the contention. The implication therefore is that, the complaint has been lodged without founded bases. Without any ado, this issue (eighth) is answered in the negative.

Whether Kenyan Nationals did vote at the polling stations of Namanga, Kimakouwa and Kamwanga is what constitutes the ninth issue. This averment by the petitioner has been contained in paragraph 9 (x) of the petition. On his part the third respondent has averred that, all the persons who voted were lawfully registered voters and none of the candidates' agents at all the polling stations, ever lodged a complaint against unlawful voters on the polling day. Besides, the voter's register was

displayed at all the polling stations seven days before, the election date. Under such situation, if there could have been any unlawfully registered voters, they would have been pointed out.

To establish that, there were Kenyan Nationals, who did vote on the election date, the petitioner has relied on the testimonies of John Kimiti Ndoipo (PW 4), who claimed to have witnessed a Kenyan National voting at the polling station of Pump house. Noorborisho Morogo (PW 8) told the Court that, he did witness Kenyan Nationals voting at Eorendeke Shuleni. And on his part, Lomayani Lokero Mollel (PW 19) has claimed to have witnessed Kenyan Nationals voting at the polling station of Kamwanga Ward, and has moved further by giving the names of about five Kenyans, whom he has claimed to know them thoroughly because they know each other.

In defense to the contention by the petitioner and his witnesses, the third respondent has relied on the testimonies of Sinyoki Melita, who has told the Court to be the Acting Ward Executive Officer for the Ward of Kamwanga. In the process of the election, which was held in October 2015, he was assigned the task of being the Assistant Returning Officer (ARO), supervising all the electoral process in his Ward. Even though he was not directly involved with the task of registering the voters in the registration voter's register, he had been visiting the registration of voters in the stations situated within his Ward, with a view of checking the progress of the activity as well as receiving complaints if any. For the whole of the registration period, he has stated to have never received any complaint relating to the whole registration process.

With regard to the polling date, the witness has told the Court that, he was the overall supervisor in the Ward. Upon having voted at the polling station of Emuruto at about 1100 hours, he did thereafter visit some of the polling stations within the Ward, where he never happened to encounter any problem. And after all the polling stations had accomplished the task of counting the votes, filling in forms 21 B, which were signed by the agents of the candidates and sealing them, the ballot boxes were handed over to him by the presiding officers, and tasked to escort them to the tallying center at Longido, a distance of about hundred (100) kilometers. All the ballot boxes were loaded into one lorry, which had been sent by the District Council of Longido, in which the presiding Officers of all polling stations, policemen and militiamen plus the political party agents, did also board. On his part, he did use a small motor vehicle, which had also been sent by the District Council of Longido that was driven behind the lorry, to ensure that, there was no tempering with the ballot boxes.

Similar version to what has been testified by the foregoing witness above (RW 11), has come from Tito Mndeme (RW 12), who claimed to be a teacher by profession. With regard to the general election, which was held in the year 2015, he was assigned the task of being an Assistant Returning Officer (ARO), supervising the Ward of Kimokouwa and that, he did perform similar tasks to the ones, which were performed by the foregoing witness above.

What stands for the Court to resolve in the light of the foregoing contesting versions, is whether there were indeed Kenyan Nationals, who did vote in the Parliamentary Election for the constituency of Longido in the

polling stations that have been complained of by the petitioner. Nonetheless, before embarking on such task, it has come to my enlightenment that, all the polling stations alleged by the witnesses of the petitioner to have been Kenyan Nationals, who did vote, none of them has been pleaded by the petitioner in his petition. This is yet another situation, where the evidence tendered by the petitioner's witnesses, is not supportive of any pleaded fact. In the same vein, as it has been held above in situations as the one at hand, the evidence by these witnesses is hereby discarded and thereby, leaving the complained of stations, without any evidence to support. I would therefore, answer the ninth issue in the negative that, there were no Kenyan Nationals, who did vote at the polling stations, which have been named by the petitioner in his petition.

I now revert to the sixth issue, which I had skipped. The basis of the complaint by the petitioner in this issue is founded on the posting of the results from forms 21B as contained in exhibits P6 collectively and exhibit P7 collectively into the spreadsheet (P 1). Essentially, the petitioner has no dispute with the summations that were made to the votes in all the polling stations within the constituency and filled in forms 21 B. This fact is authenticated by the fact that, all his agents did duly sign the forms at the polling stations. Besides, there has been lodged no complaint neither to the Presiding Officers and the Assistant Returning Officers (AROs), not to the Returning Officer. It has however been the averment of the petitioner that, the correct figures of results as they appear in forms 21 B that have been tendered as exhibits P6 collectively and P7 collectively here in Court, were deliberately inaccurately posted in the spreadsheet and thereby, giving

inaccurate results, that were ultimately filled in form 24 B, and consequently thereof, the first respondent being declared the winner, while legally he was not.

The assertion by the petitioner has in principle, not been resisted by the third respondent save the averment that, the irregularity was deliberately occasioned. The third respondent has conceded that, indeed there were some results, which, while being transferred from forms 21 B, into the spreadsheet, which was the working tool for purposes of being added, and ultimately filled in form 24 B, were inaccurately made. He has however, hurriedly submitted that, such inaccuracy did not transgress the final result and thereby, maintaining that, the first respondent was legally declared to be the winner and formally proclaimed the Member of Parliament for Longido constituency. From the foregoing averment by the third respondent, it is evident that, the part of the issue is easily answered in the affirmative that, there were fictitious and/or inaccurate figures which were posted into the spreadsheet from forms 21 B and ultimately transferred in Form 24 B, which contained the final result of the election. What is being disputed is the extent of the irregularity occasioned.

According to the third respondent through RW 10 (Loth Zakaria), who was the IT expert, who had been transferring the results from forms 21 B into the spreadsheet, the grand figure of the inaccurately posted results is about 523 votes, while according to the petitioner through PW 27 (Runda Kapande Panian), who was the statistician of the petitioner, the figure is about 742 votes. Both the two are however in agreement on the inaccuracy appearing in form 24 B, which is 149 votes.

Learned Principal State Attorney Mr. David Kakwaya on behalf of the second and third respondents, has in his final submission, in the first place discouraged, the strong reliance by the petitioner on the spreadsheet, which is not among the statutory document concerned with elections, but just a mere tool or program designed to enable the aggregation of election results. In so asserting, sanctuary has been sought from the decision of this Court in the case of **David Zakaria Kafulira Vs Hasna Sudi Mwilima and Two Others Miscellaneous Civil Cause Number 02 of 2015 High Court Tabora Registry (unreported)**. I am squarely in agreement with the learned Principal State on the fact that, a spreadsheet is not among the recognized statutory documents for election purposes. Nonetheless, it has been conceded here in Court by both Felix Kimaryo (RW 13) Loth Zakaria (RW 10) that, excel spreadsheet was the program used in deriving the results, which were posted in form 24 B (statutory document), and thereby enabling the winner to be declared. As such, our interest is to know how the program was applied in bringing about the result that was declared, which is being disputed. In the circumstance, the use of the spreadsheet in resolving the issue at hand is inevitable.

There has as well been an argument advanced by the learned Principal State Attorney that, the petitioner did have ample time to raise his queries pertaining to the summation of the votes, while in the tallying room, but failed to do so. In my view, I find no justification to place such blames to the petitioner, because it has already been held in the fourth and fifth issues above that, there was chaos in the tallying room, which did lead to the candidates and their agents being asked to get out of the tallying

room, and thereafter, the declaration of the results being declared in his absence. Under the circumstance, it would be argued that, there was no chance for the petitioner to avail to himself such opportunity of questioning the results.

The polling stations, which have been involved in the complained of irregularities, are those contained in Exhibits P6 collectively and P7 collectively that is, Larkaria s/n 52788, Sinoiki Shuleni Number 2 s/n 52797, Naripia 2 s/n 52774, Eng'ongu I s/n 52755, Oldonyolaandare s/n 52615, Lumbwa Mlimani s/n 52599, Maliki 2 s/n 72660, Kimokorwa Shuleni I s/n 52613, Irkaswa Kijiweni Ofisi ya Kijiji I s/n 52636, Longido Orobomba I s/n 52705, Tingatinga Madukani s/n 52677, Olmolog Shuleni I s/n 52670, Mtaa wa Saba I s/n 52752, Mtaa wa Saba 4 s/n 52753, IIng'ongwen I s/n 52590, IIng'ong'wen 2 s/n 52590, Kilimanyuki I s/n 52652, Matale Shuleni s/n 52592, Lesing'ita Shuleni s/n 52619, Mndarare Shuleni I s/n 52572, Karatun Kijijini 2 s/n 52573, Orpukel Losooito s/n 52626, Engutoto s/n 52574, Endirma s/n 52641, Olokii s/n 52673, Euwasii Namanga Nursery I s/n 52586, Mizigilo s/n 52635, Longido Madukani 3 s/n 52630, Longido Shuleni TRC 2 s/n 52628, Oldonyo Shuleni s/n 52676, Engarusi s/n 52664, Injalai Eng'oswa s/ 52620, Mshaloni 5 s/n 52692, Lerang'wa Madukani Ofisi ya Kijiji 2 s/n 52696, Ofisi ya Kijiji Namanga 3 s/n 52747, Namanga Makao Mapya I s/n 52755, Enabia s/n 52700, Ngeseyayi Orooki s/n 52742, Lerang'wa Kitendeni s/n 52640, Lesooito I s/n 52609, Melumbwa Shuleni I s/n 52771 and Irkaswa Kijiweni Ofisi ya Kijiji 2 s/n 52650.

I have had the chance to make some comparisons between the figures contained in forms 21 B of the complained of polling stations, and

the figures, which were posted in the spreadsheet of which the aggregation was posted in form 24 B. In so doing, I was able to note the reasons for the difference between the figure given by RW 10 (Loth Zakaria) that is about 523 votes, and that given by PW 27 (Runda Kapande Panian), which is about 742 votes. In his computation Runda Kapande did use the results contained in exhibits P 6 and P 7 collectively, which are copies of forms 21 B, which were tendered in terms of the provision of section 67 (1) (a) (i) of the Law of Evidence Act, Cap 06 of the Laws Revised Edition of 2002, on the reason that, the originals were in possession of his adversary the third respondent, who was reluctant to avail him with the same. On his part, Loth Zakaria did make his computation using the original forms of 21 B.

Among the reasons that have made the two to come from different figures, has been from the fact that, some of original forms 21 B have been edited. Among those edited include, the polling station of Sinoniki Shulen 2, with serial number 52797, where in exhibit P 6 collectively, the rejected votes has been indicated to be nil, while in exhibit R 4 collectively rejected votes have been indicated to be 19. The same scenario has been noted in the polling stations of IIng'ong'wen 2 with serial number 52590 - 12 votes and Olmolog Shuleni 1 with serial number 52670 – 29 votes. What has developed my interest here has not been the actual irregularity occasioned, but the act of the original forms being edited after completion of the process.

According to the affidavit of RW 10, it has been deposed by the witness that, during the tallying exercise in the tallying room, it was

discovered that, the original form 21 B for the polling station of Kwenia 1 with serial number 52596, which has been indicated in item number four (4) of AGC 2, which forms part of his affidavit, was nowhere to be traced. In the circumstance, another form 21 B had to be filled using a copy, which was in possession of one of the agents. The newly filled form did constitute part of the original forms 21 B that were tendered by Felix Kimaryo (RW 13) as exhibit R 4 collectively. In the same however, it has been indicated that, it was signed by the Presiding Officer one Lekule Ezekiel at about 1905 hours on the 25th October 2015, which was the election date. When Felix Kimaryo was asked by the learned Counsel for the petitioner in cross-examination as to how did that happen, he appeared to be puzzled, implying that, he was either caught pants down or the filling of the form and making it be signed with back dated date was done in his obliviousness. Whatever might have been the case, the necessary implication is that, the said form 21 B does not bear genuine entries.

In the course of going through exhibit R 4 collectively to compare exhibit P 6 and P 7 collectively, I have happened to come across with some forms 21 B, which do not tally with the testimony by Felix Kimaryo (RW 13) in Court. Even though he has told the Court that, exhibit R 4, which he has tendered in Court is composed of original copies of forms 21 B, the situation has been found to be different for the polling station of Elang'ata Engopito with serial number 52773, which is a photocopy with original entries, that suggest to have been scribbled over the photocopy entries, which had been on it before. The question that needs an answer from the third respondent is how did such a thing occur?

But the drama seems not to have ended there. While Felix Kimaryo did inform the Court that, exhibit R 4 was a total number of about 175 original forms 21 B, the situation is different for the polling stations of Irimanya with serial number 53029 and Lumbwa Madukani with serial number 53030, as the serial numbers can reveal, they are not forms 21 B as averred by Felix Kimaryo (RW 13), because they are forms 21 C, which are meant for filling results of Members of Ward Councilors. What has been done in these forms is to cancel 21 c and instead thereof written 21 B as well as the words "Matokeo ya kura ya Madiwani katika kituo cha Kupigia Kura" to read "Matokeo ya Kura ya Wabunge Katika Kituo cha Kupigia Kura". The question which does arise here is, when was the change of the forms made and by whom? It could be argued that, perhaps there were fewer forms for Members of Parliament, which did necessitate the application of forms used for Councilors. However, the fact that, form 21 B for the polling station of Kwenia 1, which was filled during the tallying exercise according to RW 10, was made of form 21 B, the implication is that, there were still some surplus forms of 21 B. In any event, the duty to explain to the Court regarding the irregularities, which have been indicated above, lay to the Returning Officer (RW 13).

The Court of Appeal (T) in the case of **Samwel Silanga Vs Republic [1993] TLR 149**, speaking through his Lordship Kisanga JA, did hold that, even though the duty to establish the guilty of the accused lies to the prosecution and that, the standard is beyond reasonable doubt;

"Once it was shown that, the appellant's palm was stained with blood at a time when murder involving stab wounds had

just been committed in the neighborhood, and no doubt suspicion was mounting high all over the place, one would expect the appellant to explain how he got his palm stained with blood, certainly, it was his best interest to do so.”

In the same vein, it is common knowledge that, the petitioner in this matter has the obligation to establish the irregularities complained in his petition beyond reasonable doubt. Nonetheless, the fact that, the documents which the third respondent has tendered in Court some of them are irregular in that, they differ with the others, implying that they have just been slotted therein for a certain purpose, the third respondent bore the responsibility to explain to the Court as to how such irregularities got occasioned. The absence of such explanation as it has been the case here, entitles the Court to draw an adverse inference against the one who has tendered them.

With regard to the number of the votes, which have not been accounted for when the figures in forms 21 B are compared with the spreadsheet according to my computation is about 730 votes. From this figure, the number of votes of which the petitioner has been deprived is about 397. It has been argued by Mr. David Kakwaya, learned Principal State Attorney in his final submission that, even if the votes which the petitioner has complained to have been deprived, are added to what he did poll, still, the first respondent will remain to be the winner by a big margin. Indeed, when the number of votes, which the petitioner was deprived of, is added to what has been indicated in the spreadsheet and for that matter in form 24 B, the number of votes garnered by the petitioner still remains to

be below the one garnered by the first respondent by a margin of 397. The question as to whether such irregularity did affect the final result of the election is the subject of the subsequent issue that is, the tenth issue.

The wording of the tenth issue is, whether the anomalies and/or irregularities, which have been pointed out in the other issues above, if established, did affect the Parliamentary results for the Constituency of Longido at the detriment of the petitioner. In the view of the learned Principal State Attorney, the irregularity occasioned by the third respondent in posting the results from forms 21 B into the spreadsheet, which was the working program as conceded above by the third respondent, was not fatal. He has craved the Court to follow the principle, which was laid down in the case of **Mbowe Vs Eliufoo [1967] EA 240**, where it was stated that;

"---the result may be said to be affected if after making adjustments for the effect of proved irregularities, the contest seems much closer than it appeared to be, when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that, the result of the election would be affected by any particular non-compliance of the rules---."

Indeed as it has been depicted above, after making the adjustment of the votes, which have been established to have been improperly posted and thereby, depriving the petitioner his legal votes which he had polled,

his margin with the first respondent, who was declared to be the winner according to my findings, is about 397 votes or so. Had the irregularity being complained of by the petitioner been solely founded on the posting of the votes into the spreadsheet from forms 21 B, the petition at hand could have peacefully been laid to rest. Nonetheless, in the petition at hand that is not the case because the current irregularity has been complemented by other irregularities as it has been illustrated above, of which can be summarized as herein below, that is;

First, that, there was chaos in the tallying room, which did move the Returning Officer to require the Candidates and their gents to get out of the tallying room.

Secondly, that, the tallying exercise of the votes in the tallying room, was made in the absence of the petitioner and agents for no apparent reasons.

Third, that, the declaration of the first respondent to be the winner for the Parliamentary election for the constituency of Longido was made by the Returning Officer in the absence of the petitioner after he had been requested to get out of the tallying room.

Fourth, that, there were irregularities occasioned in the course of posting the result from forms 21 B into the spreadsheet, which was used as the working program and ultimately in form 24 B.

Fifth, that, the whereabouts of original forms 21 B, for the polling stations of Kwenia, Elang'ata Engopito, Irimanya and Lumbwa Madukani, was not made known and instead thereof, there were slotted in other forms in the process of tallying the votes.

The question that does crop from the above listed anomalies is whether they were fatal, and thereby, vitiating the election result. In a Kenyan election petition of **Rashid Hamid Ahmed Amana Vs I. E. B. C and Two Others EP No. 06 of 2013 at Malindi**, the learned trial Judge had an occasion of giving the position to be taken in the course of deliberating irregularities alleged to have been occasioned in an election, when he held that;

"--- a petitioner not only needs to establish irregularities and their effect on the outcome of the election, but also required to establish that, such irregularities were as a result of outright negligence or deliberate action on the guilty party. The Court will generally look at the gravity of the errors, motives and effects on the results---"

Relying on the above holding, the learned Principal State Attorney has submitted that, the irregularities which got occasioned by the third respondent in the instant matter were a result of ordinary human error that was called by fatigue after having worked for a long time under pressure. The fact that, there has been no evidence to establish that there was any ulterior motive he has invited the Court to disregard the irregularities, and

confirm the verdict of the Returning Officer by declaring the first respondent to have been fairly and justly elected to be the Member of Parliament for the constituency of Longido.

I am in agreement with what has been submitted by the learned Principal State Attorney, in so far as the arithmetical irregularities are concerned. When it comes to the question of chaos, conclusion of tallying votes and declaring the winner in the absence of a candidate for no justifiable reason, as well as slotting improper forms in the tallying process cannot be said to have been occasioned by human error. To the contrary, I consider the act of slotting in improper forms 21 B in the tallying process to have been aimed at cheating the result and thereby diverting the choices of the electorate.

While mindful of one of the principles which has prefaced this judgment that, Courts have to sparingly interfere with the verdict of the Returning Officer save in the most compelling circumstance, it is my considered opinion that, the circumstance of the tallying room in the matter at hand was clearly not friendly so as to give results, which did indeed reflect the wishes and real conscience of the electorate of Longido constituency. I would therefore wish to conclude my deliberation on the irregularities occasioned in the matter at hand by citing a quotation in the decision of the case of **Prince Bagenda Vs Wilson Masilingi and Another [1997] TLR 220**, when he held that;

"I end by saying that, the irregularities and malpractices I have pointed out in this judgment went to the root of the

election, making the whole process meaningless and thus making the election not free and fair---."

To that end, I answer the tenth issue in the affirmative that, the irregularities, which were occasioned in the election at issue at the tallying room to be precise, did fundamentally affect the result of the election. As a result, I hereby nullify the election, which was held in October 2015 for the constituency of Longido and direct that, a by-election be conducted, to enable the electorate to freely and fairly exercise their right of electing a representative of their choice.

The gist of the eleventh issue is about reliefs, of which each party to this petition is entitled. It is my holding that, the petitioner has succeeded in his second amended petition, whereby his prayers therein, are hereby granted. In conclusion therefore, my final orders will be as follows that is:

First, it is hereby declared that, the Parliamentary election, which was held on the 25th Day of October 2015 for the constituency of Longido was void and therefore, it is hereby nullified.

Second, in terms of the provision of section 113 (1) of the National Election Act, Cap 343 Revised Edition of 2015, a certificate shall issue forthwith to the Director of National Election Commission informing him of the nullification of the Parliamentary election for Longido constituency.

Third, the petitioner shall have his costs for this petition.

Order accordingly.

SGD

S. S. MWANGESI

JUDGE

AT ARUSHA

29/06/2016

I hereby certify this to be a true copy of the original.

**A.K. RWIZILE
Ag. Deputy Registrar
High Court
Arusha**