

IN THE HIGH COURT OF TANZANIA

AT Mtwara

MISCELLANEOUS CIVIL CASE NO.2 OF 1985
In the Matter of Elections Petition Under the
Election Act 1985 and the Elections (Election
Petitions) Rules 1971

YONA NGUTA LUWONGO PETITIONER

Versus

1. AUSTIN KAPERE EDWARD SHABA RESPONDENTS
2. THE ATTORNEY GENERAL

JUDGMENT

RUBAMA, J:

YONA NGUTA LUWONGO was one of the two candidates that had contested for the Mtwara Urban Constituency during the 1985 General Elections. He had polled 4,580 votes as against 10,160 votes polled by his opponent AUSTIN KAPERE EDWARD SHABA. 296 votes were spoiled. He (Yona Nguta Luwongo) has petitioned this Court alleging that the election had not been conducted in accordance with the law. He seeks the following reliefs:

- (a) An order declaring void the election of Austin Kapere Edward Shaba, the first Respondent, as a constituency member of the National Assembly for Mtwara Urban.
- (b) Costs of the Petition and
- (c) Any other relief or reliefs which the Court may deem fit to grant.

Five issues were framed and fixed:

1. Whether the first respondent organised himself a meeting for the purpose of campaigning for the elections as is stated in paragraph 7(a) of the Petition.

2. Whether the said sum of shs.2,500/= was given on the 3rd July, 1985 or on or about 12th September, 1985.
3. Whether the said sum of money was given in circumstances amounting to corruption.
4. Whether one Achinji openly campaigned for and with the consent of the first respondent and whether the said Achinji threatened to prosecute those who would vote for Luwongo, the Petitioner.
5. Whether the first respondent comparison of his position with that of the Presidential candidate on the ballot paper was prejudicial against the Petitioner and in contravention of the Elections Act, 1985.

To the five issues enumerated above, I add the sixth:

6. In the organisation and conduct of the election campaign did the members of the Political Committee of the Party accord a fair and equal opportunity to each of the candidate?

The two first issues are so interconnected that it is convenient for me to consider the evidence relevant to the issues at the same time. I will try to eliminate any possible confusion that may arise as a result of this particular approach.

1. Whether the first respondent organised himself a meeting for the purpose of campaigning for the elections as is stated in paragraph 7(a) of the Petition.
2. Whether the said sum of shs.2,500/= was given on the 3rd July, 1985 or on or about 12th September, 1985.

That AUSTIN KAPEREDWARD SHABA, the first respondent had given shs.2,500/= to Mtwara Girls Secondary School after he had filled in his Nomination papers is not in dispute. I will nonetheless examine the evidence leading to the meeting at which this sum of shs.2,500/= was given as if the existence of the meeting was in dispute to enable me

to first determine whether or not this act of the first respondent fell within the ambit of William Bakari and Othiniel Abia v. Chedial Yohane Mgonja and the Attorney General Civil Appeal No.5 of 1982 (C.A.) (**unreported**) and secondly to enable me determine credibility of the witnesses that more easily.

Zainabu Rashidi (PW3) stated that she had seen the first respondent at the Mtwara Girls Secondary School three times during 1985: during March, September and October. During September visit they (the school girls) had assembled at the School's Assembly Hall. Also present were the headmistress, the sports' teacher, one Mshana, the duty teacher, one Pelekamoyo and other teachers. PW3 stated that the meeting was short. The first respondent had told them that he was a Parliamentary candidate. He gave shs.2,500/= cash to the headmistress and asked those present to vote him into the National Assembly. PW3 stated further that she had no idea for what purpose the sum of shs.2,500/= was given. She had been told by one Mshana that the money was going to be used for buying a table for the table tennis. None had however been bought by the time she (PW3) completed her studies.

Mary Edesi (PW5), a Form III girl at Mtwara Girls Secondary School stated that the meeting at which the first respondent gave shs.2,500/= to the headmistress took place either during late August, 1985 or early September, 1985. She stated that the first respondent had given the money as a gift to the sports girls whom he had congratulated for having won in all the sports competitions that they had taken part except the table tennis. He gave the money for buying a table for the table tennis. She (PW5) was emphatic that the first respondent was still a Member of Parliament at the time of the meeting and that the address was limited to sports. Dorothina Philipo (PW6) also a Form III girl at the Mtwara Girls Secondary School testified to this visit by

the first respondent. She referred to two other visits to the school that the first respondent had made following the one narrated above - one during the general elections campaign and after the general elections. On the first visit, she was emphatic that the first respondent had given shs.2,500/= as a present to them all and not just the sports girls; but a gift because the school had won in all games except table tennis competition.

Emmanuel Pelekamoyo (PW4) a teacher at Mtwara Girls Secondary School also testified to a meeting addressed by the Member of Parliament, Mtwara Urban, the first respondent. PW4 could not place the exact time of the meeting; he was certain it was either late August, or early September, 1985; a period he had pegged in relation to the time he had arrived at Mtwara on transfer from Morogoro. He stated that the first respondent had come to give a present that had been promised sometime back before his (PW4) arrival. The gift, shs.2,500/= was handed to the headmistress of the school who in turn, in the presence of all present, handed the money to the head girl of the school one Fatu. Before handing over shs.2,500/= to the headmistress, the first respondent addressed the gathering, congratulating the school team that had won some games and urged the winning team to work for farther success even harder. He was thanked by the headmistress for his contribution before the first respondent went away in a hurry.

The first respondent testified on how he had come to give shs.2,500/= to the Mtwara Girls Secondary School. He stated that he had visited the school in the afternoon of 9th March, 1985 to address the students there on the Constitutional changes that had been passed by the National Assembly in 1984. He visited the school because it was within his constituency and was one of the Party's branches. He had visited two other Party branches in the morning of that day i.e. 9th March, 1985: Teacher Training College and Technical Secondary School.

The first respondent explained that he had got permission to visit the school from its Headmistress. He went to the school at 3 p.m. On getting to the school, he was asked to be the guest of honour at the school's presentation day. There had been an inter-dormitory sports competition sometime back and the first respondent was asked to present shields, cups and medals to the winners. The school's sports teacher, Ndugu Malifedha addressed the gathering. In his address, Ndugu Malifedha touched on the difficulties that the school was facing in sports. He had stated that the school did not have a table for the table tennis and that the girls were forced to go to other institutions to play table tennis.

In response to the address by Ndugu Malifedha, the first respondent had offered to contribute some money towards acquisition of a table for the table tennis. On inquiring whether its cost was known, he (first respondent) was told that its price was not known. He asked the school authorities to enquire about it and to inform him later. The offer was in realisation of the important place attached to sports in our Republic.

The first respondent testified that the school sports teacher later wrote him a letter (exhibit D.1) dated 27/4/85 u.f.s. the School's Headmistress and copying it to the Regional Education Officer, detailing the cost of the table for the table tennis. It was shs.2,500/=. The letter reads:

YAH: KUCHANGIA MEZA YA MPEIRA WA MEZA

Husika na kichwa cha habari cha hapo juu, na ikikumbukwa mapema mwezi March, ulipotutembelea shule yetu uliafiki kuwa; Vijana wako mbele, katika fani ya michezo ila kwa sababu ya ukosefu wa vifaa ndiyo michezo inazorota. Ukahidi utatoa mchango kwa ajili ya meza ambayo gharama yake ni shs.2500/=.

Nasi tukahahidi kwamba tutahakikisha tunaleta ngao, katika mashindano ya Umiseta Mkoa. Hivyo tunakuarifu kuwa tumefanikiwa kuleta Ngao katika mpira wa Kikapu tukiwa mshindi wa Kwanza (Umiseta Mkoa) Mpira wa wavu mshindi wa kwanza, na michezo yote iliyobaki kushinda na kushika nafasi ya pili.

Wako katika Ujenzi wa Taifa,

Sgd: MALIFEDHA R.S.K.
MWALIMU WA MICHEZO

The first respondent testified that he had received the letter on 3/7/85 having been out of Mtwara between 29/4/85 and 3/7/85. He detailed his movements during this period.

The first respondent stated that he had soon after getting the letter tried to get in contact with the headmistress of Mtwara Girls Secondary School but was told that the School had been closed. He however managed to speak on telephone to the Headmistress on 2/8/85. He could not arrange a meeting for the handing of the money as he had been told by the headmistress that they had just opened the school and they had many activities to perform. The headmistress told him also that she was leaving for Masasi. The time was not therefore convenient. The first respondent again telephoned the Mtwara Girls Secondary School headmistress on 20/8/85 asking if he could go to the school to give his contribution for the table tennis. He was told that he could go to the school on the next day i.e. 21/8/85. He went to the school at 4 p.m. as planned. He gave shs.2500/= to the headmistress as his contribution for the purchase of a table for the table tennis. He rejected as a lie what was stated by Zainabu Rashidi (PW3). He had not, he stated, been to the school in September, 1985 and had not in giving the money canvassed for votes. The first respondent further stated that he had not told the girls at the school as he was leaving that they were going to meet again during the election campaign. He could not say so as the Primary Nomination of candidates let alone the final nomination of the two candidates by the Party's National Executive had not been done.

The headmistress of Mtwara Girls Secondary School Miss Cecilia Kayuza (DW.2) confirmed the story by the first respondent on how he had come to be involved with the purchase of a table for the table tennis and when he (the first respondent) had given the promised sum. Like the first respondent, she had said that the first respondent had not asked for votes as Zainabu Rashidi (PW3) had stated nor did he tell them that he (first respondent) was going to see them again during election campaign as Mary Edesi (PW5) and Dorothisa Philipo (PW6) had maintained.

She (DW2) stated that on the day the first respondent had come to give them shs.2,500/= for the purchase of a table for the table tennis, the first respondent was so much pressed for time that he had even suggested to her that he leave the money with her instead of going to attend the set meeting. She had however pressed the first respondent to hand over the money to the School himself as the girls had already been assembled. She had escorted the first respondent straight to the Assembly Hall without going to her office first. She estimated the meeting as having taken about ten minutes.

There is no doubt that Zainabu Rashidi (PW3), Emmanuel Pelekamoyo (PW4), Mary Edesi (PW5) and Dorothina Philipo (PW6) are testifying to one meeting at which shs.2,500/= was given to the headmistress of their school. The evidence of the four witnesses sufficiently identifies the meeting and as stated above the first respondent does not dispute this fact, and except for PW3, the rest (PW4, PW5 and PW6) talked of the money having been made to promote sports and with particular reference to the table tennis. Zainabu Rashidi (PW3) was the only witness out of the four that had stated that the first respondent had canvassed for votes at this meeting and that he was a Parliamentary Candidate for the Mtwara Urban seat. The first respondent disputes these assertions. Mary Edesi (PW5) and Dorothina Philipo (PW6) had added that the first respondent in bidding them fare-well had told them that they were going to meet again during the General Elections. As the first respondent was then the Member of Parliament, she and others present knew that he was going to be one of the contestants. The first respondent stated that he had made no such statement.

The duty of proving this or that is on he who alleges i.e. the petitioner. And the standard of proof is beyond reasonable doubt. Let me now look at the evidence as a whole and the witnesses who gave it. Zainabu Rashidi's testimony is contradicted even by the three witnesses of

the petitioner. The three witnesses largely support the case of the first respondent. Apart from the gift of shs.2,500/= that the first respondent gave, what she stated happened: the asking for votes by the first respondent and the statement that he (the first respondent) was a candidate in the forthcoming elections were disputed by PW4, PW5 and PW6. Zainabu Rashidi (PW3) was a very unimpressive witness. She obviously has very little retentive powers. She (PW3) could not remember the gist or content of the speech by the first respondent and she herself said so. She could hardly concentrate on anything. She could not even take stock of her surroundings in court. Her evidence clearly shows that she takes as truth anything she feels like irrespective of the contrary evidence starrng at her. She had for example stated that Emmanuel Pelekamoyo (PW4) was the duty teacher on the day the first respondent had gone to their school while this was not the case; Emmanuel Pelekamoyo himself disputed this fact. She (PW3) had stated that the sports teacher was called Mshana while this fact is disputed by the evidence of the School's headmistress (DW.2). Emmanuel Pelekamoyo (PW4) mentioned names of two teachers and these have no relationship with what was mentioned by PW3. Again she mentioned that she had been told by the same Mshana (when and where she does not mention) that the money shs. 2,500/= that the first respondent had given to the school was going to buy a table for the table tennis. The evidence is clear that the contributed money (shs.2,500/=) was for the table tennis and this had been mentioned at the time the money was being given.

I find Zainabu Rashidi (PW3) had lied to this court. She seems to enjoy lying without being bothered that she was going to be found out in no time. She had even lied to the court that she had got a IV Division - a lie she must have known would be exposed in no time. The description of her by the headmistress (DW.2) was fully borne out by her performance in court. She must indeed have been a weak student, a fact further borne out by

her examination results. She had got according to DW2 a zero division. I accept as true this examination result -- ZERO DIVISION. I see no merit in the implied submission by Mr. Tenga, the learned counsel for the petitioner that the headmistress (DW2) was not an impartial witness. For teachers could easily remember the intelligent as well as the very dull students that had passed through them all their lives; both qualities leave marks.

I accept the fact that Emmanuel Pelekamoyo (PW4) had set to speak the truth. Most of his evidence has received independent confirmation. Except for incorrect details like the fact that at the time of the presentation of shs.2,500/=, Parliament had not been dissolved, and the fact that the headmistress had given the shs.2,500/= to the head girl Fatu, I accept his evidence. In fact the head girl had prominently featured on the occasion, she having been asked to propose a vote of thanks to the first respondent. Emmanuel Pelekamoyo (PW4) gave details of the meeting including the order of speeches and their contents. He had concluded his testimony by stating that the first respondent whom he kept calling as the Member of Parliament had not been heard by him say that he was giving the shs.2,500/= for electoral purposes. He heard that the money was for the development of sports at the school and the identified sport was the table tennis. Mary Edesi (PW5) and Lorothona Philipo (PW6) were fairly detailed on what was said by the first respondent at the meeting. They both stated that the first respondent had restricted himself to sports development. I will presently come to their statement regarding the first respondent's farewell to them.

The first respondent as stated above gave to the school shs.2,500/= on 21/8/85. By this time, the National Assembly had already been dissolved. The first respondent had filled in the Primary Nomination papers on 8/8/85. He was in terms of s. 2(1) of the Elections Act, 1985 a candidate. See also MGONJA's Case (supra). However

the Special Annual District Conference had not met. No aspiring candidate for the National Assembly, incumbents included could assume that he was going to be picked a candidate for Parliamentary elections. Experience has shown how unwise it is to assume that so and so was going to be a candidate. The Mtwara Urban selection of candidates by the National Executive Committee is a case in point. The petitioner was by the evidence of the first respondent, which I accept as true, number four in the primary nomination stage out of the eight that had filled in nomination papers. He was selected to contest against the first respondent who was number one leaving aside Salim Samli Chikomele (PW2) who had been number two at the primary nomination stage. Nothing could be assumed. It is partly for this reason that I reject the evidence of PW5 and PW6 regarding the remark the two witnesses had said the first respondent had made when bidding them farewell. Further if this remark had been made, Emmanuel Pelekamoyo (PW4) would have heard it and going by the quality of his memory, he would have mentioned the statement. In this respect, I had thought of the possibility that the first respondent might have uttered the alleged statement as he was being escorted out of the Assembly Hall. I dismiss this possibility noting that the headmistress (DW2) who would have been amongst the escorting entourage would have heard the statement. She said that no such statement had been made. The statement looks oddly out of place in terms of content and order it appeared. A seasoned politician of the calibre, exposure and experience of the first respondent cannot make such a statement to a mixed bag as that. He did not even have the inclination to speak anything on the day as per evidence of DW2 which I have already stated I accept as true.

I have at some places above stated that I accepted the evidence of the first respondent as true. This was stated to cover only certain points therein considered. I would wish now to state that I accept as the truth the evidence of the first respondent presently up to the stage of the presentation of shs.2,500/= to the school on 21/3/85 for the reasons detailed below. This evidence is supported by other independent evidence. The letter addressed to him by the Mtware Girls Secondary School sports teacher (exhibit D.1) quoted above confirms the back ground to the giving of the money by the first respondent. Evidence of Emmanuel Pelekamoyo (PW4), Mary Edesi (PW5) and Dorothina Philipo (PW6) as analysed above lends further credence to the first respondent's story at some places. The evidence of the headmistress Cecilia Kayuza (DW.2) confirms a major portion of the first respondent's back ground story to the giving of shs.2,500/= to her school by the first respondent. The evidence amply confirms the first respondent's attempts also to give his promised contributions to the school. The headmistress (DW.2) explained also how inconvenient it had been for the first respondent to go to the school for the purpose of sending the money. Guests or visitors, she emphatically stated, visited her school at the school's convenience and not otherwise. This had helped to push the day the first respondent went to give the money (shs.2,500/=) to beyond the day he (the first respondent) had filled in his primary nomination papers i.e. 8/8/85. Far from criticising her (DW2), I find the rule she keeps reasonable and understandable. They are there to educate but not to play hosts to many who may be curious. I was impressed by the way she testified and the obvious command of the facts she had exhibited. I call her an independent witness notwithstanding the fact that she had been called to testify by the first respondent.

In so holding, I reject as being without merit the submission by Mr. Tenga that the witness had been a prepared one. She looked and sounded prepared because she was a confident and, as I have said, truthful witness. Another thing, the evidence sufficiently shows that the first respondent and the headmistress had not known each other for long. Collusion can safely be ruled out.

Mr. Tenga has invited the court to accept as true the evidence of Zainabu Rashidi (PW3), Mary Edesi (PW4), Dorothina Philipo (PW5) and Emmanuel Pelckamoyo (PW6) in preference to that of the first respondent and Headmistress Cecilia Kayuza (DW.2). I have already indicated my positions on the matter. I wish to add though that where there is conflict I prefer the evidence of the two teachers - Emmanuel Pelckamoyo (PW4) and Headmistress Cecilia Kayuza (DW2) to that of their students PW3, Zainabu Rashidi PW4, Mary Edesi and Dorothina Philipo (PW6). I have already stated my reasons for this.

To summarise, I am satisfied that there was a meeting at Mtwara Girls Secondary School that had been attended by the first respondent. This meeting had taken place on the afternoon of 21/8/85 as the first respondent and the School's headmistress stated. I am further satisfied that at that meeting, the first respondent had handed to the headmistress shs.2,500/= as his contribution towards the purchase of a table for the table tennis in fulfilment of the promise he had made to the school on his visit on 9/3/85 when responding to the speech by the Sports teacher. I am further satisfied that 21/8/85 was picked as the date for the handing over because the headmistress had felt the day convenient to the school and that the first respondent had no hand in its choosing. I accept as established that the meeting was short - it took ten minutes as the headmistress (DW2) stated and that if the first respondent had his way, he would have handed the money to the headmistress (DW2) to hand over to the school later on. The meeting, I find as made out was not for electioneering; it had been restricted to sports activities only.

In view of the foregoing I address myself to the two issues in the following manner:

1. that the first respondent had not organised himself a meeting for the purpose of campaigning for the elections as is stated in paragraph 7(a) of the Petition and
2. that the said sum of shs.2,500/= was not given on the 3rd July, 1985 or on or about 12th September, 1985. It was given on 21/8/85.

I now turn to the third issue:

Whether the said sum of money was given
in circumstances amounting to corruption.

Mr. Tenga submitted that the evidence sufficiently shows that the first respondent had given shs.2,500/= to the Mtware Girls Secondary School corruptly. He had stated that the donation had been timed nearer the elections to influence the voters. Ignoring the heavy schedule of the first respondent, Mr. Tenga submitted that the first respondent could have sent a cheque or money order to the school. He maintained that there had been no efforts made to pay the money earlier than 21/8/85 when the first respondent had already become a candidate. He concluded by stating that the case fell within the Ngonja Case (supra) and the Mwanga Case Civil Appeal No.4 of 1982 (CA) unreported.

Mr. Kumwembe submitted that the money was not corruptly given and has asked the court to bear in mind the evidence of Headmistress Cecilia Kayuza (DW2) in this regard. He submitted that the Mgonja case was distinguishable once one considers the long history of the contribution. Mr. Sengwaji's submission was on the same lines.

In the Mgonja Case, the Court of Appeal had accepted as established the High Court finding by two of the three judges that tried the case that Mgonja had set out to campaign for elections. He "gave out the footballs and promised audience jerseys and other game and sport equipment if he was elected and that he asked for their support in the coming election". See Mgonja Case (supra) at p. 6 - 7. Mgonja was in an election campaign, offering bribes to his audience and holding out a carrot to them - available only if they elected him. And Mgonja was at the time Minister responsible for sports. He was therefore a credible promisor of the goods. The case now under consideration is similar to Mgonja's case only in so far as the audience was of students and the functions took place in August. But the similarities end there. The case under consideration is different as its history shows. The motive of the visits, timing and content of speeches are different from those in Mgonja's Case.

I have above pointed out the history of this gift of shs.2,500/=. I wish to however emphasise the following: that the first respondent had not gone to school on 9/3/85 to give a gift. That was not the purpose. He had gone to explain to the school girls Constitutional changes. The purpose of the visit could not have been nobler. The first respondent had not solicited giving the assistance, it had been a spontaneous offer of assistance in response to the speech of the sports teacher on the difficulties the school was facing in sports gear. It is important here to note the reasons behind the offer as stated by the first respondent. He offered in realization of the importance our Republic attaches to sports. That sports plays an important place in the development of good society cannot be denied. It covers issues like health building, discipline, cooperation, refreshment etc. The Party and Government have attached a high priority to its development. The act of the first respondent in

offering to contribute was commendable. It also was eventually going to ease difficulties of administration at the school: the evidence shows that the girls were forced to travel to other places in search of facilities. With their own table tennis, they were going to stay within their campus. The evidence further shows that the offer had not been expected either - there was no question of stage managing - nobody seemed prepared for the offer of the first respondent - the price of the table for the table tennis was not known. The school had to make inquiries and it took over a month to communicate to the first respondent about the cost of the sports gear. By that time the first respondent was out of Mtwara. He never received the letter till July, 1985. There is no contrivance here to push the donation nearer the election day. Another thing, the first respondent had not offered to buy the table for the table tennis all by himself. There was no showing off offer - he stated that he was going to contribute something towards the purchase of the table. That he eventually gave the entire cost price of the sports gear may have been because of the very reasonable price of the item - it was affordable. He did not even when he eventually went to pay the money and with the elections around the corner offer to buy something else as he could very well have done. This is one other difference between the case and Mgonja's Case. The timing of the giving was not first respondent's choosing. The accepted evidence clearly shows that. The first respondent had not even wanted to speak to the girls on 21/8/85. And he was trying to avoid speaking to the gathering when the girls were already in the Assembly Hall waiting - would that have been a good way of winning popularity? Campaigning by shunning the electorate? And even when he goes to the Assembly Hall, he makes it clear to those present that he was in a hurry and spent just ten minutes. Was such an act calculated to win favour really?

I have no doubt in my mind that the money was given by the first respondent with the clear motive of promoting sports at the school as any good parent, good Party man, good servant of the people of some means or substance would have done. He expected no electoral advantage. That the money was paid in August, 1985 when it was nearing elections was accidental and not purposely timed as was the case in the case of Abel Kyagunya Mwanga v. Eliasaph Masige Lima Civil Appeal No.4 of 1982 (C.A.) (unreported.) Even the petitioner had conceded when under cross-examination by Mr. Kumwembe. He stated:

"the money was for buying table tennis equipment. I would not say the money was for the campaign. I leave it to the Court".

The court to which the petitioner has left the determination of the issue answers thus:

3. that the said sum of money was not given in circumstances amounting to corruption. It was given in furtherance of sports, a decision made as early as March, 1985.

I now turn to the fourth issue:

4. Whether one Mchinji openly campaigned for and with the consent of the first respondent and whether the said Mchinji threatened to have prosecuted those who would vote for Luwongo, the Petitioner.

Almost at the beginning of his testimony, the petitioner stated that he had lost elections because the voters had been threatened not to vote for him. He singled out one Mchinji as the person who had achieved that by cycling all over the town threatening with prosecution anybody who dared to vote for him. The petitioner stated further that he had heard that Mchinji had been even to voter's homes threatening them into not voting for him. He mentioned one Yakuti Athumani as a victim of this.

The court was told that the said Yakuti Athumani was going to testify. He was not called to testify and no reason was given. Whether a person going by the name existed or not

is difficult to state but his non production as a witness has had the effect of turning this particular piece of evidence hearsay evidence. Beyond this wide allegation against Mchinji, the petitioner produced no evidence at all. He did not for example show how Mchinji was going to know which voter had voted for whom as voting is done secretly nor how much canvassing was done. It was, however, clear that the petitioner had depended on wild rumours to support his allegation. When being cross-examined by Mr. Kumwembe,, the petitioner made it clear that he had no evidence on this question. He stated:

"I mentioned Yakuti Athumani as the person threatened by Mchinji. I cannot mention anybody else even if given more time. Yakuti was met by Mchinji at his home".

The petitioner also stated that he had been threatened by Mchinji. The nature of the threat is not however spelt out in his testimony; it certainly is unconceivable that Mchinji could have had the nerve to threaten the petitioner into not voting for himself for fear of being prosecuted by Mchinji!! The petitioner it must be pointed out had not made this allegation against Mchinji in his examination in chief. The statement that he (the petitioner) had been threatened by Mchinji came out during his cross-examination by Mr. Kumwembe, the learned advocate for the first respondent. Before then he (PW1) had restricted himself to stating that Mchinji had been threatening people not to vote for him.

I put no credence to the allegation by the petitioner. The way it came out was more of an afterthought to boost his wishful thinking that if it were not for Mchinji, he would have been elected a Member of Parliament for Mtwara Urban Constituency. According to the evidence of

Mpochi, Mohamed Salim (PW8) Mchinji was working at the Town Council supervising drainage diggers. The petitioner who was less specific on the subject had stated that Mchinji worked in Health Division of the Mtwara Town Council. Against Mchinji was the Petitioner - an Education Officer with JUWATA, a powerful office in a powerful Organisation affiliated to the Party. He has worked for this powerful Organisation since 1974. He is a teacher by profession and passably educated. He had tried to be a Member of Parliament three times, with the attempt (1985) the most successful. He is also fairly advanced in age, 52 years. He could hardly be threatened by Mchinji. These relative positions of the threatened and the threatener would have sobered the threatener into realising that he was playing with fire. If Mchinji had not been threatened by the position in society of the petitioner, the petitioner could have taken effective steps to stop the alleged hullabaloo. He had the means. He must have known that what he had believed Mchinji was doing was contrary to the Elections Act, 1985. He (PW1) could not have been an education officer dealing with Workers Education from 1974 upto now without knowing this elementary fact. Further, PW1 knew he could have reported the matter to the Police or any other agency of the Government or to the Party. The Petitioner cannot claim not to have known that the elections were being organised and conducted by the Party. Indeed old man Saidi Mchoma (DW3) an impressive witness by any standard had stated that his home was open for both candidates but neither of them had gone to complain that he was being threatened by anybody. As far as he was concerned the whole campaign went on well. I do not believe either what (the petitioner) had said during cross-examination that he had reported the matter to the Police O.C.D. This was another afterthought to eliminate incredulity that he (PW1) must have known he had created into other people's minds. If he had made the report, he would readily have

said so in his examination in chief or even during cross-examination by Mr. Kumwembe. He did not have to wait to favour Mr. Sengwaji with that answer thereby throwing overboard his earlier reply consistently made at least three times that he had taken no step against Mchinji as he had decided to wait to come to court in case he lost the elections. Further if he had really gone to the Police to report, he would not have been satisfied by the reply he received from there i.e. to ignore verbal threats and should go to report the matter only after being beaten! What an answer to be satisfied with. I doubt if the O.C.D. had heard the complaint. The petitioner does not remember the date he had gone to report the matter even!

I would in conclusion state that the petitioner has failed to prove that one Mchinji campaigned for the first respondent. Much as he had already made up his mind to come to court in case he failed to win the elections, he had not set out to come to court with evidence. Further the petitioner has failed to prove that the said Mchinji had threatened to prosecute those voters that would vote for him. For one thing even assuming that Mchinji would have brought private prosecutions as provided under s.99 of the Criminal Procedure Act, 1985, no magistrate would have assented to the private prosecutions. One has to commit an offence to be prosecuted in a court of law - (Long gone are the days of the Star Chamber as existed in England. Come to think of it, even if those days were still here, the petitioner would not have benefited. They were for the State) - Voting for the petitioner would not have amounted to an offence. Secondly assuming that anybody that had voted for the petitioner had committed an offence, could Mchinji have been in a position of knowing who had committed that offence? Voting is secret as stated above and effective statutory measure have been taken to ensure the secrecy is maintained: see s.61 of the Elections Act, 1985. Did Mchinji have the means and power of policing the voting.

Mpochi Mohamed Salimu (PW8) stated that Mchinji had threatened him with detention for having dared to ask the first respondent a 'hostile' question at the Chikongora election campaign stop. PW8 had stated that based on a breach of promise to Chikongora residents by the first respondent during his term 1980 - 1985, he had asked the first respondent where his (first respondent's) loyalty was - to those who had elected the first respondent or the nation. Mchinji went to his house soon after the campaign meeting and in the presence of many people some of whom had been playing 'bao' with him, told him (PW8) that he (Mpochi Mohamed Salim) was going to be put on the list of sixteen people for detention. He (PW8) stated that he had been effectively threatened but decided against taking any immediate action against Mchinji. He stated that he felt the threat had not been idly made as Mchinji was being backed by the first respondent whom he knew was a very powerful person, him (the first respondent) having gone to school with Mwalimu. The first respondent could therefore have asked Mwalimu, as the Head of State to detain him (Mpochi Mohamed Salimu (PW8)).

The first respondent in his defence questioned the truth of the evidence touching the alleged threat to PW8 by Mchinji. The first respondent had stated that the meeting at Chikongora had ended sometime after 6 p.m. It had started at 4.15 p.m. when the Party leaders started campaigning for the Presidential candidate. This took up to 5.30 p.m. when the petitioner started campaigning. The first respondent went on to state that before the petitioner had finished his speech, there came heavy rain which had continued up to 5.50 p.m. He too had to explain himself. The meeting therefore was closed after 6 p.m. This evidence stood unchallenged.

I find it hard to accept that the witness had had a confrontation with one Mchinji let alone threatened by him on the lines he Mpochi Mohamed Salim (PW8) has described in court. A threat of detention particularly if taken as PW8 did is serious and frightening. It is not taken lightly by any sane person; the Government included: see the Constitutional safeguards against detention. Mpochi Mohamed Salim (PW8) appeared sane; sane as he had appeared to be, his conduct on the evening of the alleged confrontation with Mchinji makes me wonder. Though he had been threatened at his home where he had been playing 'bao' with several other people, he could not remember a single person who had been present. What a memory or was it because of two big a shock or fright! But according to Mpochi Mohamed Salim (PW8), he (PW8) never even stirred - just continued to play 'bao'; he never bothered to report the threat to any Government agency. He had stated during the examination in chief and when cross-examined by Mr. Kumwembe, the learned Counsel for the first respondent that he did not report to anybody - the first respondent included despite the fact that the two were in good terms and had both worked as Mtwara Town Councillors. He stuck to this reply even when questioned on the matter several times over. But when cross-examined by Mr. Sengwaji, learned Senior State Attorney, he modified his stand and replied that he had reported the incident to his Branch Party Chairman. He was still awaiting results of the report but he was happy by the inaction! I say that other sane people could not have reacted as such if what he claimed had really happened. He (PW8) has had a varying and is it rich background - a businessman since 1974, had been a town councillor for Chikongora ward, Mtwara township for some three years 1981 - 1983 and had been during the 1985 General Elections an aspiring candidate for Tandahimba, Newala. He had come fourth out of the twelve candidates that had filled primary nominations papers - not simple feat and definately unachievable by a zombie. He was fairly

anticulate; at times I felt he (PW8) had forgotten himself and thought he was conducting business in his tea room. He (PW8) and Mchinji knew each other, Mchinji knew that PW8 had been a town councillor and very much his senior at the time at the Town Council. This is not a person to be threatened by Mchinji whom PW8 had himself described as a headman of the labourers employed by Mtwara Town Council to take care of drainage system. I dismiss this allegation of PW8 having been threatened by Mchinji as a lie, ill conceived and miserably delivered.

I must say that the petitioner had again failed to furnish any evidence to support his allegations that Mchinji had threatened him or some voters. The evidence that the petitioner has produced had been contradictory and highly unreliable. He had shifted his positions like water in a container being taken along the roads full of corrugations. I have above pointed out many examples let me add two more. The petitioner had stated that he had seen Mchinji along the campaign trail, a statement he modified during cross-examination when he admitted that he had not seen and could not have seen the said Mchinji at all the campaign stops. He had also informed the court that he knew of many people that had been threatened by the mighty Mchinji yet when pressed to mention their names he failed and had to concede through his silence that he had no facts to support his allegations. He was satisfied to bask in rumours. The evidence of Mpochi Mohamed Salim (PW8) was equally unhelpful. He had as I stated above invented it but unfortunately for him seemed to have had little time to polish it. It was crude and cowardly delivered.

In view of the above I answer the fourth issue as follows:

that Mchinji had not campaigned for the first respondent with or without his consent.

Further Mchinji had not threatened to prosecute those who would vote for Luwongo, the Petitioner. He neither had the capacity nor the law on his side to execute such an assignment.

5. Whether the first respondent's comparison of his position with that of the Presidential Candidate on the ballot paper was prejudicial against the petitioner and in contravention of the Elections Act, 1985.

Four witnesses for the petitioner testified to this. These were the petitioner, Yona Nguta Luwongo (PW1), Salimu Samli Chikomele (PW2), Mohamed Ali Kunguru (PW7) and Mpochi Mohamed Salim (PW8). Except for the evidence of the petitioner on the matter, I intend to quote the other three witnesses in full. This approach is necessitated by the fact that the quotes are short and the ease it brings in bringing out similarities and contradictions in the evidence.

The petitioner stated that at Chikongora campaign stop the first respondent had shown to those present two photos - of the President and himself. He asked the people to tell him on which side of the paper the two photos were. The people said that the photos were both on the right hand side while his (the petitioner) was on the left hand side. The first respondent went on to ask the people what was on the left of the Presidential candidate's photo and the answer from the people was that there was "darkness". The petitioner stated that the first respondent went on to state that the left was always not capable or good as it always touched dirt. The people laughed.

Salim Samli Chikomele (PW2) had attended two campaign meetings: at Vigaeni and Chikongora. He stated:

"At Chikongora there were two photographs - that of the Presidential candidate and another one of the Parliamentary candidates. The photo of the Presidential candidate was on the right hand side of the paper. Mr. Shaba was the last speaker. He showed us the photo and asked us on which side it was. We said on the right. He asked us to vote for him. He then showed the photo of the Parliamentary candidates and asked where his photo was. We said on the right. He then advised us to cover the left photo with our left hands and vote him on the right. The left hand is useless and used only for dirty things like cleaning ourselves after a call of nature. He told us to vote him, Shaba and not Luwongo who could not speak properly even with his Secretary General. How could he speak with Nyerere. That is in general what I had heard.

At Vigaeni, the same words were stated by Shaba".

Mohamed Ali Kunguru (PW7) also testified on what had transpired at the Chikongora campaign stop. He stated:

"I had attended the campaign meeting at Chikongora. The petitioner and the first respondent were the candidates. They were canvassing for votes. I heard somethings by Mr. Shaba that I felt was not in order. He had stated that he was Shaba and that even the Nation had thought he was better of the two. He wanted us to have a look at some photographs - two photos. These were of the Presidential candidate and that of Parliamentary candidates. He stated that the Presidential candidate photo was on the right hand side of the paper as was his on the Parliamentary candidates' photo. Be careful - do not get lost in your voting. Do not go and vote for one on the left for the left hand handles dirt always. If you pick the left, you would have selected dirt (mavi) and dirt does not work. Pick the right hand side photo, for I have been speaking to the President all the time. I have forgotten others said at the meeting.

On hearing these words, I was not happy. I could not understand how Shaba could compare his opponent with 'kingesi".

Mpochi Mohamed Salim (PW8) also testified on the Chikongora campaign meeting. He stated:

"... Then came Shaba who first showed us the photo of the Presidential candidate and asked us where the photo of the candidate was. We told him it was on the right. He asked us what was on the left and we said there was nothing. Then he took out photos of Parliamentary candidates and asked us where his photo was. We told him it was on the right. He then asked what was on the left and we said Luwongo. He told us to be careful as the left hand is not good. The left hand is used for cleaning ourselves after a call of nature (kuchambia mavi) and all other evils are done by the left hand. It is not good. People laughed very much".

The first respondent disputed the evidence of the four witnesses, in so far as the four had stated that he had equated the petitioner with dirt because his photograph was on the left hand side. He testified that at Chikongora election point he had told the electorate that his photograph was on the right hand side of the ballot paper like that of the Presidential candidate. He had asked them to vote for him after they had voted for the Presidential candidate by just sticking on their right hand side. He had asked the voters present not to vote for the petitioner whose photograph was on the left. The first respondent maintained that he had also campaigned for his opponent when specifying to the voters on which side his (petitioner's) photograph was placed. He rejected the allegation that he had said that his opponent, the petitioner was "mavi".

Saidi Mchoma (DW3) the chairman of the election campaigns organising committee confirmed the story of the first respondent. He stated that the campaigns were conducted in an orderly way and by the time they had concluded the campaigns, they had all cheerfully said goodbye to each other. He maintained that no rough language had been allowed. The candidates

were told to limit themselves to talking about what was contained in the "ILANI" and any diversions were quickly checked. He mentioned that under his chairmanship, the three supervisory delegates from Kilwa, a Security Officer and Police Officer together with the two Parliamentary candidates met at the end of every campaign day to review their performance; any infringements were checked there. The two candidates could also complain to the Committee asking for the regularisation of certain factors that he (the complaining candidate) may hold were out of order. The problems were discussed and sorted out.

Saidi Mchoma (DW3) accepted the use of the two photographs by the first respondent but maintained that they had been properly utilized to enable the voters know where to vote for the candidate of his choice. He could not, he emphasised, have allowed improper references being made by the first respondent on the lines stated by the petitioner, Yona Nguta Luwongo, Salim Samli Chikomele (PW2), Mohamed Ali Kunguru (PW7) and Mpochi Mohamed Salim (PW8). DW3 intanced some matters that he had forbidden by the candidates.

I have said Saidi Mchoma (DW3) was an impressive witness by any standard. He was an old man of young spirit, intelligent, witty and obviously in command of his facts. His memory was excellent. He was not given to answering questions in manners like "I have forgotten what transpired next, I don't remember, may be etc". He was straight forward. He spoke with authority and he commanded respect. He appeared to me a no nonsense man and as I have already stated, truthful.

I have above stated that he (DW3) and his Committee had disallowed certain statements which they had thought tainted with tribalism and unfair accusation to the Party. By comparison these infringements were minor to the infringements alleged in court by the petitioner that the

first respondent had committed at several election campaign stops in terms of the extreme vulgarity, obvious breach of "ILANI" and repudiation of the Party's steadfast stand that the two candidates in its eyes were equally good Party men and capable of representing the people in the Republic's highest law making body.

What was set out in Paragraph 8 of the Petition is not borne out by the evidence of the petitioner and others. I state this fully knowing the import of O.VI r.3 of the Civil Procedure Code, 1966. But the petitioner had set out the gist of the evidence in the said paragraph. What I expected to see in the evidence of the petitioner therefore was more details of the evidence and not different type of evidence. In other words, I did not expect to see repudiation of paragraph 8 of the Petition. Repudiation of Para 8 ^{means} invention or manufacturing of that which was not the truth. For truth is constant. According to paragraph 8 of the Petition, the first respondent and the Party which organises and conducts campaign had agreed to put the photograph of the first respondent on the same side as that of the Presidential candidate to further the chances of the first respondent in the elections. But the evidence of the petitioner shows abandonment of the substance of his own paragraph 8 of the Petition and brings in a totally different matter - that there was by clear implication no coordination between the Party and the first respondent in the printing of the photographs as they appeared except that the first respondent independently equated the petitioner with dirt because his (petitioner's) photograph was on the left hand side of the ballot paper and as the left hand normally was used for cleaning dirt so the first respondent is alleged to have said, the petitioner was dirty and incapable. The evidence of the three other witnesses (Salim Samli Chikomele (PW2), Mohamed Ali Kunguru (PW7) and Mpochi Mohamed Salim (PW8) did not further the substance of what was set out in paragraph eight of the Petition. They too abandoned the substance of the said paragraph and generally went along with the

petitioner's evidence with some significant additions and/or omissions which I point out below.

But even with this newly adopted version of the story, there exist major contradictions in essentials in the testimony of three of the four witnesses on the campaign meeting at Chikongora. Salim Samli Chikomele (PW2) had stated that the first respondent had accused his opponent, the petitioner, in an attempt to lower him down even further, to being inarticulate and a coward. He had told the electorate that the petitioner could not speak even with the Secretary General of JUWATA and wondered how he could be expected to speak with Mwalimu Nyerere. Neither the petitioner nor Mpochi Mohamed Salim (PW8) remembered this having been said. The accusation is not, however, insignificant to be easily forgotten. Another thing, while both the petitioner (PW1) and Salim Samli Chikomele (PW2) testified to there having been some dialogue between the first respondent and the electorate, with the first respondent showing them the Presidential and Parliamentary Candidates photos and him asking them which photograph was on what side of the paper, Mpochi Mohamed Salim (PW8) maintained differently. There had been no exchange between the first respondent and the electorate. He (first respondent) just made statements after showing the electorate the photographs. Further, there had been no clapping or laughing. Another thing still - PW1 and PW2 who maintained that the first respondent had conducted his campaign on the question and answer basis differ on the mode of asking questions and the answers he (the first respondent) had received. PW2 had stated that the first respondent had told the electorate to cover the empty space on the left of the Presidential candidate's photograph and vote for him and likewise when voting for a Parliamentary candidate, to cover their left side of the photo with their left hands and vote for the candidate whose photograph is on the right hand side of the ballot paper. But PW1 had a different story. The electorate when asked by the first respondent what was on the left hand side of the photograph of the Presidential candidate had answered "darkness".

I accept the evidence of the first respondent on what had happened at the Chikongora elections campaign stop on 26/10/85 as true. His evidence has been fully backed by that of Saidi Mchoma (DW3) whose evidence I have already said was of very high standard and credible. DW3 had referred during ~~cross~~-examination to a factor which is relevant here. He had said that during the campaign, the petitioner had been telling the voters that his photograph was smallish in comparison to that of the first respondent and that he (DW3) and his committee had to stop him from complaining telling him (the petitioner) that the Party was not to blame in the printing of the photographs. Now if the petitioner could be told to stop talking about the smallness of his photograph, a fact seen by all present, how could the first respondent really be left to use such vulgar language as the one alleged had been used by him and be allowed to get away with it? The answer is clear that the first respondent had not made the statements and what the petitioner and the other three witnesses had stated were pure lies.

I have above stated when dealing with issue number four that Mpochi Mohamed Salim (PW8) had not attended the campaign meeting at Chikongora. I hold to that finding. He could not therefore testify on something that he had not seen or heard. I accept the evidence of the first respondent that the campaign meeting on this day had ended after 6 p.m. and that if he Mpochi Mohamed Salim (PW8) had attended the said meeting he would not have stated that that meeting had ended at between 4 p.m. and 4.30 p.m. By that time the meeting had barely started. Whether one picked 4 p.m. or 4.30 p.m. as the time, the Parliamentary candidates would not have started campaigning. I am strengthened in this finding by the fact that if Mpochi Mohamed Salim (PW8) had attended the meeting, he would not have been allowed to leave the campaign meeting before the end of the meeting as had been stated by the

chairman of those meetings Saidi Mchoma (DW3). My estimation of the petitioner's credibility is equally negative. He lied when talking about threats by Mchinji, he lied by trying to bring in Yakuti Athumani and decided not to risk bringing him to testify. Mohamed Ali Kunguru (PW7) also lied. He is an old man though he had stated under oath that he was 37. Old but nonetheless an unashamed liar. It was painful to see such a human frailty exhibited by such an old man. He had lied when he mentioned that one Idarusi and one Mahadhan had attended the campaign at Chikongora. I accept the first respondent's testimony that these two were not at the meeting as Idarusi had at that time been attending a seminar and Mahadhan had fallen sick.

Likewise I find it difficult to accept as the truth the evidence of Salim Samli Chikomele (PW2). His narration of what was supposed to have taken place at Chikongora is completely at variance with that of the first respondent (DW1). Could the first respondent who was not a newcomer to politics and the National Assembly have equated or tie the membership of the National Assembly with speaking to the Chairman of the Chama Cha Mapinduzi? Even assuming that the first respondent had made the statement and had got away with it - the supervisory delegates being amongst those laughing or clapping - could he really have been that unperceptive and so soon after he had showed the photograph of the Presidential Candidate other than Mwalimu and had asked people to vote for him. Could he have failed to notice that the photograph was not of Mwalimu but that of Ndugu Mwinyi? Further by his own admission, Salim Samli Chikomele could remember very little of that meeting.

While on the question of photographs, I wondered whether or not the first respondent had not assumed a symbol that had not been given to him by the National Executive Committee of the Party. S.53(1) and (2) of the Election Act, 1985 provide:

"53 - (1) For the purpose of enabling a candidate to assist voters to identify him when voting, a candidate shall be entitled to associate himself while electioneering with an approved symbol allocated to him by the National Executive Committee of the Party and no candidate shall, while electioneering, associate himself with any other symbol.

(2) The display of a symbol during the election Campaign shall be subject to the control of the District Committee of the Party".

Could the photograph of the Presidential candidate be taken as a symbol? I think not. The Concise Oxford Dictionary, Fifth Edition defines 'symbol' as:

"Thing regarded by general consent as naturally typifying or representing or recalling something by possession of analogous qualities or by association in fact or thought. 3. Mark or character taken as the conventional sign of some object or idea or process, e.g. the astronomical signs for the planets, the letters standing for chemical elements, letters of the alphabet, the mathematical signs for addition & infinity, the asterisk".

The first respondent was not associating himself with the photograph of the Presidential candidate to the exclusion of the petitioner. He was only referring the voters to the side his photo was in relation to that of the Presidential candidate. As the first respondent had stated, when telling voters to vote for him whose photograph was on the same side as that of the Presidential candidate, he was thereby telling the electorate that his opponent, the petitioner was on the other side of the Presidential candidate's photo. This photo was serving as a focus to both of them, nothing more. It was not used as a symbol by the first respondent.

On the basis of the foregoing, I answer the fifth issue as follows:

that the first respondent's comparison of his position with that of the Presidential Candidate on the ballot paper was not prejudicial against the Petitioner and was not in contravention of the Elections Act, 1985.

Lastly, I turn to the last issue:

In the organisation and conduct of the election campaign did the members of the Political Committee of the Party accord a fair and equal opportunity to each of the candidates?

There are two people who had testified to this last issue: the petitioner (PW1) and Saidi Mchoma (DW3).

The petitioner stated:


"... On the side of the leaders of the campaign, there was a complaint that the Chairman of the campaign favoured my opponent. The complaint was raised during the meetings. Each candidate was given 15 minutes but my opponent was given 20 - 25 minutes. The chairman was always reminded of this by the three supervisory delegates".

Saidi Mchoma (DW3) labelled this assertion a lie.

Only Mr. Sengwaji, learned Senior State Attorney had addressed the court on the subject. He asked the court to dismiss the allegation stating that DW3's relevant evidence on the subject was not challenged. DW3 had given detailed evidence on the subject. I accept it as true. To some extent this evidence is supported by the first respondent's evidence - that out of the complaints he never mentioned this. Further as in other allegations made by the Petitioner, they are wild but unsupportable. He is the one who is the petitioner, he is supposed to support his petition with evidence. He has not proved this allegation beyond reasonable doubt. I therefore answer

the sixth issue as "Yes".

Mr. Sengwaji, when closing his submission to the court had stated that in the Attorney General's view, the petitioner's defeat in 1985 was like those he had suffered in 1969 and 1972. He went on to submit that the petitioner cannot attribute the 1985 defeat to unlawful acts by the first respondent or/and second respondent. I fully associate myself with the submission and add that the petitioner had no evidence at all in support of his case. What he had was a collection of rumours unsupportable by evidence. No wonder he had difficulty in getting witnesses who could stand examination. I dismiss the petition with costs and declare that the first respondent, AUSTIN KAPERE EDWARD SHABA was legally elected a Member of Parliament for Mtwara Urban.



Yahya Rubama

Judge

18.7.86