

TANZANIA / JUDGMENT

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/ p IN THE HIGH COURT OF TANZANIA AT DR ES SALAAM MISCELLANEOUS CIVIL CAUSE NO 107 OF 2010 IN THE MATTER OF ELECTION PETITION UNDER THE NATIONAL ELECTIONS ACT CAP. 343 R.E 2010 AND THE ELECTIONS (ELECTION PETITIONS) RULES HAWA NG'HUMBI.. PETITIONER VERSUS THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT JOHN MNYIKA 2ND RESPONDENT THE RETURNING OFFICER FOR UBUNGO PARLIAMENTARY CONSTITUENCY 3' RESPONDENT Date of last order: 18/4/2012 Date of Final Submission 4/5/2012 Date of the judgment 24/5/2012

JUDGMENT

The Petitioner, Hawa Ng'humbi of Chama Cha Mapinduzi (CCM Candidate) was unsuccessful candidate for the Ubungo Parliamentary Constituency having obtained 50,544 votes in the General Election Hawa Nghumbi Vs. AG, John Mflylka & Another Page 1of 56 2nd Respondent, John Mnyika of held on the 31st October, 2010. The Chama Cha Demokrasia nã Maendeleo (CHADEMA Candidate) on the other hand became a successful candidate and as a result, on 2 November, 2010 the Returning Officer one Raphael Ndunguru (Dw4) declared him (John Mnyika) a winner having obtained 66,742 votes. In the Constituency there were a total of 16 candidates in that election, who, in the final result, secured the following votes:- John Mnyika of CHADEMA got 66,742 votes Hawa Ng'umbi of CCM got 50,544 votes Julius Mtatito of CUF got 12,964 votes Prosper Karisha John of AFP got 437 votes Emil John Ruvunja of APPF Maendeleo got 317 votes Amina Amiri Mcheka of CHAUSTA got 519 votes Kanunambeo Ismail Rajab of DP got 149 votes S. Samira Pravin Lakhani of Jahazi Asilia got 138 votes . Kazimoto Rajab Thabit of NCCR Mageuzi got 253 votes Rashid Mawazo Rashid of NLD got 94 votes

- Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 2of 56 Rachel Balama George of NRA got 47 vote Kibogoyo Mark Rweyunga of SAU 40 votes Kambona Axon Mwansasu of TLP got 113 votes 14. Kamana Masudi Mrenda of UMD got 22 votes Zablon Shilinde Mazengo of UDP got 48 votes Ngomi William Mabruk of UPDP' got 69 votes The Polling stations for Ubungo Constituency were 1,113. The 2' Respondent thus had a majority of 16,198 votes over the Petitioner. The latter now questions the validity of the 2nd Respondent's election on 16 grounds of the Amended Petition which was presented in this Honorable Court for filing on 11, h October 2011. The Petitioner is praying for judgment and decree against the

Respondents as follows: i.) A declaration that the election for Ubungo Constituency was null and void, Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 3 of 56 An Order of this Honorable Court directing for a transparent, free and fair by-election for the Ubungo Constituency, Costs of the case be provided for by the Respondents. Any other relief(s) that the Honorable Court may deem just to grant. The avoidance of the election results by the Petitioner as agreed rooted on the grounds specifically stipulated in paragraphs 9, 10 and 11 of the Amended Petition. Mr. Maige for the Petitioner has not categorically brought any evidence in the allegations raised in paragraphs 9 (ii), 10 and 11(i), and (v) of Amended Petition, consequently the same are treated as - withdrawn and are dismissed. Thus the reasons for the Petitioner's prayers are contained in the following paragraphs:- Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 4 of 56 Para 9. That during the campaign period, the 2nd Respondent and his agent committed illegal practices in connection with election as enumerated hereunder.

- i) That on 11th day of September 2010, while addressing a public rally at the election campaign held at Riverside, the 2nd Respondent made a false and defamatory allegation against the Petitioner to the effect that she was involved in the illegal and fraudulent sale of a house previously belonging to Umoja wa Wanawake (UWT), the fact which the 2nd Respondent knew or ought to have known that it was not true. Para 11. The Electoral Commission and the third Respondent failed to ensure compliance with the Law and fairness as shown hereunder. Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 5 of 56 Similar to the above point, there were serious and irregularities in filing in RF 21B forms in that the particulars of the disputed and rejected votes were not provided. Further that the figures of the voters shown in forms RF 21B materially differed with those in the ballot boxes. The 3rd Respondent was requested by the principle agent of the Petitioner to open the relevant ballot boxes to verify the votes, but categorically refused to do so. The production of the same would have facilitated examination of the ballot papers in question and produce a definitive decision. Copies of the samples of the erroneous forms are hereto attached and marked collectively MJ-1 and for which leave is sought to read as part of this Amended Petition. During the addition of votes by the 3rd Respondent, unauthorized laptop computers of the 2nd Respondent were used instead of the authorized laptop computers from the Electoral Commission. The use of the strange laptop computers Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 6 of 56 was made without there being prior inspection to verify if there were no cooked data therein. iv.) Although in law the 2nd Respondent would have not been permitted to have more than one representative during the addition of votes at the level of the Returning Officer, there were more than five CHADEMA'S followers present at the counting of the votes. Reference shall be made to a copy of a video tape recorded at the material time showing the persons who were present at the counting of votes at the level of the Returning Officer as Annexure MJ-2, for which leave is hereby craved to refer to it as part of this Petition. vi.) There were serious errors in the addition and counting of the votes in Form No. 24B by the 3rd Respondent such that the announced results did not tally with the number of the voters. Copy of the Election Results Form is

hereto attached and Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 7 of 56 marked MJ-3 and for which leave is sought to read as part of this Petition. vii.) Owing to this reasons, the Petitioner declined to countersign the official declared results by the 3 RespE The hearing of the petition commenced. by Preliminary Hearing conducted in terms of Rule 19(1) of the National Elections (Election Petitions) Rules, 2010 G.N No. 447 published on the 19th November, 2010 where the following issues were agreed:-

1. Whether or not the Respondents committed serious errors, irregularities and non compliances during the election process as alleged in paragraphs 9 and 11 of the Amended Petition or at all. Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 8 of 56 If the first issue is answered in affirmative whether the irregularities and non - compliance of the Respondents alleged in paragraphs 9 and 11 of the Amended petition or part thereof affected fundamentally the election results at the detriment of the Petitioner. To what reliefs are the parties entitled to. It is the Petitioner's contention that the election was not conducted in accordance with the provisions of the law. In that the Respondents committed serious errors, irregularities and non compliances during the election process. Therefore the issues complained are as follows:- One, that there were discrepancies in the final aggregate tally of votes cast; the figures so declared showed unaccounted votes of about 14,857 as reflected in paragraph 11(vi) of the Amended Petition. Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 9 of 56 Two, that the Petitioner was defamed by the 2nd Respondent by being called "Fisadi" because she was involved in illegal and fraudulent sale of the "Umoja wa Wanawake" Building (UWT). This is as shown in paragraph 9(i) of the Amended Petition. Three, is non existence of form No. 16, which is a National Electoral Commission Dissatisfaction or Satisfaction of a candidate or agent at the counting of votes made under. Regulation 59 of the Elections (Presidential and Parliamentary) Regulations 2010, (hereinafter to be referred to as form No. 16). This was not pleaded in the Amended Petition. Four, The use of the laptop computers of the 2nd Respondent in addition of votes in the addition room; this is as it appears in paragraph 11 (in) of the Amended Petition. Five, Irregularities in forms No. 21B, a form which should be filled by a Returning Officer during the determination Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 10 of 56 of disputed votes. The gist of the Petitioner is that the forms had errors which the officers who were in the addition room were forced to correct so that the results may tally. These forms tendered as exhibits P2, P3, P4, P5 and P6 are made under Regulation 60 (1) of the Elections (Presidential and Parliamentary Elections) Regulations, 2010(hereinafter to be referred to as the Regulation) relating to polling station election results and report of presiding officer. This is as indicated in paragraph 11(u) of the Amended Petition. Six, The allegation that the 2nd Respondent entered in the addition room with more than five unauthorized members of his party; this allegation is under paragraph 11(iv) of the Amended Petition. Scrutiny of the allegations raised in the pleadings reflect that the issue related to non existence of the form No. 16, (as provided for in paragraph Hawa Nghumbi Vs. AG, John Mnyika & Another Page 11 of 56 3 above) which is the National Electoral Commission Dissatisfaction or Satisfaction of a candidate or agent at the counting of votes made under the Regulation 59 that is a complaint

form was not pleaded. Under Order VI Rule 7 of the Civil Procedure Code Cap 33 R.E. 2002 and Rule 23 of National Elections (Elections Petitions) Rules 2010, (hereinafter to be referred as the Rules) an issue which is not raised in the pleadings cannot be resolved by a Court. It is a rule against departure from pleadings. In the same lines I agree with Mr. Maige's final submission that the rule avoids parties not to be taken by surprise. I also agree with the authorities he referred to that effect. In *James Funke Ngwagilo Vs AG (2004) TLR 161* the Court of Appeal stated inter alia that: "... 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. It is also to define with precision the matters on which the parties differ and points on which they agree, thereby to identify with clarity *Hawa Ng'humbl Vs. AG, John Mnyika & Another* Page 12 of 56 the issues on which the Court will be called upon to adjudicate to determine the matters in dispute..." In this ground of non existence of form No. 16, the respondents were taken by surprise by the new ground: In such a situation the justice of the case demands that the unpleaded grounds should be ignored. The ground three above is so treated. Additionally to that, all the arguments outside the scope of pleaded issues in this case shall not attract the determination of this Court. Before venturing into the real business of determining the issues before this Court, I feel indebted to commend all the Learned Counsels for doing their utmost to defend and protect their clients' interests. In particular they made sure they avoided unnecessary delays by not caffing too many witnesses or witnesses taking too long giving their evidences. They were all thorough and direct to the issues in *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 13 of 56 examination in chief, cross examination and re-examination. This led in not having many objections which are some of the causes of delay. Apart from that, I am as well gratified by the Learned Counsels and all the parties for their tolerance and indulgence when I had my personal problems. which interfered with the scheduled session. Last but not least, I wish to express my sincere gratitude to the audience for peace and harmony portrayed throughout the trial. Having said that, I now turn to the facts in issue. After the closure of the Respondent's case all the learned counsels made oral submissions. In consensus with learned counsels in their final submissions, I find it pertinent at this stage, to put clear the position of the law in cases of election petitions. It is worth noting that "election is the right of every eligible citizen to determine who will represent them in government without encumbrance. Is the basic unit and cornerstone of any democracy and a pre-requisite for social cohesion and solidarity. *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 14 of 56 Elections are indeed an element of within the principle of rule of law" *Compendium of 2007 Election Petitions Emerging Jurisprudence, 2 Edition* at page 205 It is a constitutional right and as pointed out by both learned Counsels -----In- their final submissions as well as a statutory right, provided for under section 108 (2) of the National Election Act, Cap 343 of the laws (hereinafter to be referred to as the Act) An election petition therefore represents a potential abuse of this basic constitutional right and as final arbiter of the outcome of the electoral process. Therefore this Court has a heavy and solemn responsibility; I concur with the learned Counsels' final submissions that the provision of the law under the National Election Act, relevant to the issues before this Court

for consideration and determination, is section 108 (2) (b), Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 15 of 56 relating to avoidance of elections by election petition. The section reads:- Section 108 (1)

- (2) The election of a candidate as a Member of Parliament shall be declared void only on an election petition if the following grounds is proved to the satisfaction of the High Court and on no other ground, namely:- non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted In accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election; Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 16 of 56 In determining the issue of non compliance, the Court should be guided by the principle of law settled by the Court of Appeal directing that where the issue of non compliance with provisions of the Act is raised; such non compliance must be shown to have reference to the results of the election. The petitioner must satisfy the Court beyond doubt that the Respondents committed serious errors, irregularities and non compliances which amounted to non compliance within the provisions of the Act and it affected the election results which the Returning Officer used to declare the final results under section 81 of the Act. Another issue before the Courts when trying election petition cases involves the meaning of "to the satisfaction of the Court". This means that such standard of proof must be such that no reasonable doubt exists that one or more grounds set out in the relevant section have been proved beyond reasonable doubt. The said was considered by Sisyaj. (as he then was) in the case of CHABANGA DYAMWALE Vs ALHAJ MUSA SELF MASOMO & THE ATTORNEY GENERAL (1982) TLR Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 17 of 56 69 referring the case of MBOWE Vs ELIUFOO (1967) E.A 240, and NG'WESHENI Vs ATTORNEY GENERAL (1971) HCD No. 251. It is now settled that the law relating to the standard of proof required for the avoidance of an election result is proof beyond reasonable doubt. Any other measure below that will not suffice. The other phrase is "affected the results". In a series of cases the same as cited above Chabanga Dyamwale's case, Ng'wesheni's case, Mbowe's case and the case of Bura Vs Sarwat (1967) E.A 234 and in Re K.A Thabit 1967 E.A 177 where the phrase was considered. Onyiuke J. (as he then was) had this to say and I quote:- "In the light of this authorities I would hold that the question whether non compliance within the provisions of the Act relating to the elections affected the result of the election would depend on the nature of the particular complaint or irregularity and on the margin of victory then the irregularity has not really Hawa Nghumbi Vs. AG, John Mnyika & Another Page 18 of 56 affected the result of the election where however, the complaint goes to the root of free election such as a case of organized campaign or undue influence and it appears that the substantial number of votes obtained, or I may add, may have been obtained) thereby then since the extent of such wrong practice may never be known, the Court may be inclined to hold that it affected the result of election without proof of actual reversal of the result" It is as well held in the case of CHABANGA, above cited that:- "Although a few irregularities had been proved they could not be said to have affected the result of the election because even if the adversely affected votes were added to the Petitioner's the

Respondent would still have won the election by big majority" *Hawa Nghumbi Vs. AG, John Mnyika & Another* Page 19 of 56 Therefore not every contravention of the Election Act amount to an illegal practice which must be confined to specific offences or contravention so described. *REV. ELIYA CHIWANGA Vs REV. SEVERINO ANDREA SUPA* (1982) TLR No 12 Having addressed the position of the law let me turn to the issues raised in this petition by applying the above mentioned rules and principles of law. By so doing I will evaluate each of the witnesses, assess their credibility and make a finding on the contested facts in issue. At the hearing of the case the Petitioner called three witnesses namely the Petitioner, *Hawa Ng'humbi* (hereinafter to be referred to as Pw 1 the Petitioner), Pw2 Robert Kondela (referred to as Pw2) and Pw3 Henry Kishato (hereinafter to be referred to as Pw3). The Petitioner tendered form 24B relating to Parliamentary Election Results in a Constituency made under Regulation 66(1)(a) of the Elections (Presidential and Parliamentary) Regulations, 2010 as exhibit P1, at the *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 20 of 56 Preliminary Hearing through the 3rd Respondent after he was served with a Notice to produce. (the same to be referred to as exhibit. P1). Through Dw3 five copies of Form No. 21B which is a Polling station election results and report of presiding officer filed by Returning Officer during the determination of disputed votes at the hearing of the case, were tendered at the hearing. The forms will be referred to as exhibits P2, P3, P4, P5 and P6 respectively. The Petitioner was represented by the learned Counsel Mr. Maige. Mr. Mulokozi Principal State Attorney assisted by Mr. Sarungi Senior State Attorney represented the 1st Respondent who is the Attorney General joined in compliance with the Rule 6 (1) of the Rules which requires in every election petition the Attorney General. to be made a part as the respondent. They also represented the 3rd Respondent. The 3rd Respondent brought three witnesses who were Dwl Gaudence Odilo (hereinafter to be referred to as Dwl), Dw3 Sioni Nko *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 21 of 56 (hereinafter to be referred to as Dw3) and Raphael I. Ndunguru Dw4 (hereinafter to be referred to as Dw4) The 2nd Respondent called three witnesses namely the 2nd Respondent John Mnyika as Dw2 (hereinafter to be referred to as Dw2); Dw5 Ally Saidi Makwio (hereinafter to be referred to as Dw5) and Dw6 Erick Ongara (hereinafter to be referred to as Dw6). Dw5 tendered a programme of campaign meetings and was admitted as exhibit "D1" (hereinafter to be referred to as exhibit "D1"). He was represented by the learned Counsel Mr. Mbogoro. The first issue is of defamation, contained in the paragraph 9(i) of the Amended Petition. It is the evidence of Pw1 that on the 11/9/ 2010 when the 2nd Respondent was addressing a meeting at Riverside, he defamed the Petitioner by calling her "fisadi" in that she was involved in selling an "Umoja wa Wanawake" building *Hawa Nghumbi Vs. AG, John Mnyika & Another* Page 22 of 56 fraudulently. The witness told the Court that she was not in the meeting but she was informed by Pw2 Robert Kondela. To this extent her evidence is hearsay and not admissible. In his part Kondela, Pw2 testified that before the election he participated in different campaign meetings conducted by the candidates. That on 11/9/2010 he attended a CHADEMA meeting at Riverside IJbungo where the speaker was Dw2. He informed the audience of his intention to petition for election. He said in the meeting Dw2 told the audience not to elect CCM candidate because CCM is embracing "ufisadi" and the Petitioner

is a "fisadi". Dw2, he said, went on to tell the Court that the CCM candidate was involved in the sale of UWT building. He further said in that meeting that there were about 500 to 600 people. When he was asked in cross-examination about the effect to the Hawa Nghumbi Vs. AG, John Mnyika & Another Page 23 of 56 results he said the audience present would have influenced voters not to vote for Pwl. —_Jnjiievidence Dw2 supported Ally Said Makwilo (Dw5) who was a champagne Manager of election at Ubungo Constituency for CHADEMA who also tendered a programme for campaign meetings admitted as exhibit D1 denied to have made defamatory statements because on the 11th September, 2010 he was not at Riverside he was addressing another meeting at the Ubungo Ward Msewe Msikitini in the morning and from the afternoon to evening he was at Saranga Ward Kimara stop over and that it was on Sunday and not Monday as alleged. Dw2 further stated that for the first time he remembers to have heard the allegation that CCM candidate is corrupt one in the CCM campaigns. The second time was on 28th August, 2010 when they were in a TBC TV Programme known as "Kipindi cha MchakatO Majimboni" where Hawa Nghumbi Vs. AG, John Mnyika & Another Page 24 of 56 those allegations were raised by one of the people who attended the programme. The witness argued that if he really defamed the Petitioner she would have complained under the Election Act. In my humble view the issue here which stands for determination is whether the Petitioner was defamed. To prove the allegation one witness Robert Kondela was called. Dw2 disputed that there was no such meeting. This evidence is challenged by the Counsel for Petitioner in the final submissions for not being pleaded in the defence. He referred the Court to Oder VII Rule 6 of the Civil Procedure Code Cap 33 R.E 2002, the rule against departure from proceedings. The Petitioner prayed that the evidence that there was no meeting be dismissed. Hawa Nghumbi Vs. AG, John Mnyika & Another Page 25 of 56 Campaign meeting are regulated by programme. So for one to allege that there were defamatory words uttered in a meeting it has to be proved that on the date the defamatory words, were uttered there was a meeting at the time and the place of meeting undisputed evidence the witnesses explained very thoroughly how that programme was prepared and the procedures followed when there were changes. Because the campaign programme is the one followed in holding meeting there was' nothing wrong for the Dw2 to say he did not utter those defamatory words and after all on the alleged date, time and place as alleged by Pw2 there was no meeting. According to the programme the meeting was held at Ubungo Ward Msewe Msikitini and at Saranga Ward Kimara stop over. It cannot be said to be a rule against departure on proceedings, in saying that there was no meeting. Therefore evidence that there was no meeting cannot be dismissed Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 26 of 56 In finding out the merit of this ground, it has been proved that the Petitioner, Pwl was defamed by Dw2. Apart from Pw2 no other witness was called to testify. Out of 500 or 600 people who were in the meeting no one had come forward to prove that Dw2 uttered those defamatory words. Even if the evidence that there was no such meeting was dismissed, the question is that has it been proved that Dw2 uttered those defamatory words? The allegation of defamation is very serious. Substantial credible evidence is required to support it, and it has to be corroborated by an independent testimony. Over and above that no evidence tendered to prove how the defamatory

statement induced• the voters not to vote for Petitioner. Therefore I dismiss the issue as being baseless. *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 27 of 56 The second issue is relating to form No. 24B which was tendered as exhibit P1. On this issue Pw1 Hawa Ng'humbi testified that she was a Parliamentary election candidate for Ubungo Constituency in the year 2010-econducted on 31/10/2012. The 2 Respondent John Mnyika was declared the winner. She told the Court that the problem is not for him, to be declared the winner, but it is the errors, irregularities and non compliances during the election process. She was aggrieved by non compliance in addition of votes which led to all the results not to be valid according to law and that is why her part in exhibit P1 was not signed by her counting Agent Pw3. She said after the addition of all votes, in the filling of form No. 24B exhibit "P1" the 3rd Respondent made fundamental errors and non compliance with procedures in adding and entries made in exhibit P1 were not correct. In calculations she made in the exhibit P1, she said the non compliance led to 14,854 votes which were unaccountable. *Hawa Nghumbi Vs. AG, John Mnyika & Another* Page 28 of 56 Although in the verification clause as it reads in the Amended Petition she said all what is stated in all the paragraphs is known to the best of her knowledge, in her testimony she told the Court that she was not in the adding room but she was informed by her counting Agent, Pw3 Henry Kishato. Therefore to this extent, the Petitioner's evidence is hearsay and is accredited no weight. Henry Kishato, Pw3 on this issue informed the Court that being a counting Agent of Pw1 he was in the adding room where he realized discrepancies in some of the election forms, where the results were not tallying. An Assistant Returning Officer Lambert Kyaro ordered them to make corrections in those forms but he refused. The forms he was referring to were exhibit P3 in which 6 votes were missing; In relation to exhibit P4 there was a difference of 2 votes; in exhibit P5 the original form differed with the photocopy by 3 votes and there is an error of 1 vote in exhibit P6. The errors in the above mentioned forms he said *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 29 of 56 affected the votes in exhibit P1 because the form was not correct, as there were unaccounted votes. The issue of the discrepancy in exhibit P1 was not disputed. Dw1, Dw2, Dw3 and Dw4 admitted in their defence that there is an error in filling exhibit P1, in that the votes were not tallying. In his final submission the learned Counsel Mr. Maige told the Court that the Petitioner has proved beyond all reasonable doubt from the evidence of Pw1 and Pw3 and the evidence in exhibit P1 that there were fundamental errors and non compliance with procedure which led to 14,854 unaccounted votes. Mr. Maige submitted that once they have established that there are unaccounted 14,854 votes the evidential burden shifted from the Petitioner to the Respondent, who were supposed to explain how the 14,854 votes were arrived at. *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 30 of 56 Due to the fact that it is undisputed that there were discrepancies in exhibit P1 the issue now is whether it has been proved to the satisfaction of the Court that the non compliance complained of was malicious. / According to the testimony of Pw3, the Agent who was in the adding room, assuming he was in the room, according to the evidence of Dw2 who said that he saw him briefly while drunk and left, he did not prove to the satisfaction of the Court that the errors were malicious. Further that there was no any other witness called to prove that fact. If there was a really serious problem on that issue out of all the people who were in the

adding room would have as well complained, or would have been ready to come to Court to testify but none was called. It is my finding in this issue that the evidence did not show how the admittedly substantial error in the total number of unaccounted votes occurred maliciously and that it was declared in favor of the 2nd Respondent. *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 31 of 56 However the error as admitted did not show ipso facto that the election was so badly conducted that it could not really be said to be an election. In absence of substantial credible evidence to establish malice I find no substance in this second issue, but nevertheless that the evidence thus far recorded would, together with the other grounds raised in the petition, and remaining for our consideration, be taken into account in the petition, and remaining for our consideration, be taken into account in determining at the end of the case whether or not the petitioner has established that the election should be set aside. The irregularities took place due to human error; the 31st Respondent did not act maliciously. With due respect to the learned Counsel, Mr. Maige the law is very clear about the burden and the standard of proof. That it is the Petitioner who has a duty to prove the issue raised against reasonable doubt. It is not enough to just allege. One has to prove the allegations to the satisfaction of the Court, according to the cases of *CHABANGA Hawa Nghumbi Vs. AG, John Mnyika & Another* Page 32 of 56 *HASSAN DYAMWALE* •above cited, *STANLAUS RUGABA KASUSURA & AG Vs PHARES KABUYE* (1982) TLR 388 and the case of *LUTTER NELSON Vs AG & ANOR* E.A.LR 1992 (1999) 2 E.A 160 just to mention few. Therefore the issue is not answered in affirmative. The third issue is in relation to form No. 21B that is exhibit P2, P3, P4, P5 and P6 respectively. Just like the issue relating to exhibit P1, Pw1 told the Court she was informed by Pw3 that there were discrepancies in the forms from the Poffing stations, as the results were not tallying with the valid votes and other forms had no total number of votes. On this issue Pw3 was called who testified that when exhibits P2, P3, P4, P5 and P6 respectively were added he found out that there were discrepancies in those forms. Referring to the forms he said in the *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 33 of 56 exhibit P2 there are 3 votes missing, in exhibit P3 there are 6 votes missing in exhibit P4 there is a difference of 2 votes. The other exhibit P5 the original form differ with the photocopy by 3 votes and in exhibit P6 there is one vote missing. This led the Returning Officer, Mr. Lambert Kyaro to order them to change the figures and correct the errors where Pw3 refused and as a result he refused to sign exhibit P1 and demanded the ballot boxes to be opened. In the defence Dw2 and Dw6 denied to have been involved in making corrections in exhibit P2, P3, P4, P5 and P6 respectively. They submitted that corrections if any in the above referred to exhibits are done in the Poffing stations. Dw6 further refused to have corrected exhibits P2, P3 and P6 at the level of the constituency, and refused to have signed the same when he was shown his name. He said he was not an Agent at the Poffing station. *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 34 of 56 Challenging the contradiction of Dw2, Dw5 and Dw6 on the issue of the correction of the votes at the constituency level the learned Counsel for the Petitioner, Pw1 prayed to the Court for the witnesses to be treated as incredible. In their final submission the learned Counsels for the defence submitted that according to section 79 of the Act, corrections are made at the Poffing station. They can reach the director through complaining to the

Returning Officer by lodging the form No. 16, which was not done. They also submitted that if the Court will be satisfied that the corrections were made in the adding room it did not affect the results as it is only 15 votes, considering the margin between the petitioner and the 2nd Respondent. The question here now is whether it has been proved at the standard required, that there were irregularities in exhibits P2 to P6 and the officers were ordered to correct the same at the constituency level. Here *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 35 of 56 again the only witness to prove the issue is Pw3. The evidence of Pw1 cannot be considered as she was not in the adding room. Dw2 and Dw6 who were in the adding room denied to have made corrections. Even when Dw6 was shown his name and signature in the exhibits P5 and P6 he refused to have signed. To prove that the corrections were made in the addition room and that Dw6 was involved in making corrections as alleged, the petitioner was obliged to bring expert evidence of handwriting, to prove beyond doubt that the exhibits P5 and P6 respectively were corrected at the constituency level. Not only that but also because Pw3 was not alone in the addition room, the Pw1 was supposed to call witnesses to corroborate the evidence of Pw3. Failure of which makes the issue to have not been proved beyond reasonable doubt. So the fact that there is no evidence to corroborate the evidence of Pw3 and the fact also that Pw3 did not complain in compliance with section *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 36 of 56 79A (1) (c) of the Act shows that there was no seriousness in proving the case to the required standard. It as well makes the evidence of Pw3 incredible, because as a CCM party Secretary, Ubungu Ward and the counting Agent of Pw1 must have an interest to serve, and his evidence should be treated cautiously. Therefore this issue is not proved beyond reasonable doubt. However because election are a process and not an event, the number of votes in exhibit P2 to P6 were very small, they were only 15. They could not have affected the election results. The fourth issue is whether the 2nd Respondent went in the addition room with the laptop computers and were used for addition. Pw1 testified that the 2nd Respondent brought his laptop computers in the votes adding hall which were used by the officer adding votes for addition of the votes. She further argued that the computers used were unauthorized because it is only National Electoral Commission who were supposed to bring the computers for addition of votes. She deposed that the unauthorized computers might have unauthorized *Hawa Ng'humbl Vs. AG, John Mnyika & Another* Page 37 of 56 information that it is possible the 14,854 unaccounted votes were already in the laptop. computers. Although she was not in the addition room, she said she was informed by Pw3 his counting Agent.. Her evidence is hearsay and is in law inadmissible. On the issue of computers, Pw3 told the Court that on 1/11/2010 at about 21.00 hours the 21st Respondent complained to the Assistant Returning Officer, Lambert Kyaro that the •National Electoral Commission computers are slow hence delaying the addition of votes. He said that is because the 2nd Respondent wanted to bring his own computers. He objected but despite his objection the 2' Respondent left the room and came back with five laptop computers. He put them on the table and convinced the 'Assistant Returning Officer to use the computers in adding the votes. But he. said he heard the Assistant Returning Officer saying that he has to consult the Returning Officer on whether to use the laptop computers or . not. After 25 minutes he said

the Returning Officer., Dw4 got into the addition room and after another Ilawa Nghumbi Vs. AG, John Mnyika & Another Page 38 of 56 5 minutes Mr. Kiravu the Director of Elections also appeared. They were all pressurized by Dw2's followers and the computers of the 2' Respondent were used in addition of the votes. He said the computers are privately owned by the 2' Respondent and were not verified, it is not known what was in them. So he said they were brought to temper with the results. The Respondents strongly denied to have used the computers of the Dw2. All the defence witnesses who were in the addition room proved that the laptop computers of CHADEMA were not used. It is undisputed that before abandoning the computers alleged to be of the National Electoral Commission, the Returning Officers used two computers belonging to the National Electoral Commission. The issue now is whether the computers used are those of Dw2 and whether they were verified and authorized. Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 39 of 56 In his submission the learned Counsel for the Pwl Mr. Maige challenged the use of the computers of Dw2 in that they were not verified by a computer expert who was also supposed to appear in Court to give evidence. He also argued that the laptop computers may be having information which led to the discrepancies in exhibit P1. That the unaccounted votes might have been in Dw2's laptop computers, he stated. Referring to the evidence of Dw1 supported by the evidence of Dw2, Dw3 and Dw4 Mr. Maige said it is not true that the 4 laptop computers were obtained from the officers of the Municipal Council namely the Accountant, Hassan Mussa Assistant Returning Officer of Ubungo Constituency and IT Department of the Kinondoni Municipal Council, as it was not easy to get them after 20.00 hours when the decision to use the other system was made. As the entire officer would have not been in the office. Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 40 of 56 Assuming that the computers were for the Municipal Council he said they were as well unauthorized as they are properties of officers they mentioned. He referred the Court to Rule 50 (1) of the Regulations, The Rule reads:- 50(1) "All the election equipments and materials shall be supplied by the Commission to the Returning Officer and the Commission or the Director of Elections shall issue, directives relating to utffization, distribution and safe custody of such election equipment and materials". According to the Rules the learned Counsel stated, the person authorized to supply election equipments and materials is the Commission. Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 41 of 56 In the evidence of Pw3 which was corroborated by Dw1 the laptops were used after consultation with Dw4 Mr. Ndunguru the Returning Officer and the Director of Elections Mr. Kiravu who according to the Rule could issue directives relating to utffization of the equipments. We are told that Mr. Kiravu accompanied by Dr. Cyst an IT consultant of the Commission who according to the evidence of Dw1 and Dw4 Mr. Kiravu went there in response to a call relating to the use of other laptop computers because the Electoral Commission computers were delaying the process of adding the votes. The issue of whether the computers were verified it was subject to proof. It is my humble view that the Petitioner who is alleging that the laptop computers were not authorized and verified has a duty to prove that allegation. That is by bringing witnesses to first prove that the laptops were not authorized, not verified and had information which caused 14,857 unaccounted votes. Hawa Ng'hurnbi Vs. AG, John Mnyika & Another Page 42 of

56 The learned Counsel Mr. Maige is as well challenging the defence of Dw1, Dw2 and Dw3 that they have failed to explain the procedure used

- for verification and that the laptops could not be tampered with. The burden is upon the Petitioner to prove by calling the expert like Dr. Cyst to testify on the status of the laptop computers on the issue of verification, and Mr. Kiravu the Director of Elections on the issue of authorization. Mr. Maige argued very strongly that it was the duty of the defence to call those witnesses to give evidence on the verification and authorization of the laptop computers. That is not proper according to the law. It has been repeatedly emphasized that the one who alleges must prove his allegations. It is the Petitioner who is alleging that the laptop computers whether they are for the 2nd Respondent or the Municipal Council they had to be verified and authorized. Now that he is alleging that they were not he had to bring supporting evidence to that effect. Not to shift the burden of proof to the defence. *Hawa Ng'umbi Vs. AG, John Mnyika & Another* Page 43 of 56. Finally that the assumption that the use of unauthorized laptop computers led to the erroneous addition of votes as reflected on the second issue raises doubt as to whether the use of the laptop computers is the cause of unaccounted votes. The defence through Dw4 gave an explanation on the cause of the error and as I have said it was a human error. That in the final results they just added the votes for the Pw1 and Pw2 and left out the votes of the other 14 candidates. I have had the opportunity of dispassionately scrutinizing the entire evidence and exhibits as tendered in Court and in so doing I have observed at the outset the votes as obtained and recorded in the exhibit P1. I wish to do some calculations on the face of the exhibit P1 to justify my reasoning. John Mnyika of CHADEMA 66,742 votes Hawa Ng'umbi of CCM 50,544 votes Sub Total CHADEMA and CCM 117,286 Sub Total for other 14 candidates 15,210 *Hawa Ng'umbi Vs. AG John Mnyika & Another* Page 44 of 56
- c. Grand Total for all 16 candidates 132,496 I have observed that there is a difference of about 353 votes between the total votes for CHADEMA and CCM (as reflected in paragraph 'a' above) and the total number of valid votes as recorded in the exhibit P1 which the defence alleges to be the total of the rival parties. Mathematically it reflects that; Total number of valid votes 117,639 Total CHADEMA and CCM 117,286 Difference 353 The difference is only 0.3% of recorded total number of valid votes, the difference which in my humble view makes the error in exhibit P1 human error. Further to that as argued by the defence side the discrepancy of about 14,857 votes can mathematically be viewed as follows The Grand Total all 16 candidates (paragraph 'c' above) 132,496 Minus Hawa Ng'umbi Vs. AG, John Mnyika & Another Page 45 of 56 The recorded total number of valid votes 117,639 Minus The recorded total number of rejected votes 2,184 Remaining: 14,857 votes I have kept in mind the allegation of the Petitioner and also I have considered the nature of the process of the adding the votes as explained by parties in this Honorable Court. I have also considered the long working hours and a cumbersome process and I find the evidence tendered by defence side to be credible. The error had nothing to do with the laptops, as again from the defence on an evidence which is undisputed what was being done at the constituency level was just to add the votes from form No. 21B and record the final results in exhibit P1. It is not

disputed by Dw2 that he did not have a laptop computer in the addition room. He said that himself and other counting agents for other political parties had computers. But the laptops were not used by the Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 46 of 56 election officers for adding. They were used for verification of their votes, also that the law does not prohibit the agents from entering the addition room with a laptop computers. For the above reasons I find the Petitioner to have not proved her case beyond reasonable doubt. It is only Pw3 who testified on the issue of computes, his evidence is incredible. To prove that what he is saying exactly happened he would have called witnesses like Lambert Kyaro and the Director of Elections Mr. Kiravu but he did not do so. He wants the defence to call them and prove authorization and verification. That is not proper. The Petitioner is the one alleging she has to prove her allegation beyond reasonable doubt. For the reasons above the issue is not answered in affirmative and is dismissed. The last issue is of unauthorized people in the room of adding votes. It is the evidence of Pw3 who told Pw1 that Dw2 entered the additional room with unauthorized persons. In his testimony Pw3 said that Dw2 Hawa Nghurnbi Vs. AG, John Mnyika & Another Page 47.of 56 / entered the addition of vote's room with more than eight (8) members of his party. He mentioned those members to include one Bonoface Jacob a Councilor of Ubungo Ward, Renatus a Councilor. of Sinza Ward, Nassoro and one Mallya. He even identified some of them in Court. He said according to law people who were supposed to be in the addition room were Returning Officer, Assistant Returning Officers, Electoral Commission members, Candidates and/ or their agents, Police and Observers. He also said the Agent of the 2nd Respondent was one Erick, Dw6. Pw3 said further that he was not happy with the situation, he reported to Mr. Lambert Kyaro but he was told that there were no forms No.16. It is the evidence of Pw.l that the issue of allowing more people in the addition room as required has affected the results because it affected the concentration of the adding officers and that is the reason they made mistakes in fifying exhibit P1. . Hawa Nghumbi Vs. AG, John Mnyika & Another Page 48 of 56 Dw2 on the other hand denied to have entered with his fellow party members more than allowed. Testifying on this all defence witnesses stated that it was not possible for unauthorized people to get into the adding room. All the authorized people had to identify themselves before they entered. Some were identified by their uniforms like Police Officers, others had identity cards, and Agents had introduction letters from their respective parties. There was a very tight security to the extent of it be impossible for an unauthorized people to get in. Considering the state of affair in the addition room I do not think it is possible for people who are not authorized to get into the adding room. I think most of the officers and candidates and agents are literate and they all know their rights. I do not envisage a situation where Dw2 could enter into the addition room with so many people without the other agents and or candidates complaining. More than eight people are too many to enter the addition room unnoticed by all the other people in the room except Pw3. Pw3 did not even mention in his evidence that Hawa Nghumbi Vs. AG, John Mnyika & Another Page 49 of 56 there were other authorized people in the room who complained about the issue of Dw2 entering the room with such a big number of unauthorized people. The issue now is whether it has been proved to the required standard that Dw2 entered with more than 8 unauthorized people in the addition

room. Apart from Pw3 there is no other witness called to testify on the issue. The defence denied that Dw2 entered into the additional room with more than eight people. The petitioner was supposed to call witnesses who were in the room to prove that Dw2 entered with such a big number of unauthorized people. In absence of that, the evidence of Pw3 is untrustworthy. This issue as well not answered in affirmative. It is therefore dismissed.

Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 50 of 56 Before I leave this issue I am inclined to put it clear that it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good reasons for not believing a witness. The Petitioner herein called 3 witnesses to prove her case. Their testimony was challenged big time. I understand that what is important is the credibility and reliability of the evidence and not the number of witnesses called to testify in consideration Of section 143 of the Evidence Act Cap 6 R.E 2002. This Court have seriously and very carefully considered and weighted all the evidence of the three petitioner's witnesses before it, and the same is satisfied that they were not credible. I am very surprised that if they were, why didn't they call witnesses to corroborate their testimony? This taking into consideration the fact that in addition room and in the meeting there were many people. Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 51 of 56 As also observed in the case of Riziki Method Vs R Criminal Appeal No. 80 of 2008 CA (Unreported) where the case of Aziz Abdaiha Vs R (1991) TLR 71 was referred, it was succinctly that:- "the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses, who from their connection with the transaction in question, are able to testify on material facts. If such witness are within reach but are not called without sufficient reason being shown the Court may draw an inference adverse to the prosecution" I abide by this holding and accordingly I apply the same. In the final analysis after considering all the evidence on the grounds raised and argued in this petition I do not think that the evidence of either the Petitioner or her two witnesses Pw2, Robert Hawa Nghumbi Vs. AG, John Mnyika & Another Page 52 of 56 Kondela and Pw3, Henry Kishato; was sufficiently reliable. As a result, the Petitioner has not proved the allegation at the required standard that there was non-compliance with the provisions of the Act in relation to Parliamentary elections which have affected the final results declared by the Returning Officer on the 2nd November, 2010. It is thus undisputed fact before this Honorable Court that the 2nd Respondent's majority over his nearest rival the Petitioner was over 16,198 votes. It remains for me to see whether this majority was achieved by the 14,857 votes alleged to have been an unaccounted for. As argued above by the defence side in this judgment, the 14,857 votes which was a result of human error as clearly evidenced Dw1, Dw2 and Dw4 is in my settled mind credible. I am of that unyielding view due to the fact that the adding officer spent more than 17 hours 40 minutes in the adding room without a break. As reflected in the evidence the Hawa Ng'humbi Vs. AG, John Mnyika & Another Page 53 of 56 adding process started on about 11.00 hours (1/11/2010) and the results were declared on 04.40 hours (2/11/2010) when the results were declared. For the record, I do not think the evidence of the Petitioner has come anywhere near establishing the commission of an election offence in relation to the issues in dispute as contended in the Amended Petition dully filed in this Honorable Court. The evidence has not shown one way or the other how

this admittedly substantial error affected the final result. It could have happened either at the process of adding the votes to get the final results or in the course of the figures being transmitted from the computer to the exhibit P1. In either case I maintain that, that I do not think that the error, and or irregularities ipso facto shows that the election was conducted so badly that it cannot be said really to have been an election. *Hawa Ng'humbi Vs. AG, John Mnyika & Another* Page 54 of 56 p. In my conclusion therefore, I find that none of the grounds of the Amended Petition of this petition as argued herein above has been proved, consequently I. dismiss the petition and declare that the 2nd Respondent was validly elected for the Ubungu Constituency at the General Election of 31st October 2010 with a majority over his nearest rival, the Petitioner, of 16,198 votes. The Petitioner shall pay the costs of this petition to the 1st 2nd and 3' Respondents. Petition Dismissed. 0 NX II' I/o 1/ ' ...: . 71 •;, U Msuy II . u. JUDGE - 24/05/2012 Date: 24/05/2012 *Hawa Nghumbi Vs. AG, John Mnyika & Another* Page 55 of 56

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