

TANZANIA / JUDGMENT

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16 April 1982

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\; IN THE OF TANZANIA AT DAR ES SALAAM (C?RAM: Ny:alali, C.,J.,, Mwakasendo, .J.A., and Kisanga, J.,A.) CIVIL APPEAL NO. 3 OF 1982 B E T WE E N MARTHA MICHAEL WEJJA • ., o 000000 APPELLANT A ND HON., THE ATTORNEY-GENERAL) HON., KITWANA SELEMANf KONDO) ., RESPONDENTS 0 0 0 CLEMENT NKUNGU)· DAVID iV!LANGWA) (Appeal from the Judgment, Decree and Order of the High Court of Tanzania at Dar es Salaam) (Mapigano, J.) DATED THE,...J~h DAY .OF OCTO~ER, 1982, in Civil Case No., 55 of 1980 L . JUDGMENT OF THE COLJ.R,T NYALALI, C.J.: · MARTHA MICHAEL WEJJA, hereinafter called WEJJA, filed a petition in the High Court at Dar es Salaam seeking to nullify the Parliamentary Election results for the Ilala Constituency in respect of which she was one of the two Parliamentary Candidates. The other Candidate was KIT'vJANA SELEMANI KONDO, hereinafter called KONDO. The respondents in the High Court and in this Court are: the said KONDO; one CLEMENT NKUNGU - hereinafter called NKUNGU; one DAVID iVILANGNA - hereinafter called MLANGWA and the ATTORNEY-GENERAL. The said NKUNGU and MLANGWA were at all material times the District Chairman and the District Secretary of the Party, ' 0. 0. /2 2 "I ; , _,, respectively, in the Ilala District. WEJJA was represented f ' J ' in the High Court.by Messrs Issa E. Shivji, and G. Fimbo, /)'I learned advocates, both from the Legal Aid Committee of the Faculty of Law of the University of Dar es Salaam; whereas KONDO was represented by Mr. Lakha, learned advocate. NKUNGU and MLANGWA appeared in person in the High Court; whereas the A'l'TORNEY--GENERAL was represented by Mr. Sadallah, learned Senior State Attorney. In the appeal_before this Court Mr. Shivji appeared for WEJJAj whereas Mr. Lakha appeared for KONDO, NKUNGU and MLANGWA. Mr. Sadallah again appeared for the A'rTORNEY--GENERAL. WEJJA's petition in the High Court was based on numerous I- gro~nds alleging various electoral malpractices including sexism, tribalism, misuse of educational qu~lifications, false accusations, commotion anq display of election symbols, misuse of ngoma and dance groups, bias, irregularities i~ the organiza~ tion and management of the election campaign, irregularities in the voting and counting of votes and discrepancy between / the Presidential and Parliamentary totals of votes. The learned trial judge was of the view that the following I) allegati9ns were not.established - that is - the allegations ' of sexism, tribalism, c_ommotion and display of election symbols and misuse of ngoma and dance groups. In arriving at his conclusion, the learned trial judge found himself unable to rely on the witnesses for the petitioner. As to the ~llegation of misuse of educational qualifications, the learned trial judge found no such misuse but justification. As to the charge of bias, the learned trial judge ~onsidered the specific acts or statements and found a number of them

established by the evidence but he did not consider whether

- o, o o/3 3 such acts or statements showed any bias As to the allegation of non-compliance or irregularities concerning the election, the learned trial judge found that the provisions of section 66(1)(a) of the Elections Act as well as those of section 88 of the Act, among others, were not complied with but he was of the view that such non-compliance did not affect the results of the election. The learned trial judge, therefore, dismissed the petition but made no order as to costs. WEJJA was aggrieved by the decision of the High Court, and in a Memorandum listing twelve grounds, has appealed to this Court. The Memorandum of Appeal can be divided into two parts, firstly, the part which raises complaints of a general nature and, secondly, that which raises complaints of a specific nature. KONDO, NKUNGU and MLANGWA have cross-appealed to this Court on fifteen grounds. Most of the grounds concern specific findings in the judgment of the learned trial judge; whereas one concerns a preliminary issue of limitation and another is in respect of the learned trial judge's omission to make an order as to costs. According to the proceedings both in the High Court and in this Court, the following primary facts are either common grounds or not in dispute between the parties. It is undisputed that on the 18th August, 1980, there was a District Annual Conference of the Party for Ilala District where delegates cast their preferential votes in respect of the prospective parliamentary candidates for Ilala Constituency as required under section 53 of the Elections Act, 1970, and that on the 23rd August, 1980, the Ilala Working Committee of the Party met to evaluate the prospective candidates. I (J) and graded them either as grade "A", or "B1", or "C" or "D", as they saw fit. Prospective candidate KONDO was given an "A" grade, whereas prospective candidate "WEJJA" was given a "B1" grade. On the 12th September, 1980, the National Executive Committee of the Party met and selected KONDO and WEJJA to contest the Parliamentary Election for Ilala Constituency and gave KONDO the election symbol of a "hoe" and WEJJA the election symbol of a "house". On the 19th September, 1980, the Ilala District Working Committee met and approved the election campaign programme, the names of the Presiding Officers, the Polling Assistants and the Polling Agents. On the 30th September, 1980, a meeting of the election officials, attended by the Returning Officer, the two Parliamentary Candidates and the three Supervisory Delegates for Ilala Constituency met and approved the election campaign programme. It is common ground that the election campaign started on the 1st October, 1980, and ended on the 21st October, 1980. It is common ground also that the election campaign was organized and managed by the Ilala District Working Committee of the Party, instead of the District Executive Committee of the Party as required under section 66 of the Elections Act, 1970. The election campaign meetings were held at various places in the Ilala Constituency, that is, Mvuti, Msongola, Chanika, Pugu Kajiungeni, Kitunda, Kinyerezi, Tabata, Ukonga CoM, Kisutu, Upanga East, Upanga West, Jangwani, Mchafukoge, Gerezani, Mchikichini, Kipawa, Kivukoni, Ilala, Ukonga Majumba Sita and Buguruni. These election campaign meetings were chaired by NKUNGU who was accompanied by MLANGWA, the three Supervisory delegates and various district and branch Party officials. It is not in dispute between the parties

that Co Co Mo Party branches organized. various ngom 9 and dance groups to entertain the people who attended the campaign meetings. It is common ground that at these campaign meetings the two Parliamentary Candidates addressed the electorate but the electorate was not allowed to ask the candidates any question. Furthermore, it is common ground that at the campaign meetings held at Kipawa, Upanga West, Upanga East, Mchafukoge and, Kivukoni KONDO addressed the meetings and talked, inter alia, about the high calibre of the membership of the next Parliament, and about himself as being educationally better suited for membership of the next Parliament than his opponent WEJJA. At some of the campaign meetings, the two candidates made accusations against each other, including the accusation by KONDO about WEJJA being bad mannered and a liar, and an accusation by WEJJA about KONDO being a man of empty promises and one who had failed to call a public meeting at Ukonga. The candidates also made reference, in their speeches, to an alleged loss of money which had been donated by the Karirnjee Family, and a reference to the sale of Khanga I by WEJJA. At the campaign meetings held at Jangwani, Giza, Mchikichini, Chanika, Pugu Kajiungeni, Msongolaf Ukonga C.CsMo and Ilala NKUNGU, and sometimes MLANGWA, intervened to make corrections and comments regarding WEJJA's campaign meetings. It is undisputed that on the 13th October, 1980, in the midst of the election campaign, the three Supervisory Delegates for the Ilala Constituency wrote a report on the election campaign and personally delivered it to the Director of Elections. The report was tendered at the trial in the High Court for identification purposes as Exhibit ID.10. It is common ground that early on the polling day, that is, on the 26th October, 1980, two polling stations at Kipawa were combined with the third polling station; that on that day the polling took place in school class-rooms throughout the Constituency and that such class-rooms had no screened compartments. Among the persons appointed as Polling Agents is Ismail Mwakabala, a person who became hostile to WEJJA during the election campaign. It is also common ground that the counting of votes took place in the Diamond Jubilee Hall on the 27th October, 1980; that the counting of such votes was attended by NKUNGU, MLANGWA, the three Supervisory Delegates and others; that during the counting the said NKUNGU moved around the hall and jotted down some totals of the votes counted; that at one stage of the counting of the votes the Returning Officer, that is, Mrs. Susana Saah Tarimo, left the hall and went to Ilala Boma to take an adding machine; that when the Chairman of the Electoral Commission, that is, Chief Adam Sapi Mkwawa, visited the Diamond Jubilee Hall, NKUNGU handed him a doubtful ballot paper; that at the end of the counting the Returning Officer announced the results which were 56,821 votes for KONDO, 54,093 for WEJJA and 2,797 votes spoiled. KONDO was thus declared the winner by a majority of 2,728 votes. Furthermore, it is common ground that the total Parliamentary votes cast in the Ilala Constituency were 113,711; whereas the total Presidential votes cast were 110,842 votes. The Parliamentary votes thus exceeded the Presidential votes by ... 2,869 votes. There is no dispute between the parties that the results of the Parliamentary votes counted were recorded on a document produced at the trial in the High Court by the Returning Officer as Exhibit D.10. Moreover, it is not in dispute that

- I ... 7 .. that on the 3rd November, 1980, the three Supervisory Delegates wrote a final report on the election and sent it to the Electoral Commission and was produced at the trial in the High Court for purposes of identification as Exhibit IDo2o According to the proceedings both in the High Court and in this Court, the parties appear to be in dispute or to hold divergent positions regarding the following matters: The petitioner, who is now the appellant, contends, through her advocate, that the organization and management of the election campaign by the District Working Committee of the Party was a contravention of the provisions of section 66 of the Elections Act. On the other side, that is, the Attorney-General and the other respondents, it is contended that the practice of having Parliamentary elections organized and managed by a District Working Committee of the Party was widespread throughout the country and not confined to the Ilala Constituency. It is also submitted, on the part of the respondents, that the District Working Committee of the Party has too large a membership and as such cannot, in practice, organize and manage an election campaign. The appellant also contends that the failure to allow the electorate to ask the candidates questions at the campaign meetings contravened the provisions of section 66(1) (a) of the Elections Act, 1970, which required the candidates to be presented to the electorate at the meetings. The respondents submitted that the questioning of candidates is not provided for under the provisions of the Elections Act, 1970, and in any case it is not an established practice.

With regard to the ngoma and dance groups which were organized by the Party branches to entertain the crowds at campaign meetings, the appellant contends that one of the ngoma, locally known as "Mganda Ngoma", danced and sang songs in favour of KONDO and against WEJJA at the campaign meetings held at Ilala and Mchikichini. It is part of the appellant's case that such songs amounted to illegal campaigning or canvassing on behalf of KONDO. The other side denies any such singing. As to KONDO's talk about his 'better educational qualifications', the appellant claims that such conduct is improper and amounted to a misconduct within the meaning of the Elections Act, 1970. KONDO's position is that there was nothing wrong with such talk. The appellant also contends that KONDO's and MLANGWA's interventions to correct or comment upon WEJJA's speeches at some of the campaign meetings were biased against her. KONDO's and MLANGWA's position is that such corrections and comments were made without bias and were necessary under the circumstances under which they were made. The appellant's case also contains an allegation that at the campaign meetings held at Ilala and Ukonga Majumba Sita there was a pro-KONDO commotion and display of hoaxes, which amounted, in law, to an illegal public campaigning or canvassing on behalf of KONDO. The respondent's case consists of a denial of any such commotion or display of hoaxes. Furthermore, at the Ilala and Buguruni campaign meetings the appellant alleges that KONDO falsely accused her of being a person of bad manners. It is part of her case that such behaviour on the part of KONDO amounted, in law, to a 'misconduct within the Elections Act. KONDO's position on this point is that he was speaking on the Party Manifesto which stipulates that a good leader should be a person who respects others. He had evidence to show that WEJJA was a disrespectful person. With regard to the campaign meetings held at Jangwani, Gereza, Mchikichini, Ilala and

Buguruni it is alleged on the part of the appellant that KONDO falsely accused her of black marketeering in Khanga clothes. It is also part of the appellant's case that such behaviour on the part of KONDO amounted, in law, to a misconduct within the meaning of the Elections Act. KONDO's position on this matter consists in a denial about making such an accusation and an assertion that what J(ONDO said at such meetings was to enquire from the electorate whether they got any of the Khanga clothes which WEJJA claimed to have been selling as part of her U.W.T. activities. So With regard to the campaign meetings at Ki tunda and Kivukoni, it is alleged on the part of WEJJA that KONDO exploited differences of sex between him and WEJJA for election purposes. It is part of the appellant's case that such conduct is prohibited under the provisions of section 123(3)(b) of the Elections Act. KONDO's position consists in a denial of any such behaviour on his part. As to the campaign meeting held at Jangwani, Ilala ~ Mchikichini, Ukonga Majumba Sita, Gerezani and Buguruni, it is alleged on the part of WEJJA that KONDO exploited tribal differences for purposes of the election. It is part of the appellant's case that such conduct is prohibited under the provisions of the Elections Act. KONDO's case is a denial of any such conduct. Furthermore, it is contended on his part that he could not have done so as the Ilala Constituency is part of the City of Dar es Salaam and is cosmopolitan. Moreover, the composition of the District and Branch Party leadership is predominantly non-parochial. With regard to Ismail Mwakabala being allowed to act as a polling agent after he became hostile to WEJJA, it is contended on the part of the appellant that it was improper to allow him to act as a polling agent and that his hostility made him interfere with the conduct of the voting at Kipawa polling station. The respondents' case is that Ismail Mwakabala had shown no hostility at the time he was appointed and there was no opportunity to revoke his appointment subsequently when his hostility became apparent. The appellant also contends that the absence of screened compartments at the polling stations means that there was no secrecy in voting at the polling stations. The respondents' case, on the other hand, asserts that voters marked their ballot papers at places in class-rooms which were so removed from observations and that the absence of screened compartments was of no effect. With regard to the counting and totalling of votes at the Diamond Jubilee Hall on the 27th October, 1980, it is contended on the side of the appellant that the procedure laid down under the provisions of section 88 of the Elections Act, 1970, was not followed. On the other side, the respondents' case consists in an assertion that the Court is precluded in considering this complaint as it was raised in the petition in the High Court. Furthermore, with regard to the events at the Diamond Jubilee Hall, it is alleged on the part of the appellant that the Returning Officer abdicated her responsibilities regarding the supervision of counting of the votes and that instead NKUNGU took charge of such counting. The case for the other side consists in a denial of such allegation and an assertion that NKUNGU's attendance at the counting of votes was innocent and was a result of his civic curiosity. It is further alleged on the part of the appellant that the excess of Parliamentary votes over the Presidential votes is attributable to failure on the part of the Returning Officer to comply with the provisions of the Elections Act or some such other irregularity. As to the cross-

appeal, KONDO, NKUNGU and MLANGWA contend through their advocate that the learned trial judge was duty bound in law to order WEJJA to pay the costs of the case in the High Court after dismissing her petition, notwithstanding the fact that WEJJA was petitioning in forma pauperis. They also contend that the learned trial judge erred in law in hearing the petition when it was time barred. The case on the other side on these matters is to the effect that the awarding of costs is always in the discretion of the court and it is against the public interest to award costs to be paid by a person who is suing as a pauper. As to the issue of the appeal being time barred, it is submitted on the part of the appellant that the petition was not time barred. 12. The first important point for consideration and decision concerns the appellant's complaints of a general nature. The appellant complains that the learned trial judge erred in law in refusing to admit as evidence the two written reports made by the three Supervisory Delegates who were appointed to supervise the election in the Ilala Constituency. The documents were produced for identification purposes at the trial as Exhibits ID.1 and ID.2. The learned trial judge held that the two reports by the Supervisory Delegates were some kind of extra-judicial statements which were interspersed with prejudicial opinions and were therefore inadmissible. Mr. Shivji, for the appellant, has submitted that the two reports are admissible as the first report was prepared under the provisions of section 67(2) of the Elections Act and the second was prepared in accordance with the instructions issued by the Electoral Commission under section 141 of the same Act. He also submits that in any case the report is admissible by virtue of the provisions of section 34C of the Evidence Act, 1967. We are satisfied that the reports by the Supervisory Delegates, that is, Exhibit ID.1 and Exhibit ID.2 are admissible as evidence by virtue of the provisions of section 34C of the Evidence Act, 1967, which states in so far as it is relevant in this case:- "34C - (1) In any civil proceedings where direct or evidence of fact would be admissible, any statement made by a person in a document tending to establish that fact, shall in production of the original document, be admissible as evidence of that fact, lieu of the attendance of the witness, if the following conditions are satisfied:- ... /13 (13)(a) if the maker of the statement either -

- (i) had personal knowledge of the matters dealt with by the statement; or (ii) ...; and
- (b) if the maker of the statement is called as a witness in the proceedings, but the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him or to identify him, have been made without success." It is apparent that the first paragraph of section 34C contains a typographical or printing error concerning the words "lieu of the attendance of the witness". These words should instead read: "in lieu of direct oral evidence". We arrived at this conclusion after Mr. Shivji had drawn our attention to the fact that section 34C is a product of a recommendation made in 1967 by the Judicial System Review Commission, known as Msekwa's Report. The Commission recommended at page 275 "Of its Report that an amendment be made in our law of evidence on lines similar to section 90 of the Evidence Ordinance of Nigeria. Mr. Lakha submits in effect that it is

prejudicial to his clients if this Court admits Exhibit ID.1 and Exhibit ID.2, as the learned trial judge's exclusion of the documents prevented Mr. Lakha from cross-examining Wambura Magesa on the documents. We do not see how Mr. Lakha was precluded from cross-examining Wambura Magesa by the trial judge's ruling, since the documents had already been produced in court for identification purposes and they could be used by Mr. Lakha to contradict any testimony given by Wambura Magesa in court. 0000/14 14 We have found that the learned trial judge erred, ... in law in not admitting Exhibit ID.1 and ID.2 as evidence. We are thus entitled to consider the documents as part of the evidence on record by virtue of the provisions of section 34C of the Evidence Act, 1967. Moreover, the statements contained in these reports are admissible as evidence of consistency in respect of oral testimony of the maker of such document. The second general complaint made by the appellant - I through her advocate is that the learned trial judge used double standards in evaluating the evidence before him; in that he adopted one approach in dealing with the witnesses for the petitioner and another in dealing with the witnesses for the respondents. This complaint has given us great anxiety, but we are satisfied that the complaint is justified. On a number of points such as the allegation of tribalism, commotion and display of election symbols and the allegation concerning the accusation of black marketeering, the learned trial judge found himself unable to rely upon the evidence given by witnesses for the petitioner because he felt that such witnesses had lied at one point or were in some way deficient. For instance, he could not rely on the evidence of WEJJA whose evidence he found to be an assimilation of suspicions and inferences; that of Wambura Magesa whom he found to have a tendency of jumping to conclusions and was arrogant and that of Rose Mbonde whom he found to have a racing mind - whatever that means. On the other hand, the learned trial judge relied on a number of witnesses for the respondents in spite of his finding that such witnesses lied at some point or were somehow deficient. For instance, the learned trial judge preferred KONDO's version concerning the accusation of black marketeering allegedly made against WEJJA, but the learned judge found KONDO to have lied with regard to the events at Tabata concerning the snake dance and the events at the election campaign meetings at Ilala and Mchikichini concerning the mganga ngoma. The third general complaint is to the effect that the learned trial judge failed to evaluate the evidence of some of the witnesses for the petitioner such as PoWo 16 and PoWo20. Although it is true that the learned trial judge mentions these witnesses in the course of reviewing the evidence before him, he does not express any specific or implied opinion on them. We find the petitioner's complaint justified. The second important point for consideration and decision is whether this Court; as an appellate court, is precluded from interfering with the assessment of witnesses made by the learned trial judge. Mr. Lakha has submitted that the learned trial judge was in a better position to assess the witnesses who appeared before him than we are in this Court. We agree but we must point out that this is a first appeal and as such this Court is entitled to look at and evaluate the evidence afresh and come to its own conclusion, particularly where the learned trial judge adopts a wrong approach in evaluating the witnesses or omits to evaluate some of the witnesses or to consider some vital piece of evidence as is the case here. This legal position is accepted in many common law

jurisdiction. For instance, in *Yuill v. Yuill* (1945) 1 All A.R. 83 at p. 188 - it is stated: ".... But it is said that we are not entitled to take this view because the judge believed the evidence of the respondent and the co-respondent and based his belief, as he said, upon a careful observation of their demeanour and the opinion which he formed of their type and characteristics." He said that much of their evidence - particularly that of the respondent - was given in a very unsatisfactory manner and that the respondent was on some occasions "resentful and consequently reckless in her answers." Both of them, he said, were affected by nervousness and embarrassment and he was "not satisfied that they were deliberately dishonest in the box." He was, however, satisfied, despite his serious criticism, that they were substantially truthful in their testimony on the vital matters which he mentioned. We are reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part upon his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to say claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value. 11. The third significant point for consideration and decision is whether the election petition was time barred by failure to pay the prescribed fees within the period of one month stipulated under section 130(1) (i) of the Elections Act, 1970, read together with Rule 8(1) of the Elections (Election Petitions) Rules, 1971. Section 130(1) of the Elections Act states: "Every election petition shall be presented within one month of the date of publication in the Gazette of the result of the election: Provided that an election petition questioning the election upon the ground of a corrupt practice, and specifically alleging payment of money or other act to have been made or done since the date of the election said by or with the knowledge and consent or approval of the member whose election is questioned or by or with the knowledge and consent or approval of an agent of the member in pursuance or in furtherance of such corrupt practice, may be presented at any time within twenty-eight days after the date of such payment or act." Rule 8(1) of the Elections (Election Petitions) Rules, 1971, reads: "A petition shall be presented by lodging it with the Registrar and by paying the prescribed fee." We agree with Mr. Shivji for the

appellant that the position is covered by Rule 27(1), (2) and (3) of the Elections (Election Petitions) Rules, 1971, which state:- 11(1) Save as is expressly provided to the contrary in these Rules, no petition shall be dismissed for the reason only of non-compliance with any of the provisions of these Rules or for the reason of the only of any other procedural irregularity unless the court is of the opinion that such non-compliance or irregularity has resulted or is likely to result into miscarriage of justice

- (2) Where there has been any non-compliance with any of the provisions of these Rules or any other procedural irregularity, the court may require the petitioner, subject to such terms as to costs or otherwise as the court may direct, to rectify the non-compliance or the irregularity in such manner as the court may order
- (3) Where an order has been made under paragraph (2) of this rule, and the petitioner fails to comply with such order within such time as the court may specify, the court may dismiss the petition. Mr Lakha has argued that the requirement of paying court fees is not a matter of procedure and practice falling within the Elections (Election Petitions) Rules, 1971, but it is part of the substantive law falling within the provisions of section 130 and 132 of the Elections Act, 1970. We do not agree. It is apparent to us that the payment of court fees in respect of election petitions is provided for under Rule 8 of the Elections (Election Petitions) Rules, 1971, and is thus a matter of procedure and practice. We are satisfied, therefore, that the learned trial judge did not err in law in proceeding to hear the petition. The fourth important point for consideration and decision in this case is whether the organization and management of the election campaign by the District Working Committee of the Party instead of the District Executive Committee of the Party contravened any provisions of the Elections Act, 1970. The learned trial judge considered this point and stated in part of his judgment:- "I will next consider the point which I myself raised when Mr Sadallah was addressing the court. By section 66(1)(a)(i) of the Elections Act a Parliamentary election campaign must be organized by the District Executive Committee. In the case at hand, those functions were, admittedly, discharged by the District Working Committee, which is a smaller body. I have heard the argument about Articles Three, sections 40 and 41(1) of the Party Constitution permitting that. But the answer to that is section 4 of the Elections Act which provides that 'Where this Act requires any matter or thing to be done by an organ of the Party, that matter or thing shall be done, subject to the Constitution and this Act, in accordance with the Constitution of the Party and any rules of the Party applicable thereto which are not inconsistent with the Constitution or this Act' (underlined provided) ... , dated 19/19. "But there is some evidence, particularly from the document, Exhibit P4, which shows that in doing so the District Working Committee was only complying with the directive of the Electoral Commission. Whatever was the reason behind that directive, I hold, however, that even the Electoral Commission had no discretion to override the statutory provision. All the same, I hesitate to say that the breach affected the result of the election." It is apparent that the learned trial judge was of the view that there was a contravention of the provisions of section 66(1) (a) (ii) of the Elections Act in having the election campaign organized and managed by the District Working Committee

tee of the Party instead of the District Executive Committee of the Party. We respectfully agree with his finding on this point. The learned trial judge appears also to have been of the view that this irregularity was a result of erroneous instructions by the Electoral Commission which were tendered at the trial in the High Court as Exhibit P4. We also respectfully agree with that view. We have taken note of Mr. Lakha's submission before this Court that the irregularity was not confined to the Ilala Constituency but that does not change the legal position that the practice is irregular in law. We do not subscribe to Mr. Lakha's contention that the large membership of the District Working Committee of the Party makes it impracticable for that organ to organize a parliamentary election. We can see nothing, in law, which prevents the District Executive Committee of the party from carrying out its statutory responsibilities under the Elections Act by working through one or more sub-committees of itself provided it meets and decides to do so and remains over-all in charge of the election campaign. In the present case the District Executive Committee never met to consider the arrangements for the parliamentary elections in the Ilala Constituency, 1980/2000 and it never decided to act through the District Working Committee. In our considered opinion, this irregularity on this point amounts to non-compliance within the meaning of the provisions of section 123(3)(c) of the Elections Act, 1970. Under those provisions the court is required to nullify a parliamentary election if it appears that the election was not conducted in accordance with the principles laid down in the relevant provisions of the Act, and that such non-compliance affected the results of the election. The question arises therefore whether the election campaign in this case was not conducted in accordance with the principles laid down under the provisions of section 66 of the Act, and whether the results of the election are affected thereby. The principle underlying section 66 of the Elections Act requires parliamentary elections campaigns to be organized or managed by the Party and not by individuals or other bodies. It is beyond dispute that the election campaigns for the Ilala Constituency were organized by the Party. The only breach is that the specified organ of the Party did not organize or manage the election campaigns, but instead another organ of the Party did so. This irregularity does not violate the underlying principle. The position would have been different if the election campaigns were organized by a non-Party organization, such as a football club. Mr. Shivji conceded that non-compliance with the provisions of section 66 per se cannot be said to affect the results of the election. No doubt this concession is in agreement with the views of this Court expressed in the case of Stanslaus Rugaba Kasusura - Civil Appeal No. 26 of 1998 (unreported) where this Court held that non-compliance with the provisions of section 88 of the Elections Act was fundamental and went to the root of the election. No non-compliance with the election provisions goes to the root if non-compliance is governed by the provisions of section 123(3)(c) of the Elections Act. In the present case Mr. Shivji has submitted that the organization and management of the election campaign by the Ilala District Working Committee affected the results because that same body evaluated and graded the candidates at its meeting held on the 23rd August, 1980, and awarded Grades "A"

to KONDO and "B" to WEJJA. Mr. Lakha has countered by submitting that in the absence of evidence to show the process involved in the grading of the candidates, and to show on which side NKUNGU or MLANGWA was in the grading exercise, it is not reasonable to hold that the organization and management of the election campaign by the Ilala District Working Committee, instead of the District Executive Committee affected the results. We agree with Mr. Lakha's submission and we find that there is no evidence to show that the results were affected by this irregularity. Mr. Shivji also submitted that the grading of the candidates by the District Working Committee after the District Annual Conference had cast its preferential votes is not allowed by law, and that under the provisions of section 55(2) of the Elections Act the National Executive Committee is precluded from considering the results of such grading exercise. With due respect to Mr. Shivji, we are unable to agree. We are of the considered opinion that the provisions of section 55 (2) lays down only the minimum matters which should be considered.

- the National Executive Committee is required to consider / while selecting candidates to contest parliamentary elections. Those provisions do not prohibit the National Executive Committee of the Party from considering other matters or information which it considers necessary to enable it to select the appropriate candidate or candidates. The next material point for consideration and decision is whether there is a legal obligation on the part of the organizers of an election campaign to allow the electorate to ask questions to candidates. The learned trial judge specifically considered this point and stated:- "It seems to me that the question of questions is not provided anywhere in the Act or in Exhibit P4. With respect to Mr. Shivji, I do not think that section 66(1)(a) covers it. There was no evidence that it is an established practice. On the contrary, there was evidence through Kondo in the 1970 election the position was the same. Mr. Shivji has submitted to the effect that the words 'the election campaign on behalf of both the candidates shall be organized by, and the candidates shall be presented to the electorate at meetings convened for the purpose of', contained under section 66(1) (a) can be construed as including a requirement upon organizers of the election campaign to give opportunity to the electorate to ask the candidates questions. Mr. Lakha countered by submitting that the various provisions of section 66 read in their entirety exhaustively provide for the matters that are obligatory, such as the requirement to give the candidates the opportunity to address the electorate by alternating at successive meetings. It is Mr. Lakha's contention that if Parliament had intended to make it obligatory for the electorate to be allowed to ask questions, it would have said so. We agree with Mr. Lakha and we find that although it is desirable to allow questions to be asked, it is a matter of discretion for the campaign organizers but there is no statutory obligation requiring the organizers to allow the electorate to do so. The next significant point for consideration and decision is whether the 'mganda ngoma' performers did dance, and sing in favour of KONDO and against WEJJA at the election campaign meetings held at Ilala and Mchikichi. The learned trial judge considered this aspect of the case and stated:- "The petitioner's case rests, in the main, upon the testimony of these witnesses ... Wejja,

PoWo16 Rose Mbonde and PoWo20 Kassim Liundi that the Mgar.da was performed after the two They st,:it2d meetings and that the participan~s sand in Kiswahili 'tunamtaka Kondo, hatumtaki Wejja'. They did not say that the participants continued to sing that song after leaving the meeting plo.ceso Wejja only talked of a certain rowdy g~?UP of people that descended at the Juwata Hall' where it chanted similar , 'lQrds. And the other. witnesses mentioned by Mro Shivji in his final. address, PaWc3 Wambura Magesa, merely stated that mganda was performed at the rallieso On the other side, there was the e~vidence of Lieutenant Masudi, D.Wo8 Abdallah Athumani Jazza and D. W,o 17 Nyamgunda that the mg and a did not perform after the meetings. Nyamgunda 'added that when the officials and the candidates were leaving the Ilala rally a jazz band , was playing CCM yajenga 1 Nchi' o \ I have considered the evidenceo I think it is hard to believe that the mganda did not perform after the me.-2tingo It is also hard to believe that it left the meeting places quietlyo T~at would be out of character~ But I am not persuaded that the participants sang 'tunamtaka Kondo, hatumtaki Wejja'". It is apparent that the learned trial judge accepted a great part of the evidence of the witnesses for the petitioner on this point, that is, the evidence of WEJJA herself, Rose Mbonde (PoWc16), Kassim Liiilndi CPoWo20) and Wambura Magesa (P.W 3)o 0 The learned trial judge appears to hav,~! rejected ••• /24 f 24 ~ the evidence of the witnesses for the respondents on this point, that is, the evidence of Lieutenant Masudi (D 0 √J.6), • Abdallah Athurnani •azz (PoWo8), Jumanne ~oharned Nyarngunda (D .. Wo17), as well as the evidence of the respondents themselves,so That being the/position, we cannot see.why the learned trial judge was not persuaded by the evidence given on the side ~ of the petitioner, that the participants sang: "Tunamtaka , . Kondo, haturntaki Wejja". We can find no basis for accepting t~:~f the evidence given on the side of the petitioner except where ,',,: it concerns the kind of song that was sung. On the evidence before him, the learned trial judge should have found that the I participants in the "rnganda ngoma" did sing "tunamtaka Kondo, haturntaki Wejja". The question then arises whether the singing of such song by the "mganda ngorna" performers contravened any of the provisions of the Elections Act. The learned trial judge specifically considered this matter and stated:- "Mro Lakha argued that even if it were true that they sang those lines that would matter for nothing. With due respect, I disagreeo In my opinion, that would h~ve amounted to illegal public canvassing within the meaning of section 66(1) (b) of the Elections Act." ' We agree that such dancing and singing amounted to illegal public canvassing or campaigning in favour of ~ONDO, and on the authority of Chrisant Majiyatanga Mzindakaya, where illegal campaigning by Party officials was held to be a misconduct, we find that the dancing and singing in favour of KPND0 and against WEJJA in this case amounts to a midconduct within the meaning of the provisions of section ,123(3) (a) of th2 Elections Act, 19100 ,~. 0. /25 Under those provisions the coun_is required :to nullify ·the election on the ground of proven misconduct:ifc it is s:a tisfied that· ,the majority of voters· were .or may have been, prevented from electing the candidates whom they preferred'!. We have asked .ourselves whether this particular misconduct did have the effect stipulated by law. We have borne in mind wha.t this Court stated in Mzindakaya's case, 'that'the term "the majority of voters were, or may have been prevented from electing the candidate whom -they preferred II, :is_ not -a matter of

quantification of numbers but has to be viewed and assessed within the Context of the factual matrix. The factual situation is that this misconduct occurred only at Ilala and Mchikichini. We are of the opinion that unless there is some other proven illegal campaigning of canvassing at some other place or places, the majority of voters cannot be said to have been prevented from exercising their rights. We have, therefore, tried to see whether there is any other proven illegal public canvassing or campaigning at other places which would have a cumulative effect on the voters. There is the allegation of pro-KONDO comotion or display of hoes at the campaign held at Ilala and Ukonga Majumba. The learned trial judge considered this aspect of the case and stated: -

"With regard to the Ilala meeting, Wejja stated that about forty people came there carrying hoes and that some were wearing khangas bearing the picture of a poster and the inscription 'Jogoo wa shamba hwiki mjini'. She said that though those people raised their hoes when she started speaking she managed to address the meeting fully. At the end, she said; there was an uproar: some people were shouting 'we don't want Wejja; we want Kondo'. Others, she said, advanced threateningly and Inspector Mlolele had to usher her into a vehicle after he had scuffled with and overpowered a person who was about to strike her with a hoe. In contrast, she said Kondo was carried shoulder high. She told the court that that was the most gruesome spell she underwent and that she seriously thought of bowing out. With a sinking heart, she continued, she telephoned Pius Msekwa, then the Chief Executive Secretary of the Party, and apprised him of her misgivings. She said he counselled perseverance. Wejja's evidence was, in large part, upborne by the testimony of P.W. 15 Henry Munga, P.W. 16 Rose Mbonde and P.W. 20 Kassim Liundi. As for P.W. 16 Inspector Mlolele, whose duty was to keep peace and order at the meeting, he recalled that there was a group of about fifteen people which was cheering Kondo when he was addressing. At the end, he said, three men charged toward Wejja, one wielding a hoe, the second holding a stick and the third carrying sand in his hand. He said he drove them back and that Wejja was able to climb into the vehicle without any molestation. Kondo's account was that he did not see any person carrying a hoe. He agreed that one person wanted to cover him with a khangas and that some people wanted to carry him shoulder high. But, he added, he turned them down. The testimony of P.W. 12 Sgt. Juma, the Party Branch Chairman, D.W. 17 Nyamgunda and D.W. 21 Nkundu was almost parallel. I think we can safely go by the testimony of Inspector Mlolele. I accept his word that there was a group of about fifteen people which was cheering Kondo. I accept his evidence that at the end the atmosphere grew charged and that a few people, including a man who was wielding a hoe, made attempts to set upon Wejja. That happened at the time the officials and the candidates were leaving the meeting place for Amana Hall for a reception. The Uhamiaji Jambao band was then playing a rendition of the popular song: 'Cigi Yajenga Nchi'. I find that Inspector Mlolele drove those people back and... such was the extent of the disorder at that meeting. It is not surprising that some people were chanting 'Kondo, Kondo' at the time he was addressing the crowd. But there is no provision in law that prohibits the chanting of such words. The evidence of P.W. 10, P.W. 15, P.W. 16 and P.W. 20 shows that not only was there a group of people chanting, "Kondo, Kondo", but

they were also raising hoes which was " KONDO' s election symbol". The effect of the testimony of these witnesses is that there was disorder at the Ilala campaign: -,,,meeting, calculated to undermine WEJJA' s position and enhance that of KONDO. The learned trial judge,2 relied on the evidence of Inspector Michael Mlolele (PW16) who testified about seeing only one hoe and about the disorder occurring only at the end of the election meeting. We think that the learned trial judge ought to have treated the evidence of Inspector Mlolele with caution as he was attending the campaign meetings to maintain law and order; it is unlikely that he would testify about his failure to do so. Had the learned trial judge properly directed himself regarding Inspector Michael Mlolele, he would have found it difficult to rely on his testimony. Moreover, paragraph "C" of Exhibit ID.2 contains a report by the Supervisory Delegates which states:- "In the campaigns at Mchafukoge, Gereza, Ilala, Ukonga; Majumba Sita, Kipawa and Buguruni there was a group of people who were applauding candidate Kondo. The said group which was carrying hoes in the campaigns rallies at Ilala, Kipawa and Ukonga Majumba Sita caused commotion at Kipawa and especially so at Ukonga Majumba Sita where candidate WEJJA failed to deliver her speech as a result of the commotion. When the Inspector of Police Ndo MLOLELE from Msimbazi Station attempted to take away the hoes carried by the said group, the District Party Chairman intervened and prevented him to do so". This report supports the testimony of witnesses for the petitioner, about the occurrence of a pro-KONDO commotion and display of hoes at the Ilala and other campaign meetings. On 28/01/2015, the learned trial judge stated in his judgment after reviewing the evidence on both sides:- "The fact that I am asked to determine is which side was speaking the truth. In my considered opinion, I think that the petitioner's case is questionable. I think it suffers from exaggeration and as we are told the distinction between exaggeration and mendacity is not always obvious. I think witnesses like Inspector Mlolele and Mwando can be relied on. Admittedly Mwando's recollection was foggy on other events, but I do not think he was a liar. It is simply inconceivable that he would not have recalled any such disruption of the meeting as alleged by the petitioner. I am, therefore, not satisfied that anybody acted in a disorderly manner for the purpose of stopping Wejja from addressing the rally. I think that the only moment when the meeting was disturbed was when the police wanted to take the girl away. It was not a serious disturbance and it happened when Kondo was still speaking. I find it not proven that there was any person, other than that girl, who came to that meeting carrying a hoe. And there is no affirmative evidence that the girl ever displayed the hoe". Mr. Shivji has submitted that had the learned trial judge admitted Exhibit ID.2 he would have come to a very different conclusion. We agree. The report of the Supervisory Delegates contains in paragraph "C", already mentioned, a statement to the effect that at Ukonga Majumba Sita WEJJA completely failed to deliver her speech as a result of a commotion made by people who were applauding KONDO and raising hoes. The question then arises whether this behaviour amounted to any contravention of the provisions of the Elections Act. Clearly, it is an illegal or unauthorised public campaigning or canvassing in favour of KONDO - contrary to section 66(1)(b) of the Elections Act, and it amounts to a misconduct within the

meaning of the provisions of section 123(3)(a) of the same Act. This misconduct in the nature of illegal public campaigning or canvassing at Ilala and Ukonga Majumba Sita, cumulatively, may have prevented the majority of voters from electing the candidate whom they preferred. ...; ~\ ... /29 · ' · ,,,f -" ,,r,,,...:' t"?: · · d,, ... r;,-,,,. 1 - 1. ,, ~ - .. 1 · ,·t"l. ,,-1·"· ,,,_ , t , '!,,,,. ·t ,,, , · · :-,- · · "" ,4, '·;:-1·l~ ~ ,~ "; ,,' -".... .h.J~\-.1·Lf~' ~ · '·:-'".... ~ ' ,.1·~·"!'..-,'X;,,t,....~ ,~ · · ~ : ~-;_____ - - - - - - ... ~ ~ ~-r...., ~ ~;,,,. ,,,...- - · . 29 , The other major point for consideration and decision in this case is whether KONDO accused WEJJA of black marketeering at the campaign rallies held at Jangwani, Ilala, Gerezani, Mchikichini and Buguruni. The learned trial judge considered this aspect of the case and stated:- "Wejja told the court that it started at Jangwani where she was presented first. She said that among other things she told that mPeting that one of her extra-official activities during tnP- war was the collection of clothes for the war. She said that when Kondo was presented he charged that she was involved in Khanga rackets and in the selling of khangas at higher and illegal prices. The evidence adduced by P.W.3 Wambura Magesa and f.W.16 Rose J Mbonde was similar. Wejja also Mbond4! also told the court that Kondo hit the same line when he addressed other campaign meetings at Gerezani, Ilala and J-Buguruni. Wejja's allegation also found support in the testimony of Wambura Magesa, P.W.4 Anne Anita Micoji and Beatrice Mgendi in respect of Gerezani; P.W.20 Kassim Liandi in respect of Ilala; and P.W.19 Shabani Omari in respect of Buguruni. Wejja herself did not mention Mchikichini in this regard, but the testimony of f.W.3 Wambura Magesa and P.W.16 Rose Mbonde shows or purports to show that Kondo made a similar charge at that meeting. Kondo repudiated those statements. He said that it was not true that at Jangwani Wejja had told the meeting that she was collecting clothes for the war. According to him, what Wejja told the crowd was that she was a UWT leader and that one of her activities as such leader was the selling of khangaso He said when his turn came he asked the women who had attended the meeting whether they were getting those khangas. The answer, he said was no. He said he seized upon it and referred to Wejja's statement at Gerezani, Mchikichini, Ilala and Buguruni and then posed the same question; do you get those khangas? On each occasion, he said, the crowd answered in unison 'hapana' or 'I have considered the evidence and I am not quite satisfied that Kondo made the accusation that Wejja was a khanga profiteer at any of those meetings. To those who attended, the Jangwani meeting should be a memorable one. The speeches of the candidates at that meeting were quite acrimonious. It was there that Wejja accused Kondo of diverting a sum of shs~ 100,000/- which had been donated by the Kamujee Family. It was there that she charged that villages in the district were stagnant or regressing. It was at the same place that Kondo branded Wejja a liar. In fact the organizers and the supervisors felt that the language used by the candidates was too harsh and uncivil and there was a sitting thereafter in which the candidates were required to moderate their language. There is hardly any evidence to show that anything was said in that sitting about khangas. The question, therefore, arises if it is true that Kondo had called Wejja a black marketeer, how come that the matter was raised, let alone discussed, in that sitting? In my judgment, Kondo's version is capable of being believed. It is quite possible that it was a case of pulling the rug from under Wejja's

of it, as Kondo explained before this court. She is not particularly smart and it hardly strikes me as strange that she could make that kind of statement." Mr. Shivji submitted, inter alia, that the learned trial judge would not have come to the same conclusion had he admitted and considered Exhibit ID.1 and Exhibit ID.2. Paragraphs 34 and 38 of Exhibit ID.1 contain reports by the Supervisory Delegates to the effect that KONDO had accused WEJJA of selling khanga (i.e. clothes) at the exorbitant price of shs. 200/-. The last full paragraph but one in Exhibit ID.2, also contains a report by the Supervisory Delegates to the effect that KONDO accused WEJJA of selling khanga clothes at shs. 200/- against the interests of the electorate. Bearing in mind that the price of khanga clothes has a controlled price, we agree with Mr. Shivji that had the learned trial judge admitted and considered Exhibits ID.1 and ID.2, he would have found that KONDO did accuse WEJJA of black marketeering. This behaviour on the part of KONDO amounts to a misconduct within the provisions of section 123(3)(a) of the Elections Act. It is indisputable, in our view, that the electorate in the Ilala Constituency would not vote for a black marketeer. Taking into account that these accusations were made at five different campaign meetings, we are satisfied that

- On 31/12/80 they may have prevented the majority of voters from electing the candidate whom they preferred. On this point, therefore, the election for the Ilala Constituency could also be nullified. The next significant point for consideration and decision is whether KONDO did exploit differences of sex between him and WEJJA for electoral purposes during the election campaigns. The learned trial judge considered this aspect of the case and was of the view that what KONDO was doing was to rebut a call made by the UWT National Chairman shortly before the start of the election campaign, calling upon women to vote for fellow women candidates. It was common ground – admitted by WEJJA that at a rally held on the 27th July, 1980, the UWT National Chairman made such a call. Mr. Shivji's contention is that the election campaign meetings were not the proper forum for KONDO's rebuttal of that call. We do not agree, since the call for women to elect women was made with a view to the parliamentary elections which KONDO was contesting. The next important point for consideration and decision is whether KONDO's claim that he was educationally better qualified for membership of the next Parliament was improper and amounted to misconduct within the meaning of the Elections Act. The learned trial judge considered this aspect of the case and stated: "The point that I have to decide is whether those statements constituted illegal practice or misconduct under section 123(3)(a). Mr. Shivji would have me hold so, but, with respect, I cannot. The message which Kondo was trying to get across was essentially that he was more learned than his opponent and that, therefore, he would be a more effective MP than her. That may have ruffled some feathers. If so, Kondo must have paid the price for making the statements. Now it is quite true I find that there is no educational qualification for one to be a member of that, August 1980. That is in keeping with Tanzania's emphasis on grassroots democracy. But it may be one thing to say a person is qualified to be an MP and quite another to say that he or she will be a productive MP. It might be that it was politically wrong for a parliamentary candidate to base his campaign on those lines, but that is not for a court to decide." Mr. Lakha's telling

argument was that a candidate, 'c';13 cannot be legally faulted for doing so, much as it might grate on the ears of people like Wambura ~ ~ ~, ~, '(- ~, Mage sa. In support he has cited para 10 of the Director of Elections' Directive circular, Exhibit P4, which says, in Kiswahili, that: 1 Matusi na kashi~a au matamshi mengine yoyote au vitendo ambavyo vinaweza kuleta maudhi, vyote hivyo vimekatazwa Lakini ukiondoa mambo hayo yote yaliyokatazwa, hapana ;nengine zaidi yaliyokatazwa yasitajwe katika hotuba za wagombea uchaguzi. Kwa mfano, hakatazwi mgombea uchaguzi mmoja kUeleza katika hotuba yake kuwa yeye ni hodari zaidi kuliko mpinzani wake, na akatoa mifano ya kuonyesha uhodari wake yeye na mifanoingine ya kuonyesha ulegevu au udhaifu wa mpinzani wake katika kutekeleza si~sa na mipango ya nchi kama ilivyotolewa katika ilani ya uchaguzi'o I think it is possible for one, especially a layman, to spell out of the language;2 of that. paragraph a reference that a parliamentary candidate could say the sort of things K9ndo saido Not~ however, that the directive circular was lawo All the same, I think, ~s indicated, that there is considerable force in Mro Lakha's argumentc In my opinion, I entirely agree that legally no blame can be attached to Kondo for making his and his opponent's education a theme in his electioneering." c We agree that nothing wrong can be attributed to what KONDO said, after all the election campaign was for the purpose of enabling the electorate to decide which of the two candidates would make a better member of Parliament for the Ilala Constituencyo The next material point for consideration and decision is whether the interventions, corrections or comments by KONDO or/and MLANGWA at the campaign meetings at Tabata, Jangwani, Gerezani, Mvuti, Chanika, Pugu Kajiungeni, Mchikl~hini, Mchafukoge, Vkonga C°CoM. and Ilala showed bias against WEJJA on the part of KONDO or/and MLANGWA 0 oo.--•/33 --, r .. 33 - • The learned trial judge specifically considered this aspect of the case and stated:- "So on this issue of bias I find, in sum, as follows The remarks made by Nkungu at Mvuti, Chanika and Pugu, upon Wejja's singing or chanting 'Nyerere, nyumba', were uncalled for. Still I cannot say that those remarks had any great influence on the voterso I hold that Nkungu can be faulted for stopping the snake-dancers from performing at Tabata. However 1 it is impossible to disagree with Mr. Lakha's submission it is hard to accept the proposition that the non-performance of the snake-dance induced some voters .not to cast their ballots for Wejja. I find that Mlangwa's statement at Jangwani in regard to the villages was uncalled for. But I am far from being persuaded by the argument that I that ~er se constituted a bias on his part or that it had any substantial effect on the electorate. I find that at Gerezani it was needless for Nkungu to demand a clarification from Wejja in regard to the mud. But as we have seen she told him off and it is doubtful whether wh~t transpired did prejudice her. The chances are that it was a boon. In other words, it is arguable that the way she stood up to him .did favourably impress the electorate and furthered her prospects in the poll race. Lastly, I find that Nkungu's correction at Mchikichini was unnecessa~y. But I cannot make myself go a. step further and say that it had any great weight on the voters of that ;place.". Mr. Shivji's main complaint concerning this point is to the effect that the learned trial judge failed to consider whether the J interventions, corrections and comments which he found to be uncalled for or unwarranted, ~nd.also which he found to have been made by NKUNGU at Mvuti, Tabata,

Gerezani and Mchikichini; and the statement made by MLANGWA at Jangwani did show any bias against WEJJA and in favour of KONDO. We are of the view that this criticism is of substance, since bias is the issue on this point. But, we agree with the learned trial judge that the interventions, corrections and comments made at the places which he mentions were uncalled for. There was no need at those places to do so in public and in the presence of the electorate since, on the evidence, there were 1,1134 regular private meetings of election officials and candidates held nearly after every election meeting for the purpose of reviewing previous meetings. The evidence shows that KONDO was being corrected mainly at these private meetings. In our considered view, the readiness to correct, intervene or comment upon WEJJA's speeches in public and in the presence of the electorate when it was not necessary, indicated a desire on the part of NKUNGU and MLANGWA to discredit WEJJA in the eyes of the electorate. In other words, NKUNGU and MLANGWA showed bias at a number of election campaign meetings. There were other election campaign meetings where we think NKUNGU and MLANGWA were justified in intervening and commenting upon WEJJA's speech in public and in front of the electorate. Such was the meeting at Jangwani where WEJJA talked about the money donated by the Karimjee Family, and which was allegedly missing. KONDO defended himself at that meeting by stating that the money was safely in the custody of the District

- Party leadership. Admittedly, the money was in the custody and control of MLANGWA in his capacity as District Party Secretary and under such circumstances MLANGWA was duty bound to inform the electorate of the true position to protect the Party's image in the eyes of the electorate. Similarly, at Tabata there was nothing wrong on the evidence for NKUNGU to stop the snake-dance, since neither WEJJA nor KONDO had anything to do with the organization or presentation of the snake-dance. Similarly, at the campaign meeting at Mchafukoge, MLANGWA was duty bound to correct the information given by WEJJA to the effect that the houses in that area were earmarked for demolition, because a failure to make such a correction was likely to lead to public unrest. NKUNGU's proven bias at Jangwani, Mvuti, Chanika, Pugu Kajiungeni, Gerezani and Mchikichini is consistent with other evidence. Wambura Magesa (P.W.3) one of the Supervisory Delegates appointed to supervise the election in the Ilala Constituency, testified to the effect that at a meeting of Party election officials called by NKUNGU to review the Jangwani campaign meeting, NKUNGU declared in the course of the discussion that if WEJJA is elected he would find it difficult to work with her. The learned trial judge did not consider this piece of evidence. We do not know what conclusion he would have reached if he had done so. However, the learned trial judge evaluated Wambura Magesa as a witness by stating:- "What about Wambura Magesa? He is easily the star witness for the petitioner. Little wonder, therefore, that his evidence has been singled out by Mr. Lakha for a long and ardent attack. The learned counsel has tried to portray him as a man who had a jaundiced eye against Kondo and as a sly operator. Wambura Magesa was in the witness-box for quite a long time - even longer than Wejja herself. One cannot frankly deny that his bearing was, for the most part, impressive. But to me he also came across as a man who swiftly leaps to conclusions"

Thus, when Kondo declared I at Tabata that he was not a tribalist, Mag~sa took it to be an insinuation that Wej j a was a tribalist~ Thus, too, when Kondo told the rally at Kariakoo that he was quoting from Msahafu: Samuel II, Magesa took it that he was quoting the J Holy Qoran - simply because Kondo happened to be a Moslem. There is also, in my view, a twitch of emotion and a streak of arrogance in him: with~ss his usurping the power of the chairman by banging the table in order to stop Kondo from addressing the meeting at Upanga East. And Mro Lakha is probably right in saying that what Kondo said at several meetings regarding his education and mastery of the English language did touch Magasa's sensitive nerve. He more or less demonstrated (it in the witness-boxo The possibility of his temperament having skewed his evidence against, K011do ca<mot, in my judgment, be ruled out. 11 0 e.o O o/36 ,. 36 -- The criticism made against Wambura Magesa by the learned trial judge appears to us to be peripheral; since Wambura • Magesa's tendency to jump to conclusions is not directed at 1 his perception of the primary facts. Moreover, Wnrnbura Magesa's act of banging the t~ble at Upanga ~West in an attempt• to stop KONDO speaking beyond his allotted time .cannot be indicative of emotion or arrogance as he was merely performing his statutory duties as a . - xsupervisory delegate autl)orized , under the provisions of section 67(1) of the Elec,tions Act, 1970, , which declares that:- "The organization and conduct of an electoral campaign in a constituency or a ward shall be subject to the supervision of supervisory delegates appointed for the constituency or, as the case may be, the ward, o o • " . Furthermore, Wambura i'~agesa's alleged stensitive n3ture is not, a'pparent on the record. If he did ~demonstrate sensitivity in the witness box, there is nothing to preclude the pro~ability f that this was due to his very prolonged stay in the witness box which the trial judge mentions and which could render him irritableo We are satisfied that the learned trial judge Wns wrong in belittling Wambura Magesa whom he had found to be generally an impressive witness. Paragraph 41 of Exhibit rn.1 cont~ins a report of the Supervisory Delegates which states:- "The Chairman continued •to say that contestant WEJJA in the campaigns at J3.ngwani ward stated that villages as well as the district were retrogressing. He doubted whether one could be sure that she would not win the ele~tione He emphasized that if she would be elected member of parliament he would ..fail to work with her. He cont~nued to say that he would convene the District Party Executive Committee that WEJJA apologizes in front of it for it was untrue to say thali, the District was retrogressingo "o ' 37 '<... It is apparent from this report that NKUNGU declared . to the effect that if WEJJA is elected member of Parliament for the Ilala Constituency, he would find it difficult to work with heLo In the light of this report and the testimony of Wambura Magesa~ we are satisfied beyond reasonable doubt that: NKUNGU was biased against VJEJJA during the election campaigno The question arises whether NKUNGU's and MLANGWA's proven bias amounts to any contravention of the provisions of the Elections Act. Mro Shivji has submitted that such bias contravenes I the provisions of section 66(5) of the Act, which states:~ "In the organization and conduct of the election campaign the members of the District Executive Committee or, as the case may be, the Branch Executive Committee, shall accord a fair ~nd equal opportunity to each of the candidateso 11 o We respectfully agree with Mro Shivj io What then was the consequence of this bias, Undoubtedly, bias on the part

of the organizers of an election campaign is a misconduct within the meaning of section 123 (3) (a) of the Elections Act. The Party holds a central position in our country. Therefore bias on the part of leading Party officials organizing an election campaign against one candidate in favour of his opponent, particularly where it manifests itself at numerous meetings as was in this case, is most likely to have adverse effects upon the candidate who is the victim of such bias. We are satisfied, therefore, that "the majority of voters were, or may have been, prevented from electing the candidate whom they preferred", in the Ilala Constituency. Thus, on this point also, the election ought to be nullified. The next important point for consideration and decision is whether KONDO's accusations of WEJJA as being a person of bad manners was improper and amounted to a misconduct. It is common ground that the letter which KONDO read at Ilala purporting to be written by a group of Kipawa elders complaining about WEJJA's manners was addressed to the District Party Secretary, requiring him to admonish both candidates. On the evidence, it is apparent that it was not intended to be used by KONDO in the manner he did. We are of the view that NKUNGU who presided over the Ilala campaign meeting should have stopped KONDO from using the letter for purposes for which it was not intended. His failure to do so is, in our view, consistent with his proven bias which we have already dealt with. The other significant point for consideration and decision is whether KONDO did exploit tribal differences for purposes of the election at the 2 election campaign meetings held at Jangwani, Ilala, Ukonga Majumba Sita, Gerezani and Buguruni. The learned trial judge (viewed the evidence on both sides concerning the events at the various campaign meetings but criticised the witnesses for the petitioner's side by stating that WEJJA's evidence contains assimilations of suspicions and inferences and that Rose Mbonde (PoW.16) had a tendency to jump to conclusions and had a grudge against NKUNGU. We are of the view that with the exception of the alleged grudge towards NKUNGU, these criticisms are peripheral. In any case the correct approach is not to use these criticisms as a basis for a total rejection of the evidence for the petitioner but they can be reason for treating the testimony of such witnesses with caution. We, on our part, have done so and have sought for supporting evidence. The testimony for the petitioner is to the effect that KONDO urged the electorate to vote for MTOTO WA HAPA HAPA (that is someone born here) and not for MTOKA MBALIMBI (that is someone who hails from far away) and KONDO's assertion that his speech was distorted has to be tested in the light of such evidence. With regard to the meeting at Ilala, Exhibit It. 2 contains a report by the Supervisory Delegates in paragraph 'G' to the effect that KONDO told the electorate that he was born in Kariakoo and he could not envisage how a person who hailed from afar could solve the problems of Ilala. As for Buguruni, Exhibit IDo1 contains a report by the Supervisory Delegates in paragraph 'G' to the effect that KONDO told the electorate that they should not vote for his opponent who was a Msukuma of Maswa, who could not know more than he who was born in the Ilala Constituency. We can find no reports by the Supervisory Delegates concerning tribalism at the Ukonga Majumba Sita and Gerezani meetings. The testimony of the witnesses for the petitioner regarding those meetings, therefore, remain uncorroborated. But as to the evidence of the petitioner's side regarding the campaign

meetings at Jangwani, Ilala and Buguruni, it is fully corroborated by the Supervisory Delegates' reports - Exhibits IDo1 and IDo2 0.../40 1- 40 We therefore find it established that KONDO exploited tribal differences at those meetings. Under the provisions of section 123(3)(b), such behaviour is prohibited and is sufficient to nullify a parliamentary election. The next material point for consideration and decision is whether polling agent I-mail Mwakabala did interfere with voting at Kipawa polling station. The learned trial judge considered this aspect of the case and found no sufficient evidence to support the allegation. We respectfully agree with him. The other significant point for consideration and decision in this case is whether the absence of screened compartments at polling stations did affect the results of the election. The learned trial judge considered this aspect of the case and stated:- "The question for determination is, therefore, whether the voters at these polling stations did not record their votes secretly. The sum total of the evidence of the petitioner regarding this is unsatisfactory. Wejja alleged that at Kipawa and Ukonga the polling officials were sitting close to the ballot boxes. And P.Wo18 Kimwaga alleged that at Ukonga one could not see how a voter marked his ballot papers. I am inclined to believe the evidence of several witnesses, that there was distance between the officials and the place where the markings were done. I think that distance is as efficacious as any screen." :...;;, '>.~ ;1~', We think this was an irregularity but:_, in the circumstances of this case, it did not affect the results. The other material point for consideration and decision in this case is whether the failure by the Returning Officer to comply with the provisions of section 88 of the Elections Act did affect the results of the election. The learned trial judge considered this aspect of the case and stated:- , eooo/41 J . - . 41 "The Returning Officer did not observe the provisions of Section 88. That section provides that before the votes are counted the Returning Officer must open each ballot box, take out the ballot papers, count and then record the total number thereof, and then mix together the whole of the papers contained in the ballot boxes. It was stated in *AYO v. SIMEON* (1967) E./L, 229 at 231, Coram Georges, C.J., and Bannerman, J. that:- 'The reason for this is no doubt to insure that the total number of votes cast is known, before the counting of votes for each begins. This total number can then be verified against the ballot paper submitted by each Polling station. It also helps to preserve the secrecy of the ballot.'" However, as was stated in another case, *Re. Penbroke Election Petition*, 11908) 2 IR 433, failure to count or record the number of ballot papers in each box or mix the whole of the ballot papers before counting is not sufficient to void the election. We are of the considered opinion that the learned trial judge misdirected himself in law in applying the case of *Re. Penbroke Election Petition* (1908) 2 IR 433 to the facts of this case, as that case is distinguishable from the present case. The Irish case involved an irregularity about only two ballot boxes and what is more important, the irregularity was agreed upon by the candidates. In the present case the irregularity concerns all the ballot boxes for the entire constituency and the candidates did not agree to it. Furthermore, there is a discrepancy between the total Parliamentary votes and that of the Presidential votes by which the Parliamentary votes exceeded the Presidential votes by a total which practically corresponds to the margin of victory. Under these circumstances, we are satisfied that the non-compliance with section 88 of the Act did

affect the results of the election. The election can be voided on this basis al SOo 42 The next important point for consideration and decision i, is whether the Returning Officer, that is, Mrso Susana Sara Tarimo did abdicate her supervisory responsibilities as a Returning Officer during- the counting of votes and whether NKUNGU was over-all in charge of such counting at the Diamond Jubilee Hallo The learned trial judge considered this aspect of the case and after reviewing the evidence stated:- "Now it is beyond dispute that the two men as well as the supervisory delegates went round the tables observing the seventy plus enumerators sorting out and counting the votes~ They were recording down some totals .. Wejja's counting agent, PoW.21 SoS.Po Athumani Ali Msangi, alleged that Nkungu was throughout lording it over and that at the beginning he Msangi thought that Nkungu was the ' person in command: he would issue directions to the Returning Officer and he would be consulted by some of the enumerators and give his advi~e. At the end, Msangi furthP.r alleged, there was a dispute between Nkungu and the Returning Officer over the grand totalse He said that Nkungu's and the Returning Officer's figures did not correspond and that he Nkungu ordering her to go and fetch an adding machineo Nkungu denied these allegations, but he admitted tha_t at one stage he handled one b3llot. Thai:, -he said, was at the time the Speaker was inside the Hall. The Spea~er had called at the place to see how the counting was going ono I feel that Msangi's testimony is suspiciouso In my view probability is that he is a Wejja's sumpathiser and one should not discount the real possibility that he is the sort of witness who would be disposed to make purposeefvl mis-statements against respondentso I am not prepared to accept that the Returning Officer was as submissive as Msangi would have me believeo I see no cogent evidence that she was pendering tQ Nkungu's wishe~o It is true that at one stage she left the place in order to fetch an adding machire'o That was after the enumerators had completed the countingo She told the court that she did sb because the adding machine she had there had broken down 0 She as woll as Nkungu dP.nied that there was any dis- agreement betw~en them over the ~rand total and 1 am inclinEd to. believe her, because, it seems that even Wejja was not aware of the alleged argumento \ ,. 43 ,.-. .. ~ w 11 As I h,ave stated, it was wrong for the Returning Officer to permit Nkungu, Mlangwa and 'SJ other& to be present at the counting, but I do not believe that those people interfered with the counting. And I do not believe that the short abs~nce of the Returning Officer during which she went to her office to fetch the ~adding machine had any undesirable effect. There is no evidence that there was any interference with the ballot_ papers or the totals she had recorded during her absence. In fa~t the evidence on record establishes the reverse. It should be observed that throughout the counting she had five assistants and I suppose that they knew what they were supposed to be doing there. 11 • It is obvious that the main tP.stimony on the petitioner's side is that of Athumani Ali Msangi (P .w. 20) who was vLEJJA' s counting agent. We agree with the learned trial judge's view _J that Msangi ought to be treated as WEJJA's supporter; but we do not think that it is a correct approach to treat his evidence as totally worthless for that reason. The correct approach is to treat his evidence with caution and see whether it is corroborated in material particular by other independent testimony. It seems to us that the testimony of NKUNGU, MLANGWA and Mrs. Tarimo corroborates that of Msangi in a ~aterial particular. NKUNGU and MLANGWA

admit attending and being present throughout the counting at the Diamond Jubilee Hall. Furthermore, NKUNGU admits moving around at the counting hall and jotting down some totals of votes as they were being counted. NKUNGU and Tarimo also admit that at one stage during the counting, Tarimo had to leave the Diamond Jubilee Hall and go out to Ilala Boma to fetch an adding machine. NKUNGU also admits handing a doubtful ballot paper to the Chairman of the Electoral Commission when he visited the Diamond Jubilee Hall at one stage of the counting. Msangi stated in his testimony that the enumerators were 44; i.e. 44 frequently consulted NKUNGU about the doubtful ballot papers and he was giving them advice. This appears to be in line with NKUNGU's conduct in accepting a doubtful ballot paper from an enumerator and showing it to the Chairman of the Electoral Commission when he visited the Diamond Jubilee Hall. This shows NKUNGU was in charge of the counting instead of the Returning Officer. Msangi's evidence can thus be accepted as being corroborated. On the basis of the evidence, we are satisfied, therefore, that the Returning Officer did abdicate her supervisory responsibilities as a Returning Officer and that NKUNGU instead was over-all in charge of the counting. This state of affairs amounted to non-compliance with the principles underlying sections 86 and 94 of the Elections Act, 1970, which require the Returning Officer to have a final say on matters of counting of votes. The question arises whether the Returning Officer's abdication of her responsibilities affected the results of the election. We have considered Exhibit D2 which was produced at the trial in the High Court by the Returning Officer as a record of the votes counted. The record is highly unsatisfactory as it contains interpolations or corrections which, on the face of it, suggest doubtful counting or additions of ballot boxes. We are satisfied, in the light of this evidence, that this non-compliance did affect the results of the election. This is yet another ground upon which this election ought to have been nullified. The other point concerns the issue whether the High Court ought to have ordered the petitioner to pay the costs of the case when dismissing her petition regardless of her Legal Aid position. 1; r ~ ..', < ~, r' - 45 ~\('

- On the basis of the outcome of this appeal; we find it not necessary to decide on this point in this case; and we leave it for decision in a proper Case in the future. For the reasons which we hope we have amply demonstrated, this appeal succeeds, and we set aside the judgment and decree of the High Court and declare the Ilala Constituency Parliamentary Elections void, and we order costs of this case in this Court and the court below to be paid to the appellant by the respondent. DATED at DAR ES SALAAM this 16th day of April, 1982. For Lo NYALALI CHIEF JUSTICE Y.M.H. MWAKASENDO JUSTICE OF APPEAL R.H. KISANGA JUSTICE OF APPEAL I certify that this is a true copy of the original. IZ/ (t, L' < /4:l, L. A. • KYANDO DEPUTY REGISTRAR

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Prepared on 14 October 2026 · Esheria