

TANZANIA / JUDGMENT

19810616 TZHC Mbeya

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V

- • 4-O ____ AT IEYA NISC CIVIL CLE NO, 9160 GILBERP LOUIS NGUA PETITIONER
Versus i cimisi MLIJIYAT.ANGA NZINDAKLiYA)• RESP0Nn1TS 2 THE A1'BORNEY -
GENERAL) J1JD4ENT OF THE COURT On October 26 9 1980, a aereral electiorL was held in
this country. Among the cons tituenc'es in which the parliamentary election was contes ted
was Sumbawanga rual, The candidates in that constituency were Gilbert Louis Ngua and
Chrisant Najiyatanga Mzindaicaya, Thir s3inbojs ware Nba and Jembe reative1P. Chrisant
Majiyatanga Mzindakaya polled 33,974 votes, while Gilbert
- Louis Ngua polled 21,263 votes. There were 1838 spoilt votes. In consequence the Returning
Officer declared Chrisant Najiyatanga Iizindakaya as the winner, having secured a majority
of 12,711.
 - However, Gilbert Louis Ngua was dissatisfied with the results and has petitioned this court
with a prayer that the said election be declared void. In this petition Chrisant Najiyatanga
Mzindakaya is the first respondent and thE Attorney-General is the second respondent by
virtue of Rule 4(1) of the Elections (Election Petitions) Rules, 0 1971. The petition contains a
number of allegations whioh we do not consider necessary to set cut at length. In a nutshell
they consIst of non—compliance with the provisions of the Elections Act,)970 (hereinafter
referred to as the Act), illegal practices and currupt practices. Both respondents denied the
allegations in their entirety. Issues were framed but which again we do not
consider.uecessary to set out. We shall, howe-var, answer them in the course of this judnment.
We propose to begin with issues whioh fall under the heading of non—oompliance with the
provisions of the Act. In paragraph 6 of the petition it was claimed that the number of -votes
cast in the constituency was greater than that of registered voters. No evidence was adduced
to establish this allegation. We therefore do not consider ourselves bound to give it any
consideration. j In paragraphs 9 and 15 of the petition the [petitioner alleges non—
compliance with s.84 and 95 of the Act. gec, tion,84 deals with the 0
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- Ii *1 - —3- We now wish to turn to the delay in- starting the count. As pointed out above, there was a twelve-hour lapse between the receipt of the last ballot box and the start of the count. We consider it useful to set out here the provisions of section 86(1) of the Act, which governs the aspect now under consideration. The sub-section reads as follows: 11 The Returning Officer shall make arrangements for counting the votes in the presence of the coun-ting.agents as soon as practicable after the close of the poll in the constituency, or as the case may be, the ward and shall, so far as practicable proceed continuously with the counting, allowing only reasonable time for refreshment, until it is complete." 1 Attempting to explain away the twelve-hour delay, the Returning Officer claimed that there were electrical power problems in the counting hall and he had not finalised the arrangements for alternative supply of light. We think, with respect, that the explanation is unacceptable

and we reject it. While it may be conceded that artificial light may have been required for part of the period aforesaid, we can think of no reasonable explanation, and the Returning Officer literally failed to furnish any, as to why the, counting could not start shortly after sunrise. We are therefore of the view that the Returning Officer failed to comply with the provisions cited above. It is not possible to over-emphasize the importance of an election in the democratic process and, if we may state the obvious, we think that great responsibility lies upon those whose duty it is to ensure the success of that process. We believe that in this case not everybody concerned appreciated this fact. As pointed out earlier, it was conceded by the Returning Officer that at least thirteen ballot boxes had to be broken in order to retrieve the ballot papers therein. It was claimed that keys could not open the locks. - There was lack of unanimity as to the exact number of such boxes. According to the Returning Officer, there were ten for the parliamentary votes and three for the presidential votes. According to Chief Louis Dantes Ngwa (Pi8), there were seventeen such ballot boxes - twelve for the parliamentary votes and five for the presidential votes. According to Yesaya Ngonile (Pi9), - there were twelve such boxes - nine for the parliamentary votes and three for the presidential votes. We consider these differences of little significance. The disturbing factor is as to how this situation came about. The Returning Officer told the court that before he despatched the ballot boxes he checked and found serviceable the locks thereon: each key opened its respective lock. He then put the keys in an envelope which he sealed and kept under lock and key until the counting time. The Returning Officer was emphatic that no one else handled the keys. According to him, the locks might have got damaged due to vibrations during transportation of the ballot boxes from polling stations to the counting hall. The witness identified in court a lock which he said was identical to those which were used on ballot boxes in his constituency. The lock was of LARK make and of the hardened type. We are of the settled view that short of deliberate tampering with the locks mere vibrations could not have adversely affected their mechanism. There was an allegation, too, that s.88 of the Act, which provides

- for the method of counting of votes, was not complied with. This section provides as follows: "Before the Returning Officer and Assistant Returning Officers proceed to count the votes, they shall, in the presence of the counting agents, if any, open each ballot box and, taking out the ballot papers, shall count and record the total number thereof, and then mix together the whole of the papers contained in the ballot boxes" According to PW8 and Pi9, there was no mixing together of the ballot papers contained in all the ballot boxes. There was mixing of the ballot papers only according to symbols. This was disputed by the Returning Officer, but we see no reason why Pi9 and PW9 should lie. It may be pointed out that Pi9 who was the chairman of the supervisory delegates, impressed us as the most independent, frank and honest witness. We are satisfied that s.88 of the Act was not complied with. Finally, on the subject of non-compliance, it was alleged that at Nkima polling station some voters were denied the opportunity to cast their votes. According to the direction issued by the Electoral Commission under s.62(4) of the Act, the poll was to start at 7.00 a.m. and close at 5.00 p.m. There was evidence that Nkima polling station closed at

10.00 p.m. and that a number of people who had turned up after 5.00 p.m. were turned away. 15

- --. -5- * - 'Before taking into mind the provisions of s. 33 of the Act, we find no fault in the decision of the presiding officer to turn them away. In the absence of any evidence that any such people had arrived at the polling station before 5.00 p.m. we reject the contention that some people were wrongly denied the right to cast their votes. We now come to the allegations of illegal practices, which are summarised in paragraph 11 of the petition, the import of which is that some of the Party and Government leaders in the region campaigned for the 1st respondent. We would wish to refer to the evidence relating to specific instances. At a campaign meeting held on October 10 at Tatanda village the question was put to the 1st respondent as to what he had done in the past fifteen years he had been a Member of Parliament. After he had answered the question the Sumbawanga district Party chairman Baltazar Npendakua Kamuka (1W5), suddenly took the floor and added that the 1st respondent was responsible for the creation of the Rukwa region, for the creation of Nkansi district, and for the creation of the Lyangalile Villages Development company (popularly known as LYAVIDECO). For clarification, the shareholders of LYAVIDECO are five villages within the Sumbawanga rural constituency, including the 1st respondent's and Baltazar Kamuka's villages. The 1st respondent is the Chairman of the Board of Directors and Karacka is his deputy. The company has a subsidiary transport company which was established in April 1980 and owns some lorries. Kamuka's conduct drew instant disapproval from the supervisory delegates who banged the table in an attempt to make him resume his seat. In his evidence, however, Kamuka denied giving any credit to the 1st respondent. He asserted that what he told the meeting was that the achievements recorded were the result of collective effort. He admitted, however, that efforts were made to stop him from continuing with his speech. We had the advantage of hearing the supervisory delegate (1W9) and of reading the report (iibch.P1) prepared by his team immediately after the election. We also had the advantage of observing Kamuka in the witnessbox. Once again, we have no hesitation in believing PT9 on this matter. We would add that his evidence on this point was substantially similar to that of the petitioner and that of Remigius Daniel Kalubu (P.W2). It was also in evidence that immediately after the Tatanda campaign meeting there was a sitting at Sopha at which Kamuka was reprimanded and asked to ... ON 6 - aoe 'he tionr. We are bound to doubt that Kamuka's conduct at Tatanda was a campaign in favour of the 1st respondent. Secondly, it was testified, and not disputed, that the Party Regional Secretary for Rukwa, one Michael Baruti, unexpectedly turned up at a campaign meeting at Kaenesa on October 16. He arrived at the meeting in the motor vehicle Reg. No. SU 2748, the property of the Small Industries Development Organisation (SIDO) which was at the time being used by the 1st respondent. He was accompanied by the 1st respondent's wife and the wife of the Regional Party Chairman, Zeno Noel Nkoswe (JMi). The Regional Chairman was at the time the 1st respondent's host. There was evidence from 1W2 that, according to the campaign programme, the Regional Secretary was expected to be elsewhere campaigning for the presidential candidate. According to Kalubu and Kamuka, the Regional Secretary, an

admitted friend of the 1st respondent, told them that he had come there because he had been informed that the candidates were fighting. The witnesses and the candidates agreed in the witness.. box that the campaign was very peaceful. Unfortunately, we had, no opportunity to hear the Regional Secretary on this matter. Nevertheless we are satisfied that the explanation given by him was lame. We are of the view that the appearance of the Regional Secretary in the 1st respondent's wife and the wife of the Regional Chairman must have created the impression to the public that the Party was backing the 1st respondent, Thirdly, there is evidence of a campaign at Miangalua village. It came from Valentine Nzungu (1w3), Benedicto Pambwa (P14), Anania Mwananzurigu (147) and George Stima (iwlo), The substance of this evidence was that on the evening of October 23, 1980, one Marcelo Kamanga and one Isaa Mbela called and addressed a meeting of ten—cell leaders and other leaders urging them to campaign for the 1st respondent. According to P13, the ward secretary, Kamanga stated: ' Chama Nkoani na WilayaI wanetuagiza kuwa uchaguzi wa niaka huu ni mguniu.. Munchague Nzindakaya, Mkimchagia Ngua atarudisha uchifu. Kama swila alikuuma au kukutemea mate, ukimwona mtoto wake anatembea unaweza ukamwacha? Baba yake alitunyanganya ardhi ya huko Kwela. Akichaguliwa anaweza kuichukua tena lie ardhi, Nchagueni Mzindakaya, ameleta magari," & I -7- After this meeting Xaxaanga and Mbela proceeded to Novu. village, In the meantime, Id4 and P17, who were cell leaders, passed on the message to villagers under their jurisdictions. However, the ward secretary had received the message with suspicion, He decided to arrest Kamanga and Mbela on their way back from Novu. Indeed, they were arrested, at about 11.00 p.m., and upon interrogation they disclosed that they had been sent by the Regional Party Chairman Nkoswe, the District Party Chairman, Kameka, and the 1st respondent, Since he knew them the ward secretary released them and decided to take up the matter with the police on the following day. Kamanga was and is a member of the District Working Committee and the Regional Executive Committee of the Party. Mbela was and is the chairman of Laela 'B' Party branch. On the following day a report was made at the Laela police post concerning the activities of the two men, and according to Cpl. Edson Nwanga (IM5) and P.C. Albert Elisaria Urusa (PW6), similar reports about the same persons had already been received from Mititi, Kisalala, Novu. and Turilco villages. The police therefore decided to arrest them. The arrests were effected on the same day. The two men had been using motor vehicle Reg. No. TZ 40997, the property of one Bojaki, a Sumbawanga businessman. Back at the police post the two men, who were later taken to the O.C.D. at Sumbawanga, repeated that they had been sent by the Regional and District Party Chairmen. According to P.C. Albert Urusa, Mbela said, when his statement was being recorded, that it was the 1st respondent who had hired the vehicle, But Kameka later came to tell the court that he had himself hired the vehicle on behalf of the Party to distribute campaign posters in respect of the President and the Vice President. There was, however, evidence from the Returning Officer that he had assigned six vehicles for the distribution of campaign and election materials. We had the advantage of seeing and observing the various witnesses on this matter. We believe that EW3, EW4, P159 P16, W7 and P410 were witnesses of truth, We therefore find without any hesitation that Kamanga and Mbela had gone to Miangalua and campaigned for the 1st

respondent. We reject as being implausible the explanation of Kameka that he had hired Bojaki's vehicle for the purpose alleged by him. In the first instance, we see no reason why the Vice President's posters, if they were, had to be distributed on the mainland. Secondly, in view of the Returning Officer's evidence, which we accept, that six public vehicles /8

- 8 - were available to facilitate the U.stribution of èlectioi materials, we find, it inconceivable that Kaaeka (or anyone else for that matter) should have found it necessary to hire private transport for the same purpose. It is in fact on record that Kameka never approached the Returning Officer with a request for trahsport. We therefore hold and find as a fact that Bojaki's vehicle was hired to facilitate an unofficial campai1 for the 1st respondent. It is also not without sigsificànce that the respondent's side refrained from calling Kainanga and/or Mbela to' deny the allegation that they had campaigned for the 1st respondent. We are entitled under s422 of the Evidence Act, 1967, to presume that if they had been called the 'two men would have given evidence unfavourable to the respondents, for omniapraesumuntur contr torem. Before we leave the subject of illegal practices we wish to refer to the evidence relating to a public meeting held late Notrember 1980 at Miangalua. It is undisputed that the meeting was addressed by Kameka and th 1st respondent. According to W4 and Pi110, the 1st respondent, ainog øthei' things, referred to rumours Uh.'at: the..elebtioh was not faii and thr,atehed that..anhmdy.ass.oithg - himself with..stich.rthnours would - lose , iisjoior. go to ,rison: We. hid a.. di ff.ér.ent Version from Kameka and. the.' 1st respondnt.!: They said that thea 1st respondent.. thanked theeople for .hav±nreelectd him: dfid urged thea to cocentrate. on fàrndhg., The st.rep.ondnt. I caegorically, denied 'to have.i uttuie'd! any.. theats. However, .acc,ording. to. Kameka, 'Addressin:hin 9 a. memb.ei' of the iuiblic.eLiarked::
-1' .: . . . Mt.fenyékiti, tuhashangaa unabngozaana -. 4 ... wakatIsisi ' .
- katika uchaguzi uliofanyika tuna3ua haukuwa wa haiali .Kameka sid i-xe could not an3wer the question., and asked Mzindakiya C , to answer it Aing to h.in(Kaxaeka). Nzindakaya's reply was in the following terms: Nclugu wananchi, uchaguzi ai,mi rajua umthalizika, ña mLthi tarai Him61rishi • `àpishwa.:kama inmge: ': maneno rnayasiida lcwa .watu hayp yaithzie . kufara kai.' Kana kuna thàlaiiko • . . , yatajitokezyehyewe." ': Nzircda'kaya bimself a&itted tht .a sthtérthitwha. re'eting. on the validity'of the election. According toh±, his cmentonthattatement.Mas.as follows:. ' L - -9- " Mimi sifahctniu u.ta-bio yoyote kuhusu uchaguzi huu arubao muliufanya tarehe
- 26. Nawaom'ba wananchi wote tuungane kuleta maendeleo." We have already stated that P44 and P110 were witnesses of truth in respect of the ca?:ipaigu by Kamanga and Mbela. We find no' reason to doubt their credibility on what transpired - at the meeting under consideration. On the contrary, we believe that what they said is what took place. We have therefore come to. the unfortunate conclusion that the' threats were intended to silence potential witnesses in this case. Upon the credible evidence before us we are satisfied beyond reasonable doubt that the Party leadership campaigned for the 1st respondent. This

was contrary to the law. It is not surprising that immediately after the results were announced the Party leadership mounted a jubilant procession to escort the 1st respondent to the Regional Party Chairman's residence, On the following day, October 30, he was escorted in a Party vehicle to his home village by the Regional Party Chairman, Nkoswe, the Sumbawanga rural district Party Chairman, Kameka, the Sumbawanga urban Party Chairman, one Peter Mtuka, the Sumbawanga Urban Member of Parliament, one Kinyonto, the District Executive Secretary, one Mbegani, and the District Accountant, one Maarufu. At the village a grand party was organised by the local branch at the branch chairman's house. The last subject is that of corrupt practices. There were a number of corrupt instances alleged in this connection. First, it was alleged by Simon Alberto Yulamasi (1M13) that in September 1960, at Mpuji village, the 1st respondent gave him a pair of kitenge to deliver to Mwene Maria, the petitioner's grandmother, as an inducement to her to campaign for him. We have considered this allegation and we reject it for three reasons. First, the witness admitted that he and the 1st respondent were strangers to each other. Secondly, the alleged transaction took place twenty-five paces from Mwene Maria's residence. Thirdly, as just pointed out, Mwene Maria is the petitioner's grandmother. Taking these factors into consideration, it occurs to us as being improbable that the alleged transaction could have taken place. . . ., 10 S''

- 10.- The second allegation was that at a campaign meeting held at Ilambila village the District Party Chairman, Kameka, gave shs. 200/= to one Ntungu, a primary school teacher. This was in the evidence of the petitioner and that of Kaluu (W2). The allegation was denied by Kameka, we consider it unnecessary to make a finding on this matter for there was no evidence that the alleged transaction had any connection with the campaign. Next, there was an allegation that on the polling day, at the Mkima polling station, the 1st respondent gave out forty shillings to procure refreshments for voters. It was further alleged that the money was used to buy some liquor which was consumed at the polling station. This testimonial was given by Nazalia Adolph Tariba (W11). In view of the fact that no evidence was adduced from the village chairman, Musa YacLitwi, who was alleged to have received the money, and taking into consideration the circumstances under which the money was alleged to have been given, we consider it unsafe to accept the allegation. Finally, on this subject of corrupt practices, there was evidence that milling machines were supplied in the 1st respondent's constituency immediately before and during the election campaign. This evidence came from Jogwak. i. Tunfunde Mwatujobe (P, 112) 0 Kameka (Th15) and Ailoyce Henga (Ud6), the Rukwa Regional Small Industries Promotion Officer. According to RJ12, these machines were being procured by the 1st respondent in Dar es Salaam who was then directing their distribution to villages in Sumbawanga rural constituency. According to Th16, villages were making applications for loan to purchase these machines and when procured the machines were being supplied to the villages upon the payment of ten per cent of the price thereof. More background information was particularly given by Kanieka. He told the court that during the tour of his constituency the 1st respondent had encouraged villages to make the applications and had promised, in his capacity as the Chairman of the

Board of Directors of SIDO, that he would ensure the supply of the machines. The evidence of the 1st respondent was to the effect that loans for the purchase of the machines were being approved by a sub-committee of SIDO's Board of Directors and that he was not a member of the sub-committee. Secondly, he agreed that he knew that such machines were being supplied in his constituency. But, thirdly, he claimed that the machines were being supplied throughout the country. We have concluded that beyond reasonable doubt that the 1st respondent was behind the supply of the machines in his constituency. In this view we are strengthened by two factors. First, while in the witness-box the 1st respondent did not seek to dispute the evidence of Kameka on the point. Secondly, the evidence before us demonstrates beyond peradventure that at least ten machines were distributed in the constituency during the campaign period. And according to the Rukwa Regional Small Industries Promotion Officer (Th16), only eleven milling machines were received by his office throughout 1980. It is also significant that no evidence was adduced to establish the supply of such machines anywhere else in the Rukwa Region. Having regard to the whole evidence on this subject, we hold that the supply of these machines was intended to influence the voters. We are satisfied that this was a corrupt practice within the meaning of s. 112(a) of the Elections Act, 1970. To summarise, we have found the following established by the evidence. Under the subject of non-compliance with the provisions of the Act we found that there was delay in starting the count of the votes, there was an omission to mix all the votes before the counting, and there was a wrong rejection of, two hundred and four votes. Under illegal practices we found that the Party leadership campaigned for the 1st respondent contrary to the law. Under corrupt practices we found that the 1st respondent caused to be supplied to his constituency milling machines with a view to influencing the voters. Non-compliance with the provisions of the Act is governed by s. 123(3)(c) thereof. Under this provision an election is liable to be declared void if the non-compliance has affected the result of the same. The expression "affected the result" has been the subject of discussion by this court on diverse occasions and we do not, therefore, feel compelled to discuss it here. We are of the view that non-compliances proved in this case have not been shown to have affected the result of the election..

- We have found, on the other hand, that illegal practices were committed in connection with the election. The question of the impact of illegal practices on an election is governed by s. 123(3)(a) of the Act, which reads as follows:
- 12 - " (3) The election of a candidate as a member shall be declared void on any of the following grounds which are proved to the satisfaction of the court, namely-
- (a) that by reason of corrupt or illegal practices committed in connection with the election, or other misconducts or other circumstances whether similar to those before enumerated or not, the majority of voters were, or may have been, prevented from electing the candidate whom they preferred." We have seriously considered the impact on the election of the conduct of the Party leadership during the campaign period and we have come to the conclusion that such conduct may have prevented the majority of the voters from electing

the candidate whom they preferred. This finding is by itself sufficient to dispose of the petition, but we would go further. As will be recalled, we found that the 1st respondent committed a corrupt practice in connection with the elections. Under section 123(3)(d) of the Act a corrupt practice automatically avoids an election. For the reasons which we have given, it becomes our duty to declare, as we do, that the parliamentary election held on October, 26, 1980, in the Sumbawanga rural constituency is void. We accordingly allow the petition with costs and certify for one counsel. K. S. K. LUGAKINGIRA JUDGE. B.A. SINAL'TA JUDGE BEYA N. N. MtISIJI 6L1981, JUMD. I certify that this is the true and correct copy of the original. District REGISTRAR

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