IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF TABORA)

AT KIBONDO

MISCELLANEOUS CIVIL CAUSE No. 2 OF 2010

[In the matter of Election Petition under the National Elections Act, CAP. 343 (R.E 2010) and the National Elections (Election Petitions) Rules, GN No. 447 of 2010)]

JAMAL A. TAMIM .....PETITIONER

VERSUS

1. FELIX FRANCIS MKOSAMALI
2. ATTORNEY GENERAL } **.....RESPONDENTS**

JUDGEMENT

19/03/ & 20/04/2012

SUMARI, J

In the 2010 Parliamentary General Elections in Muhambwe constituency, **FELIX FRANCIS MKOSAMALI** sponsored by **National Civil Coalition Party (NCCR** Mageuzi**)** emerged the victor, beating his opponent, **JAMAL A. TAMIM,** the contestant and candidate of Chama Cha Mapinduzi (CCM), the ruling political party. Mkosamali scored twenty five thousands five hundred and seventy four votes (25,574) as against the second placed Mr.

Jamal who scored fifteen thousands, two hundred and twenty three (15,223) votes, making a marginal difference of ten thousands three hundred and fifty one votes (10,351) just by simple mathematics.

It is the victory of **Mr. Mkosamali** that aggrieved **Mr.Jamal** who through Mr. George Obuya Herzon, learned counsel decided to challenge the said parliamentary election results before this Honourable Court and thereby fielded fifteen witnesses to prove his case out of 32 indicated earlier, including Mr. Jamal himself.

Mr. Mkosamali through Mr. Method Raymond Gabriel Kabuguzi, learned counsel, assisted by Dr. Chacha Murungu, learned counsel has fielded seven witnesses out of 32 indicated earlier, including Mr. Mkosamali himself and the Attorney General who was represented by Mr. Prosper Mwangamila, learned Senior State Attorney assisted by Mr. Renatus Mkude, learned State Attorney, who had earlier indicated to call eleven witnesses called none.

For convenience of reference **Jamal A. Tamim** is hereinafter referred to as (the Petitioner) and **Felix Francis Mkosamali (1st respondent)** and the **Attorney General (2nd respondent).** The 2nd respondent is actually featuring in these proceedings in fulfilment of legal requirement as no specific complaint rose against either in both the petition and evidence adduced.

Following the outcome of this election, the CCM candidate who lost, Mr. **Jamal A. Tamim,** the Petitioner filed a petition claiming for the nullification of the election of the Muhambwe parliamentary election dated 31st October, 2010. The petition was for the first time filed in court on 16th November, 2010 but was amended twice, the last amendment being on **4th January, 2012**.

According to the **Amended Petition**, the petitioner seeks to avoid the election results on the following grounds that (as per paragraphs 7, 10 and 11 of his Petition):-

(7). *That during campaigns, and on different dates in Mabamba Ward, Kizazi Ward Kumsenga Ward, Rurongwe Ward, Murungu Ward, Bunyambo Ward, Itaba Ward, Kitahana Ward, Bugagara Ward, Misezero Ward and Bitale Ward within the constituency of Muhambwe the 1st respondent made statements which were intended to exploit racial and religious differences against the petitioner.*

(10). *That during the campaign, some religious leaders on behalf or with the knowledge of the 1st respondent made statements in their Christian Churches within Mabamba Ward, Kizazi Ward, Kumsenga Ward, Rurongwe Ward, Murungu Ward, Bunyambo Ward, Itaba Ward, Kitahana Ward, Bugagara Ward, Misezero Ward and Bitale Ward which incited their believers to vote along racial and religious differences and since the petitioner is not a Christian, he was religiously discriminated following the statements.*

(11). *That on several occasions in Mabamba Ward, Kizazi Ward, Kumsenga Ward, Rurongwe Ward, Murungu Ward, Bunyambo Ward, Itaba Ward, Kitahana Ward, Bugagara Ward, Misezero Ward and Bitale Ward within the constituency of Muhambwe during campaign, the 1st respondent called upon voters not to vote for the petitioner*

because the petitioner is a murderer especially of Albino and is always involved in armed robbery.

The petitioner is therefore asking this Court for the following orders, namely:

1. Avoidance and/or nullification of parliamentary election of Muhambwe constituency dated 31st October, 2010.

2. A return of salaries and whatever benefits that the 1st respondent received in his capacity as a member of parliament such as salaries and allowances.

3. Costs of the petition.

4. Any other relief that the court may deem fit to grant.

In their Reply to the Petition, both respondents disputed the Petitioner's claims and prayed this Honourable Court to grant them the following relief(s):-

(i) A decree confirming the election results and declaration of the first Respondent a winner of a Member of Parliament seat for Muhambwe constituency in the general election held on 31st October, 2010.

(ii) Dismissal of the petition.

(iii) Costs of the petition.

On 19th March, 2012, the hearing of the Petition commenced and preliminary hearing was conducted in compliance with Rule 19(1) of the National Elections (Election Petitions) Rules, 2010 GN. No.447, published on 19th November, 2010 and the following issues were agreed and framed at the beginning of the whole exercise, namely:-

1. Whether during the General Election Campaigns the 1st respondent made statements which were intended to exploit racial and religious differences against the petitioner.

2. Whether during General Election Campaigns, some religious leaders on behalf of or with the knowledge of the 1st respondent, and with consent or approval by the 1st respondent made statements in their Christian Churches which incited their believers to vote along racial or religious differences.

3. Whether during the General Election Campaigns the 1st respondent made defamatory statements against Petitioner.

4. If the answer in issues No. 1, 2 and 3 above, are in the affirmative, whether the alleged statements affected the results of the Muhambwe Parliamentary Election.

5. What are the reliefs the parties are entitled.

Before engaging myself in discussing these issues as they appear, I feel obliged first, to commend all counsels for their zeal to work tirelessly till evening hours strenuously and with exertion. I also wish to express my gratitude to the audience for their tranquillity observed throughout the trial of the case, despite their large number in attendance. Generously, the trial of the whole case was commendable.

Second, I wish to put clear what is the law about election petitions in respect of a candidate as a Member of Parliament. First and fore most election is not only a Constitutional right but a Statutory right envisaged under Section 108 (2) of the National Elections Act, Cap. 343 of the Laws (R.E.2010). It is envisaged in both The Constitution and the Election Act that elections must be free and fair. Contrary to that anything which renders the election unfree and unfair, that thing under the law shall be valid ground for avoidance of such election (**Attorney-General and Two Others v Aman Walid Kabourou 1996 TLR 156 (CA).**

In terms of **Section 108(2)** of the **National Elections Act, Cap. 343 of the Laws (R.E.2010),** the election of a candidate as a member of Parliament shall be declared void only on an election petition if the following grounds is proved to the satisfaction of the High Court and on no other grounds, namely:-

(a) That, during the election campaign, statements were made by the candidate, or on his behalf and with his knowledge and consent or approval, with intent to exploit tribal, racial or religious issues or differences pertinent to the election

relating to any of the candidates, or where the candidates are not of the same sex, with intent to exploit such differences.

(b) Non-compliance with the provisions of this Act relating to election if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that the results of the election, or

(c) That, the candidate was at the time of his election, a person not qualified for election as a member of parliament.

The principle is however, that the Courts of law can only interfere with results of the election when a clear case is made out by a party seeking for the avoidance and/or nullification of parliamentary election. That is to say under the principle the petitioner(s) is strictly required to prove his/her allegations to the satisfaction of the court. So the burden of proof is solely placed on the petitioner. The Court of Appeal of Tanzania in the case of **Manju Msambya Versus The Attorney General and Kifu Gullamhussein Kifu (Civil Appeal No. 2 of 2002, Mwanza Registry, unreported Manju Salum Msambya v The Attorney General** in fact stated very clear that "burden of proof placed on the petitioner is a heavy one" citing with approval the case of Mbowe v Eliufoo (1967) E.A 240, where the then Chief Justice Georges, citing Bater v. Bater (1950)2 All ER458; said:

"……the standard of proof is one which involves proof "to the satisfaction of the court". In my view, these words in fact mean the same thing as satisfying the court…one cannot be satisfied where one is in doubt. Where a reasonable doubt exists, then it is impossible to say that one is satisfied…"

The Court of Appeal went on insisting that *"this decision and these words have been affirmed over the years and* ***remain the standard of expression of the law as it presently stands"*** (emphasis is mine). So this is the stance of the law to date.

Being guided by the above principle let me now discuss and determine the issues as they appear. But prior that, it is imperative to put this clear that after the closure of their case both sides preferred and applied to finally submit in writing, an application which I granted and in so doing the petitioner's counsel submitted in writing as per court's scheduled order, similarly both respondents filed their joint written submission as scheduled.

The first issue is **whether during the General Election Campaigns the 1st respondent made statements which were intended to exploit racial and religious differences against the petitioner***.*
In support of this issue, a total number of 11 witnesses testified for the petitioner. **PW1**, Jamal A. Tamim, the petitioner testified that during campaign rallies in all 13 wards, with 53 villages, the 1st Respondent, Felix Francis Mkosamali, made discriminating statements against the petitioner, that *"msimchague huyu ni mwarabu, sii mwenzetu ataturudisha katika ukoloni*. Further to that *"Msimchague huyu mwarabu, mkimpa ridhaa ya kuwa mbunge, atawaleta wenzake na itakuja Mahakama ya Kadhi".* That Pw1, Petitioner, *"Sii mwenzetu katika njia ya msalaba".* Also that Pw1, Petitioner *"ni jambazi, kina mama mkienda shambani kukata kuni atakata vichwa vyenu na kuonyesha ishara ya kukata shingo kwa mkono", Anaua maalbino na anauza vioungo vya maalbino".*

According to Pw1 all these words uttered by 1st respondent in many campaign rallies in all 13 wards constituting the Muhambwe constituency. It is Pw1's evidence that he was informed of all about what the respondent Mkosamali was saying in his campaigns by persons listed in the verification clause. He vehemently complained that the statements uttered, affected him a lot because each who heard that petitioner is a robber and albino murderer saw him as a dangerous person to the society.

He further complained that he was affected very much because Mkosamali stated that petitioner will bring back colonialism he being an Arab and a Moslem. That Moslems are very few while a big number of the villagers are Christians, so by saying *"Hayupo katika njia ya msalaba"* many people believed that petitioner is not one of them (*sio mwenzetu kwa dini*).

That despite being informed of the statements Pw1 also told the court upon XXD that on 20.10.2010, he found the 1st Respondent and his campaign team at **Kizazi Ward** speaking those discriminatory statements against him.

On their part respondents strongly attacked **PW1's** (petitioner) evidence urging the court not to consider it because is based on hearsay which is inadmissible under Section 62 of the Evidence Act, 1967.

Respondents too called upon the court to seriously consider the contents of the verification clause in the petition because PW1 admitted that **'it is true**

that allegations contained in Paras 7, 10 and 11 were information given from the list of persons in the verification. It is argued that petitioner's information was based on the listed persons as witnesses appearing on the verification clause in the petition but surprisingly PW1 only brought PW3 and PW7 amongst the persons who had informed him about the allegations contained in the petition.

It is further submitted by respondents that if at all there were any statements made against the petitioner, such statements were not made by the first respondent at all, but by other persons as can be reflected in **Exhibit R1,** an article published in **RAIA MWEMA** which reflects that such allegations were made prior to the election campaigns. They also invited the court to take judicial notice of a High Court Judgment delivered by Hon. A.K Mujulizi, J in **High Court Civil Case No.5/2006 at Tabora, (unreported case).**

It is therefore their strong submission that any allegations against the petitioner had existed long before the campaigns period, and to be specific in 2006, as such those statements were never made by the first respondent.

It is the petitioner's submission through his learned counsel, Mr. Hezron that Pw1's evidence is supported by **Arsemo Nathanael Matabaro**

(PW2), a CCM publicity secretary of Kibondo District since 2007 and a CCM campaign manager of Muhambwe during 2010 general election.

With due respect to the learned counsel, Mr. Hezron, I doubt whether Pw2 really supports Pw1's evidence in the manner it is argued. What Pw2 actually told the court is that he received complaints from the petitioner, and I quote; *"We received complaints from Jamal Tamim on statements uttered by the NCCR Mageuzi candidate which involved defamation. He complained that Felix Mkosamali uttered statements that he is a robber, murderer of albinos, a Moslem, and an Arab".*

On 28/10/2010 we convened a meeting in the morning session at Kibondo CCM District Office. We then wrote the Returning Officer of the said complaints".

Pw2 further on XXD testified that although he got the complaints from PW1, he also heard the 1st Respondent making such statements because his office is next to where the campaign rally was being conducted by NCCR – MAGEUZI.

This piece of evidence to my opinion suggests that this witness never physically attended the said meeting and in fact this was so because when XXD by Mr. Mkude, State Attorney Pw2 replied "*I heard rumours, I never went to the NCCR Mageuzi campaign myself. I took trouble that's why I complained in writing to Returning Officer. There are people who witnessed the statements uttered by 1st respondent. It is not hearsay evidence.* ***One day I heard the statements from NCCR Mageuzi candidate while in my office as the ground was near my office" (****emphasis supplied****).*** This again suggests that what Pw2 heard is hearsay for he was not physically at the place where the alleged

statements uttered. He was inside his office so he cannot tell with certainty who spoke the words he is associating with as defamatory word, if ever stated. Which are these words also is a riddle. Which is this one day also is a riddle.

On their part respondents are silent on this (Pw2's) evidence. I however, scrutinized it to satisfy myself on whether it supports Pw1's evidence as strongly argued by the petitioner's counsel. This witness throughout his evidence never stated what kind of words or mentioned a single statement complained of as Pw1 did or what actual discriminatory statements heard from Mkosamali while in his office. Pw2 therefore cannot be said with certainty as put by petitioner's counsel that he heard the alleged discriminatory statements and therefore supports Pw1's evidence.

Not only that, Pw2 also purported to had received complaints from Pw1 regarding campaign held at Kizazi Ward and complaint letter wrote to the Returning Officer i.e. Exh. P1. The letter dated 28/10/2010 contains two complaints, one concerning Christian leaders which complaint is not relevant in this issue but the second one concerns NCCR Mageuzi's announcements made on 28/10/2010 morning hours defaming CCM and its candidate. In that complaint no specific words or statements mentioned to have been stated by the 1st respondent against the petitioner or his party, CCM. It is a general complaint so to speak. I thus don't see how this witness (Pw2) supports Pw1's evidence at all. At most his evidence is unreliable.

The respondents have bitterly challenged and attacked the petitioner's option not to call in evidence the persons listed in the verification clause whom according to respondents these would have been key witnesses in advancing the petitioners case against the first respondent regarding the allegations of discriminatory and defamatory statements allegedly made by the 1st Respondent in the whole constituency of Muhambwe during his campaigns. Instead petitioner brought only **PW3 (Emmanul Kayenga) and PW7 (Dickson Mayengo)** among those 12 persons mentioned in the Verification Clause.

It is the respondents' argument further, which I doubt, that the two (PW 3 and PW 7) gave identical testimonies in the Court, and the gist of their testimonies is that both witnesses **(PW3 and PW7)** are **residents of Kifura Village in Busagara ward.** That both of them attended the campaign meeting by the first respondent twice at **Kifura Centre and at Kifura Market** during which they allegedly heard the first respondent uttering the defamatory statements against the petitioner.

I noted above that I doubt whether it's true that the two gave identical evidence or testimony as submitted by the respondents. Let's see what the two stated to had heard from the 1st respondent:-

"Msimchague Jamal Abdallah Tamim kwa sababu yeye ni mtoto wa sheriff. Sisi wakazi wa Kifura hakuna anayemfahamu Jamal Tamim kuliko yeye kwa sababu Jamal amemuoa shangazi yake (shangazi wa Felix Mkosamali). Kwamba Jamal ni jambazi.

Jamali anakata vichwa vya watu na kuchuna ngozi. Jamal anajihusisha na biashara ya viungo vya Albino. Akaongezea, akasema, akina mama wa Kifura mpo? Wakajibu tupo. He then mixed the language Kiswahili and Kiha; *"Mkienda porini kukusanya kuni au kuokota uyoga vichwa vyenu vitabaki huko huko kwa sababu ndio shughuli zake za kukata vichwa na kuchuna ngozi;* he then translated in KIHA language so that people understand well. In the 2nd meeting I attended he said *"Katika mkutano huu hapa kuna watu wa Jamal. Mimi siogopi, mimi ni mwanasheria, wewe Pablo nakutuma kamwambie Jamal ni jambazi".* **(this is PW3's version of testimony).**

The following is what **Pw7** heard from 1st respondent in the same meeting, I quote: - *"Enyi wana Kifura wananchi nawaombeni sana msimchague Jamal Abdallah Tamim ni jambazi anajihusisha na biashara ya Albino*". He also went on saying *"Kina mama mpoo, wakasema tupo*". He then changed the language from Kiswahili to KIHA that *"Mkimchagua Jamal Abdallah hamtakwenda kuchanja kuni porini wala kuchuma uyoga kwa sababu*, he showed them signs by fingure – cutting neck *(kuchinja)".*

Pw7 further stated on another meeting which he don't remember the date the 1st respondent said:- *"Yeye ni mwanasheria na nitakayoyatamka mwenye kuumia aende akashtaki kwa sababu anatamka neno ambalo ana uhakika nalo*". He then said *"Mnamfahamu Shariff ndio babake Jamal. Jamal si Mtanzania ni mtu wa asili ya Yemen. Jamal ni jambazi, Jamal anakata vichwa vya watu".* He went on saying *"Ninakuagiza Pablo ukamwambie Jamal kuwa nimesema mimi Jamali ni jambazi".*

So reading between lines the two witnesses' evidence/testimonies are not identical. They differ in a way. While Pw3 said *"Mkienda porini kukusanya kuni au kuokota uyoga vichwa vyenu vitabaki huko huko kwa sababu ndio shughuli zake za kukata vichwa na kuchuna ngozi;* he then translated in KIHA language so that people understand well. Pw7 on this said "*Mkimchagua Jamal Abdallah hamtakwenda kuchanja kuni porini wala kuchuma uyoga kwa sababu*, he showed them signs by fingure – cutting neck *(kuchinja)".*

While Pw3 is talking of 1st respondent's statement that he knows petitioner very well he said*"Msimchague Jamal Abdallah Tamim kwa sababu yeye ni mtoto wa sheriff. Sisi wakazi wa Kifura hakuna anayemfahamu Jamal Tamim kuliko yeye kwa sababu Jamal amemuoa shangazi yake (shangazi wa Felix Mkosamali).* But Pw7 during the 2nd meeting on this he said *"Mnamfahamu Shariff ndio babake Jamal. Jamal si Mtanzania ni mtu wa asili ya Yemen. Jamal ni jambazi, Jamal anakata vichwa vya watu.* While Pw3 said respondent said in the 2nd meeting that *"Katika mkutano huu hapa kuna watu wa Jamal. Mimi siogopi, mimi ni mwanasheria, wewe Pablo nakutuma kamwambie Jamal ni jambazi",* Pw7 said *"Ninakuagiza Pablo ukamwambie Jamal kuwa nimesema mimi Jamali ni jambazi".*
One should expect these two witnesses to have identical testimonies because they testified to have attended same meetings allegedly the 1st respondent uttered the discriminatory and defamatory words against the petition.

It is again the respondents' submission which I fully agree, that the evidence of Pw3 and Pw7 is highly doubtful and tainted with shaky evidence, a fact which shows how the petitioner's case against the first

respondent leaves much to be desired. In my considered opinion these were the only expected witnesses of the petitioner who could give evidence to prove at list in one or two campaign meetings allegedly attended they heard the 1st respondent uttering discriminatory and defamatory statements against the petitioner. However, as said their evidence leaves much to be desired. Why they are not consistent in what actually spoken by 1st respondent while they were physically present (if it's true) is not known. Is their evidence tainted with what we call desire to secure victory against the petitioner's opponent, the 1st respondent? They have actually tried to magnify the hill into a mountain but spectacularly.

We are told by Pw7 that all listed persons in the verification clause (namely**:- Emmanuel Kayenga, Melksedek Bakunda, Joyness Gaspar, Haruni Mdala, Anania Chubwa, Donatha Kakwila, William Zakaria, Erasto Kilolo, Bella Nkoko and Elizabeth Mdalla)** are all residents of Kifura. Why they were abandoned by the petitioner is best known to him but the truth tells itself as it has been seen in the evidence of Pw3 and Pw7 that the probable reason is to avoid contradictions, inconsistencies and the like.

But again it is challenged that the two witnesses are so much unreliable because in some instances the witnesses clearly gave lies answers to the court when for instance Pw3, Emmanuel Kayenga was XXD by Mr. Mwangamila (SSA) whether the first respondent preached on his party's (NCCR – Mageuzi) policy during his campaign meeting at Kifura he replied

"*there was no party policy that were preached except bad character of the petitioner, Jamal Tamim."*

Similarly, PW7 (Dickson Mayengo) when XXD by Mr. Kabuguzi (first respondent's counsel) on the same issue replied that *"NCCR – Mageuzi never talked about development policy apart from defaming other political parties candidates."*

As correctly argued by the respondents, it is highly improbable that the first respondent could utilize his entire golden time of campaigning just doing as what PW3 and PW7 purport to say. The reality is duly revealed in the testimony of the first respondent (RW1 – Felix Francis Mkosamali) in his testimony in examination in chief and when he was being cross-examined by Mr. Hezron (the Petitioner's counsel) he replied *"it is true I said I know the ward Secondary School. As for agriculture I told the public that we will use the constituency development fund to buy tractors. As for health I told them and I will insist on the health policy that old people should get medical treatment freely, children and women to**...**Yes, I told people I wonder why Kibondo, an old district has no electricity…'etc.*

Admittedly as I earlier stated and I reiterate here that PW3 and PW7, the only two mentioned witnesses out of twelve listed in the verification clause are the only expected potential and key witnesses for the petitioner but I'm satisfied that their evidence is incredible and unreliable. It is not worth regarded.

Another evidence submitted to have supported Pw1 on issue one is that of PW4, Gisbert Tausiga who told the Court that in a campaign rally held at Kagezi Village, Kumsenga Ward, at the Roman Catholic Church in 2010, he personally heard the 1st Respondent making the following statements against the petitioner:

> ***"Msimchague Jamal kwa sababu si mkristo ni Mwislam. Waislamu wana nia mbaya ya kuanzisha Mahakama ya Kadhi ambayo wakristo wote wataendana na sheria ya kiislam".***

The words warned the gathering not to vote for **petitioner** because he is a **Moslem** that the **Moslems** intend to establish a **Kadhi Court** upon which the Christians shall be subjected to Islamic laws. The witness further testified that he is the village chairman of Kagezi Village and a **Roman Catholic believer**. He was surprised to see that the **1st Respondent** held his campaign rally at the Roman Catholic Church of Kagezi instead of Kagezi Primary school where public meetings are usually held. It is petitioner's submission that this evidence is so tight that the 1st Respondent failed to shake it.

On their part respondents attacked this witness' testimony as one of full of exaggerations which intended to mislead the Court and hence renders it of doubtful and not worth of belief. It's worth noting that no other witness from the same meeting testified in supports of Pw4.

PW5, Richard William, is another witness from neighboring Village of Kabuye in the same Kumsenga ward. The witness testified that he had an

opportunity to attend two campaign rallies of the **1st Respondent** at **Mikonko** and **Kabuye Village**. He testified that he personally heard the **1st Respondent** addressing the gathering, saying that:-

> *"Ninyi wananchi wa Mikonko mnatakiwa kufahamu kuwa **Jamal ni muislam.** Msichague **Muislam**, kwani waislam katika Tanzania yetu wamejipanga kuomba ubunge ili wapitishe mahakama ya kadhi"*

The words are warning to Mikonko people not to elect CCM candidate, **Jamal A. Tamim**, because **he is a Moslem**. It was because the Moslems in this country are seeking to be elected as members of parliament so that they may have the majority seats in Parliament in order to vote for the establishment of **Kadhi Court.** This witness using different words gave nearly the same testimony with slight difference but here in a different occasion and place. Just as it was for Pw4, Pw5's evidence is not supported by any other witness in that occasion.

PW6, Kaleb Petro**,** also testified to the same effect that he attended **NCCR- MAGEUZI** Campaign rally on 28.10.2010 which was held at a Pombe Club in Busunzu a village, Busunzu ward, and heard the 1st Respondent addressing the rally against CCM candidate, Jamal A. Tamim: -

> *"Mimi ni kijana wenu mnayenitambua ningeomba mnipigie kura kwa kuzingatia kwamba mtu ninaye gombea naye, bwana Jamal si raia wa Tanzania, ni **raia wa Yemeni**. Siamini kwamba jamii ya mtanzania na hasa wakazi wa Muhambwe hatuwezi kujitawala **mpaka tutawaliwe na raia wa Yemen.***

PW9, Saimon Paulo, of Kigaga Village, Rugongwe ward testified to have attended NCCR – MAGEUZI campaign rally dated 17.9.2010 at Kigaga Primary school. His evidence is basically that he heard the 1st Respondent saying that;

> *"Jamal ni Muislam, mkimchagua ataenda kuunda mahakama ya kadhi, kwamba wakristo hamtapata sehemu ya kwenda kusali".*

Substantially the words calls upon the gathering not to vote for petitioner as doing so would amount voting for a Kadhi court.

PW10, Asha Meshi, testified for the petitioner told the court that she attended a campaign meeting held by NCCR – MAGEUZI at **Mabamba Village**, Mabamba ward, in 2010 and heard the **1st Respondent** saying:

> *"Msimchague Jamal kwa kuwa yeye ni Mwarabu atarudisha ukoloni."*

The testimony is in line with the evidence of **PW1** to the effect that petitioner is **an Arab** and that if elected, he will **bring back colonialism**.

PW11, Awadhi Hassan, who attended four meetings held at Bunyambo Ward at **Sumvura B, Minyinya** and **Bunyambo village centers** heard the 1st Respondent speaking the discriminatory statements against CCM candidate, the petitioner that:-

> *"Nichagueni Mimi kijana Mwenzenu, mkristo mwenzenu naombeni msiiangushe njia ya msalaba, sisi Ni wengi, wakristo kwa ujumla. Huyu anayekuja ni muislamu, tusimpe kura zetu kwa maana kwamba tusimpigie kura…"*

The words called upon the listeners to vote for the 1st Respondent because he is a fellow Christian who are many than Moslems, a religion that the petitioner belongs.

PW14 Masumbuko Chaboya, from Nyankwi Village, Busunzu Ward and **PW15**, Hussein Nduhiye of Kitahana Village, Kitahana Ward also testified to the effect that they attended different campaign meetings in their respective villages and wards and heard the 1st Respondent saying the petitioner is not a Tanzanian but an Arab from Yemen, therefore, he should not be voted for.

It is the petitioner's submission that the above evidence clearly proves that during NCCR-Mageuzi campaign meetings, the 1st **Respondent** made discriminatory statements against CCM Candidate, the **petitioner**, by calling voters not to vote for him because he is an Arabian from Yemen and that he shall go to establish a kadhi Court if elected.

Mr. Hezron, learned counsel for the petitioner insisted that this evidence is watertight and reliable. He is of the view that the petitioner's witnesses were credible and consistent throughout, even during cross examination by the 4 experienced counsels for both Respondents no inconsistencies and contradictions concerning the matters in dispute created.

To the contrary Mr. Hezron submitted that 1st respondent's denial to have made racial and religious discriminatory statements the petitioner together

with his witnesses is nothing but lies. That apart from the general denial, the 1st Respondent and his witnesses told the court that in all his campaign rallies, he, only, talked about NCCR – Mageuzi Election Manifesto and that he was guided by the manifesto, the National Election Commission guidelines, 2010, the National Election Act and the Constitution of the United Republic, 1977.

Admittedly, the 1st Respondent fielded 4 witnesses including himself to refute the allegation by the petitioner on issue one. This being the case, it is argued and I quite agree that, the sustainability or otherwise of the petitioner's case wholly depend on the credibility and reliability of both the contending and the countering witnesses, i.e. both the petitioner's and 1st respondent's witnesses.

Petitioner's contention is that the petitioner's 11 witnesses namely, **PW1, PW2, PW4, PW5, PW6, PW7, PW9, PW10, PW11, PW14** and **PW15** whose evidence have been summarized above, were unshaken in their telling the truth about the discriminatory statements made by the 1st Respondent during the general election campaign rallies in the villages stated above. It is contended that the witnesses were ordinary simple citizens from different walks of life who were only bent on telling the truth and the truth alone. They told the truth without the slightest ill will or disfavour towards the 1st Respondent.

It is further contended that, petitioner's witnesses had no reason whatsoever to fabricate lies against the **1st Respondent**, which fact is said to have been admitted by the 1st respondent also that he knows no any reason as to why the witnesses should tell such serious lies against him.

I quite agree with the petitioner's counsel that from the record there is nothing can be found suggesting why these witnesses could create a story against the 1st Respondent on a grave matter like that. I however, wish to remind the learned counsel that sometime in such cases i.e. the election petitions, out of victory desire against the opponent most of the witnesses are motivated to falsehood.

On their part respondents submitted that petitioners' witnesses based on unfounded exaggerations. On account of such unfounded exaggerations, they call upon the court to find out that these witnesses are not credible and their entire testimony, hence be disregarded entirely.

It is the respondent's contention also that, since all these witnesses were not mentioned in the verification clause of the Petition, their evidence is highly fabricated and is possibly motivated by other grounds not related to this case. It is however, insisted by the respondents, that failure to bring the listed witnesses in the verification clause and instead recruited new witnesses from different places other than those mentioned amounts to import new case which this court should not allow.

Perhaps I should comment at this juncture about the verification clause which reads "***Verification:-*** *What is stated in paragraphs 1, 2, 3, 4, 5, 6, 8, 9, 12, 13, 14, 15 and 16 are true to the best of my knowledge and what is stated in paragraph 7, 10, 11 are true according to the information obtained from* ***DICKSON MAYENGO, EMMANUEL KAYENGA, OSWALD KISIGO, MELKSEDEK BAKUNDA, JOYNES GASPER, HARUN MDALA, ANANIAS CHUBWA, DONATHA, WILLIAM ZAKALIA, ESTA KILOLO, BELLA NKOKO, MRS ELIZABETH MDALA,*** *and what is stated in paragraph 17 is true according to advise provides to me by George O. Hezron my Counsel.*

*Verified at Mwanza this 29th day of December, 2011" (***the underlining is mine for emphasis).**

Perhaps it worth having the definition of the word verification. Much as I could wish to quote the meaning from the Law Dictionary, I must confess I failed to get one. But suffice to have the meaning plainly. To my understanding **"Verification"** in law means "swear to or support a statement by affidavit. In other words is to make sure or demonstrate that something is true, accurate or justified, or correct in all details. So as correctly put by the respondents, one should expect the petitioner to abide with his verification in his pleadings, i.e. to call as witnesses all those pleaded to be the petitioner's informers. Whether in this case the petitioner, was bound and strictly required by law to call only those witnesses I will not dwell much on that. But suffice to say and agree with respondents that by necessary implications, it is only these persons mentioned in the verification clause who must have been **key witnesses**

in advancing the petitioner's case against the first respondent, regarding the allegations of discriminatory and defamatory statements allegedly made by the 1st Respondent in the whole constituency of Muhambwe during his campaigns (**emphasis supplied**). However, for reasons best known to petitioner, he brought only **PW3 (Emmanuel Kayenga) and PW7 (Dickson Mayengo)** among those 12 persons mentioned in the Verification Clause to testify in his favour.

Apparently, the two witnesses have turned out to be of no much help to the petitioner's case, as I demonstrated their evidence is very shaky and unreliable.

Suffice to say that the evidence adduced by the petitioner's witnesses on issue 1 is highly questionable, including that of the petitioner himself. Just to be precise on this issue PW1, upon his testimony testified that on 20.10.2010 he was told by the people that RW1 was uttering defamatory and discriminatory statements against him at Kizazi Ward. Thus after having been told he found that the 1st respondent and his campaign team doing the same. Thereafter he informed the police who followed the 1st respondent and his team.

It is very cumbersome that the petitioner who alleged to have been told by many people including the 12 in the verification clause, that RW1 was uttering the said statements failed neither to bring a single witness who told him that Mr. Mkosamali was uttering those words at Kizazi nor he

failed to bring the police officers whom he complained to them after the incident.

I believe in cases of this nature and in particular this one at hand, this Court must look deep the authenticity of the petitioner's evidence. Having scrutinized the evidence on record from both the petitioner and the respondent I tend not to believe what the petitioner purports this court to believe that the 1st respondent made statements which were intended to exploit racial and religious differences against the petitioner because, looking at the petitioners amended pleadings the petitioner did not depose this fact that he was also an "eye witness" and heard of the defamatory and discriminatory statements uttered against him by the 1st respondent. Even in his examination in chief petitioner never adduced such evidence. It was until and after cross-examined that's when he told this court that he attended the meeting at Kizazi and heard the statements been uttered by 1st respondent.

The petitioner unequivocally pleaded at paragraphs 7, 10, and 11 that at several occasions at Mabamba,Kizazi,Kumsenga, Rurongwe, Murungu, Bunyambo, Itaba, Kitahana, Bugargara, Misezero and Bitale Wards the first respondent uttered the said defamatory and discriminatory words. The petitioner went further to state at his verification clause that it was Emmanuel Kayenga, Dickson Mayengo, Harun Mdala, Ananias Chubwa, Esta kilolo, Mrs Elizabeth Mdala, Melksedek Bakunda who gave him the said information.

It is very surprising that PW7 when cross examined by Mr. Kabuguzi learned advocate, acknowledged knowing all these persons as fellow residence of Kifura. The testimony of PW7 contradicts what the petitioner purported this Court to believe that the information was obtained by him from different wards, while in actual fact it was only in a single Ward of Kifura. With this analysis the first issue is answered in the negative.

The second issue is **Whether during General Election Campaigns, some religious leaders on behalf of or with the knowledge of the 1st respondent, and with consent or approval by the 1st respondent made statements in their Christian Churches which incited their believers to vote along racial or religious differences.** On this issue the petitioner called PW3 Emmanuel Kayenga, PW11, Awadhi Hassan and himself. The 1st Respondent on the other hand called RW3, RW4 and himself RW1

PW11 is student of Busami Secondary School which is in Bunyambo Ward and in 2010 he attended four campaign meetings of NCCR-Mageuzi. The witness testified that he is a day scholar. He attended the first meeting which was held and addressed by the 1st Respondent between 11 – 11.15 am at Busami Secondary School. He thereafter attended some other three meetings on the same day which were held in Samvura B, Minyinya and Bunyambo Center. He further told the court that he heard the 1st Respondent speaking, among others, the following words:

"Nichagueni mimi kijana mwenzenu, Mkristo mwenzenu, naongea hili hata ninyi mlishapewa maelekezo kutoka katika jumuia zenu ndogo ndogo mnazosali. Naombeni msiangushe njia ya msalaba…"

It is Mr. Hezron's contention that the evidence of PW11 is credible because though a Moslem by faith, he was able to tell about sub-parishes which is a common feature of the Roman Catholic Church. It is a common knowledge that it is the Roman Catholic Church that mostly use small communities (sub-parishes) in Swahili, **Jumuiya ndogo ndogo**.

It is further contended that the testimony of PW11 is somehow corroborated with the evidence of RW3, Rosemary Wilbert from Kifura village in Busagara Ward. RW3 told the court that she holds several posts in her Roman Catholic Church known as Bikira Maria Mshindaji, of Kifura Village. One of her posts which are relevant here is that she is a secretary of Moyo Mtakatifu wa Yesu small community (Jumuia ndogo ndogo).

The evidence of RW3 show that it is true and it is PW11 said, that he heard RW1 saying that people were given directives to vote for him, RW1, in their mall communities (Jumuia ndogo ndogo). RW3 upon cross examination by Hezron, Advocate, admitted that Exh. R4 which is a letter dated 07/09/2010 copied to all parishes of Dekania of Kibondo which was read to their respective Roman Catholic Churches. This fact was also admitted by RW1 who is also a Roman Catholic.

In his strength to criticizing Rw3 Mr. Hezron said, though RW3 remembers, only voting for quality and good leaders and not to vote for corrupt and "fisadi" leaders, Exh. R 4 if read between lines shows that the Roman Catholic Church, Kibondo, mentioned the kind of leaders who should not be voted for. The letter requires the Roman Catholic believers to vote for a God fearing leader (A man of God) and warned them not to vote for a robber, a murderer and a person who is associated with the business of Albino.

It is further submitted by petitioner's counsel that, when the letter was written and read to the Roman Catholic Churches, it was during the election campaigns and the candidates for Muhambwe parliamentary seat were known. The candidates were Jamal Abdallah (CCM), Felix Fransis Mkosamali (NCCR-Mageuzi), Arcado Dennis Ntagazwa (CHADEMA), Masoud Khamis (CUF) and Enock Zephania (SAU).

According to Mr. Hezron, which I also agree, there is no dispute from the evidence of PW11, RW1, RW3 and Exh. R 4 that on 07.9.2010, the Roman Catholic gave directives to her believer to vote for a god-fearing leader, a leader who is not associated with the sale of Albinos, not a murderer and a robber. The only question is who among the above named candidates were referred to by the church?

Mr. Hezron's conclusion is that the Roman Catholic Church warned her believers not to vote for the petitioner because the petitioner is the one

among the candidates who had been associated with armed robbery and murder.

It is Mr. Hezron's contention which I fully subscribe that the evidence on record indicates that it is the very Roman Catholic Church that was the source of the allegations of armed robbery and murder against the petitioner since 2006. A Roman Catholic padre, Adreano Jeminiz was heard in one of his church services calling the petitioner a robber and a murderer. He referred the court to the Judgment of the High Court of Tanzania, Tabora Registry, Civil Case No. 5 of 2006, Mujulizi, J. The judgment was tendered by the 1st Respondent as evidence that even the church had way back in 2006 named the petitioner as a robber and a murderer.

Mr. Hezron is therefore insisting, which I don't agree, that it is for this matter the Roman Catholic and the 1st Respondent who is a member of that church had in their mind that their believer knew that a person who was not godly, a robber, murderer and associated with the business of Albino was the petitioner who had sued the church in Civil Case No. 5 of 2006.

It is Mr. Hezron's further contention, which I also don't agree with, that it sounds logical that the Roman Catholic having lost the battle in the High Court in Civil Case No. 5 of 2006 against the petitioner they changed the

battle field; this time it was to fight the petitioner in the parliamentary election for the reasons already stated.

Mr. Hezron also referred to Exh. R 5 a photocopy of Raia Mwema Newspaper dated 15 – 21 September, 2010 with an article entitled **"Hewa yachafuka CCM:** that it also corroborates the evidence of PW11, RW1, RW3, Exh. R 4, R 6 and the Civil Case No. 5 of 2006 to the effect that the Roman Catholic Church and RW1 were referring to petitioner.

He is of the view that Exhibit R 6, towards the end of the article, says that the religious leaders were included not to vote for the CCM candidate who was associated with the business of Albino and that it is obvious the religious leaders were of the Roman Catholic Church who finally warned their believers through Exhibit R4.

He is of the opinion that when the Roman Catholic Church warned her believers to vote for *a god fearing leader* and even threatened to punish those who would disobey the directives, it had in mind that the petitioner, being a Moslem, a robber, a murderer and a person associated with Albino business was not a god-fearing man and that is why he even sued the church in Civil Case No. 5 of 2006 and had been mentioned by the "Raia Mwema" Newspaper.

It should be noted also that Exh. R6 is not an article, it is a **'TANGAZO'** intended to be announced by the local radio of the area known as Radio Kwizera. In the said Exh. R6 no where towards its end says that the

religious leaders were included not to vote for the CCM candidate who was associated with the business of Albino. Obviously Mr. Hezron must have mixed up things and missed a point he wanted to advance.

Finally, it is submitted by the petitioner's counsel that since the 1st Respondent did not call any credible witness, especially the ones who attended his meetings at Samvura B. Minyinya and Bunyambo villages to refute the evidence of PW11 it is true that the Roman Catholic Church directed her believers to vote along racial and religious lines against the petitioner.

On their part respondents submitted that the petitioner adduced flimsy evidence on this issue. That the petitioner relied on hearsay information that there had been words uttered by the first respondent. He did not inform the court that those words were actually uttered by religious leaders ***on behalf of or with the knowledge or and with consent or approval*** by the first respondent as the law requires in Section 108(2) (a) of the National Elections Act, 2010. Hence, the standard of proof required for this particular allegation is not firmly met because there is no indication to suggest that the alleged statements if any (which are disputed) were made during general election campaigns ***with the consent and approval by the first respondent*** (emphasis supplied).

When Pw1 cross-examined by Mr. Kabuguzi, whether such alleged statements had religiously discriminated him were made during the period

of campaigns, the petitioner informed the court that he was accused by Padre Adriano in the year 2006 during the Easter mass in the Roman Catholic Church at Mabamba. He did not however testify more how the same persisted.

Respondents further submitted that is only PW3 Emmanuel Kayenga on record whose testimony tend to import the issue of religious discrimination in that, he attended two seminars held at Kifura one of them took place at Catholic Church between **May and June, 2010 on Haki na Amani** of which the coordinator was Kayusi Christopher Mgando on behalf of the Priests and further that during the seminar he heard that there was a candidate of Islamic religion (with a sign of the head) and that the same should not be voted in. This witness however, did not tell the court the actual person by name who had allegedly uttered such words let alone the fact whether the "Muslim candidate referred to" was the petitioner.

Regarding the 2nd seminar allegedly held at Kifura, this witness (PW3) told the court that the same was organized by FPCT, in which the witness worships towards the end of October, 2010. The witness further testified that the first respondent allegedly went there to ask for vote on Sunday. He said, during the prayers their Pastor (Samwel Kasa) allegedly told them that Felix Mkosamali is MP contestant of Muhambwe constituency and he introduced him to them. He testified further that Felix Mkosamali promised

to contribute Tshs. 300,000/= as his contribution for completion of construction of the Church.

Respondents called upon the court to find the witness Pw3 incredible for he could not tell the court whether such alleged statements by the Pastor **were made with the approval or consent of the first respondent**. Hence, it is difficult to prove this fact and thus this evidence is shaky which has to be disregarded.

It is further submitted that the first Respondent adduced concrete evidence to counter the petitioner's evidence on this issue. It is argued that first respondent (RW1) credibly informed the Court that he did not go to the alleged FPCT church to campaign on the alleged date insisting that he is a Roman Catholic Church worshipper and every Christian denomination has its own procedures of worshiping.

It is therefore urged that the testimony of PW3 (Emmanuel Kayenga) that the first respondent allegedly went to their church on a normal Sunday mass to ask for votes was fabricated because PW3 had not known that the first respondent is not a believer of FPCT church. This fact was however, admitted by PW3, when he was further cross-examined and on reply he informed the Court that he did not know the first respondent's denomination apart from knowing that the same was a Christian.

Besides such evidence on record, it is argued by respondents that RW3 Rosemary Wilbert credibly countered the petitioner's evidence on the issue of the seminar that was alleged to have been organized by the Roman Catholic Church on "*Haki na Amani".*

It is contended that she credibly informed the Court, contrary to what had been alleged by PW3 that she was a leader of the relevant church at Kifura (*Bikira Maria Mshindaji*). She remembered very well that there had been two seminars, the first one was held in 1999 and the second seminar on 23/02/2010 on Tuesday long before election campaigns. The theme of the seminar was: Haki na Amani" which involved Catholic believers who were trained on crisis in the marriages, ethics for youths, women and family responsibilities. She further informed the Court that the seminar had nothing to do with elections, neither voting nor any religious discrimination. She said she knew Emmanuel Kayenga (PW3) has never been a Catholic member; hence he was not in the seminars because the seminar involved only Catholic members.

It is further argued that Exhibit R4 (the letter from DEKANO DEKANIA YA KIBONDO of 7/09/2010) also corroborates evidence that the religious leaders, particularly from the Roman Catholic Church in Muhambwe Constituency (which had been mostly alleged by the petitioner to have incited their believers to vote for the first respondent) had actually prohibited their believers from voting on religious grounds. The letter which

was admitted without objection by the petitioner only advised on the qualities of good leaders in the society.

It is therefore submitted that the mere fact that people voted for the first respondent and not the petitioner, does not mean that such voting was based on religious discrimination. It is submitted that by voting for the first respondent the people simply exercised their rightful and best free choice. It's urged that a mere difference in votes does not mean discrimination in voting. It was simply a matter of free choice.

Upon my careful examination of PW3's testimony, I'm of the considered opinion that since the said seminar was conducted between May and June 2010, a period which the General Election campaigns had not yet started the allegations claimed against the 1st respondent are clearly unfounded. I find also no proof that whatever stated in the said seminar, if any, which I doubt, were not made or uttered on behalf or with knowledge or instructions of the 1st respondent. It is plain therefore that the Petitioner has failed to prove beyond reasonable doubt that Pastor Christopher Mgando was instructed or approved by RW1 to utter such words (if he really uttered).

When it is stated by PW3 that they were instructed not to vote for Muslims in the said seminar, the petitioner's name was not mentioned. We are however, told that not only the petitioner was a Muslim candidate

contesting for the seat but also one Mr. Athumani Masoud Hamis a contester of CUF political parties.

But all in all, RW3 challenges the testimony of PW3 as she testified that ”HAKI NA AMANI” seminar was all about matters related to spouses and not matters pertaining with politics as PW3 purports to be. The evidence of Pw3 is therefore on this issue unfounded.

I wish also to point on Exh. R4. The religious leaders clearly stipulated in their letter the kind of leaders their worshippers would vote, they mentioned no name, they mentioned no race, they mentioned nothing like religious discrimination. I find the complaint over this letter unfounded too. In the light of foregoing, the 2nd issue is answered in the negative.

I now turn to issue 3 **whether during the General elections the first respondent made defamatory statement against the petitioner.**

On this issue Mr. Hezron, learned Counsel for the petitioner submitted that witnesses brought by petitioner testified that RW1 made defamatory statements against the petitioner that the petitioner should not be voted because he is an armed robber, murderer as he cuts peoples heads and involves in buying and selling of Albino body parts.

Mr. Herzon submitted further that the testimonies of PW9, PW10, PW11, PW12, PW13 and PW15 have not been countered by the respondent; as

the respondent failed to bring evidence from people who attended those campaign meetings to refute the petitioner's witnesses.

On their part respondents submitted that allegations that the petitioner was a murderer, robber and dealer of organs of Albino had been the game of the day even before the commencement of 2010 General Elections Campaigns as evidenced in the Civil case no.5 of 2006 and the two article's in *RAIA MWEMA News paper (Exhibits R1 and R5*) which proves that there were allegations before commencement of the general election campaigns.

It is submitted that the petitioner took advantage of existence of such allegations against him as an excuse for his defeat by the first respondent in the relevant election.

It is further argued that if at all there were such statements made against him by the first respondents during campaigns as alleged that have not been accounted for in the petitioner's entire evidence on record. Even Exhibit P1 (a purported letter from the Returning Officer) should not be considered on the ground that it contains two different dates that contradict each other and fact. That in the last paragraph of Exhibit P1, it is alleged that the first respondent was called on 30/10/2010 whereas the letter was itself written and signed by the Returning Officer on 29/10/2010. This raises doubts as to how the first respondent could be called a day after the reply was sent to the petitioner!

Admittedly, Exhibit P1 leaves much to be desired. Suffice to say its genuineness is highly questionable. I'm therefore unable to give it a considerable legal weight it deserves.

Indeed after a depth analysis of whether the 1st respondent made such impugned defamatory statements against the petitioner, I have the following observation. It is known that defamation is an offence under the law of the land. Everyone is prohibited from committing it at all times including during election campaigns **(see Amani Walid Kabourou (1996) TLR 156 (CA)).**

One thing I wish to put forward is that the statements allegedly made or uttered by the 1st respondent in its bear meaning are defamatory statements in law, no doubt on that. But the vital question before hand for this Court to consider is whether RW1, the 1st respondent uttered those statements against the petitioner as alleged.

It is my considered opinion that if the petitioner really defamed by the 1st respondent from the date when campaigns started i.e. 20/8/2010 and on 20.10.2010 when Pw1 alleges to have heard the defamatory statements himself, he could have immediately complained to the relevant authorities. He has never advanced any reason why he failed to do so in time.

Exh. P1 purports that petitioner complained on 28/10/2010, which is two months after the campaigns started and eight days from the date when he alleged to have heard the same. The said Exh. P1 as demonstrated is not genuine. It raises doubts since it is not possible that the 1st respondent could be called by the Returning Officer a day after the reply was sent to the petitioner**.** The 1st respondent denied to have been summoned and in support of his denial RW2, one Vedasto Pesambili testified that he was a member of Ethics committee for Muhambwe and Bunyungu Constituents, a fact which is not disputed. He told the court that, at all times of the Election Campaigns the committee never convened a meeting or summoned the 1st respondent to defend himself over any complaint levied against him. This witness clear explained what the Returning Officer was required to do in case of any complaint presented to him. What actually this witness contended is exactly what is provided in the **ELECTORAL CODE OF CONDUCT FOR THE PRESIDENTIAL, PARLIAMENTARY AND COUNCILLORS' ELECTIONS, 2010 (MAADILI YA UCHAGUZI KWA AJILI YA UCHAGUZI WA RAIS, WABUNGE NA MADIWANI YA MWAKA 2010), Government Notice No. 273, August 2010.**

Under Section **5.2.3** of this GN 273/2010, the Returning Officer is required to form Constituencies Committee after being instructed by the Commission to do so and The Constituency Committee shall comprise the following:-

a) A Returning Officer who shall be the chairperson;

b) One member from each Political Party participating in the Parliamentary election in a constituency who shall submit a official letter from his/her party's District/Regional Secretary to the Committee's Chairperson;

c) One member who shall represent the Government and who shall be nominated in writing by the District Administrative Secretary of the relevant district; and

d) The Secretary to the Constituency Committee shall be one of the Assistant Returning Officers from the headquarters of the constituency.

Any Candidate who believes that the Electoral code of Conduct has been contravened is required to submit in writings complaint(s) to the Chairperson of the Committee concerned within forty-eight (48) hours from the occurrence of an event that caused the complaint (see s. **5.3 &5.4 of** the code).

Section 5.5 provides for the manner how the Constituency Committee shall handle the complaints i.e. as follows:

a) All complaints shall be discussed and decided upon in a meeting of the Committee concerned.

b) The Committee shall deliberate on complaints and make decisions as early as possible.

c) Upon receiving the complaint, the Committee shall require the side/party against whom the complaint has been made to submit his/her/its defence in writing within forty eight (48) hours from the time the complaint was lodged.

d) The quorum for the Committee's meetings shall be more than half of the total number of its members.

e) The Committee shall make decision on complaints after hearing both sides and receiving written explanations from both sides.

f)……..

g)…….

h)…….

According to Rw2 no such meeting convened which is clear implication that no complaint levied against the 1st respondent and dealt with accordingly. Very unfortunately, the Returning officer was not called to testify in proof of this allegation.

As such I am unable to find that RW1, the 1st respondent uttered those statements against the petitioner as alleged. The 3rd issue is thus answered in the negative.

Having answered issues 1, 2 and 3 in the negative then the 4th issue automatically collapses since I am satisfied beyond reasonable doubt that the petitioner has failed to prove existence of the alleged racial and religious discriminatory statements and or defamatory statements during the general election campaigns.

I thus hasten moving to the 5th issue on relief the parties to this petition are entitled to, which is nothing but to dismiss the petitioner's petition entirely with costs and to declare the first respondent a rightful winner of the seat of a Member of Parliament for Muhambwe Constituency. Consequently, the petition is **dismissed** in its entirety. The 1st Respondent, **FELIX FRANCIS MKOSAMALI** is hereby **certified** a lawfully duly elected member of parliament for Muhambwe constituency for 2010-2015 term.

The petitioner is ordered to pay to the respondents all costs of the petition.

A.N.M Sumari
Judge

DELIVERED IN THE OPEN COURT, IN PRESENCE OF E.R. HEZRON FOR PETITIONER, DR. MURUNGU, FOR 1ST RESPONDENT, MR. MWANGAMILA, SENIOR STATE ATTORNEY AND MR. MKUDE, STATE ATTORNEY FOR 2ND RESPONDENT, THE 1ST RESPONDENT IN PERSON AND IN THE ABSENCE OF THE PETITIONER.

AT KIBONDO
20/04/2010