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LUTTER SYMPHORIAN NELSON v. ATTORNEY GENERAL AND IBRAHIM SAID MSABAHA

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COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Mfalila, Lubuva and Samatta, JJ.A.)

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CIVIL APPEAL No. 24 OF 1999

(From the decision of the High Court of Tanzania at Dar es Salaam, Mkwawa, J., dated 6 May 1998, in Miscellaneous Civil Cause No.124 of 1995)

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Electoral Law – Elections – Avoidance of Election - Exploiting tribal differences as a ground for avoiding election – Whether such exploitation must affect result of election – Section 108(2)(a) of the Elections Act 1985.

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A *Electoral Law – Elections – Avoidance of election – Corrupt practices as a ground for avoiding election – Nature of evidence required to prove corrupt practices.*

B *Civil Practice and Procedure – Evidence – According due weight to evidence – Trial judge's failure to give reason for disbelieving witnesses – Effect thereof.*

The appellant was an unsuccessful candidate in a parliamentary election. He petitioned
C the High Court to challenge the result of the election. One of the grounds set out in his petition was the exploitation of tribal differences. Several witnesses gave evidence that the second respondent, who was a rival candidate, or his agents, made statements during the campaign with intent to exploit tribal differences relating to the appellant and him. The other ground was bribery. The High Court dismissed the petition. The
D judge ignored material evidence adduced by the second respondent in relation to the respondent's exploitation of tribal differences. The judge then directed himself to the effect that for the election of the second respondent to be declared void the court must be satisfied that the exploitation of such differences affected the results of the
E election. The appellant appealed from the decision of the High Court, and matters before the Court of Appeal for consideration were whether the judge had misdirected himself in law; and whether the judge erred in law in ignoring material evidence on the issue of exploitation of tribal differences.

F **Held:** (i) The trial judge erred in law in directing himself that election results cannot be avoided if exploitation of tribal differences did not affect such results; when there is such proof the question of the contravention affecting the result of the election does not arise

G (ii) Cogent and clear evidence is required to prove a corrupt practice in an election petition.

Appeal allowed.

H Cases referred to:

(1) *Preston-Jones* [1951] 1 All ER 124

(2) *Grace Shipping Inc. and another v. C. F. Sharp and Co. Malaya*
I *(pte) Ltd* [1987] L.R.C. (Comm) 550

A The appellant was declared to have polled 11,915 votes. The rest of the valid votes were shared by the remaining candidates. The appellant was aggrieved by the second respondent's election. He challenged it before the High Court under sections 111(c) and 112 of the Elections B Act, 1985 (hereinafter referred to as "the Act"). The petition was dismissed. The appeal now before us is against that decision.

The appellant's grounds of challenge were many; they included the following: (1) delay in opening and premature closure of some C of the polling stations; (2) illiterate and blind voters being assisted by CCM zealots in casting their votes; (3) failure to post the appellant's particulars at some of the polling stations; (4) illegal campaign; (5) treating; (6) intimidation; (7) corrupt practices; and (8) campaign D exploiting tribal differences. The trial was a protracted one. Twenty seven issues were framed and a total of fifty-two witnesses testified, twenty-one of whom were called by the appellant, who gave evidence on his own behalf. In this appeal only the learned trial Judge's findings E in respect of the fifth to eighth grounds of challenge, inclusive, are being contested. Originally, there were two grounds of appeal, namely:

1. The Honourable Judge erred in law and in fact in holding that the appellant has failed to prove his case beyond all reasonable doubt F in respect of the allegations relating to tribalism, corrupt practices, treating and intimidation of the electorate.

2. The Honourable Judge erred in law and in fact in holding that the CCM (Chama Cha Mapinduzi) had not planted zealots at Miswe G "B", Mbwawa Primary School "A" and "B" and Vikuruti to assist the blind, deafs and illiterates.

The second ground of appeal was abandoned by Mr. Magafu, counsel H for the appellant, and marked withdrawn by the court. So, we are left with only one ground of appeal.

We consider it useful to state at this juncture some of the general principles of law which we shall keep in view while considering the I merits or otherwise of the appeal. The following are those principles:

(1) The burden is heavy on him who assails an election which has been concluded. He must prove his case beyond reasonable doubt. But as Lord Oaksey observed in *Preston-Jones* (1), at page 133, "... what is a reasonable doubt is always difficult to decide and varies in practice according to the nature of the case". The standard of proof depends upon the seriousness of the allegation made.

(2) Although a trial court cannot be treated as infallible in determining which side is indulging in falsehoods or exaggerations, an Appellate Court will not lightly disturb its findings of fact. It will disturb those findings only if they are clearly unsound, perverse or have been based on grounds which are unsatisfactory by reason of material inconsistencies or inaccuracies. Although a first appeal is a re-hearing, the trial court's findings of fact will be interfered with only if they are wrong.

(3) A finding boldly based on demeanour alone is not satisfactory. In the absence of legal litmus tests to discover the truthfulness or otherwise of oral evidence, the trial court must have regard to the general probabilities and broader aspects of the case as to where the truth lies in the case. Where there is a conflict of evidence or where the evidence of the witnesses is likely to be unreliable, reference to the objective facts and documents, to the witnesses' motive, and to the overall probabilities, can be of very great assistance to the trial court in ascertaining the truth: *see Grace Shipping Inc. and another v. C.F Sharp and Co. Malaya (pte) Ltd (2)*...[1987]?

(4) While it is not right to dismiss outright evidence of partisan witnesses, that evidence must be viewed with great care and caution, scrutiny and circumspection.

(5) Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. As the learned authors of **Sarkar on the Law of Evidence**, (10 ed), Volume I, aptly put it, at page 46:

> Trifling discrepancies should be ignored as they are often a test of truth. Several persons giving their versions of a transaction witnessed by them are naturally liable to disagree on immaterial points. It must be remembered that there are discrepancies of truth as well as falsehood. It is the broad facts of a case and not the little details that are to be considered in the weighing of evidence.

Having stated these principles, we proceed to consider the validity or otherwise of the criticisms which Mr. Magafu has forcefully made against the learned trial Judge's findings, and arguments tenaciously made on behalf of the second respondent by Mr. Mselem in support of those findings. The second ground of appeal, the one which concerned the Attorney General, having been abandoned by Mr. Magafu, Mr. Salula, Principal State Attorney, merely assisted the court on one point of law which we shall later have occasion to consider in the course of this judgment. We propose to deal with the complaints against the learned Judge's findings on the four subject-matters raised in the remaining ground of appeal, namely, treating, intimidation, corrupt practices and tribalism seriatim.

In so far as the issue of treating was concerned, it was the appellant's case at the trial that rice-meals commonly known as "pilau" were served by the second respondent and his agents to members of the public who attended the second respondent's campaign meetings at Mlandizi A and B, Disunyara Village, Mwendapole, Kwa Mfipa, Msanganyi, Mkuza, Bokomonemela, Mengindu, Vikawe, Kongowe, Ruvu Station and Mlandizi Kwa Dosa. The food was served either before or after the rallies. The following witnesses on the appellant's side gave evidence on treating: Rehema Sudi Sadi (PW2), Salum Leja (PW4), Said Zinga (PW6), Rajabu Yusufu Athumani (PW7) and Kinyama Songo Ulaiti (PW19). It was the appellant's case that the message accompanying the "hospitality" was that the consumers should cast their votes for the second respondent. According to the Appellant's testimony a total of about twenty five thousand people ate the *pilau*. The second respondent's defence was total denial that food was served to members of the public. He asserted that only members of his campaign groups,

which included choirs and one traditional dance group, were served with food, the funds for which were supplied by his Party, friends and supporters. He called six witnesses: Ali Nassoro Rufumba (RW.11), Hamisi Ramadhani Chanzi (RW14), Simba Saidi Simba (RW22), Kassumu Ahmad Liyame (RW23), Muharami Mohamed Lubawa (RW25) and Yasini Abdalla Majuto (RW26). Each one of these witnesses supported the second respondent's denials and assertions. In the course of his evidence RW26 said: "I am the one who supervised the distribution and consumption of the meal by the choir groups. Each group had an average of twenty (20) participants. On the average five plates of pilau meal were consumed by each group ... The meals were not eaten in the open. They were always eaten inside the provided buildings. These were invariably CCM's offices. The meals were not meant to be eaten by the public. They were exclusively for choir groups".

The learned trial Judge analysed the evidence of the scales of justice and found himself unable to make a positive finding that, as was alleged by the appellant and his witnesses, the *pilau* was also served to members of the public. He entertained the view that what might have occurred was that pilau was prepared for, and served to the members of the campaign groups but some members of the public invited themselves to the meal. He accordingly found no substance in the complaint against treating. Mr Magafu sought to persuade us to hold that the learned Judge erred in so concluding. While very fairly conceding that the evidence of PW6 was hearsay, he contended that the evidence of PW2 stood unchallenged on the point, and PW6 was unshaken during cross-examination, and, therefore, the learned trial Judge should have preferred the evidence of those two witnesses to that of the second respondent, which, according to counsel, constituted general denials. Mr Magafu concluded his submission on the issue of treating by contending that what occurred at the named rallies constituted treating in law. Mr Mselem, on the other hand, urged us to hold that the learned trial Judge directed himself properly and arrived at a correct conclusion. He submitted that the evidence of the second respondent, RW12, RW13, RW23, RW25 and RW26

established that members of the public were not served with the *pilau*. The learned advocate concluded his argument by submitting that if there were gatecrashers in the places where the pilau was served, the second respondent cannot in law be condemned for that.

We have carefully considered the rival arguments and in the end we are of the opinion that, upon the evidence on the record, it cannot be said that the learned trial Judge was not entitled to find, as he did, that threating was not proved in this case. None of the appellant's witnesses told the trial court that members of the public were invited to go and eat the pilau. In the course of his testimony, PW7 was constrained to admit that no invitation was made at the rally he attended, namely, the Mwendapole rally. In the light of these facts, it seems to us that the version given by the second respondent and his witnesses was more plausible. Since the *onus* of proof in this case lay on the appellant, we have no hesitation in concluding, as did the learned trial Judge, that treating was not proved. As was held by this court in *Gilliard Joseph Maseko and Two others v. Corona Faida Busongo and another* (3), the serving of food to members of election campaign teams is a perfectly lawful thing. We can detect no fault in the learned trial Judge's findings on the complaint against treating.

We proceed to consider whether the learned Judge misdirected himself in holding that intimidation was not proved. The appellant called four witnesses to prove several alleged episodes of intimidation by the second respondent and his agents. The first of those episodes was alleged to have taken place at Mlandizi. It was the evidence of Iddi Saidi Wenge (PW14), a vendor at Mlandizi market, that during the campaign period Ibrahim Ismail Kambanyaka (RW16), a Ward Councillor, came to the market in the company of one Morris Foeks, and told the traders at the market that if they voted for the appellant they would find themselves paying higher fees for their business licences. In his testimony RW.16 denied to have made the alleged "threat". He said that at the market vendors paid a daily fee of TZS. 50 and a monthly fee of TZS. 300. These charges, according to the witness, were levied by the District Council and not CCM. In the

course of his submission Mr. Magafu conceded that the alleged statement by RW16 did not in law constitute intimidation because CCM was entitled, if it found it necessary, to caution the people that a victory for CHADEMA could result in business fees being raised. In view of that concession of which we approve, we say no more on the matter. Another intimidation was alleged to have been made at Visiga Kwa Vipofu. The evidence here was given by one Sijaoni Athumani Mzuzuri (PW12). His testimony was to the effect that on 28 September 1995, on the eve of the polling day, a video film depicting what he called "The Uganda War" was shown to an audience of "almost one hundred persons". He asserted that he was the one operating the video-set. According to the witness' testimony, the film included horrifying scenes of killings, and that a Ward Councilor, one Omari Rashid Nonganonga (RW19), cautioned the audience that if they voted for the opposition parties what they had seen on the film would befall this country. The second respondent brought RW.19 and one Salum Rajabu Muhunzi (RW18) to refute PW12's evidence. Both witnesses said nothing about where they were or what they did on 28 September 1995. Apparently assuming that PW12 meant to talk of the events which occurred on 28 October 1995, they asserted that on the night of that day they were at Ruvu Secondary School attending an election seminar. The evidence of an Assistant Returning Officer, Suleiman Mfaume Bigi (RW21), who claimed to have been the supervisor of the seminar, supported the testimony of the two witnesses. This support moved the learned trial Judge to hold that there was no "powerful evidence to establish the complaint". Mr. Magafu submitted that that finding was not justified. He contended that the evidence of PW12 was reliable and enough to establish the electoral misconduct complained against. Mr. Mselem submitted that the learned trial Judge's finding cannot be faulted, because, as he put it, there was sufficient credible evidence before the court proving that RW18 and RW19 were at the Ruvu Secondary School on the night in question. With respect to Mr. Magafu, we are of the opinion that the rejection by the learned trial Judge of PW12's solitary testimony was justified. First, according to his evidence, the appellant was told that the film was screened on

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28 October 1995. This information appears to have come from PW12. That witness was, however, emphatic in his evidence that the "show" took place on 28 September 1995, and not on 28 October 1995. Under cross-examination by Mr. Mselem, who also represented the second respondent at the trial, the witness said, among other things:

> I am telling the truth – election was held on the 29 September 1995. The film was screened on the 28 September 1995. *This was just a night before the election day.* I had operated the video machine. The house of Mhunzi is in the compound where the video was screened. *The video was not shown on the 28 October 1995.* It was in the month of September, 1995. [the emphasis supplied]

Plainly, the witness was confused. As everyone else knows, the general election did not take place in the month of September. Was the witness' confusion confined to dates? We cannot be sure of that. In our settled opinion, the learned trial Judge would not have been justified to accept PW.12's unimpressive testimony. It is not, in our opinion, insignificant that none of the members of the audience, estimated by the witness to be almost a hundred, was called as a witness to support that evidence. Be that as it may, we are decisively of the opinion that, in the absence of evidence proving, or from which it could reasonably be inferred, that a substantial number of votes were obtained as a result of the alleged intimidation, the appellant's complaint must be found to lack merit.

One Dr. Zainabu Gama (RW28), an Assistant Medical Officer employed by Shirika la Elimu, Kibaha, was alleged by Asha Juma (PW18) and Salum Issa Kinyogori (PW21), both of whom are residents of Miswe Village, to have uttered a threat that if the residents of the village voted for the appellant or if that candidate won the election she would refuse to attend them if they came to the hospital for treatment. PW21 told the trial court that one night, a few days before the election day, the village and CCM Chairman, Sahabana Chaurembo, brought Dr. Gama to his (the witness') house. As to what allegedly transpired there we shall permit the witness to take up the story:

She [Dr. Gama] arrested me. In the process she asked me why I have [defected] from CCM to CHADEMA. She told me as I had been there was no point why I should abandon it. She further told me that we should not be unwise to vote for Lutter who is a Bahaya. She further threatened that people from Miswe village will be denied treatment in her hospital in case Lutter Nelson emerged the winner in the election. She also asked me to inform my co-villagers to attend a meeting on the following morning.

The witness was the Chairman of CHADEMA at the village. Dr. Gama was a Regional and District Executive Committee member of UWT, an organization affiliated to CCM. She was also a member of the Political Committee of that Party at the regional and district level. PW.18 testified to the effect that, in response to an invitation by the Village Chairman, one morning before the polling day she attended a women's meeting. About fifty women attended it. Dr. Gama was the main speaker. As to what Dr. Gama allegedly said, the witness told the trial court as follows:

She introduced herself to us. Her message to us was briefly to the effect that we should cast our votes for Dr. Msabaha not Lutter Nelson. She ... told us that if we elected Nelson then we should be prepared to face the consequences of being turned away when we go to Kibaha for treatment.

While admitting the holding of the meeting, Dr. Gama emphatically denied to have exhorted those present to vote for the second respondent or to have threatened to refuse them medical treatment if they voted for the appellant or if the candidate emerged the winner in the election. Although she admitted to have told the appellant, who passed by the meeting hall, that the meeting was a "mkole", a Zaramo initiation meeting for women, she asserted that the gathering was a UWT meeting. During the meeting, she told the trial court, she exhorted those present to vote for the second respondent. Analysing the evidence of PW18 and that of Dr Gama, the learned trial Judge said, among other things:

Taking into consideration RW28's denial in this matter and the way she straightforwardly gave her evidence-in-chief and how unshaken she stood the fiery cross-examination I was left with a lasting impression of sincerity

A of her part. In the result, I cannot say that she was not a credible witness. I am fortified in this view when I bear in mind that PW.18 did not at all impress me as a witness of belief and that PW18's testimony is, as is evident from the record, lonesome. Having this in mind I find it extremely
B unsafe to believe PW18 and discredit RW28.

He went on to conclude as follows:

Even assuming in arguement that RW28 had uttered those threats as alleged
C by Nelson and his witnesses, I am still not persuaded that such remarks or utterances could have any effect or substantial influence on the electorate.

Mr. Magafu forcefully criticized the learned trial Judge's finding that RW28 was a credible witness. He contended that the witness
D could not correctly be regarded as being a reliable one. He gave two reasons for that contention. First, in examination-in-chief the witness said that the meeting was exclusively for women but during cross-examination she admitted that a man, too, attended the meeting. Secondly,
E the witness contradicted herself because at one time she said that the meeting was a "mkole", but later she said it was a UWT meeting. Mr. Magafu submitted that the learned trial Judge should have preferred PW18's testimony to that of RW28. Mr. Mselem, on the other hand,
F urged us to hold that the learned trial Judge was entitled to make the finding Mr. Magafu had attacked. According to the learned advocate, the police, to whom a complaint had been made against the witness, would not have been so insouciant as to ignore the contravention if there was some evidence showing that it had been made. The learned
G advocate did not, however, disclose in respect of what offence the witness could be arrested. We have given a careful consideration to these arguments and in the upshot we are of the opinion that there is no warrant for disturbing the learned trial Judge's finding. As far as
H the making of the alleged threat is concerned, we think it was one man's word against another. Neither evidence of PW18 nor that of PW21 was supported directly or indirectly. No reason was given at the trial why no other member of CHADEMA or any of the other
I opposition parties who attended the meeting could not be called to lend some colour to PW.18's testimony. According to the evidence

of PW.21, the meeting was for women "regardless of their party affiliations". Be that as it may, we do not think Mr. Magafu's criticisms against the evidence of RW28 carry much weight. We hold that opinion mainly for two reasons. First, the delay in disclosing to the trial court that there was one man at the meeting intended exclusively for women did not, in our opinion, constitute a substantial blot on the credibility of the witness. Secondly, at no time during her testimony did the witness say that the meeting was a "mkole". She used that word in connection with what she had told the appellant when the latter had wanted to know whether the meeting was a public one. Mr. Magafu appears to have misunderstood the witness' answers to the questions posed by the learned trial Judge. For these reasons, we are of the opinion that there is no basis for interfering with the learned trial Judge's findings on the intimidation allegedly made by RW28.

Finally, as far as intimidation is concerned, there is the complaint against the rejection by the learned trial Judge of the evidence of PW15, Issa Jumanne Mngombanya, that at the Kwa Dosa campaign meeting threats were made by RW14, RW21 (the Kibaha District Commissioner) and RW27 that those who would not vote for CCM would be dispossessed of their shambas. The evidence was strongly disputed by the defence witnesses and the second respondent. One of the principal common features of their evidence was that the meeting in question did not last long because it started to rain heavily a short period after it had commenced. The learned trial Judge was impressed by the credibility of the defence witnesses. Having given the matter careful consideration, we are unable to agree with Mr. Magafu that, upon the evidence on the record, we are entitled to take a different view from that taken by the learned trial Judge. Having subjected the impugned judgment to close scrutiny, we are unable to say that the learned trial Judge failed to use or palpably misused the advantage he enjoyed, which we lack, of observing the manner and demeanour of the witnesses.

Mr. Magafu strongly urged us to hold that, contrary to the findings made by the learned trial Judge, it was proved beyond reasonable

doubt at the trial that the election in the Kibaha Constituency was not, because of intimidation by the second respondent and his agents, free and fair. For the reasons we have given, we cannot prevail on ourselves to believe that it would be right for us to accede to the learned advocate's arguments. That conclusion brings us face to face with the appellant's complaints against the learned trial Judge's findings on the evidence to the allegations of corrupt practices.

There were not less than seven alleged acts of bribery by the second respondent and some of his agents. We shall start with the evidence of Kinyama Songo Ulaiti (PW19). This witness was a member of the CCM's campaign team in the Kibaha Constituency. Testifying on what allegedly occurred on 26 October 1995, he said:

> ... I was called by the CCM's branch secretary. He is called Saidi Kokota. He gave [me] TZS. 20 000 which he said I should use in luring the voters into casting their ballot in favour of Msabaha. The notes were all in TZS. 500 currency notes denomination. I was instructed to give money only to those with Registration Certificates. I gave each one of these TZS. 500. I gave the money to forty persons. I was not given anything as an inducement. I was to be rewarded later on. I was promised TZS. 2 000. [This money] I was to be paid when Msabaha wins. I know the persons who I have paid ... I approached the individuals in person and I did it secretly.

Cross-examined by counsel for the Attorney General, the witness said, among other things:

> I had given [TZS. 500] to one Mkumbwa. He is blind. I took him to the polling station. I left him sitting outside. I left him with my uncle. He is called Kibwana Suleiman Kiyani. ... I had given him [Mkubwa] the money three days before the election day. [the emphasis supplied]

Mkumbwa gave evidence as PW16. He confirmed receiving 500 from PW19, but his story differed from the latter's story in two respects. First, he said he received the money on the polling day. Secondly, he said it was one Kinyamasigwa who led him to the polling station. The evidence of the two witnesses was disputed by the second respondent's side. According to Said Kokuza (RW17), PW19 had ceased to be a

member of CCM when, on 6 June 1995, he resigned from the Party. The witness produced before the court as an exhibit minutes of a meeting of CCM which were said to demonstrate that fact. Having taken into account the inconsistencies between the evidence of the two witnesses, the learned trial Judge found himself unable to accept the evidence of PW16 and PW19. In his brief attack on that finding, Mr. Magafu submitted that the issue was not who assisted the witness to go to the polling station, but whether PW19 was given TZS. 20 000. Mr. Mselem submitted that, bearing in mind the inconsistencies between their evidence and the "lie" by PW.19 that he was a member of CCM, the learned trial Judge was perfectly entitled to arrive at the conclusion he did. With respect to Mr. Magafu, we are of the opinion that Mr. Mselem's argument is well-founded. Assuming that PW19 did not tell a lie on his membership of CCM, his evidence reminds us of the caution voiced by the Supreme Court of India in *Rahim Khan v. Khurshid Ahmed and others* (4) regarding the acceptance of turncoat testimony in election petitions. Speaking through Krishna Iyer, J., the court said, at page 657:

> We cannot understand how tergiversation can become a virtue. Defection in politics is becoming a pervasive vice and its projection into election cases must be frowned upon by courts. It scandalizes us that a person should be the campaign agent of one candidate during elections and should shift loyalties during the election case to undo the victory he contributed to attain. The price of post-election swiveling must slump. It is naivete to pin faith on such probative circus and it is necessary to discourage such defection in the interests of the purity of the court process. Except in special circumstances which are not present in the present case we decline to dismantle an electoral result by the technique of turncoat testimony.

It will be recalled that it was the evidence of PW.19 that he was a member of the CCM campaign team. In that capacity, he exhorted the voters in the Kibaha Constituency to cast their votes for the second respondent, CCM candidate, and yet, by his own testimony, he tried to persuade the learned trial Judge to declare the second respondent's election void. We can see no special circumstances in

this case justifying the acceptance of the evidence of this swivel-chair witness. On the contrary, the very material inconsistencies between his evidence and that of his fellow player, PW16, dictate, in our settled opinion, the rejection of that evidence. It is very difficult to believe that the two witnesses were talking of the same incident when they were in the witness-box. We find no merit in Mr. Magafu's submission.

That conclusion brings us to the question whether the learned trial Judge was wrong in not finding that a few days before a CCM campaign meeting was held at Mwendapole village the second respondent bribed some villagers there. The appellant adduced evidence from two witnesses on the complaint – Rajabu Ali Ngateka (PW10) and Salum Suleiman Difa (PW11). It was the evidence of the two witnesses that on a Sunday morning the second respondent came to their village and parked his vehicle at a bus stand. Soon thereafter a crowd of men and women gathered there. The second respondent addressed them briefly; he exhorted them to vote for him.

Then he dipped his hand into his trouser pocket and dished out TZS. 30 000 in three currency notes. The crowd scrambled for the money. PW10 grabbed it and threw two of the notes to the crowd. The witness then went to a shop where he changed the note he had retained into TZS. 5 000 notes, one of which he gave to PW11. There were some inconsistencies in the evidence of the witnesses. According to PW10, the second respondent told the women to wait for their turn as the TZS. 30 000 was for men. According to PW11, however, the second respondent also gave women TZS. 20 000. PW11 tried to explain the inconsistency during cross-examination. He said that the women were given the TZS. 20 000 when PW10 had gone to the shop to change the TZS. 10 000 he had retained. The second respondent vehemently disputed having bribed the crowd. He asserted that he could not indulge in bribery when his mobilization groups denounced corruption in their songs and poems. The learned trial Judge was not impressed by the evidence of PW10 and PW11. In is opinion, the disharmony between their evidence left a reasonable doubt as

to whether the alleged bribery took place. Mr. Magafu attacked this view. He contended that the second respondent's evidence on the issue was no more than a general denial. Relying *on Basil P. Mramba and The Hon. The Attorney General v. Leons S. Ngalai,* (5), the learned advocate submitted that a general denial of an electoral irregularity or misconduct cannot suffice. He concluded his submission by arguing that the evidence of PW10 and PW11 was credible and proved the alleged bribery beyond reasonable doubt. Mr. Mselem's response was two fold. First, it was improbable that the second respondent, a man who is highly educated, would have acted in such a reckless manner in broad daylight as described by the two witnesses. Secondly, the unresolvable inconsistencies between the evidence of the witnesses were material and robbed the witnesses' accounts of their persuasiveness. Mr. Mselem concluded his submission by reminding us of the fact that being a very grave charge, corruption ought to be strictly proved.

Whose contention is correct? Mr. Magafu's that bribery by the second respondent was proved? Or is it Mr. Mselem's that there was no such proof. There cannot be doubt that if it is true that the second respondent behaved as alleged by PW10 and PW11 he acted with reckless courage. Like the learned trial Judge, however, we are not satisfied that it was proved that he so behaved. In our opinion, the inconsistency between the evidence of the two witnesses regarding whether or not women were also bribed was not of a trifling character. The belated explanation by PW11 that the bribery occurred when PW10 had gone to the shop flies in the face of the testimony of PW10, which suggested, very strongly, that PW11 accompanied him to the shop. It is not irrelevant to add, we think, that the omission by the appellant to call as a witness at least one of the women who witnessed the alleged bribery gives rise to doubt whether the accounts of PW10 and PW11 were true. We conclude, therefore, that there is no basis for faulting the learned trial Judge's findings on the evidence of PW10 and PW11.

We now turn to a consideration of the appellant's complaint against the learned trial Judge's finding that it was not proved beyond reasonable

doubt that Dr. Lawrence Gama, the then Secretary General of CCM, handed over bribe money to PW2. The witness gave a very interesting story. We propose to tell the greater part of it in her own words. This is what she told the trial court:

> On the 6 October 1995 I and two other CHADEMA members attended a meeting at the CCM Lumumba Office in Dar es Salaam. I was a leader in Tumbi Ward. I was a CHADEMA Secretary. The CCM's Party Secretaries for Dar es Salaam and Coast Regions and a chairman for Visiga Village were also present at the CCM Sub-headquarters at Lumumba in the city. With me there were Mohamed Mkanda and Seif Rashid. We had all pretended to have deserted CHADEMA in favour of CCM. I was a security agent of CHADEMA. We were directed by the CCM leaders in attendance to entice CHADEMA members to vote for Dr. Ibrahim Msabaha. In order to achieve this objective the former Secretary General of CCM, Dr Lawrence Gama, gave me a bribe of TZS. 30 000 and 25 CCM cards. I was directed to offer each person I had enticed a CCM card and TZS. 1 000. The remaining TZS. 5 000 was not for luring CHADEMA *(sic)*. It was given to me as transport allowance.

The witness went on to assert that after leaving the CCM Sub-Headquarters she proceeded to CHADEMA National Headquarters where she reported the alleged incident to the Party's Vice Chairman, one Mr. Brown Ngwilulupi. She said She left the CCM cards and TZS. 25 000 with that leader. It should also be pointed out that, according to the witness' testimony, her companions, Mohamed Mikanda and Seif Rashid, were also given some money for the same purpose by the Secretary General. In rebuttal, the second respondent called one Abbas Shabani Mfikurwa (RW29). In October 1995 the witness was Personal Assistant to the Secretary General of CCM. He told the trial court that on 6 October 1995, he officiated at a ceremony for welcoming to CCM Kibaha defectors from CHADEMA. He had been told they were two hundred defectors but only thirty would attend the ceremony. He obtained thirty CCM cards for the occasion, but in the end only three "defectors" turned up – PW2, Mikanda and one whose name he could not recall. The witness asserted that on that date the Secretary General was at

Songea where he was also involved, as a candidate, in a contest for a parliamentary seat. He went on to tell the trial court that he presented the trio with CCM membership cards and handed over the remaining cards to one Mr. Mhagama, the Coast Region CCM's Secretary, for distribution to those defectors who had not turned up at the ceremony. According to the witness, the three "defectors" had insisted that the ceremony take place in Dar es Salaam and not Kibaha because they feared to be subjected to harassment by the appellant's followers.

The learned trial Judge subjected the evidence of the two witnesses, PW2 and RW29, to a critical analysis. He said:

> The evidence of PW2 is lonesome as the said Brown Ngwilulupi was not called to lend credence to her version. If her story is credible, one wonders why he did not come. PW2 had asserted that Dr. Lawrence Gama was in attendance on that day but the same is borne out in Exhibit R13 [a news report in UHURU issue of 7 October 1995]. Had he been there quite obviously he would have hit the headlines. In the circumstances, of the two RW29 is more credible and worth of belief.

Mr. Magafu made a general attack against the rejection by the learned trial Judge of PW2's evidence. With respect, we agree with Mr. Mselem that the reasons given by the learned Judge for that rejection are incapable of being faulted. In our view, the learned Judge could also have doubted the veracity of the witness' evidence on the additional ground that the unexplained omission by the appellant to call Mohamed Mikanda or Seif Rashid as a witness suggested that the solitary evidence of PW2 was not going to be supported if those persons gave evidence.

The only remaining story of alleged bribery worthy our attention is that given by Faustin Everista (PW5). This witness told the trial court that on the polling day, while he and one Haule and Mohamed were going to a polling station to cast their votes, one Felician Kisutu, a CCM ten cell leader, who was at his house, called them. As to what allegedly happened at the house, we shall tell the story in the witness' own words:

> He (Felician) gave a thousand shillings each and asked us to vote for Dr. Msabaha. He promised us more money if Msabaha was elected. He told us that about [TZS.] 200 000 was available. I cast my vote for Msabaha. I have not been paid the money to date. I had gone in search of the money.

In his analysis of the evidence laid before him the learned trial Judge made no specific reference to the evidence of this witness. Mr. Magafu, not unexpectedly, attacked the omission. He contended that the witness' evidence was capable of belief. Mr. Mselem, on the other hand, submitted that the witness had told palpable lies and therefore his evidence was not worthy of the court's consideration. Since the learned trial Judge does not appear to have evaluated the evidence of the witness, we shall discharge that task. In doing so, we remember, of course, that we have not had the benefit of observing the witness' demanour in the witness-box. As a matter of reason, we think it is unsafe to rely on the witness' evidence. If his story were true, it seems unlikely that counsel for the appellant, an experienced one, would have omitted to call as a witness at least one of the witness' companions (Haule and Mohamed) at the time the bribes were allegedly given. The omission seems to suggest to us that the appellant's side was not sure that if those companions had gone into the witness-box they would have supported PW5's story. We would attach little weight to that story.

Corruption is a grave misconduct, and the allegation of it is a very serious charge. When it is proved in an election petition very serious consequences follow. It must, therefore, be strictly proved. Although the conditions prevailing in this country with regard to elections may not be very similar to those obtaining in India, the observations made by the Supreme Court of that country in *Rahim Khan's case* (4), at page 656, on the dangers of accepting *bare oral* evidence on allegations of corrupt practices are, we think, useful here:

> We must emphasize the danger of believing at its face value oral evidence in an election case without the backing of sure circumstances or indubitable documents. It must be remembered that corrupt practices may perhaps be proved by hiring a dozen witnesses apparently respectable and dis-

> interested ... There is no X-ray whereby the dishonesty of the story can be established and, if the court were gullible enough to gulp such oral versions and invalidate elections, a new menace to our electoral system would have been invented through the judicial apparatus. We regard it as extremely unsafe, in the present climate of kilkennycat election competitions and partisan witnesses wearing robes of veracity, to upturn a hard won electoral victory merely because lip service to a corrupt practice has been rendered by some sanctimonious witnesses. The court must look for serious assurance, undying circumstances or unimpeachable documents to uphold grave charges of corrupt practices which might not merely cancel the election result, but extinguish many a man's public life.

Cogent and clear evidence is required to prove a corrupt practice in an election petition. The evidence adduced by the appellant in the present case being, as we have demonstrated, of a shaky and prevaricating character, we are satisfied that the learned trial Judge was perfectly right to hold, as he did, that no corrupt practice was proved beyond reasonable doubt. We, therefore, see no merit in the appellant's complaint.

Finally, we turn to the appellant's complaint against the learned trial Judge's findings on his (the appellant's) allegations of tribalism. To prove those allegations, the appellant adduced evidence from twelve witnesses. The witnesses were PW2; Collence Wilisoni (PW3); PW4; PW6; PW7; Mohamed Kabondo (PW8); PW10; Ali Chizo (PW13); PW14, Issa Jumanne Magombanya (PW15) and Salum Issa Kinyogori (PW21). Save as for PW21, the essence of these witnesses was that at the CCM campaign rallies they attended in the constituency of Kibaha – PW2 and PW6 at Mkuza, PW3 and PW4 at Kwa Mfipa, PW7, PW8 and PW10 at Mwendapole, PW13 at nearly all the rallies, PW14 at Mlandizi, and PW15 at Vikuruto – the second respondent and his agents (in the presence of the former) exhorted the crowds not to vote for the appellant who they described as a Mhaya, Wakuja (non-indigenous person in the area), TX, or foreigner. They urged the people to vote for the second respondent, their fellow Zaramo or Mzawa (a son of the land). According to the witnesses, the choirs and dancing groups conveyed the same message to the crowds. According

A to PW3, at the meeting he attended, one line of one of the songs ran as follows:

... Wazaramo nambari one ... Wahaya hawana bao.

B The ten witnesses asserted that the following were the second respondent's principal agents whose speeches contained tribalistic messages: RW14, the CCM's District Chairman; RW16, Ward Councilor; RW21, Ward Executive Secretary; and Morris Foeks, who did not give evidence in this case. PW21 testified to the effect that one night before the C polling day RW28 (Dr. Zainab Gama) visited his house and exhorted him not to cast his vote for the appellant, a Mhaya. The evidence of PW13 was to the effect that he was a member of one of CCM's campaign choirs. He produced before the court as an exhibit an audio D tape which he asserted contained some of the songs which he had taped at some of the campaign rallies. The thrust of the second respondent campaign, the witness asserted, was to portray the appellant as unfit to be Member of Parliament for Kibaha Constituency on the ground E that he was not indigenous to that constituency. The appellant himself essentially testified on the reports he received from his agents and supporters.

F In the witness-box the second respondent vehemently denied that he or his agents conducted the campaign rallies on the lines of tribe as alleged by the appellant's witnesses or at all. He called nine witnesses to refute those allegations. Those witnesses were: Alli Nassoro Rufumba (RW11), Athuman Maje (RW12), Deogratia Kishura (RW13), RW14 G (Hamisi Ramadhani Chanzi), Msafiri Jackson (RW20), Simba Saidi Simba (RW22). Abdallah Juma Mbonga (RW24) and Muharami Mohamed Lubawa (RW25). Each of these witnesses denied that speeches on tribal lines were made at the campaign meetings they attended. According H to them, in the speeches and songs voters were exhorted to cast their votes for the CCM Presidential election candidate and the second respondent. RW11, RW12, RW13, RW14 and the second respondent himself asserted that the subject-matter of tribes was touched upon I by the speakers at the CCM campaign rallies only for the purpose of demolishing the baseless utterances which the appellant had been

making at some of his campaign rallies that, (1) although at the CCM nominations, before he had defected to CHADEMA, he had polled the highest number of votes thereby beating the second respondent by far, he was not nominated by that Party as its candidate in the constituency because he was a Mhaya and not a Zaramo, and (2) the second respondent was a Muha. The second respondent told the trial court that he "found it prudent for the inhabitants of Kibaha to know the truth". It was not in dispute at the trial that the second respondent is a Zaramo, and the appellant is a native of West Lake region, who has now settled in the constituency.

On the issue of tribalism the learned trial Judge analysed the evidence of three witnesses only – the appellant, PW13 and RW20. He was silent as to the truthfulness or otherwise of the evidence of PW2, PW3, PW4, PW6, PW7, PW8, PW10, PW14, PW15, RW11, RW12, RW13, RW14, RW22, RW24, RW25 and RW26. We shall quote him *in extenso*. This is what he said:

> There can scarcely be any doubt that Nelson was an exciting witness. He was in the witness box for a relatively long time. It will be recalled that it is common ground that Nelson in the election posters, sample ballot papers and in his speeches at several campaign rallies described himself as a doctor. It later on transpired that the said credential was spurious and Nelson himself has unblushing conceded (*sic*) that his claim in respect of that credential was utter falsity. And I venture to say as a result of this falsehood the court has to approach his evidence with the greatest circumspection. Besides, I could not help but get the feeling that parts of his evidence were assimilations of suspicious and inferences and that there is some likelihood that he was carrying out a vendetta and a jaundiced eye against Dr. Msabaha after being jilted by CCM from the candidature. This being the position Nelson's evidence should be suspect. The reason is that he has *a palpable interest* to serve. At any rate, I think, as already stated Nelson's evidence in respect of this issue was a fusion of suspicions and deductions. I find it difficult to buy the account of PW.13 particularly when it is pitted against that of RW.20 who I find credible. His evidence finds support in the cassette itself. Most of the evidence given show that

A during the campaign rallies there was cheering, jubilation and all sorts of applauses. It strains credulity and indeed one wonders why the cassette did not pick a single voice from the crowd, it having been recorded amid a crowd as per PW.13 himself. This raises great doubts which should be
B resolved in favour of Dr. Msabaha.

Having evaluated the evidence of the three witnesses in that manner, the learned trial Judge concluded his consideration of the issue of tribalism as follows:

C Without prejudice to the foregoing, I wish to further state that on my part it is by no means new or obsolete law that even assuming for argument sake that tribalism was the theme in the campaign rallies, I am far from persuaded that the substantial number of votes were obtained from such
D utterances bearing in mind the cosmopolitan nature of the constituency. The decision in *Ngwashemi's Case* [(1971) HCD n. 251] is hereby relevant. I am quite unable to hold that such a situation obtained in the Parliamentary election in the Kibaha Constituency. I so find.

E Mr Magafu made a strenuous attack against the learned trial Judge's reasoning in these passages. He submitted that the learned trial Judge gravely misdirected himself in analyzing the evidence because he concentrated on the appellant's evidence. According to the learned
F advocate, the omission by the learned Judge to evaluate and make findings on the evidence of the other witnesses, other than PW13 and RW20, who testified on the issue of tribalism, was a serious misdirection. Mr. Magafu went on to contend that the evidence of
G PW2 (who, he said, was not challenged during cross-examination on the issue of tribalism), PW3, PW4, PW6, PW7, PW8, PW15 and PW16 was reliable and ought to have been accepted by the learned trial Judge. The learned advocate described the evidence of the second
H respondent and his agents as mere general denials, and went on to submit, relying on *Basil P. Mramba's case* (3), that those denials were not sufficient in law to constitute a defence. He invited us to hold that it was proved beyond reasonable doubt that the second respondent
I and his agents made statements during the election campaign with intent to exploit tribal differences relating to the appellant and the

second respondent, and that the agents made those statements with the second respondent's knowledge and consent or approval. Finally, Mr. Magafu submitted that in considering the effect of the tribalistic statements on the result of the election the learned trial Judge misdirected himself in law because, as he put it, once any of the objectionable statements described in section 108(2)(a) of the Act are proved to have been made, the election of the returned candidate must be declared void. According to the learned advocate, the question of the result on the election being affected arises only when the proved complaint is a non-compliance with the provisions of the Act. In his response, Mr. Mselem was ingenuous enough to confess that he was not at ease with the way the learned trial Judge approached his task on the issue of tribalism. He conceded that the learned trial Judge gave no reasons for disbelieving the witnesses other than the appellant, PW13 and RW20, who testified on that issue. The learned advocate nevertheless contended that if he had considered the evidence of those witnesses the learned trial Judge would inevitably have disbelieved it. He reminded us that on the issue of corruption the learned trial Judge found PW2 a liar, and went on to submit that having been so labeled, the witness could not possibly be believed on the issue of tribalism. He pointed out what he regarded as weaknesses on the evidence of the following witnesses of the appellant: PW.3 (disharmony with evidence of PW13), PW4 (he admitted to have sold his Registration Certificate) and PW13 (the audio cassette he produced before the trial court had no sound made by the crowds, a fact which, he said, supported RW20's assertion that it was recorded after the election had been held). Mr Mselem further submitted that if the assertion by the section respondent and his witnesses that the question of tribalism was commented upon by the speakers of their camp merely for the purpose of exposing the falsity of the allegation which the appellant was making that the section respondent's nomination by CCM as a parliamentary candidate was influenced by tribalism was true, then it could not be said that the statements were made with intent to exploit tribal differences. The learned advocate, who conceded that once a contravention of section 108(2)(a) of the Act is proved, nullification of the election must

follow regardless of the result of it, concluded his argument by submitting that no such contravention was proved in the present case.

Mr Salula agreed with the interpretation on section 108(2)(a) of the Act urged by Mr Magafu and Mr Mselem. He invited us to hold that the absence in that paragraph of the test of effect on the result of the election which is provided in paragraph (b) of the subsection demonstrates that Parliament intended not to have that test applied to statements on the lines of religion, race, tribe or sex. He sought to remind us that, for the sake of National Unity, both the Constitution of the United Republic of Tanzania of 1977 (hereinafter referred to as "the Constitution") and the Political Parties Act, 1992 prohibit discrimination.

We have paid due attention to the submissions made by counsel for all the three parties. Having done so, we are left in no doubt that the learned trial judge strayed into some serious errors in his treatment of the evidence laid before him on the issue of tribalism. First, he did not apply his mind to the evidence of seventeen witnesses, including that of PW8, PW14 and PW15. A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In *Amirali Ismail v. Regina*, (6) Abernethy, J., made some observations on the requirements of judgment. He said:

> A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how.

Though they were made in a criminal case, we think these observations equally apply to judgments given in non-criminal proceedings. Since, in the present case, the learned trial Judge completely ignored a portion of the material evidence, we shall, unfortunately, embark

upon the task of evaluating that evidence without the advantage of his assessment. Secondly, the learned trial Judge misdirected himself in rejecting the evidence of the appellant partly on the ground that the appellant had "a palpable interest to serve" in the case. The fact that, as the returned candidate, the second respondent had equal, if not greater, purpose of his own to serve in the case, seems to have escaped the attention of the learned trial Judge. Thirdly, as we shall demonstrate later, the learned trial judge erred in law in considering the effect of statements, if proved, made in contravention of section 108(2)(a) of the Act on the result of the election.

Although, unlike the learned trial Judge, we did not enjoy the advantage of observing the manner and demeanour of the witnesses when they were in the witness-box, we are of the settled opinion, having regard to, among other things, the totality of the evidence on the record, the fact that RW26 was recorded by the learned trial Judge to have been evasive at a certain stage of his evidence, and the admission made by RW11 in the course of his evidence, to which we shall shortly revert, that there was no basis for the learned trial Judge not to accept the evidence of PW8, PW14 and PW15. The trio appear to us to have given simple and straightforward stories. They did not embellish those accounts. The evidence of the three witnesses was, among other things, to the effect that at Mwendapole, Mlandizi and Ruvu Kwa Dosa, respectively, the second respondent and his agents made speeches exhorting the people not to vote for the appellant a non – Zaramo, but vote for the second respondent, their fellow tribesman. Of course, the second respondent and his witnesses disputed those assertions, but their case that the question of tribes was raised at the CCM campaign rallies only to refute the story the appellant had been telling the crowds at his campaign rallies as to why CCM had not nominated him as its candidate in the constituency was put only to the appellant, who disputed it. We are at a loss to understand why counsel did knot put that case to PW2, PW3, PW4, PW6, PW7, PW8, PW10, PW14 and PW15. It seems to us not unreasonable to infer from the omission that counsel realized after the appellant's emphatic denial that it would be futile to pursue the

matter. Be that as it may, the evidence of PW8, PW14 and PW15 appears to find some support from the admission made by RW11, the CCM's District Secretary, in his evidence. Under cross-examination by Mr. Swai, for the appellant, the witness said, among other things:

> I concede that there was that tribal difference talk that surrounded the campaign atmosphere.

This admission shows, we think, that, although the witness' heart was with his Party and the second respondent, he did not so lose his head as to avoid telling the trial court that which the second respondent and the rest of his witnesses who testified on the issue of tribalism seemed very reluctant to say. Be that as it may, we think the evidence of PW8, PW14 and PW15 could stand its ground without RW11's admission. To put it differently, we would be prepared to act on the evidence of the trio in the absence of the admission.

It cannot be disputed that the evidence of PW3 (who sold his Registration Certificate), PW6 (a former prisoner), PW7 (one of the witnesses whose evidence on treating was found lacking veracity), PW10 (the witness whose story about a bribe of TZS. 30 000 the learned trial Judge rightly found unconvincing) and PW13 (the witness whose evidence on recorded tape was rightly doubted by the learned trial Judge, and who was imprisoned in 1993 for assaulting a school teacher) required supporting evidence before it could be acted upon. There is such evidence on the record in respect of the evidence of PW3, PW7, and PW10. That evidence is that of PW8. Bearing in mind the compelling nature of the evidence of PW8, PW14 and PW15, the fact that the allegation that in talking about tribes the second respondent and his agents were merely responding to false statement by the appellant regarding his failure to secure a nomination in CCM was not put to any of the appellant's witnesses, and, finally, the admission made by RW11, we are of the opinion that the learned trial Judge should have rejected the second respondent's version regarding the issue of tribalism. Accordingly, we find as a fact that the second respondent and his agents conducted a campaign on tribal lines as asserted by PW3, PW7, PW10, PW14 and PW15. We entertain no doubt that those agents did so with the

knowledge and consent or approval of the second respondent and that both the second respondent and his agents made those statements with intent to exploit differences between the appellant and the second respondent. In what we regard as a half-hearted submission, Mr Mselem contended that there was no proof of such intent. It suffices to say on that argument that, upon the evidence, the only rational conclusion is that the statements were made with that intent. Without any hesitation we reject the learned advocate's contention.

The making, during an election campaign, of statements, by the candidate or his agents with his knowledge and consent or approval, with intent to exploit tribal differences pertinent to the election or relation to any of the candidates is frowned upon by section 108(2)(a) of the Act. The sub-section reads:

> (2) The election of a candidate as a Member of Parliament shall be declared void only on an election petition [if any] of the following grounds is proved to the satisfaction of the High Court and on no other ground, namely:
>
> (b) 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 or relating to any of the candidates, or, where the candidates are not of the same sex, with intent to exploit such difference;
>
> (c) non-compliance with the provisions of this Act relating to election, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election; or
>
> (d) that the candidate was at the time of his election, a person not qualified for election as a Member of Parliament". [the emphasis supplied]

It will be recalled that the learned trial Judge held that in accordance with the principle laid down in *Ngwashemi's case supra* he could

not say, assuming that the appellant's complaint was proved, that "the substantial number of votes were obtained from such utterances bearing in mind the cosmopolitan nature of [the] constituency". With great respect, we are satisfied that the learned trial Judge misdirected himself in law in considering the effect of tribalism in the speeches on the result of the election. When, contrary to section 108(2)(a) of the Act, an election campaign is conducted on the lines of tribe, race, religion or sex, the law is jealously qualitative, not clumsily quantitative, in its nullification test. It does not count the number of contraventions, for, one contravention has the same ultimate result as ten contraventions. When there is such proof the question of the contravention affecting the result of the election does not arise. That question arises only if the provision of the subsection which has been contravened is paragraph (b). Contrary to what the learned trial Judge held, *Ngwashemi's* case *(supra)* concerned the contravention of paragraph (b) of the subsection and not paragraph (a). The complaints in that case were: (1) more votes were counted than the number of registered voters; (2) failure to keep the poll open at some of the polling stations; (3) failure to provide screened compartments wherein electors could cast their votes secretly; and (4) a substantial number of voters were denied the opportunity to vote. The decision in that case was plainly irrelevant to this case. In its grate wisdom, Parliament found it necessary to impose an absolute prohibition of the making by an election candidate, or on the candidate's behalf with his knowledge and consent or approval, of statements with intent to exploit tribal, racial, religious or sex differences pertinent to the election or relating to any of the candidates. However big the margin of the victory of the returned candidate may be, if the candidate conducted his campaign, or permitted his agents to campaign, on the lines of any of those pernicious evils, the High Court is bound by the law to invalidate the poll verdict regardless of the effect of the illegal practice on the result of the election: see the very recent decision of this court in *Azim Suleiman Premji v. Attorney General and Dr. Aman Walid Kabourou* (7). The law's aversion to short-cut to power is boundless. We want to say in the clearest terms that it is of first importance

that elections should not only be fairly and properly held but should also be seen to be so conducted. John Adams, a renowned jurist, who, between 1797 and 1801, was President of USA is said to have once remarked:

> Remember, remember, democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did knot commit suicide.

The vices prohibited by section 108(2)(a) of the Act are capable of posing a very grave threat to the national cohesion and our young democracy. The spirit underlying the provisions of articles 9(g) and (h), 13(4) and (5), 20(2)(a), and 29(2) of the Constitution, and section 9(2) of the Political Parties Act, 1992, is that discrimination on the basis of tribe, race, religion or sex has no place in this country. It is of earth-shaking importance that those cancerous vices be eradicated from the hearts and minds of the leaders and those who aspire to become leaders. The politics of stoop-to-conquer must be denounced with a loud voice.

Upon a close and fresh re-evaluation of the evidence on the record, we are satisfied beyond reasonable doubt that, contrary to the provisions of section 108(2)(a) of the Act, the second respondent and his agents, with his knowledge and consent or approval, made statements during the election campaign with intent to exploit tribal differences relating to that candidate and the appellant. For the reasons we have given, we cannot in law pause to consider whether those illegal practices affected the result of the election. A campaign on tribal lines having been proved, the electoral purity must claim its victim. Accordingly, we allow the appeal, reverse the decision of the High Court dismissing the election petition, and declare that the election of the second respondent as a Member of Parliament for Kibaha Constituency is void. The second respondent is to pay the costs of the appellant and those of the first respondent, both in this court and the court below.