IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NYALALI, C.J., KISANGA, J.A. And MFALILA, J.A.)

CIVIL APPEAL NOS. 32 AND 42 OF 1994

1. THE HON. ATTORNEY GENERAL)
2. RADIO TANZANIA DAR ES SALAAM) ..... APPELLANTS
3. AZIM SULEMAN PREMJI)

VERSUS

DR. AMAN WALID KABOUROU ..... RESPONDENT

(Appeal from the judgement of the High Court at Tabora given by Honourable Mr. Justice L. Mchome dated the 11th day of August 1994)

in

The High Court Miscellaneous Civil Cause No. 1 of 1994

REASONS OF JUDGEMENT

NYALALI, C.J.:

On the 28th December 1994 we delivered our judgement in these two consolidated appeals but we reserved our reasons until now. However, before we proceed to give our reasons which are the basis of our judgement, we must present the matters which constitute the framework of our reasons. We start with the matters which appear not to be in dispute between the parties to this case. The Parliamentary by-election which is the subject of this case was organized and supervised by the National Electoral Commission established under the Constitution of the United Republic of Tanzania. The functions and powers of the National Electoral Commission are derived from the Constitution and the Elections Act, 1985 as amended from time to time. Its membership includes a Chairman and Vice-Chairman. At the time material to this case, both the Chairman and Vice-Chairman are justices of this Court.

One Mr. Alex Thomas Banzi, who gave evidence as the sixth witness for the respondents at the trial in the High Court, was at the material time serving under the Commission as Director of Elections and Secretary to the Commission.

There is also no dispute between the parties that prior to election day, the National Electoral Commission appointed one Augustine Mudogo to act as a Returning Officer for the by-election. His substantive employment at the time was that of Director of Kigoma-Ujiji Town Council. After his appointment as a Returning Officer, he proceeded to nominate eighteen Assistant Returning Officers to help him in his duties.

The National Electoral Commission took other steps in connection with the by-election. These steps include the issuing of an official proclamation in Kiswahili titled "TAMKO RASMI LA TUME YA TAIFA YA UCHAGUZI YA JAMHURI YA MUUNGANO", hereinafter called simply as "TAMKO RASMI." Furthermore, it declared the period for registration of voters, the 17th November as the date for nomination of candidates, the period between 30th January and 12th February 1994 as being the period for election campaigns and the 13th February 1994 as the polling day.

There is also no dispute between the parties that prior to the period prescribed by the Electoral Commission as the election campaigns period, the then Minister for Home Affairs and Deputy Prime Minister,

namely, Augustine Lyatonga Mrema, and the Minister for Communications, Transport and Works, namely, Nalaila Kiula, visited Kigoma Urban Constituency. The former visited the constituency twice, first on 14th January 1994 and second on 29th January 1994. The latter visited once on 26th January 1994. Both ministers addressed public rallies attended by many people. Furthermore it is undisputed that among the problems which the people of Kigoma Urban constituency regarded as most pressing were the problems of Burundi and Rwanda refugees and the bad condition of the Kigoma-Ujiji Road.

Again it would seem that there is no dispute between the parties to this case, that six political parties contested this by-election. The most serious contenders were CHAMA CHA MAPINDUZI, commonly known by its acronym as CCM, and CHAMA CHA DEMOKRASIA NA MAENDELEO, commonly known by its acronym as CHADEMA. As already mentioned in our judgement, the third Appellant, namely, AZIM SULEMAN PREMJI was a candidate sponsored by CCM, whereas the Respondent, namely, Dr. AMAN WALID KABOUROU, was a candidate sponsored by CHADEMA.

The parties are also not in dispute regarding the following matters concerning the status of the Third Appellant. He was born in 1954 in Kigoma town. According to his birth certificate tendered at the trial as exhibit P18, both his parents, namely Suleiman Premji and Nurbanu Suleiman Premji were of Indian nationality. One of these parents, namely, the said Nurbanu Suleiman Premji was born in this country at Dodoma in 1926.

Subsequently both parents applied and became Tanzanian citizens by registration in 1963. In the same year, Third Appellant's father wrote a letter to the Principal Immigration Officer seeking clarification about the status of his children. The letter, tendered at the trial as exhibit P22 got no response. When the Third Appellant attained the age of 18 years in 1972 he applied for and obtained a Tanzanian passport. He is currently the holder of a Tanzanian Passport No.0020324 issued at Kigoma on 20th August 1992.

No dispute exists between the parties that during the period of election campaigns, a number of prominent politicians from the contesting political parties went to Kigoma Urban Constituency to campaign for the candidates sponsored by their respective political parties. Among them were His Excellency Ali Hassan Mwinyi, President of the United Republic of Tanzania and National Chairman of CCM; Kingunge Ngombale-Mwiru, MP, a Minister without portfolio and National Publicity Secretary of CCM and Horace Kolimba, MP, a Minister in the President's Office and then Secretary General of CCM. The campaigns were covered by the Press and Radio Tanzania, Dar es Salaam.

Furthermore, there is no dispute between the parties to this case that after the conclusion of the polling process, the counting of votes took place at Bangwe Prison Hall. The Returning Officer, that is, the first witness for the respondents at the trial (RW1) appointed fifteen pupils from Kigoma Secondary School to act as enumerators. The process at Bangwe Prison Hall involved

the following undisputed steps. At the beginning there was inspection of the ballot boxes by the candidates and their counting agents followed by the verification of the number of votes in each ballot box compared to the number of relevant registered voters. Thereafter all the ballot papers were put into a drum. Then four enumerators picked the ballot papers from the drum and handed them to six other enumerators seated at tables and each representing one of the six political parties contesting the election. Each of these six enumerators was to receive only the ballot papers for the political party he or she represented, and to put such ballot papers into bundles of one hundred each. Behind each one of these six enumerators was a counting agent of the relevant political party. The process went on smoothly until the drum was empty of ballot papers and the six enumerators completed putting the ballot papers into bundles. It was apparent that CCM and CHADEMA had most of the bundles and that CCM had more bundles than CHADEMA.

Again there is no dispute between the parties that after all the ballot papers had been put into bundles, a representative of CHADEMA expressed dissatisfaction with the situation and it was agreed by representatives of CCM, and CHADEMA and by the Returning Officer that representatives of CCM and CHADEMA should go through the bundles of each other. The exercise was completed as far as CHADEMA's bundles are concerned and 53 bundles and a part were established. The exercise for CCM bundles however was not completed. It was stopped. Neither the Respondent in this appeal nor any of his counting agents filled in the Form CF-7. The election results as

announced by the Returning Officer were as follows:

1.	CCM:	9,475 votes
2.	CHADEMA:	5,366 votes
3.	PONA	169 votes
4.	T.P.P.	45 votes
5.	NRA	36 votes
6.	TADEA	24 votes

It was on the basis of these figures that the Third Appellant was declared the winner of the by-election.

We now turn to the relevant matters which are in dispute between the parties. It was part of the petitioner's case at the trial in the High Court that in order to ensure that the by-election for Kigoma Urban Constituency would be free and fair, the Electoral Commission, exercising its powers granted by the Constitution and the Elections Act 1985, made and issued a number of directives, regulations and notifications, including the TAMKO RASMI for compliance or observance by all those concerned. In this way, the Electoral Commission prescribed and specified the period for election campaigns, mandated all contesting political parties to refrain from inter alia, using abusive or defamatory language or intimidation, and to educate voters about democracy and political tolerance. The Electoral Commission also mandated the Ruling Party to refrain from furthering its election campaign by using government employees and property or by using the government positions or offices held by some of its party leaders. In the same way the Government was

mandated to act impartially between the political parties, to disengage or distance itself from the electioneering activities of the Ruling Party and to give equal opportunity through the radio and the government press to all contesting political parties.

It was part of the petitioner's case at the trial in the High Court that CCM and its candidate or their agent as well as the Government or its agents violated many of the regulations, directives or notifications made and issued by the National Electoral Commission, in that during their visits to Kigoma Urban Constituency, Hon. Augustine Lyatonga Mrema (MP) the then Minister of Home Affairs and Deputy Prime Minister, and Hon. Nalaila Kiula, (MP), Minister of Communications, Transport and Works, conducted election campaigns for CCM and its candidate prior to the prescribed campaigns period; and in that during such premature campaigns, the Hon. Augustine Lyatonga Mrema, intimidated the voters against voting for a non-CCM candidate; and in that during the official election campaigns period, His Excellency, President Ali Hassan Mwinyi used Government property, that is, Government aircraft and motor vehicles; and in that he also used defamatory language in furtherance of the election campaign in favour of the CCM candidate, and in that Hon. Kingunge Ngombale-Mwiru used incriminating language against the CHADEMA candidate, and in that Hon. Horace Kolimba, (MP), Minister in the President's Office and the then Secretary General of CCM, intimidated the voters against voting for a non-CCM candidate.

Furthermore, it was part of the petitioner's case that Radio Tanzania Dar es Salaam, which is government owned, openly campaigned for CCM, and favoured CCM in giving opportunity for publicity in respect of the election campaigns. It was also part of the petitioner's case that the Central government, contrary to established programmes and practices intervened and took over from the Kigoma-Ujiji Town Council the maintanance work of the sensitive Kigoma-Ujiji Road in furtherance of the election campaign for the CCM candidate. It was the contention for the Petitioner that this act was corruptly done by the Government to influence the voters infavour of the CCM candidate, and that the visits by Hon. Augustine Lyatonga Mrema, (MP) and Nalaila Kiula, (MP) were connected with that corrupt objective.

Also, it was part of the case for the Petitioner at the trial in the High Court that the process of counting votes at Bangwe Prison Hall was not completed but was prematurely stopped by the Returning Officer ostensibly for security reasons.

Finally, it was part of the case for the Petitioner in the High Court that the CCM candidate, that is Azim Suleman Premji was not a Tanzanian citizen and therefore not qualified to stand as a candidate in the Parliamentary by-election. In conclusion the Petitioner's case at the trial was to the effect that the violations of the rules of election conduct affected the results of the election, and that in any event the election of the CCM

candidate was null and void since he was not a Tanzanian citizen.

On the other hand the case for the Defence at the trial consisted in the denial of the Petitioner's case and in the assertion that the TAMKO RASMI made by the Electoral Commission was invalid as it was ultra vires the powers of the Commission and, in any event, was not properly made and issued. Furthermore, it was the contention for the Defence at the trial to the effect that under the multi-party system, it was no longer required to prescribe a specific period for election campaigns. It was also part of the Defence case that CCM paid for the expenses of using Government property by the President in connection with the by-election campaigns, and in any event, there was no justification for restricting the President of the United Republic in using official transport and other facilities attached to his office while campaigning for a candidate of the President's political party. As to the visits to Kigoma by the two cabinet ministers, that is, Hon. Augustine Lyatonga Mrema, (MP) and Hon. Nalaila Kiula (MP), the Defence case was an assertion to the effect that none of the ministers went to Kigoma for electioneering purposes but that the former went there in connection with his ministerial responsibilities for the Burundi-Rwanda refugees and the latter went there in connection with his ministerial responsibilities for maintanance of the Kigoma-Ujiji road. Furthermore, it was part of the Defence case that the works being undertaken on the road were part of an on going maintanance programme and had nothing to do with the by-

election. As to the defamation and intimidation allegedly made by CCM leaders, the Defence case consisted mainly of general denials. As to the process of counting, the Defence case is an assertion to the effect that the counting process was completed and that the final exercise of going through the bundles of votes was not part of the counting process but was an exercise of verification requested by CHADEMA representatives and agreed to by the Returning Officer and representatives of CCM to ascertain the state of the votes in the bundles. That exercise of verification was stopped at the instance of CHADEMA representatives after being satisfied with the position.

Again, it was part of the case in defence to the petition that Radio Tanzania Dar es Salaam, as a government department, was wrongly joined to the petition in which the Attorney-General was the sole and proper party to be joined. Furthermore, it was the Defence case that Radio Tanzania Dar es Salaam did everything possible within its limited resources to give equal opportunity of publicity to the contesting political parties and was not in any way favouring CCM. Finally it was the contention of the defence to the petition to the effect that according to the relevant law and the available evidence, the CCM candidate was a Tanzanian citizen and therefore fully qualified to contest the by-election.

Fifteen main issues were framed by the High Court for its decision. The findings of the High Court on many of these issues form the basis of the grounds of

the two appeals as set out in our judgement. Before we give our reasons for our decisions on those grounds of appeal, we have to deal with a preliminary matter which arose at the commencement of hearing of this appeal. Mr. Makani, learned Advocate for the Respondent in this appeal gave a Notice of Preliminary Objection seeking to strike out grounds numbers one, three and six from the Memorandum of Appeal of the Third appellant, and grounds numbers one, two and four from the Memorandum of Appeal of the First and Second Appellants. After hearing both sides, we overruled the objection with costs. We reserved our reasons until now. The argument of Mr. Makani in support of the objection is that the above mentioned grounds of appeal are too general and not concise. With due respect to Learned Counsel, we do not think that he is correct because the two Memoranda of Appeal in which the relevant grounds of appeal are to be found are in full conformity with the provisions of Rule 86 of the Court of Appeal Rules, 1979 and because the particular grounds of appeal are traceable to specific parts of the Judgement of the High Court. That is why we overruled the objection. For purposes of clarity, we need only to add that the order for costs is payable in any event.

We now come to our reasons in support of our findings on ground number one in both memoranda of appeal concerning the validity of the TAMKO RASMI. We begin naturally by considering whether Courts of Law have jurisdiction to inquire into the validity of the TAMKO RASMI in view of the provisions of Sub-Article (12) of Article 74 of the

Constitution. That Sub-article as amended by Act No.4 of 1992 states:

> "No Court shall have jurisdiction to inquire into anything done by the Electoral Commission in the exercise of its functions according to the provisions of this Constitution."

On the face of it, it appears that the Constitution expressly prohibits the courts from inquiring into the validity of such things like the TAMKO RASMI, but on a deeper consideration of the principles that underlie the Constitution, it is obvious that such an interpretation of the Constitution is wrong. One of the fundamental principles of any democratic constitution, including ours, is the Rule of Law. The principle is so obvious and elementary in a democracy, that it does not have to be expressly stated in a democratic constitution. However, perhaps for purposes of clarity, there is an express provision to that effect under the Constitution of the United Republic of Tanzania. It is Sub-Article (1) of Article 26 which states:

> "Every person is obliged to comply with this Constitution and the laws of the United Republic."

In the light of this principle, we respectfully agree with the submission of Mr. Werema, Learned Senior State Attorney to the effect that Sub-Article (12) of Article 74 of the Constitution cannot be interpreted so as to protect unconstitutional or illegal acts or deeds

of the Electoral Commission from inquiry by the courts of law. This means that the protection from inquiry by the Courts applies only to acts or deeds made according to the Constitution or the relevant law. It follows therefore that any act or deed made contrary to the Constitution or the relevant law is subject to review or inquiry by the appropriate courts of law. It makes no difference that the Electoral Commission has a Chairman and Vice-Chairman who are justices of this Court. What counts is the principle of the Rule of Law. Under this principle nobody is above the Law of the Land and similarly nobody is authorized to act unconstitutionally or illegally. To hold otherwise is to advocate the rule of force which inevitably leads to the grave-yard of civilian rule.

In England, where our legal system derives much of its origins, the principle of the Rule of Law has been articulated judicially by the Courts in a number of cases, including the recent famous case of ANISMIC Ltd vs FOREIGN COMPENSATION COMMISSION (1969) 2AC 147. Ever since Tanzania reverted to de jure Multi-party democracy, it is time the same was similarly articulated here. We are satisfied and we find that the High Court in this country, like the High Court in England, has a supervisory jurisdiction to inquire into the legality of anything done or made by public authority, such as the TAMKO RASMI. As a collorary, this Court has similar jurisdiction to do so in a matter properly before it, as in the present case.

We now come to our reasons in support of our finding to the effect that the Electoral Commission is empowered to make and issue the TAMKO RASMI but under the circumstances of this case, the TAMKO RASMI is invalid. It is patently

clear that the Electoral Commission derives its powers under the Constitution and the Elections Act, 1985 as amended from time to time. Under paragraph (b) of Sub-Article (6) of Article 74 as amended by Act No. 4 of 1992, read together with sub-section (2) of section 4 of the Elections Act, 1985 as amended by Act No. 6 of 1992 it is provided that, "The Commission shall be responsible for the overall supervision of the general conduct of all Parliamentary and Presidential Elections in the United Republic". Similarly under sub-section (1) of section 124 of the Elections Act 1985, it is provided that:

> "(1) The Commission may make regulations for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing, may make regulations -
>
> (a) prescribing anything, which under the provisions of the purposes of this Act, may be prescribed;
>
> (b) prescribing forms of documents and declarations for the purposes of this Act."

We have underlined the relevant parts of this sub-section. Those parts clearly show that the Commission is enpowered to make regulations "for the better carrying out of the provisions of the Act" and to prescribe "anything" or "forms of documents and declarations" "for the purposes of this Act".

In our considered opinion, we are satisfied that on a true and proper interpretation of the above cited provisions of the Elections Act, the Electoral Commission is empowered to make regulations not only in furtherance of specific provisions of the Act, but also in furtherance of the purposes of the whole Act. From the scheme of the Act as manifested in the various provisions of the Act, including the provisions for secrecy of the ballot and for polling agents, counting agents, one person one vote, one candidate one seat, as well as those provisions concerning election campaigns and election offences, it is evident that the overriding purpose of the Elections Act is to secure the election of the President of the United Republic and the Members of the Parliament of the United Republic in a free and fair election. It is also implicit from the provisions of the Constitution concerning the People, such as the Preamble envisaging a Representative Parliament elected by the People; Article 5 on the Franchise or the Right to Vote; Article 8(1)(a)(c) and (c) on Sovereignity of the People, democracy, accountability to the People and People's participation in their Government; Article 21 on the Fundamental Right to participate in the affairs of the government either directly or through freely elected representatives, that there is an underlying constitutional principle that requires democratic elections to be free and fair.

It is our considered opinion that this constitutional principle of Free and Fair Elections has to be read into the Elections Act 1985, not only because of the express

provisions of sub-section (2) of section 1 of the Act which require the Elections Act, 1985 "to be read as one with the Constitution ..." but also because the Constitution is the basis of the elections. It follows therefore that the Electoral Commission has power to make regulations to ensure Free and Fair Elections under both the Elections Act, 1985 and the Constitution. On a close examination of the contents of TAMKO RASMI, we respectfully agree with Messrs Makani and Boaz, Learned Counsel for the Respondent in this appeal that the TAMKO RASMI was made and issued by the Electoral Commission to ensure a Free and Fair by-election in Kigoma Urban Constituency. Unfortunately however, the Electoral Commission did not properly exercise its power as prescribed under section 3 of the Act which states:

> "All regulations, directions and notices which the Commission is empowered to make, issue or give, shall be deemed to have been validly made, issued or given, if they aremade, issued or given under the signature of the Chairman of the Commission or the Director of Elections".

There is no controversy in this appeal that the TAMKO RASMI was not signed by the Chairman or the Director of Elections as specifically required by the Act. Instead it was signed by the Vice-Chairman of the Electoral Commission. Since there is no provision under the Act or any other relevant law authorizing the Vice-Chairman to sign such regulation, the TAMKO RASMI was clearly invalid as we mentioned in our judgement.

There is another point concerning the TAMKO RASMI which we need to mention not for purposes of supporting our judgement but as legal guidance for the conduct of future elections. It was argued in this appeal by Learned Counsel on the appellants' side to the effect that the TAMKO RASMI was legally ineffective since it was neither published in the Official Gazette nor otherwise made known to all the parties to the by-election. Of course there is no controversy between the parties to this appeal that the TAMKO RASMI was not published in the Official Gazette and that such publication is not necessary for the validity of the TAMKO RASMI by virtue of the Provisions of section 3 of the Act. It is our considered opinion that there is a distinction between the validity of a regulation on the one hand, and the commencement or coming into effect of such regulation on the other hand. The validity of a regulation, including the TAMKO RASMI lies in compliance with the conditions for making it. Such conditions may exist in the provisions of the Act which confers the power to make regulations or, under section 32 of the Interpretation of Laws and General Clauses, Act 1972 which concerns "provisions with respect to power to make subsidiary legislation". In the case of regulations made under section 124 of the Elections Act, 1985 read together with section 3 of the same Act, it is apparent that one of the essential conditions for the validity of such regulation is the signature of the Chairman or the Director of Elections.

As to commencement of subsidiary legislation, the relevant provision is section 27 of the Interpretation of Laws and General Clauses Act, 1972 which states:

> "Any subsidiary legislation published in the Gazette shall come into force on the date of such publication or, if it is provided either in the subsidiary legislation or in the Act that such subsidiary legislation or any provisions thereof shall come into force on some other date, such subsidiary legislation or as the case may be, such provisions thereof shall, subject to section 28, come into force on such other date."

Section 28 concerns retrospective operation of subsidiary legislation. Unfortunately, the TAMKO RASMI was neither published nor did it specify when it was to come into effect. Furthermore the Act under which the TAMKO RASMI was made does not specify the commencement of such regulations. Thus had the TAMKO RASMI been properly signed, it is doubtful if it could be construed to have come into effect on a certain date, if at all it did. We hope that this situation would be avoided in the future by the Electoral Commission.

As to the reasons in support of our finding on ground number one of the two appeals, these are connected to the reasons which support our finding on ground number 4 of the Attorney-General's Memorandum of Appeal, which is number 6 of the Third Appellant's Memorandum of Appeal. Our finding on these grounds concurs with that

or the trial court to the effect that there are grounds other than those stated under section 108 of the Elections Act for nullification of election results. The finding is based partly on the reasons relied upon by the learned trial Judge and partly on additional reasons. Section 108 as amended by Act No. 6 of 1992 states:

> "108 (1) The Election of a Candidate as a member shall not be questioned save on an election petition.
>
> (2) The Election of a candidate as a member shall be declared void on any of the following grounds which are proved to the satisfaction of the court namely -
>
> (a) that, 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;
>
> (b) non-compliance with the provisions of this Act relating to election if it appears that the election was not conducted in accordance with principles laid down in such provisions and that such non-compliance affected the result of the election;

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

(3) Notwithstanding the provisions of sub-section (2) where upon trial of an election petition respecting an election under this Act the court finds that an illegal practice in connection with the election has been committed by or with the knowledge or approval of any of the candidate's agents and the court further finds, after giving the Attorney-General or his representative an opportunity of being heard, that the candidate has proved to the court -

(a) that no illegal practice was committed by (the) candidate himself or with the knowledge and consent or approval of such candidate or his agent; and

(b) that the candidate took all reasonable means for preventing the Commission of any illegal practices at such an election;

(c) that in all respects the election was free from illegal practice on the part of the candidate and his agents;

then, if the court so recommends, the election of such candidate shall not by reason of any such practice be void".

The learned trial Judge, Mchome, J., was of the opinion that the grounds listed under paragraphs (a) to (c) of sub-section (2) above cited are not exhaustive by reason of the fact that the word "only" is not used therein. He was also of the opinion that the defences provided under paragraphs (a) to (b) of sub-section (3) for illegal practice necessarily imply that illegal practices are grounds for nullification of election results though not expressly stated to that effect under section 108. As we have already stated, we concur with the reasons given by Mchome, J, and we have additional reasons for upholding his finding. First, we are satisfied that the established rule of interpretation embodied in the Latin Maxim "Expressio Unius Est Exclusio Alterius" that is, where matters are expressly stated, then any other matters of the same class not so expressly stated are excluded, does not apply to section 108 because that section provides defences to matters which are not expressly stated therein. Second, taking into account the principle which underlies the Constitution and the Elections Act, 1985 that Elections shall be Free and Fair, we are of the considered opinion that an election which is generally unfree and unfair is not an election at all as envisaged by the Constitution and the Election Act, and consequently anything which renders the elections unfree or, and unfair is in law valid ground for nullification of such purported election. We are further of the considered opinion that any law which seeks to protect unfree or, and unfair elections from nullification would be unconstitutional.

For purposes of clarity we need to point out here that the removal of illegal practices and corrupt practices from Section 108 by the Elections (Amendment) Act 1992 (Act No. 6 of 1992) as specified grounds for nullification of election results cannot be construed as having the effect of making illegal practices or corrupt practices permissible under the Elections Act, 1985. What the amendment achieved was to make illegal practices and corrupt practices PER SE no longer sufficient grounds for nullification of election results under the circumstances stipulated under section 108(3)(a) and (d) as it then was before the amendment. Paragraph (a) of sub-section (3), as it then was, stated:

> "that by reason of corrupt or illegal practices committed in circumstances whether similar to those before enumerated or not the majority of voters were, or may have been, prevented from electing the candidate whom they preferred."

As to paragraph (d) it stated:

> "that a corrupt or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or by or with the knowledge and consent or approval of any of his agents;"

In our considered opinion, illegal and corrupt practices are still relevant either as non-compliances or as electoral misconduct which renders elections

unfree or, and unfair, contrary to the principles and objectives which underlie the Constitution and the Elections Act.

It is pertinent to point out for purposes of clarity that it is conceivable to have generally Free and Fair elections but which are afflicted with a non-compliance of specific provisions of the Elections Act and which affects the results of the elections. In other words not every non-compliance which affects the results of an election necessarily makes an election unfree and unfair. A case in point is where a significant number of un-registered persons are allowed to vote in an election but not for any particular candidate. Such incident would clearly be a non-compliance with the provisions of section 61(a) and (b) concerning method of voting. A non-compliance of this nature may affect the results but does not necessarily make the election unfree and unfair.

The last point we need to point out, in view of the forthcoming Presidential and Parliamentary Elections is a lacunae or gap in the Elections Act concerning Presidential Elections. Section 108 deals only with challenges to elections of constituency members of the Parliament of the United Republic. This is clear under section 2 which defines a 'member' as being "in relation to the National Assembly, a constituency member". We can find no provision concerning disputed Presidential elections. We cannot understand why this lacunae was not remedied under the Elections (Amendment) (No.2) Act 1992 (Act No.21 of 1992) which amended the provisions of

the Elections Act, 1985 concerning Presidential Elections. The amendments therein contained went as far as to apply to Presidential Elections, the provisions of Chapter IV and V of the Elections Act, 1985 which deal with qualification of candidates and election procedure respectively. Chapter VII which deals with invalidation of election results was not applied to Presidential Elections. The omission is puzzling, since in multi-party Presidential Elections, such lacunae is an invitation to political chaos. We hope appropriate amendments of the relevant law would be made before the forthcoming multi-party Presidential Elections.

Let us now revert to our finding, concurring with Mchome, J. on ground number 2 of the Attorney-General's Memorandum of Appeal, which is ground number 3 of the Third Appellant's Memorandum of Appeal. This concerns the holding that there was a corrupt practice and that such practice is a tenable complaint under the Elections Act. We have already disposed of the question of corrupt practice being a tenable complaint. With regard to the existence of a corrupt practice, the finding by Mchome, J. to the effect that the Third Appellant corruptly offered to turn his building popularly known as "Azim Magorofani" into a dispensary providing free services to the people of Kigoma Urban Constituency appears to be based mainly on the credibility of witnesses. There were contradictions between the witnesses for either side. The learned trial Judge was of the view that the contradictions between the witnesses for the Petitioner's side concerning whether what was promised was a dispensary or a clinic

were minor compared to the contradictions on the Defence side on whether the corrupt offer was greeted with cheers or silence from the public attending the election rally. Furthermore, the learned trial Judge found one of the witnesses for the Defence side to be a liar. We can find no basis for differing with the learned trial Judge in his evaluation of the credibility of the relevant witnesses.

Next we come to our reasons in support of our finding on ground number 3 in the Attorney-General's Memorandum of Appeal, which is number 5 in the Third Appellant's Memorandum of Appeal, in which we upheld the finding of the learned trial Judge to the effect that the road construction in Kigoma during the campaign period was executed with the corrupt motive of influencing voters to vote for CCM candidate and that it affected the results of the election. The basis of the finding of the learned trial Judge appears to be threefold. Firstly, he was of the view that the maintenance work of the Kigoma-Ujiji road was undertaken by the Central Government as a reward for the people of Kigoma Urban constituency agreeing to vote for CCM candidate. Secondly, he was of the view that the undertaking by the Central Government was not made in the ordinary course of business of government. Thirdly he was also of the view that since the undertaking was made by prominent cabinet ministers at well attended public rallies in the constituency, it must have influenced the voters to vote for CCM candidate.

We respectfully agree with these reasons. There was credible evidence given by witnesses who attended the public rallies addressed by Augustine Lyatonga Mrema, the then Minister of Home Affairs and Deputy Prime Minister, and by Nalaila Kiula, the Minister of Communications, Transport and Works. These witnesses include one KANYARI DONATUS, the 6th witness for the Petitioner (PW.VI), one RAMADHANI JUMA KALOVYA, the seventh witness for the Petitioner (PW.VII), one HAMISI SHABANI MARANDA, the ninth witness for the Petitioner (PW.IX), one KUDRA MUSSA, the tenth witness for the Petitioner (PW.X) who tape-recorded one of the speeches made by Hon. Augustine Lyatonga Mrema, and one MWINYI BARUTI, the eleventh witness for the Petitioner (PW.XI). The testimony of the witnesses who attended the public rallies addressed by Hon. Augustine Lyatonga Mrema and Hon. Nalaila Kiula shows clearly that the Kigoma-Ujiji road was being repaired by the Central government as consideration for the people of Kigoma Urban constituency agreeing to vote for CCM candidate. PW.VI in a part of his testimony told the trial High Court regarding Hon. Mrema's speech:

> "He asked if you get a tarmac road will you have any quarrel with CCM? And the citizens said they would have none. He asked how many would vote for CCM if we gave you a tarmac road. All people raised up their arms ..."

PW.XI, in a part of his testimony concerning the speech made by Hon. Nalaila Kiula, told the trial High Court:

"Then he said I have come here to remove the stigma you are putting on CCM. The tarmac you wanted will be put on the road by the Government".

Further on the witness said, inter alia:

"He said he was sent by the President to remove the stigma or in Kiswahili "nuksi" which was thrown at CCM".

No witness was produced by the other side to seriously contradict these or other witnesses who testified to the same effect. On a proper evaluation of the relevant evidence directly linking the roadworks with voting for CCM, no reasonable court or tribunal can come to a conclusion other than that the maintenance work of the Kigoma-Ujiji road was valuable consideration given by the Central Government to the people of Kigoma Urban Constituency for agreeing to vote for CCM candidate.

As to the second reason, it is beyond controversy on the evidence that the Kigoma-Ujiji Town Council, had failed to live up to its responsibilities of maintaining the road in question under the road maintenance programme which had been in existence for a long time. There was credible evidence given by one VEN KAYAMBA NDYAMKAMA, the seventh witness for the Defence (RW.VII) who is a Road Maintenance Management Engineer in the relevant Ministry headquarters in Dar es Salaam, to the effect that the responsibility of maintenance of the country's roads is divided between the Central Government and the local authorities, and that local authorities can request

the Central Government to assist in maintenance of local authority roads, whenever the need arose. The evidence given by one Augustine Mudogo, the first witness for the Defence (RW.1) who is the Director of Kigoma-Ujiji Town Council, appears to show that the Central Government had assisted his Council in maintenance of the road in question by providing funds amounting to Shs.7,000,000 in 1992 and Shs.10,000,000 in 1993. The evidence of this witness together with that of RW.VII however shows that at the time of the by-election, the Central Government decided to take over the maintenance work of the Kigoma-Ujiji road, and Hon. Augustine Lyatonga Mrema instructed RW.1 to put aside the Shs.10,000,000/= which had been previously supplied and intended by the Central Government to assist the Town Council. This sudden and total intervention by the Central Government, in the absence of an earthquake or similar disaster or situation affecting the Kigoma-Ujiji road is clearly way out of the ordinary course of government business.

With regard to the third reason relied upon by the learned trial Judge concerning the large number of people who attended the public rallies addressed, and corruptly influenced by Hon. Mrema and Hon. Kiula, there was evidence given by witnesses for the Petitioner, which was not seriously contradicted by the Defence, and which showed that large numbers of people attended these rallies.

It was contended by Counsel for the appellants to the effect that there was no one who testified about being influenced to vote for CCM by this road maintenance

undertaking. However, the contention collapsed when Counsel for the appellants conceded that under the principle of secrecy of the ballot, no one could be expected to testify to that effect. In our considered opinion the fact of influence affecting the vote can be inferred from the circumstantial evidence relating to the large number of people who attended the public rallies, the pressing desire of the people of Kigoma Urban constituency to have their road repaired and the respect usually given by the people of this country to ministers of their Government.

For purposes of clarity we need to point out here that a corrupt practice under the Elections Act, 1985 is not necessarily the same as corruption under the Prevention of Corruption Act, 1972. This can be seen under the provisions of section 97 of the Elections Act which states various categories of persons deemed guilty of bribery. It is evident that such persons are not necessarily guilt under the Prevention of Corruption Act, 1972.

We need to point out further that a corrupt practice under the Elections Act is capable of being construed, as we mentioned earlier, either as being a non-compliance in the sense of being a failure to abstain from committing the offence of bribery as defined under section 97 of the Elections Act, or as, where it is extensively done, as a misconduct which renders the election unfair. In the present case the corrupt undertaking to repair the road amounted not only to a non-compliance with the prohibition against electoral bribery contra section 97 of the

Elections Act, but was also unfair to the political parties which were challenging CCM. Had the "TAMKO RASMI" been properly signed and therefore valid, the intervention by the Central Government would also have been a non-compliance with the directives of the Electoral Commission against the use of government property in furtherance of the campaign of one political party.

With regard to our finding on ground number 5 in the Attorney-General's Memorandum of Appeal, which is number 7 in the Third Appellant's Memorandum of Appeal, in which we upheld the learned trial Judge to the effect that the campaigns by Hon. Augustine Lyatonga Mrema, (MP) and Hon. Nalaila Kiula (MP) were illegal campaigns which affected the results of the by-election; and in which we faulted the finding concerning the campaign of the CCM Chairman, Ali Hassan Mwinyi, our reasons are as follows. We are satisfied that under the Election Act, 1985 read together with the Constitution, the Electoral Commission is empowered to prescribe a specific period for election campaigns as it did in the present case. As we have already mentioned earlier, this power is derived under Article 74 (6)(b) of the Constitution read together with section 124 of the Election Act.

Of course no where in the Elections Act, 1985 is to be found a specific provision requiring the Electoral Commission to prescribe a period for election campaigns. We are of the view that the absence of such a requirement does not derogate from the general power of the Electoral

Commission to do so. We think it is wise for the Commission to continue to do so in order to ensure the fairness of elections and to enable it to effectively supervise such elections.

In the present case, the period prescribed for campaigns was from 31st January to 12th February 1994. By campaigning before the commencement of this period, Hon. Mrema (MP) and Hon. Kiula (MP) did conduct illegal campaigns, which on the authority of the case of Ndugu Basil P. Mramba and the Attorney-General vs Ndugu Leons S. Ngalai, Civil Appeal No. 27 of 1987 (not yet reported) such illegal campaigns were non-compliances. As already mentioned earlier in respect of another point, many people attended the campaign rallies addressed by these ministers. On the basis of the circumstantial evidence mentioned earlier, the illegal campaigns must have affected the results of the by-election.

The learned trial Judge however erred in holding that the election campaign conducted by CCM Chairman Ali Hassan Mwinyi was also illegal. All the evidence show that the CCM Chairman, who is also President of the United Republic, arrived in Kigoma for election campaign purposes on 10th February 1994. That was within the prescribed period. The fact that some government property was used in connection with the visit and campaign did not turn his campaign into an illegal one. What can be said is that if the TAMKO RASMI had been valid, such use of government property might have been a violation of the prohibition contained in the TAMKO RASMI. But since the

TAMKO RASMI was invalid, we do not have to go into the details of the matter except on one aspect. We must point out that in a country like ours with a constitution establishing an Executive President, who is also Commander-in-Chief, restrictions concerning his conduct during multi-party election campaigns must be such as not to endanger his personal security or disable him from effectively discharging his constitutional responsibilities as President and Commander-in-Chief. We think that restrictions which adversely affect the President's ability to discharge his responsibilities at any time would be unconstitutional. On the other hand, since fairness is one of the important elements in a democratic election, the use of government property or government employees by the President during election campaigns in a manner which is not necessary for his personal security or the discharge of the responsibilities of the Office of President or Commander-in-Chief is prohibited in accordance with the principle of fairness. We think that a violation of this prohibition, if it renders elections generally unfair, will result in nullification of elections results.

As for the reasons in support of our finding on ground number 6 of the Attorney-General's Memorandum of Appeal, which is number 8 in the Third Appellant's Memorandum, in which we faulted the learned trial Judge in holding that Radio Tanzania Dar es Salaam was properly joined as a party to the petition, it is obvious that the learned trial Judge was led to his erroneous conclusion by relying entirely on procedural law, where substantive

law is also involved. The issue framed for decision by the High Court at the trial was, "Whether the Third Respondent was properly joined in this Petition". In resclving this issue the trial Court relied on the provisions of Rule 4(2) and (3) of the Election Petition Rules, 1971 as well as the case of ATTORNEY-GENERAL vs AMIRI ZUBERI MUYA and ABDALLAH ZUBERI MUYA in Civil Appeal No. 32 of 1987 (not yet reported) which considered the procedural aspect of joinder of parties in election petitions.

Unfortunately, the learned trial Judge in the case before us failed to notice that, unlike in the AMIRI ZUBERI MUYA case, there is a matter of substantive law involved, and that is whether Radio Tanzania Dar es Salaam is a legal person capable of being joined to the election petition. Learned Counsel on both sides in this appeal conceded and we think rightly so, that Radio Tanzania Dar es Salaam was at the material time purely a government department which is not separately established by any law as a body corporate. Learned Counsel on both sides rightly concurred with us that under those circumstances Radio Tanzania Dar es Salaam, had no legal capacity to be joined as a party to the Petition, separately from the Attorney-General, who represents the Government.

We must now turn to the reasons supporting our finding on ground number 7 of the Attorney-General's Memorandum of Appeal, which is number 9 of the Third Appellant's Memorandum of Appeal, on which we confirmed the finding of the learned trial Judge to the effect

that the broadcasts of Radio Tanzania Dar es Salaam affected the results in favour of the CCM candidate. During the hearing of this appeal, it was argued by learned Counsel for the appellants to the effect that no evidence was adduced at the trial to show that the people in Kigoma Urban Constituency possess any radio sets or receivers and that they listened to the relevant broadcasts of Radio Tanzania Dar es Salaam during the material time.

With due respect to learned Counsel for the appellants, we think that this is a desperate argument. It is common knowledge in this country, and which therefore requires no evidential proof, that there is a large number of people both in the rural and urban areas of Tanzania who possess radio sets or receivers and who regularly listen to Radio Tanzania Dar es Salaam. On that premise, it can reasonably be inferred that a large number of people in Kigoma Urban Constituency must have listened to the broadcasts of Radio Tanzania Dar es Salaam regarding the by-election in their constituency. But did these broadcasts affect the results of the by-election in favour of the CCM candidate?

To answer this question, one must consider two aspects of the matter. The first is the air time given by Radio Tanzania Dar es Salaam for the campaigns in favour of the CCM candidate compared to the campaigns in favour of the other political parties contesting the by-election. From the evidence given by Eric Raymond Mchatta, the fifteenth witness for the Petitioner (PW.XV), which

was not seriously challenged by the Defence, it is quite clear that the CCM campaigns were given more air time compared to the combined air time given for the campaigns of the other political parties contesting the by-election. The explanation given for this glaring inequality as per the evidence of Habib Juma Nyundo, the eighth witness for the Defence (RW.VIII), who is the Chief Editor of Radio Tanzania Dar es Salaam, is that, apart from CCM, the other political parties did not know how to utilize the facilities of Radio Tanzania, Dar es Salaam. Taking into account that Radio Tanzania Dar es Salaam is government property, we are of the considered opinion that this is not a sufficient explanation. As a government radio, and in fairness to the contesting political parties, it was duty bound to take the initiative to offer such political parties equal air time and let them choose to utilize the whole or part of the air time thus offered. We are satisfied that it was the absence of such a system which allowed CCM to utilize more air time than the other political parties.

The second aspect of the matter is the nature of the contents of the relevant broadcasts by Radio Tanzania Dar es Salaam. It is apparent from the evidence that the broadcasts, including surprisingly those made to reflect the official position of Radio Tanzania Dar es Salaam itself, were biased in favour of the CCM candidate. The surprising example is the programme known as MAZUNGUMZO BAADA YA HABARI aired for a number of days during the period of the by-election campaigns commencing on 4th February 1994. Ostensibly what was aired in the programme

was meant to congratulate CCM on its 17th birthday the following day. But as it turned out, the programme went on for a number of days and much of its contents were clearly political campaign material in favour of the CCM candidate. We need only to reproduce a few parts of the broadcast to demonstrate what we mean. In one part it says in Kiswahili:

> "Na kwa bahati nzuri sana, wapiga kura wa JIMBO LA ILEJE wiki iliyopita waliitunza CCM zawadi ya kuanzia sherehe za kuzaliwa kwake kwa kumchagua kwa kura nyingi sana mgombea wake wa kiti cha Bunge Ndugu CHEYO. Hivi sasa, CCM inasubiri kwa hamu kubwa kuona kama itapata zawadi ya kukamilisha sherehe zake hizo kutoka kwa wapiga kura wa Jimbo la KIGOMA MJINI.
>
> MATOKEO ya uchaguzi mdogo wa Jimbo la Ileje yanatudhihirishia mambo mengi muhimu ambayo yanapaswa kuzingatiwa na kila mwanasiasa, na hasa kila mpinzani wa CCM na kila Chama cha Siasa nchini.
>
> UKWELI wa kwanza na wa dhahiri kabisa ni kwamba CCM bado ni chama chenye nguvu kubwa sana na chenye wapenzi wengi walio wanachama na wasio wanachama. Tunasema CCM ina wapenzi ambao hata siyo wana-chama wake kwa sababu kuna baadhi ya watu wanafanya makosa kwa kufikiria tu kuhusu namba ya wanachama wa CCM wenye kadi na kupiga hesabu zao zote za kisiasa kwa kuzingatia nambari hiyo ambayo haijafikia hata milioni tano.
>
> KOSA JINGINE kubwa wanalofanya ni kudhani kwamba WATANZANIA wote wasio wana-CCM, kwa lazima watavipigia kura vyama vingine. HIYO siyo kweli hata kidogo".

Yet in another part it says:

> "CCM tokea awali imekuwa Chama cha Umma badala ya wateule wachache. Tena imekuwa na sera nzuri ambazo zimeitikia matakwa ya wananchi wote kwa wakati wote ambao imekuwa katika uongozi".

Having examined the contents of various broadcasts of Radio Tanzania Dar es Salaam, including the above mentioned MAZUNGUMZO BAADA YA HABARI, and bearing in mind the time tested maxim that INFORMATION IS POWER, we were bound to conclude, as the learned trial Judge did, to the effect that these broadcasts in favour of CCM must have influenced the by-election results in favour of the CCM CANDIDATE.

Let us now turn to our reasons supporting our finding on ground number 8 of the Attorney-General's Memorandum of Appeal, which is number 10 of the Third Appellant's Memorandum of Appeal, on which we upheld the finding of the learned trial Judge to the effect that the counting of the votes was not proper. It is apparent from the proceedings in the High Court and before this Court, that although there is great controversy on whether the process of counting the votes was completed or prematurely stopped before the results were announced, there is common ground, that the final exercise undertaken by agreement between CCM and CHADEMA representatives and approved by the Returning Officer, involved going through the bundles of votes for each political party, after a representative of CHADEMA had expressed

dissatisfaction with the position reached. It is this exercise of going through the bundle of votes which was stopped after a number of CCM bundles had been gone through.

The first question that arises here is whether this exercise is permitted by law. In our considered opinion, we are satisfied that the answer is in the negative. Under section 78 of the Elections Act, there is only one course of action open where, as was the case here, a candidate or counting agent expresses dissatisfaction, and that course of action is for the Returning Officer to grant a recount. On the authority of the case of THE ATTORNEY-GENERAL vs JOSEPH MUSA MONKO in Civil Appeal No. 10 of 1987 (not yet reported), the Returning Officer is duty bound to grant a first and second request for recount. This was not done in the present case. Instead, an extraneous exercise was undertaken. This was clearly not proper in law.

A more serious impropriety however concerns the Petitioner's complaint to the effect that the actual counting of the votes never really started, and that the exercise of going through the bundles which was aborted on alleged security grounds, was merely for the purpose of ascertaining whether the bundles were correct in the number and kind of votes contained therein. Ample evidence was adduced on both sides on this aspect of the case. The evidence on the Defence side was intended to show that the counting of votes had been completed when the exercise of going through the bundles was undertaken at the request of a CHADEMA representative. The learned

trial Judge, after evaluating the evidence on both sides, accepted the version given for the Petitioner's side. Was the learned trial Judge correct in so doing?

We have given the evidence a fresh look, and we are satisfied that the learned trial Judge was correct, particularly when account is taken of the report made by a journalist of Radio Tanzania Dar es Salaam, concerning the activities that were then going on in the counting hall. That report, by one Abbisay Stephen, was broadcast on the state radio and an official record of the programme was made and kept by Radio Tanzania Dar es Salaam. A transcript of the record was produced as exhibit R.49 as part of the evidence for the Defence. It is our considered opinion that since Radio Tanzania Dar es Salaam is a Government Department managed by public servants, the record of that broadcast was properly admitted as evidence under the provisions of section 37 of the Evidence Act, 1967 which states:

> "Any entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty or by other person in performance of a duty specially enjoined by law of the country in which such book, register or record is kept, is itself a relevant fact."

That record reads in Kiswahili as follows:

> "Asante Mbonde zoezi la kuhesabu kura lilianza saa moja asubuhi kule Bangwe Magereza na zoezi hilo litaendelea

> mpaka saa 10 jioni. Tatizo lililo-
> jitokeza ni kwamba ilipofika saa kumi
> kura zilikuwa zimepangwa vizuri kura
> 100 kwa kila mgombea ili kurahisisha
> kazi ya kuhesabu kura. Sasa ilipofika
> saa kumi jioni ndiyo ikabidi waanze kuhesabu
> kura ili kuhakikisha kwamba kweli zile
> ambazo zinafungashwa 100/100 ni kweli
> zimetimia. Zoezi hilo litaendelea mpaka
> usiku".

We are of the considered opinion that this evidence corroborates the evidence given for the Petitioner's side to the effect that the exercise of going through the bundles of votes was purely for the purpose of ascertaining the state of the votes cast for each candidate. It follows therefore that since this exercise of ascertaining the state of the bundles was prematurely stopped allegedly on security grounds, the counting process had not been concluded when the election results were announced by the Returning Officer.

Next we come to the reasons in support of our finding on ground number 9 of the Attorney-General's Memorandum of Appeal on which we concurred with the finding of the learned trial Judge to the effect that the failure of the Petitioner to fill in form CF-7 at the end of the activities in the counting hall was due to alleged security risk. Obviously, having found that the counting process was aborted, we were bound, like the learned trial Judge, to accept the evidence given for the Petitioner to the effect that the abortion of the counting process allegedly for security reasons was the

cause of the failure by the Petitioner to fill in Form CF-7 as required by the regulations of the Electoral Commission. We are also satisfied that there is no longer any provision under the Elections Act, 1985 as amended or under any other relevant law which renders the failure by the Petitioner to fill in Form CF-7 fatal to the petition. Undoubtedly, in a proper case, such a failure could undermine the credibility of a petitioner or his or her agent. This is not such a case.

We now move on to give our reasons in support of our finding on ground number 2 of the Memorandum of Appeal of the Third Appellant, on which we faulted the finding of the learned trial Judge that the Third Appellant is solely liable to pay the Petitioner's costs. We are of the considered opinion that the Third Appellant is liable to pay only those costs arising from the electoral misdeeds committed either by himself or by his agents including the political party which sponsored him, and which constitute the grounds for nullification of the election results. He is not liable to pay the costs arising from the misdeeds of agents of the Electoral Commission or the Government. Those are payable by the Government of the United Republic. For purposes of clarity, we hold that the illegal campaigns conducted by Hon. Augustine Lyatonga Mrema and Hon. Nalaila Kiula are to be construed as having been done under the auspices of the political party which sponsored the candidature of the Third Appellant.

Next we turn to the reasons supporting our finding on ground number 4 of the Third Appellant's Memorandum of Appeal on which we upheld the finding of the learned trial Judge to the effect that the CCM Chairman, Ali Hassan Mwinyi; the then CCM Secretary-General, Horace Kolimba; the CCM National Publicity Secretary, Kingunge Ngombale-Mwiru, and the Hon. Augustine Lyatonga Mrema, (MP), then Minister of Home Affairs and Deputy Prime Minister uttered defamatory statements regarding the Petitioner and his political party and that such statements affected the election results. We however faulted the learned trial Judge in holding that the statements made by Hon. Nalaila Kiula, (MP), Minister of Communications, Transport and Works were defamatory.

We have given the evidence adduced on this point a fresh look as we are bound to do in a first appeal. The evidence consists in the testimony of witnesses who attended the campaign meetings or rallies addressed by these eminent persons. All the testimony was given on the side of the Petitioner. The Defence produced no witness to contradict the Petitioner's witnesses. PW.VI, one of the witnesses for the Petitioner told the trial High Court in a part of his testimony as follows:

> "On the 15/1/94 I was near Kawawa stadium. We were there waiting to hear the speech of the Minister for Home Affairs Lyatonga Mrema. Almost the whole town was there ... then Mr. Mrema's speech followed.
>
> He started to warn us against opposition parties. He said who knows not how to die should look at the grave.

> He asked us to go to Lake Tanganyika and see Burundi Refugees and said they were a product of opposition parties. At Lake Tanganyika Stadium there were thousands of Burundi Refugees who were living in real hardships. They slept outside and had no shelter from rain or sun."

In another part of his testimony the same witness told the trial High Court:

> "... He repeated that if other parties were elected this will be a cause for war like in Angola, Burundi, Liberia, etc. ..."

Another witness for the Petitioner, that is PW.VII, in a part of his testimony told the trial High Court regarding the speech by Hon. Mrema (MP):

> "... Then he continued don't you know that opposition parties will bring chaos and a breach of the peace in this country? ..."

There is yet another witness for the Petitioner, that is, SALIM s/o MALICK, the Eighth witness (PW.VIII) who, in a part of his testimony, regarding a campaign speech delivered by Hon. Kingunge Ngombale-Mwiru (MP), told the trial High Court:

> "A lot of people attended that meeting. They could be three or four thousand people ... some of the words by the speaker Mr. Ngombale-Mwiru are that the person we want to elect first tore the national flag and if he had failed to respect the national flag, will he respect you? He said that that person

> does not respect his mother. He comes and lives in a hotel instead of at his mother's house. He said his mother lives in a mud house. Even when his father died he did not come to bury him but stayed in the United States of America ..."

There is another witness for the Petitioner, namely, Hamisi Shabani Maranda, the ninth witness (PW.IX) who in a part of his testimony concerning a campaign speech by Hon. Horace Kolimba, told the trial High Court:

> "... Kolimba told us that electing another party besides CCM is to bring war and refugees like in Burundi, Rwanda and other countries. There were very many people, between 20 and 25 thousand people. The whole town was called by loud speaker to attend the meeting ..."

Another witness for the Petitioner namely, George Mazula, the second witness, (PW.2) who in a part of his testimony concerning a campaign speech given by the CCM National Chairman, His Excellency President Ali Hassan Mwinyi, told the trial High Court:

> "... I heard him talking. He talked many things but one of them is calling opponents puppets and mercenaries ... And that those puppets were given money and people should take the money and eat it as it was their money ... I was not expecting such words from a president but he uttered them".

In another part of his testimony, this witness told the trial High Court:

> "... 'Mamluki au Vibaraka' are mercenaries or people paid by outsiders to do something for them ..."

Further on the witness testified inter alia:

> "At that meeting the President said, "Hawa wapinzani, vibaraka, mamluki wamepewa pesa, wananchi zichukueni mzile."

The evidence adduced at the trial shows that these statements were widely published in the press. There can be no doubt that those who uttered those statements were aware that the statements would be published in the press.

It is our considered opinion that the statements disclosed by all this testimony, were defamatory of the political parties in opposition to CCM, and in particular, to the Petitioner and his political party. In addition, the statements made by Hon. Mrema (MP), and Hon. Horace Kolimba (MP) were intimidating to the electorate of Kigoma Urban constituency. Since defamation is an offence under the Law of the Land, everyone is prohibited from committing it at all times including during election campaigns. We are satisfied that legally indefensible or inexcusable defamation committed in furtherance of an election campaign, as was done in the present case amounts to a breach of sub-Article 26 of the Constitution which categorically states, "Every person is obliged to comply with this Constitution and the laws of the United Republic". It is our view that this Constitutional command applies at all times. It follows therefore that Presidential

and Parliamentary elections are required to be conducted not only with due observance of the Constitution and the Elections Act, but also with due observance of the general law of the Land. We are further satisfied that because of the large number of people who attended these campaign rallies and the respect the people of this country usually give to their President and his ministers, the defamatory and intimidatory statements in question must have affected the election results. As to the statement made by Hon. Nalaila Kiula (MP), Minister of Communications, Transport and Works about the road works being aimed at removing a stigma from CCM, we are satisfied that his remarks did not amount to defamation of anyone.

Finally we come at last to the reasons in support of our finding concerning the citizenship of the Third Appellant. The issue of citizenship was extensively argued at the trial in the High Court. The learned trial Judge decided to resolve the issue by giving the Third Appellant the benefit of doubt. Although the Petitioner's side made no cross-appeal to us on the issue, we decided to raise the issue on our own initiative in this appeal in the interest of justice. We did so because citizenship is the basis of everything else that is exercised by political parties and candidates under the Elections Act. Undoubtedly we have the jurisdiction to do so under the provisions of section 4(2) and (3) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 concerning powers of revision.

It is apparent on the face of the record that the learned trial Judge used the wrong approach in resolving

the issue. He seems to have approached it as an issue which required to be resolved on the basis of Indian law, rather than on the basis of the law of Tanzania. This can be seen from the following extract of his judgement:

> "As for the citizenship issue it had been argued that the Indian book referred to by the Petitioner is an old 1968 book and the condition prevailing at present in India has not been proved. Mr. Makani for the Petitioner has argued that the author of that book is of high repute and that book is an authority used in the U.K., Canada, the U.S.A. and Tanzania.
>
> ... I do not doubt the genuineness of the book cited ... But taken as it is and presumed to be expounding on the true position of the Law of India the book explains the position on or before 1968. The present position is not clear. India being a fellow Commonwealth country with whom our country shares diplomatic relations I see no reason why the Petitioner's side did not secure a copy from the Indian High Commission in Dar es Salaam of the present state of the law in India to prove their case.
>
> ... We have no evidence on the true present situation on how much Parliament in India has legislated on this issue at present moment. The burden is on the Petitioner to prove that the 2nd Respondent is not a Tanzanian citizen beyond reasonable doubt. That burden has not been discharged to the satisfaction of the court."

The book on the law in India, which the learned trial Judge mentions in this part of his judgement, is

authored by H.M. Seorvai on "Constitutional Law of India". We think that had the learned trial Judge approached the issue of citizenship correctly and applied the law of Tanzania, he would have come to the same conclusion as we have done, that the CCM candidate was not Tanzanian at the time of the election.

The relevant law on the issue is the Citizenship Act 1961 CAP 512 read together with the British Nationality Act, 1948. Under the scheme of the Citizenship Act, 1961, there are three main categories of Tanzanian citizenship, that is, citizenship by birth, citizenship by descent, and citizenship by registration as defined or provided under sections 2 and 10 of the Citizenship Act, 1961. Under section 10 a citizen by birth "means a person who is citizen of the United Republic -

(a) by virtue of section 3 of this Act.

(b) by virtue of the combined effect of sub-section (1) of section 1 of this Act and paragraph 1 of the Fourth Schedule to the Extension and Amendment of Laws (No. 5) Decree, 1964; or

(c) by virtue of his birth in Zanzibar and the effect of paragraph 2 of the Fourth Schedule to the Extension and Amendment of Laws (No. 5) Decree, 1964."

Similarly under the same section, citizen by descent "means a person who is a citizen of the United Republic -

(a) by virtue of section 4 of this Act; or

(b) by virtue of the combined effect of sub-section (2) of Section 1 of this Act or of section 4 of this Act as in force immediately before the commencement of the Extension and Amendment of Laws (No. 5) Decree, 1964, and of paragraph 1 of the Fourth Schedule to the said Decree;

(c) by virtue of the combined effect of his being a Zanzibar subject by descent in accordance with the former law of Zanzibar (and had that law remained in force until immediately before Union Day) and of paragraph 2 of the Fourth Schedule to the said Decree."

As to the provisions concerning the acquisition of citizenship by registration, these are to be found under section 2 of the Act read together with Part II of the Citizenship Ordinance, CAP 452. The position of the Third Appellant clearly does not fall within the category of citizenship by registration or citizenship by birth within the scope of sub-section (1) of section 1 of the Act, which states:

"Every person who, having been born in Tanganyika is on the eighth day of December, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Tanganyika on the ninth day of December 1961:

Provided that a person shall not become a citizen of Tanganyika by virtue of this sub-section if neither of his parents was born in Tanganyika".

Undoubtedly on the facts of this case, this sub-section of section 1 has to be read together with the provisions of section 6 of the Act which concern dual citizenship. On the facts of this case the relevant part is sub-section (1) of section 6 as amended by Act No. 24 of 1970. It states:

> "Any person who, upon the attainment of the age of 18 years, is a citizen of the United Republic or was a citizen of the former Republic of Tanganyika and also is or was a citizen of some country other than the United Republic or the former Republic of Tanganyika shall, subject to the provisions of sub-section (7) of this section, cease to be a citizen of the United Republic upon the specified date unless he has renounced his citizenship of that other country, taken the oath of allegiance and, in the case of a citizen by descent, made and registered such declaration of his intention concerning residence as may be prescribed by Parliament."

It is apparent that there are three factors which determine citizenship by birth within the scope of sub-section (1) of section 1 of the Act. These are firstly, being born in Tanganyika by 8th December 1961; secondly, being a citizen of the United Kingdom and Colonies or being a British protected person on 8th December 1961, and thirdly and finally having at least one parent who was born in Tanganyika.

It follows therefore that the impression given in the decision of the High Court in the case of ABDALLAH SALIM ALI ABSALAAM (1967) HCD No. 174 to the effect that

only one factor is required in determining citizenship by birth under sub-section (1) of section 1 cannot be correct. In that case, Georges, C.J. as he then was, is reported to have held:

> "Section 1 (1) of the Citizenship Act, 1961 designates persons born in Tanganyika as citizens, "provided that person shall not be a citizen if neither of his parents was born in Tanganyika." This section clearly requires only that one parent have been born in Tanganyika ..."

We are of the considered opinion that the wrong impression need not arise if one bears in mind that the factor of parentage appears in a proviso which qualifies a preceeding statement in sub-section (1). The preceeding statement designates persons born in Tanganyika and who are citizens of the United Kingdom and Colonies or are British protected persons on the 8th December 1961, as citizens of Tanganyika. Clearly the fact of having one parent born in Tanganyika is not sufficient to confer citizenship by birth within the scope of sub-section (1) of section 1 of the Act.

For purposes of clarity we need to point out here that citizenship of the United Kingdom and Colonies exists under the law of Tanzania only for the purpose of determining citizenship by birth within the scope of sub-section (1) of section 1 of the Act, and is not recognized as a parallel citizenship which a citizen of Tanzania continued to have after 9th December 1961. It would seem that once citizenship of the United Kingdom

and Colonies served its purpose of determining citizenship by birth for those born before 9th December 1961, it disappeared from their lives. Bearing in mind that one of the objectives of the Citizenship Act, 1961 is the exclusion of plurality or duality of citizenship, we are satisfied that this must be the correct interpretation of the law. The contrary interpretation leads to an absurdity in the sense that the vast majority of people born in Tanganyika before 9th December 1961 would be construed to have continued with the colonial citizenship of the United Kingdom and Colonies and subsequently forfeited their new citizenship of Tanganyika for failure to renounce their colonial citizenship under section 6 of the Act. We do not think that such absurdity was the intended effect of the Act.

Let us now turn to the specific position of the Third Appellant. There is no dispute between the parties that he was born in Tanganyika in 1954 and, one of his parents, that is, his mother, was similarly born in 1926. The first question that has to be resolved is whether the Third Appellant was a citizen of the United Kingdom and Colonies or was a British protected person at the time of his birth. The answer is to be found under the provisions of section 4 of the British Nationality Act, 1948 which states:

> "Subject to the provisions of this section, every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth:

Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth -

(a) his father possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to His Majesty, and is not a citizen of the United Kingdom and Colonies; or

(b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy."

It seems to us that since Tanganyika was, as defined under section 32 of the British Nationality Act, 1948 a colony of the United Kingdom at the time when the Third Appellant was born therein in 1954, he must have been a citizen by birth of the United Kingdom and Colonies. Undoubtedly that was the legal position concerning the vast majority of people born in the colony known as Tanganyika before the 9th December 1961. However, the Third Appellant's legal position was significantly different from that of the vast majority of people. Unlike them, the Third Appellant was at the time of his birth not only a citizen of the United Kingdom and Colonies by virtue of the provisions of section 4 of the British Nationality Act, 1948, but he was also a citizen of India. This can be seen from the particulars of his birth certificate which was produced in evidence at the trial in the High Court. The particulars show that both parents of the Third Appellant were of Indian Nationality at the time of his birth. We are satisfied that the term "nationality"

as used for purposes of registration of births under the Births and Deaths Registration Ordinance, CAP 108 connotes citizenship. We take judicial notice of the fact that at the time of the Third Appellant's birth in 1954, India had been an independent nation state for almost 7 years with its own citizens. We are satisfied that, according to the law of this country, the Third Appellant must be regarded as having acquired the nationality or citizenship of both his parents at the time he was born, and that such nationality or citizenship is presumed to have continued until the time when under Tanzanian law he was required to choose between Tanzanian citizenship or Indian citizenship, unless such presumption is rebutted by credible evidence. In our considered opinion, the burden of rebutting such a presumption lies with the person who seeks to rebut it. In the present case, it was for the Third Appellant to satisfy the trial High Court that his Indian citizenship ceased to exist before he was required under Tanzanian law to renounce it according to the provisions of sub-section (1) of section 6 read together with sub-section (7) of the Citizenship Act, 1961.

We note that according to sub-section (6) of section 6 of the Citizenship Act as amended by Act No. 24 of 1970, the specified date for a person like the Third Appellant who was still a minor on the 9th December, 1961, is the date of attaining the age of majority, which is 18 years. Sub-section (7) provides for Parliamentary extension of the specified date wherever appropriate.

Since it is apparent from the record of the proceedings in the trial High Court that the Third Appellant

produced no evidence to show that his Indian citizenship had ceased to exist at the time he attained the age of 18 years, that is, in 1972, and in the absence of his renounciation of such Indian citizenship in 1972, then, unless there was an extension granted by Parliament for the required renounciation, the Third Appellant must have automatically lost his Tanzanian citizenship in 1972, that is, at the time he applied for and obtained his first Tanzanian Passport. As this court is not aware of any Parliamentary extension for renounciation being granted to the Third Appellant under the provisions of sub-section (7) of section 6 of the Citizenship Act, we are satisfied that the trial High Court ought not to have given the Third Appellant the benefit of doubt but should have found that he was not a Tanzanian citizen at the time of the by-election.

In conclusion, these then are the reasons which compelled us to make the findings we did in our judgement delivered on 28th December 1994.

DATED at DAR ES SALAAM this 31st day of January, 1995.

F. L. NYALALI
CHIEF JUSTICE

R. H. KISANGA
JUSTICE OF APPEAL

L. M. MFALILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M. S. SHANGALI)
DEPUTY REGISTRAR