



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Election Petition 1 of 1998

EUSTACE MBUBA NTWIGA.....PETITIONER

VERSUS

JULIUS MUSYOKA.....1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA.....2ND RESPONDENT

SAMUEL KIVUITU.....3RD RESPONDENT

BENARD NJOKA MUTANI4TH RESPONDENT

JUDGMENT

The petitioner, EUSTACE MBUBA NTWIGA, filed this petition against four Respondents. The First Respondent was Julius Musyoki who was the Returning Officer for Nithi Constituency. The Second Respondent was the Electoral Commission of Kenya. The Third Respondent was SAMUEL KIVUITU, the Chairman of the Electoral Commission of Kenya and the Fourth Respondent was BERNARD NJOKA MUTANI who was the successful candidate for the said constituency during the Parliamentary elections held on 29th December 1997.

In his petition the Petitioner raised 24 grounds of irregularities against the 1st, 2nd and 3rd Respondents. At the end of his case he abandoned 7 grounds. He also raised 5 grounds of irregularities against the 4th Respondent. He concluded that because of those irregularities, the election of 4th Respondent, BERNARD NJOKA MUTANI to the National Assembly be declared null and void. That the Respondents be condemned to pay his costs.

At the conclusion of the hearing of this petition, Counsel for the 1st, 2nd and 3rd Respondents, Mr Etole, assisted by Mr. Muoki submitted that the Electoral Commission of Kenya and Samuel Kivuitu were wrongly sued and their names should be struck out. This application should ideally have been brought at the commencement of the hearing not at the end. This does not however preclude me from dealing with the issue.

Section 3(1) of the National Assembly, and Presidential Elections Act provides that the Electoral Commission of Kenya shall appoint officers to assist it in the discharge of its functions under the Constitution. Section 3A of the said Act provides that no member or officer of the Commission shall be personally liable for acts done by him in good faith while executing the powers, functions or duties of the Commission. The National Assembly Elections (Election Petition) Rules defines “Respondent” as the

person whose election is complained of or, if the petition complains of the conduct of a returning officer, that officer.

In the instant case the Returning Officer has been sued. There is no quarrel with that. Was the Electoral Commission of Kenya properly sued? In paragraph 13(4) (v) of the petition, the Petitioner makes a particular claim against the Commission in that it failed to print his full names and title on the ballot papers thereby causing confusion. Under Section 17A of the Act, the Commission has full control of the elections. The Returning Officer only conducts the elections, he does not print the ballot papers. In the instant case the Commission was properly sued.

As regards SAMUEL KIVUITU, there was no specific charge leveled against him. Whatever action he took, he took it on behalf of the Commission. He was not the Returning Officer in this Constituency. I hold that he was wrongly sued. I strike out his name from this petition. The Petitioner shall pay the costs.

I shall now consider the irregularities leveled against the 1st and 2nd Respondents.

Paragraphs 1 to 13(3) of the Petition were formal and were not challenged.

Paragraph 13(4) (a) of the Petition read as follows:-

“The first, second and third Respondents failed, omitted, neglected and or refused to supply adequate ballot papers in the various polling stations in the Constituency as required by law and all other materials prescribed by the Presidential and Parliamentary Elections Regulations and required for the conduct of an election, contrary to regulations 22(1) thereby substantially effecting the outcome and the returns at the said election.”

It was not disputed that at Kiriaini Primary School Polling Station there were no ballot papers in respect of civic elections when the station opened. The Returning Officer put this to wrong gazettement of the civic ward. The voting was definitely affected as voters could not vote only for Presidential and Parliamentary candidates. The evidence shows that voters refused to vote until the Returning Officer had to photocopy ballot papers for the civic elections. It should however be borne in mind that this confusion did not only affect the Petitioner. It affected all the candidates. No evidence was adduced to show that only the petitioner’s supporters were frustrated by the confusion.

There was evidence that at Chuka Township Polling Station only one Register was provided for the 3 streams. This made the voting exercise quite slow. Granted, this was not the way to go about the exercise but once again this frustration affected all the candidates.

I therefore dismiss this ground.

Paragraph 13(4) (b) of the Petition provided that:-

“The first, Second and Third Respondents failed, neglected and or refused to open the polling stations in the constituency at the prescribed time thereby adversely affecting the returns and the outcome of the elections”

There was evidence that some polling stations opened late especially Kagumo and Kangoro Polling Stations but no evidence was adduced by the Petitioner to show that the late opening of those polling Stations was aimed at frustrating his election as a member of Parliament. The Presiding Officers of the two stations gave valid reasons for the late opening. In any event the late opening affected all the candidates. I therefore dismiss this ground.

Paragraph 13(4) (c) of the petition provided that:-

“The Second and Third Respondents arbitrarily and without due notice announced and or caused to be announced on the evening of 29th December 1997 while voting was still taking place a postponement and

or extension of the elections in the constituency to 30th December 1997 and proceeded to close most of the polling stations on 29th December 1997 only to fail to reopen the same on the 30th December 1997 as had been previously announced, and as a result many eligible voters could not cast their ballots thereby adversely affecting the outcome of the elections”

The Presiding Officer at Kangoro Primary School Polling Station, ELLJOY GITARI testified that voting started at her station at 12.30 pm on the 29th December 1997 and continued till 12.30 am. By 11 pm on the 29.12.97 all people had voted.

ARMSTRONG MATE BORE, the Presiding officer at Kagumo Polling Station testified that voting started at 12.30 pm at his station and continued till 3.20 am when he closed the station after everybody had voted.

Were these presiding officers right in allowing the voting to be carried out through the night.

The position at law is that voting is to take place between 6 am and 6 pm. Under Regulation 25 of the Presidential and Parliamentary Elections Regulations, a presiding officer may extend the hours of polling at his polling station where polling has been interrupted under this regulation or for other good cause and shall, where polling in that polling station has started late, extend the hours of polling by the amount of time which was lost in so starting late.

Ordinarily the presiding officers would have been justified in extending the voting hours by the hours they started late. In 1997 the position was different. The Electoral Commission of Kenya having discovered that voting had started late in many stations due to heavy rains and other causes, declared that voting would continue upto 30.12.97. The voters therefore had two days instead of one day to vote. It follows therefore that in these stations which started the voting late, they should have been opened for voting the following day. One does not expect the elderly and the mothers to line up at the Polling Station until 11 pm or 3.30 am. It is for this reason that voting was extended to the following day.

Although all the candidates were affected by this blunder, the fact still remains that some voters did not exercise their Constitutional right to vote. This was an irregularity and it does not cease to be an irregularity simply because it affected all the candidates.

Paragraph 13(4) (e) of the petition provided as follows:-

“The First Respondent allowed persons not authorized by law or otherwise, to be admitted into the various polling stations in the constituency with the intention and the results that such persons unduly influenced the voters and eventual returns and outcome of the elections”.

The Petitioner adduced sufficient evidence to show that people were admitted into Kangoro, Kagumo, Ndagoni, Itugururu and Kambandi Polling Stations to influence the voters. The Presiding officers of these stations were called to testify and they denied that they allowed people in to their stations. The evidence for the Petitioner was quite detailed and the witness were not shaken during cross examination.

The defence put forward by the 4th Respondent was that the activities were not carried out in Polling Stations as defined by Regulation 2 of the Presidential and Parliamentary Election Regulations and in any event there was no proof that the people involved were agents of the 4th Respondent.

Mr. Kathurima M’Inoti for the 4th Respondent submitted that a Polling Station as defined by the Regulations means: “any room, place, vehicle or vessel set apart and equipped for the casting of votes by electors at an election”. According to him the polling station is the roped off area where actual elections were taking place and not the whole school despite it having been gazetted as a polling station. The school was only for description purposes. He went on to submit that since the activities were outside the roped off area, they were not carried out within the polling station as defined by the Regulations.

Mr. Kennedy Okong'o for the petitioner submitted that polling stations were gazetted by the Electoral Commission of Kenya and if schools were so gazetted then the whole compounds of the schools were polling stations. He referred the Court to the decision in ELECTION PETITION No. 11 OF 1997 ANDREW KIMANI NGUMBA –vs- PAUL K. BOIT and Dr. MUNYUA WAIYAKI.

The confusion in the mind of most people arises when one talks of a polling area as that area where election actually takes place. This is not so. It should be realized that a constituency is divided into various polling areas. These polling areas are in turn divided into polling stations.

Regulation 6(1) (a) provides that the Electoral Commission shall divide the constituency into polling areas. Sub paragraph (c) provides that the Commission shall appoint a place or places at which the polling station or stations for each polling area shall be established. While Regulation 6(4) provides that if the Electoral Commission considers it desirable it may appoint a single polling station for two or more polling areas. In short, under the law the polling station is the smallest unit. It cannot be subdivided further. It becomes even clearer if one looks at the Special Issue of the Committee of 3.12.97. The gazette sets out the Constituency, the Polling area and the Polling Station. As an example: ITUGURURU was one of the Polling areas of the NITHI CONSTITUENCY. Under Itugururu Polling area you find the following polling stations: Itugururu Primary School, Kangu Primary School, Kathagara Primary School, and Igamatundu Primary School.

Regulation 7(1) provides that the Electoral Commission may use, free of charge any public School or any part of the school as a polling station. In my opinion once the Electoral Commission gazettes a school as a polling station, the whole school becomes a polling station. If only part of the school is to be used, then the gazette notice will declare so. The Kenya Gazette, Special Issue of 3.12.97 declared some offices of the Coffee Factories to be polling stations.

I therefore hold that the activities that were carried out in the school compounds referred to above were carried out within the polling stations and this was irregular.

Paragraph 13 (g) of the petition stated as follows:-

“The First Respondent and his subordinate presiding officers in charge of various polling stations denied and refused to accept the duly appointed polling agents of the petitioner at some polling stations and the right to inspect, take and record serial numbers of ballot papers issued at the various polling stations in the constituency before the commencement of the voting exercise contrary to the requirements in the Presidential and Parliamentary Elections Regulations. Regulation 28(4).”

The evidence in support of this ground was thin. It was not proved to my satisfaction and the same is dismissed.

Paragraph 13(4) (i) of the petition provided that:

“The First Respondent omitted and or neglected to admit the Petitioner's counting agents into the counting hall before the commencement of the counting of ballots thereby affecting the outcome of the election against the petitioner adversely contrary to regulation 35”.

When arguing this ground counsel for the Petitioner argued it together with ground 13(4) which stated that:

“The First Respondent at the counting hall, despite protests from the Petitioner and his agents, deliberately chased away the agents of the Petitioner when they protested a deliberate mix up of Petitioner's votes with those of the Fourth Respondent”.

Regulation 35 provides how counting agents are appointed. Their names must be submitted to the Returning Officer at least 36 hours before the close of the poll. The Returning Officer is not obliged to admit more than two counting agents in the counting poll even if they are properly appointed. We have

evidence that the Petitioner had 4 counting agents instead of 6. At one time, according to the evidence of ISAAC MUGO RUGANE PW.6, all people were taken out of the counting hall and only two agents of the Petitioner were allowed back. The counting hall was allowed to be filled up with the authorized persons. The Returning Officer was right in having all people taken out of the hall. He was within the law in allowing only 2 agents of the petitioner back into the counting hall. There was no sufficient evidence to indicate that in doing so, he was biased against the Petitioner. These grounds lack merit and the same are dismissed.

Paragraph 13(4) k of the petition read as follows:-

“The first Respondent denied the Petitioner the right to have ballots cast recounted in spite of requests and demands to do so contrary to Regulation 37(1) of the Presidential and Parliamentary Elections Regulations”.

It was the Petitioner’s case that counting was done station by station but the results of each station were not announced on completion. That the Returning Officer and his deputies then retired in an office where additions were carried out and results announced. The petitioner then asked for recount but the same was refused. It was the case of the First and the Second Respondents that the Petitioner never asked for a recount. They went further to state that at the time of the announcement of the results, the Petitioner was not even in the counting hall.

The Returning Officer, Mr. JULIUS MUSYOKI, annexed to his affidavit a letter dated 2.1.98 written by the Petitioner to the Chairman of Electoral Commission complaining of the irregularities that were observed during the election. The letter was written a day or two after the elections. In that letter the Petitioner did not complain that he asked for a recount and was refused. Had he asked for a recount and refused, he would have set it down as one of his complaints.

I hold that the petitioner has failed to prove this ground and the same is dismissed. –

Paragraph 13(4) (1) of the petition read as follows-

“The First and Second Respondent appointed biased and partisan electoral officers to conduct the election process in the Constituency thereby adversely affecting the outcome of the results and the returns at the election unfairly”.

In support of this ground the petitioner relied on the fact that the Presiding Officer at Kambandi Polling Station, SEBASTIAN KABUGU MBUNGU was the brother in-law of the 4th Respondent and the fact that unauthorized persons were allowed into this station together with Kangoro, Kagumo, Ndagoni, and Itugururu.

It was wrong for the Returning Officer to have appointed the brother in-law of the 4th Respondent to be a Presiding Officer at Kambandi Polling Station, a station where in fact the 4th Respondent voted. There must be transparency in any election. Having said that, the mischief was carried out in only 5 polling stations out of about 147 gazetted polling stations. This in my view does not amount to the charge that the First and Second Respondents appointed biased and partisan electoral officers. This ground is dismissed.

Paragraph 13(4)(n) of the petition provided that:-

“The First Respondent allowed the presence of unauthorized persons into the counting hall and further allowed such unauthorized persons to take control of the counting process thereby adversely affecting the results at the said elections. The said unauthorized persons so admitted freely and without restraint used loud speakers to declare that the Fourth Respondent was the most suitable candidate to be elected, during the entire counting process and hurled insults at the petitioner and his agents”.

The Returning Officer in his evidence admitted that the counting hall at one time or other became full and

he had to throw everybody out. This was a clear admission that unauthorized persons were allowed into the counting hall. As regards the use of the loudspeakers by these persons, this was denied by the Returning Officer and his deputies. In any event even if they declared that the 4th Respondent was the right person to be elected, this declaration came too late as the votes had already been cast. Their rowdy behaviour would have been relevant to this petition if there was evidence that during this commotion ballot papers were either destroyed or mixed up, but there was no evidence to this effect. This ground is dismissed.

Paragraph 13(4) of the petition read as follows:-

“Ballot papers marked in favour of the fourth Respondent were picked in Chuka Town, outside the hands and control of the First Respondent and the First Respondent conspired with the Fourth Respondent prior to the Polling day, to have ballot papers marked in his favour and this showed that the First Respondent did not have adequate control of the election materials used at this election and allowed the same to be held by unauthorized persons and this clearly influenced the outcome of the elections unfairly to the detriment of the Petitioner and in favour of the Fourth Respondent.”

Counsel for the Petitioner argued the above ground together with ground 13(4)(x) which read as follows:-

“The First Respondent together with his counting clerks and in collusion with the Fourth Respondent did remove from the counting hall before counting and during the counting process ballot papers casted and clearly marked in favour of the Petitioner with the intention that the same be excluded from the counting and such ballot papers were later found in Chuka Town and delivered to the Police and this influenced the results and the outcome of the election to the advantage of the Fourth Respondent and to the detriment of the Petitioner”.

The Petition satisfactorily proved that 50 ballot papers were found at a Chuka Telephone booth on the 7.1.98. 45 such papers were marked in favour of the Petitioner and 5 in favour of the 4th Respondent. The Returning Officer testified that these ballot papers had a stamp of the Electoral Commission indicating that they had been used in voting.

Counsel for the 4th Respondent Mr Kathurima M’Inoti submitted that the evidence of SAMUEL MUTEGI MURATHI, the witness who found the ballot papers in the telephone booth, was suspect because he did not take the ballot papers to the Police straight away but waited to be escorted to the Police Station by the petitioner. I observed this witness give evidence, he impressed me as a truthful witness. He was subjected to intense cross examination by both Mr Etole and Mr Kathurima M’INoti and he remained firm. He gave good reasons why he never went to the Police alone. He feared the police might mistake him. He gave two instances where somebody went to report to the Police that he had been beaten. He ended being locked up instead. Again his neighbour took a cow he had found in his shamba to the Police but the police at Chuka locked him up for 2 days saying he must have stolen it. As a result of those incidences he did not have full confidence in the Police at Chuka Police Station.

These ballot papers were handed to the Chuka Police Station and the witness recorded his statement with the Police. Regulation 39 provides that upon completion of a count the Returning Officer shall seal up in separate packets the counted ballot papers and the rejected ballot papers together with the statement relating to them. Regulation 41(1) provides that all documents relating to an election shall be retained in safe custody by the Returning officer for a period of 6 months after the declaration of the results. Regulation 41(2) provides that documents relating to the election EXCEPT the ballot papers and their counterfoils shall be available for inspection by any member of the public.

The question that arises is: if the ballot papers were supposed to be sealed in packets, how come 50 of them were found in a Chuka telephone booth?

The 1st and 2nd Respondents relied on the evidence of JUSTUS MATHIU KARIA, the Deputy Returning Officer as an answer to the question posed. Mr Ikaria stated in his affidavit that he was conversant with the laws, regulations and rules governing the electoral process and he confirmed that he complied with the

said laws, regulations and rules during the 1997 General Elections. That on 12.1.98 he received a set of 50 marked ballot papers from the officer-in-charge Chuka Police Station which papers had allegedly been found in a telephone booth within Chuka town. That he noted from the Serial Numbers on the ballot papers that these ballot papers had been based at Ibiriga Polling Station. That he personally re-checked the ballot box from the affected stations and discovered that the ballot papers from that station were short by 50. That after the announcement of the results, the Chairman of the Electoral Commission instructed them to repack the ballot papers into fewer boxes for the purposes of storage. That he was in charge of this exercise and he had 10 clerks to assist him. That it is his strong belief the 50 ballots papers which were later allegedly found at Chuka were stolen during the repacking exercises.

In cross examination by Mr Okong'o for the petitioner Mr Ikaria stated that after counting the ballot papers and recording the particulars, they returned them in the ballot boxes and sealed them. They broke the seal when the police came with the 50 ballot papers for purpose of rechecking. He said he was aware that he was breaking the law when he broke the seal. They bound the ballot papers into 50 and put them in the envelopes and sealed them. When the Police came they found the seal to the ballot box intact. The repacking was done on the 4.1.98. In re-examination by Mr Etole he said it was done around 5.1.98.

The Petitioner proved that 50 ballot papers were found in a telephone booth at Chuka town. These papers were supposed to be in safe custody of the First and Second Respondents. The doctrine of *res ipsa loquitur* applies. The evidential burden of proof now shifted to the First Respondent. Did the First Respondent discharge that evidential burden of proof?

As stated earlier the law is that the ballot papers must be sealed on completion of the counting. It is not for nothing that the regulation was made. The Returning Officer has no powers to break the seal once the ballot papers have been sealed after the counting. It is immaterial that he was ordered by the Chairman of the Electoral Commission to repack the ballot papers because even that Chairman has no power to break the seal of the ballot box. The court was not shown any letter from the Chairman of the Electoral Commission authorizing the Returning Officer to break the seals of the ballot boxes for the purpose of repacking the ballot papers. That letter would not have in any event made any difference.

The ballot papers were repacked on the 4th or 5th January 1998 and on the 12.1.98 when the Police from Chuka Police Station came with the 50 ballot papers, Mr Ikaria again broke the seal and rechecked the ballot papers. He then confirmed that they were the only missing ballot papers.

I should point out that Mr Ikaria was very economical with the truth. He knew way back in January 1998 that ballot papers were not kept in safe custody as required by law. SAMUEL MUTEKI MURATHI testified about finding these papers on the 3.11.98 and Mr Ikaria had his affidavit sworn on the 28.1.99, about 3 months later, one would have expected a detailed explanation of what exactly happened especially that the burden of proof now lay upon the Returning Officer. Instead we got Mr Ikaria's strong belief that the 50 ballot papers were stolen during the repacking. Unfortunately Mr Ikaria's strong belief is not satisfactory to the court. He knowingly and deliberately broke the law by breaking the seals of the ballot boxes on two occasions. No satisfactory explanation was given why the 50 ballot papers were not in safe custody. In fact one cannot tell with certainty at what time they went missing, if they went missing at all.

This was an irregularity on the part of the First Respondent.

Paragraph 13(4)(v) of the Petition stated as follows:-

“The Second Respondent failed, neglected and or willfully and maliciously refused and or omitted to include and or print in the ballot papers used at the said Parliamentary election in the constituency the petitioner's full names as presented to it during the nominations of candidates. This caused confusion among the voters for there was similarity of names between the petitioner and another candidate and this confusion denied your Petitioner several votes as electors who knew him by his full names and title resorted to identifying him by other names and this affected the outcome of the elections”.

In support of the ground the petitioner produced in evidence a certified copy of his Certificate of Nomination by his party addressed to the Returning Officer Nithi constituency. His name was given as "CAPT (RDT) EUSTACE MBUBA NTWIGA". When the Ballot Papers were printed his name was shown simply as "EUSTACE MBUBA NTWIGA". The Returning Officer when questioned about this simply answered that he did not print the ballot papers. The Second Respondent did not call any witness on this ground.

The Petitioner complained that without printing his name accompanied by his title, this caused confusion as there was another NTWIGA on the ballot paper. The other candidate was "BASIL MBUNI NTWIGA J, NYAGA". It was the petitioner's case that he was popularly known as Captain Ntwiga. The Respondents in turn argued that a part from his name there was the symbol of his party. They further argued that the literate voters who could have read the title "Captain" could have known the party symbol.

The Second Respondent was unable to explain why the Petitioner's names appearing on the ballot papers did not correspond with those appearing on his Nomination Certificate. It is common knowledge that people acquire titles and academic qualifications during their lifetime and they become known by their titles. It would therefore be improper to leave out the title "Doctor, Captain, Major Colonel, General or Professor" from one's name who has acquired that title. I noticed when the witnesses gave evidence that they referred to the Petitioner most commonly as "Captain".

It is not far fetched in a Kenyan context that some people would come seeking to vote for Captain. The party sponsoring the Captain is immaterial. It is known that in Kenya certain politicians have what one would call, a permanent constituency, in that the voters will vote for him irrespective of what party he belongs.

It was therefore irregular to omit the petitioner's title from his name.

The claim by the Petitioner against the 4th Respondent can be summarized as follows:-

- (i) That the 4th respondent and other persons on his behalf used a fraudulent device, trick and deception by carrying a coffin in a procession in Chuka town on the eve of the election claiming that the Petitioner was dead contrary to Section 9 of the Election Offences Act.
- (ii) That the 4th respondents and his agents prior to and up to and including 29th and 30th December 1997 bribed the voters contrary to Section 10 of the Election Offences Act.
- (iii) That on diverse dates during the campaign period upto and including the 29th December 1997 the 4th Respondent, his agent and supporters threatened temporal and spiritual injury damage or loss to electors and voters in the constituency for the purpose of inducing them to vote for the 4th Respondent in contravention of Section 9 of the Election Offences Act.

It was not disputed that on the eve of the elections i.e on the 28.12.97 there was a procession through Chuka town in which a coffin or a coffin like structure was carried by the supporters of 4th Respondent Counsel for the 4th Respondent referred to it as a joke but none of the witnessed for the 4th Respondent came forward to say that he or she was the initiator of this joke and what that joke was to accomplish.

On the other hand the Petition called NTHIGAI KASIMA – PW 16 to testify. He said that he was a witchdoctor and was consulted by the 4th respondent on the 24.12.97 at around 8 pm. The 4th Respondent was accompanied by one Masiga, another man and a lady. All these remained outside while the 4th Respondent and Kasima went into the house Kasima sees his patients. Kasima then told the 4th Respondent to come with a coffin on the 27.12.97 together with 2 cocks, one white and the other red. I will reproduce the relevant paragraphs of his affidavit:

“Para 22. That while inside I asked Hon Njoka to remove his coat and the shirt and he remained bare chested after which I prayed to my god and the spirits and asked him to sit on the coffin and to hold the white cock and to twist its neck which he did”

“Para 23. That I then produced my special knife, gave it to Hon Njoka and asked him to cut the cock’s head off and to collect its blood in a ‘Nkuniko’ which I gave him and then asked him to put the cock in the coffin.”

“Para 24. That I then took the head from Hon Njoka’s hands and dipped it in the blood, took it out and wrapped it in a banana leaf which I had earlier brought for the purpose and asked Hon Njoka to put it in his trouser pockets”.

“Para 25. That I thereafter took out a concoction of charms I had stored in another ‘Nkuniko’ and dipped a Muthengera stick into it and went around the coffin sprinkling the concoction and saying the following words:-

‘Let the powers of my God, my spirits and that of my medicine summon the people following Captain Mbuba and bring them to follow Hon Njoka and make them vote for Hon Njoka on 29th December, 1997 so that he can win the elections”.

“Para 26. That I did this while going round the coffin seven times with the dead white headless cock inside and the head inside Hon Njoka’s pockets”.

“Para 27. That I then made Hon Njoka go through this ritual of going round the coffin seven times again while holding the cocks blood in the ‘Nnkuniko’ and holding the Muthengera stick and sprinkling blood and while saying the following words:-

‘May God and the work of this medicine and the ritual we have carried out tonight make voters abandon Captain Mbuba so that they can vote for me and make me win the coming elections and make people believe that Captain Mbuba is dead”?

Para 32. That I then asked Hon Njoka to carry in his pocket at all times the head of a white cock with him throughout until after the announcement of the results, when he could then throw it way”.

“Para 33. That I then instructed Hon Njoka to carry out publicly a mock burial of the coffin or to burn it in public so that people could see that for real, Captain Mbuba was dead and to have the red cock killed publicly in the same manner we had killed the white one and then to pour its blood on the coffin and then to bury or burn both cocks and the coffin publicly”.

“Para 34. That I also instructed Hon Njoka to tell his supporters to spread word round that Captain Mbuba was dead so that this rumour could reach as many people as possible”.

“Para 35. That I thereafter assured Hon Njoka of his impending victory at the elections and then asked him to pay for my fees”.

On the issue of bribery and threats of temporal and spiritual injury, damage or loss the Petitioner also relied on the evidence of this witchdoctor and others. I shall reproduce the relevant paragraphs of NTHIGAI KASIMA’s affidavit.

“Para 8. That Hon. Njoka was very particular and specifically asked me to use my powers and assist him to defeat Captain Mbuba who was also contesting and whom he said was the most popular among the other candidates and was also very rich”.

“Para 19. That on 27th December 1997 at around 10.00 p.m. Hon. Njoka, Masiga and the person he had visited me with earlier and the woman came again to my home as I was expecting them”.

“Para 20. That they brought with them a wooden coffin wrapped in black polythene paper and the woman was carrying two cocks, a white one and red one, and Hon Njoka was carrying two black polythene bags which contained big bundles of money in Kshs. 20/- notes, some 500/- notes and some 200/- notes”.

“Para 29. That I then sat on the coffin and stepped on the money inside the coffin together with Hon. Njoka while holding the “Muthengera” stick together and made Hon Njoka to say the following words after me:

‘May all the people of Nithi Constituency, all those who shall be given this money, all those who shall see or hear of this coffin and the faked death of Captain Mbuba believe it so that they do not vote for him but for me at the election so that I Njoka Mutani can win”.

“Para 30. That I then asked Hon. Njoka to close the coffin and put on his shirt, tie and coat and also put the red cock inside it”.

The Petitioner then relied also on the evidence of the following witnesses on the issue of bribery:-

PW 3 Kenneth Muriithi Kamanda

PW 6 Isaac Mugo Rubane

PW 7 Raphael Mutegi Gitari

PW 9 James Mugendi Jospeter

PW 10 Mary Kaari Kinyua

PW 11 Stanley Michemi Mpiuki

PW 12 Humphrey Wangai Mpiuki

PW 13 Mucioki Nathaniel Mbari

PW 14 Henry Giitari Francis

PW 17 Jenrosa Karimi Ntabari

I have deliberately omitted referring to PW5 JUSTIN GITARI KENYA because of the controversy regarding two brothers using same name and identify card. I have also discarded the evidence of PW 8 JOSEPH KABAE J.M. MUGWIKI who claimed to have been registered as a voter at Gituntu and yet voted at Minugu Polling Station.

The defence put forward by the 4th Respondent is contained in his affidavit and can be summarised as follows:-

(a) As regards the procession in Chuka town when the coffin was carried, he never participated in the same as he was campaigning at Mwimbi. He had left his vehicle KVC 600 at Chuka town with his driver Wilfred Micheni.

(b) Eustace Kent Nkonge was not his agent. He was a KANU candidate during the preliminary elections and lost to the Petitioner. He never defected and he continued campaigning for KANU.

(c) Micheni Musa was Nkonge’s Chief campaigner during KANU nominations. He was not his agent. He never campaigned for him.

(d) He had never seen Nthigai Kasima before he came to testify in court. He had never been to Kasima's home. He did not bribe or cause any voter to be bribed.

His counsel Mr Kathurima M'Inoti then weighed in with the law. He submitted that the Petitioner's witnesses were turncoats, accomplices and their evidence was worthless. The evidence of an accomplice cannot corroborate the evidence of another accomplice. That there was no proof that those who bribed the voters were agents of the 4th Respondent. He termed them busy bodies.

KASIMA set out in detail how he carried out witchcraft on Hon. Njoka. How the cocks were put in the coffin, the red one alive while the white one was headless. This was on the 27.12.97. Next day 28.12.97 there was a procession within Chuka town. A coffin covered in black polythene paper was carried. Inside the coffin were the two cocks. The red one was killed in a manner dictated by Kasima. The coffin and the cocks were then burnt as stipulated. Hon Njoka's motor vehicle, a Peugeot 504 KVC 600 was captured in a photograph taken by PW7 RAPHAEL MUTEGI GITARI. The occupants of the car could not be identified from the photograph. Mr. Gitari said he did not know that the photograph would be used in evidence when he took it. As I said earlier nobody has claimed credit for the procession from the 4th Respondent's camp. Kasima's vehicle cannot therefore be faulted.

Kasima was subjected to intense cross examination by Mr Kathuruma M'Inoti but he remained unshaken. He impressed me as a truthful simple man. Were it not for the fact that the 4th Respondent did not pay him the balance of the agreed fees amounting to Shs 6000/- we would not have heard what went on between him and the 4th Respondent. He stated in cross examination that this was the second time he had treated Hon Njoka. He treated him during the previous election and he won. I accept his evidence in preference to the mere denial by the 4th Respondent and that of RW-C STANLEY MUKURU "MASIGA".

There was evidence of PW 6 ISAAC MUGO RUGANE that he saw Micheni Musa in the procession and also with Nkongwe dishing out money at Magumoni Polling Station.

At Kagumo Polling station PW 10 MARY KAARI KINYUA stated that a lady by the name Doris Kaguna boasted that she had been bribed Shs 20/- by Gitari Francis. This was confirmed by PW 14 HENRY GITARI FRANCIS who testified that he bribed voters at the station.

At Itugururu bribery was carried out by PW 17 JENROSA KARIMI NTABARI with money given to her by MICHENI MUSA and NKONGE.

The next question to be determined is whether Micheni Musa and Nkongwe were agents of the 4th Respondent or mere busy bodies.

There was evidence that Nkongwe stood against the petitioner in the KANU nominations and was defeated by the Petitioner. According to the evidence of the 4th Respondent Micheni Musa was the Chief campaigner of Nkongwe during the KANU nominations. The names of the two appear in the evidence of the most of the petitioner's witnesses.

PW 7 RAPHAEL MUTEGI GITARI alias Utamaduni saw Micheni Musa seated with the 4th Respondent in the 4th Respondent's car during the procession when he took the photograph. PW 6 ISAAC MUGO RUGANE saw Micheni Musa in the procession and also when he bribed voters at Magumoni PW 9 JAMES MUGENDI JOSPETER took Micheni Musa and Nkongwe to see PW 17 JENROSA KARIMI NTABARI. This was confirmed by NTABARI. PW 11 STANLEY MICHENI MPIUKI also saw Micheni Musa in the procession.

Granted that Nkongwe and Micheni Musa might have been in KANU at the time of the party nominations but their conduct prior to and at the time of the elections were incompatible to that of the Petitioner. The evidence indicates that they were supporters or campaigners of the 4th Respondent. They dished out the

money with an injunction that those who received the money must vote for the 4th Respondent as the money was treated and harm would befall those who didn't. How did they know that the money was treated by a witchdoctor? The only person who knew this was the 4th Respondent and Kasima, the witchdoctor.

In ELECTION PETITION No. 7 OF 1983 YUDA KOMORA –vs- ISRAEL LEKWA DDAIDDO the Election Court quoted HALSBURY's LAW OF ENGLAND VOL. 14 paragraph 301. Evidence of agency: "It is not necessary in order to prove agency to show that the person was actually appointed by the candidate or that he was paid. The crucial test is whether there has been employment or authorisation of the agent by the candidate to do some election work or the adoption of his work when done.

...Employment in the business of the election is a question of degree but it has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relationship between the candidate and the person guilty of corruption as should constitute agency. No one yet has been able to go further than to say, as to some case, enough has been established, as to others, enough has not been established to vacate the seat. All the circumstances of the case must be taken into consideration and the evidence may be regarded cumulatively as establishing agency".

The behaviour of Eustace Nkonge and Micheni Musa during the period leading to the elections and on the day of the elections leaves me with no other choice but to conclude that they were agents of the 4th Respondent. I hold that they bribed the voters with full knowledge and approval of the 4th Respondent, Hon Njoka.

It was held in ELECTION PETITION No. 9 of 1983 MOHAMED JAHAZI –vs- SHARIFF NASSIR A. TAIB again quoting HALSBURY's Laws of England 3rd Edition Vol. 14 page 222 paragraph 384 on:

"Proof of Bribery: Due proof of a single act of bribery by or with the knowledge and consent of the candidate or his agents however insignificant that act may be, is sufficient to invalidate the election. The judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to CRIMINAL cases, but may act to the uncorroborated testimony of an accomplice".

The burden of proof throughout rests on the Petitioner and the quality of the evidence that is preferred by him is to be considered with a thoroughness and gravity which is commensurate with the dire consequences to the Second Respondent that can follow by virtue of the provisions of Section 6 of the National Assembly and Presidential Elections Act (Cap 7) and Section 35 of the Constitution".

A lot of emphasis was placed on the fact that the witnesses were turncoats, accomplices and whose evidence was worthless.

PW 3 KENNETH MURIITHI KAMANDA testified about Dr. Kanyuru dishing out money at Kangoro Polling Station. There was no proof that Dr. Kanyuru belonged to the 4th Respondent's camp. There was no evidence that he told the people he gave the money that the money was treated by a witchdoctor. On this one I give the 4th Respondent the benefit of doubt.

PW 9 JAMES MUGENDI JOSPETER and PW 17 JENROSA KARIMI NTABARI were KANU officials who had supported Nkonge. They turned round by Nkonge and Micheni Musa especially after being given money which they were told was treated by a witchdoctor.

PW 14 HENRY GITARI FRANCIS was an agent of the 4th Respondent at Kagumo Polling Station together with Edward Mate. They bribed voters and campaigned for the 4th Respondent at the Polling

Station. This is supported by the evidence of PW 10 MARY KAARI KINYUA who was an agent for the petitioner at the said polling station.

PW 6 ISAAC MUGO RUGANE was not a turncoat. He was a supporter of the petitioner. He saw Nkonge and Micheni Musa dish out money at Magumoni Polling Station.

PW 11 STANLEY MICHENI MPIUKI an ex policeman and now a tax driver in Chuka town and a D.P. official testified how he took part in the procession. How he and others were given treated money by the 4th respondent at the 4th Respondent's home at night on the 28.12.97 and how he bribed voters at Kambandi Primary School Polling Station.

PW 13 MUCIOKA NATHANIEL MBARI testified how he bribed voter at Ndagoni Primary School Polling Station.

I have perused the authorities cited to me by counsel and especially those dealing with evidence of accomplices. I have considered carefully the evidence adduced in this petition by all the parties and have come to the following conclusion.

1. That the 4th Respondent Hon. Bernard Njoka Mutani, Micheni Musa, Stanley Micheni Mpiuki and Eusatace Ken Nkonge and others by participating in the procession within Chuka town carrying a coffin and knowingly spreading lies that the Petitioner was dead are guilty of the offence of undue influence contrary to Section 9(a) and (b) of the Election Offences Act Cap. 66 Laws of Kenya.

The said Section provides as follows:

“Every person shall be guilty of the offence of undue influence who directly, and indirectly, by himself or by any other person on his behalf makes use ofany fraudulent device, trick or deception for the purpose of or on account of-

(a) inducing or compelling a person to give or refrain from giving his vote whether to a particular candidate or not, at an election: or

(b) otherwise impeding or preventing the free exercise of the franchise of an elector or voter”.

2. That the 4th Respondent, Hon. Bernard Njoka Mutani is guilty of bribery contrary to Section 10 of the Elections Offences Act.

3. That the 4th Respondent, Hon. Bernard Njoka Mutani, his agents and supporters threatened temporal and spiritual injury, damage or loss to electors and voters in Nithi Constituency for the purpose of inducing them to vote for Hon. Njoka contrary to Section 9 of the Election Offences Act.

This petition is therefore allowed and the election of the 4th Respondent, BERNARD NJOKA MUTANI, as Member of Parliament of Nithi constituency nullified.

The 4th Respondent shall pay the costs of the petitioner. The First and Second Respondents shall bear their own costs since they were not blameless in this election.

Under Section 31(1) of the National Assembly and Presidential Elections Act (Cap 7 Laws of Kenya) I shall report in writing to the Speaker that election offences contrary to Sections 9 and 10 of the election Offences Act have been proved and have been committed by the 4th Respondent.

Judgement accordingly.

Delivered at Meru this 23rd day of April, 1999.

J.V.O JUMA

JUDGE