



**Mbondo v Ngei & another (Election Petition 16 of 1974)
[1975] KEHC 7 (KLR) (Election Petitions) (19 November 1975) (Judgment)**

Neutral citation: [1975] KEHC 7 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
ELECTION PETITIONS
ELECTION PETITION 16 OF 1974
J WICKS, CJ, ARW HANCOX & SK SACHDEVA, JJ
NOVEMBER 19, 1975**

BETWEEN

RAPHAEL SAMSON KITHIKA MBONDO PETITIONER

AND

LUKA DAUDI GALGALO 1ST RESPONDENT

PAUL JOSEPH NGEI 2ND RESPONDENT

JUDGMENT

1. The petitioner was an intending candidate at the preliminary election for the parliamentary constituency of Kangundo, to be held on the October 14, 1974. As a result, however, of his withdrawal from the nomination the second respondent Mr Paul Ngei, who is presently the minister for local government, was the only person nominated for the preliminary election and was duly returned to parliament unopposed on the October 28, 1974. It is in respect of his withdrawal from the nomination that the petitioner now seeks redress from this court, as he alleges in his petition that he was illegally and improperly prevented from contesting the election. The allegations in the petition relate to the morning of the August 24, 1974, and may conveniently be grouped as follows:-
 - (1) That when the second respondent submitted his nomination papers, and while the petitioner was awaiting the allocation of his election symbol from the first respondent, the second respondent addressed a crowd numbering about 1000 people gathered there and instigated them to compel and coerce the petitioner by any means at their disposal to withdraw his nomination.
 - (2) That the second respondent then personally threatened the petitioner with danger to his life unless he withdrew.



- (3) At about midday, and before the first respondent could declare the names of the candidates, the second respondent caught hold of the petitioner, dragged him into the first respondent's office and made threats against his life unless he withdraw.
 - (4) Simultaneously with (3) the crowd, instigated by the second respondent, gathered outside the said office shouting and demanding the petitioner's withdrawal.
 - (5) An assistant superintendent of police (Mr Sakaja), the OCPD, at that time that neither he nor the first respondent would be in a position to face the consequences and risks of violence from the assembled mob unless he withdrew from the nomination.
 - (6) In consequence of the foregoing the petitioner "lost his courage and confidence" and at about 12.10 pm purported to withdraw his candidature under regulation 19.
 - (7) That such withdrawal was, in any event, invalid because, as subsequently emerged from the evidence,
 - (a) It occurred after the period laid down for presentation of nomination papers, namely 8 am to midday had expired and
 - (b) It was not a valid notice of withdrawal and did not comply with regulation (19).
2. Thus, the petitioner claims, he was a victim of undue influence as specified in paragraph (c) of section 9 of the *Election Offences Act*, cap 66 and perpetrated in particular by the second respondent or at his behest, and was improperly and illegally compelled to withdraw his candidature. Accordingly it follows that the first respondent should have published a statement in accordance with form 13 in the first schedule to the *National Assembly and Presidential Election Act*, cap 7, instead of one in accordance with form 12 and the second respondent was wrongly declared to be elected unopposed at the parliamentary election.
 3. We observe at this juncture that the petition with which we are now concerned differs from the others we have heard, inasmuch as in all other cases the allegations were that the undue influence, or other malpractices, occurred not for the purpose of suppressing a nomination, but when two or more candidates had been nominated to contest the preliminary election in order to be nominated for parliament as the candidate of the Kenya African National Union.
 4. Before turning to the evidence of the petitioner and his witnesses in detail it will be convenient to set out very briefly the case for the two respondents.
 5. The case for the first respondent (the returning officer) was not at variance with that of the petitioner up to the time of the acceptance of the latter's nomination papers at 10.50 am. At that time each candidate was asked to choose his symbol, the petitioner choosing the hurricane lamp. Mr Ngei then filed his nomination papers. Subsequently at 11.45, as a result of a communication by S/Sgt Mulinge, he saw the petitioner who, to his surprise, expressed his desire to withdraw "for the sake of peace in the district and the unity of Akamba". When this was reiterated, the first respondent called for the nomination papers and, at his insistence, in accordance with regulation 19, the petitioner wrote the word "withdrawn" on Ex 1 and signed it. This was shortly after 10 minutes to 12. The first respondent then announced the withdrawal to the crowd outside, who applauded it, whereupon the petitioner also announced his decision to the crowd in both Swahili and Kikamba. He was likewise cheered. This respondent's case was that the withdrawal took place before the deadline of 12 noon. There was no pressure brought on the petitioner at any time, and the crowd was not hostile to him and was a typical election crowd with some singing and chanting of slogans. Though the means were available he did not have occasion to take any steps to restore order.



6. The second respondent's case was to the like effect. He arrived with his wife and driver at between 9.30 and 10 am. He made no address to the crowd, inflammatory or otherwise but, like other prospective candidates, (of which there were about 40), he mingled with the crowd and conversed with them. He made no threats to the petitioner and did not manhandle him, nor did he call him a little man. He did not mind being opposed as he was in any event confident of victory. His case thereafter was substantially the same as that of the first respondent, namely that the petitioner's withdrawal was entirely voluntary without any kind of pressure or inducement. The crowd was peaceful and in a good mood throughout.
7. It is not in dispute that the petitioner went to the district commissioner's office on nomination day armed with his papers, on which some 20 names appeared, thus challenging a leading and extremely well known politician who is and has for some years been a minister of the government, and withdrew from the contest within 3 hours. Secondly, it is clear that the petitioner still genuinely intended to be nominated at 10.45 am because he had been round the district and purchased a sufficient number of tickets to cover the supporters named on his nomination papers as required by the first respondent.
8. Then it is common ground that the petitioner did make a report as soon as practicable to the supervisor of elections, Mr Montgomery. This witness who was interposed after the petitioner, stated in answer to Mr Swaraj who appeared with Mr Kakuli for the second respondent, that the first respondent told him that the crowd had been hostile to the petitioner, that he and the second respondent had had a discussion and that the petitioner had withdrawn because he was afraid. We shall return to his evidence which we think is of the utmost significance in this case, in due course.
9. At 10.55 am the petitioner said he left the office and went for coffee to a snack bar some 300 yards away. At that time, according to the petitioner, the second respondent had already contemptuously referred to him as the "little man" who was opposing him. Yet he (the petitioner) again returned to the offices at 11.50 am in order to be allocated his election symbol. When he emerged at 11.55 am, the second respondent was still addressing the crowd (which it was generally agreed numbered about 2,000) to the same effect and saying that as he was a senior minister in government it would be generally beneficial to the local community that he should be returned. In fact he would probably become the second man in the government instead of the third. By this time the crowd had become angry and some of them were threatening to kill the petitioner.
10. The remainder of the petitioner's evidence in chief generally supported the allegations in the petition. He stated in answer to Mr Shields, who appeared with Mr Raballa for the first respondent, that had he not withdrawn he "would be dead by now". He was emphatic that he had withdrawn under duress, and, in any event, after the time for the nomination had passed. He maintained, contrary to the respondent's case, that when he mounted the table after the first respondent had announced his (the petitioner's) withdrawal, he did not speak to the crowd but merely raised his right hand. After he had left the scene his supporters told him that the second respondent had said he would telephone his excellency the president and inform him that the situation was calm and good. The petitioner's nomination papers were produced as Ex2. They show that the nomination was accepted at 10.36 am. Also produced was the list of candidates for Kangundo upon which, as the petitioner admits, he wrote "withdrawn" above his signature. It is the circumstances leading up to and surrounding that withdrawal, and at the time at which it took place with which we are concerned in this case.
11. Under cross-examination by Mr Shields the petitioner again denied that his withdrawal was voluntary and that he withdrew just before midday when he saw how popular Mr Ngei was.
12. The petitioner was cross-examined at length by Mr Swaraj Singh. He did succeed in establishing that certain matters which the petitioner put in evidence were omitted from his police statement (Ex R1(1)).



For example, there was no mention of withdrawing from the nomination in favour of the second respondent in the statement. However, contrary to Mr Swaraj's suggestion, there was a reference to the crowd collecting money to reward to him, and also a mention of the "coffin".

13. Other differences were pointed out. The petitioner frankly agreed that the implication from the passage in the statement (page 3) relating to the second respondent's proposal to seek his excellency's approval had the petitioner's name as a nominated member instead of Lt Col Wambua. This was said outside the offices, whereas in his evidence the petitioner's witness said this took place in the boardroom. Again there was the discrepancy as to whether the petitioner's right or left arm was grabbed by the second respondent. Nor did he mention in his statement the contemptuous reference to the petitioner as being a "little man". But taken as a whole, we think that the general account given by the petitioner in his statement is in accord with what he said in court, remembering that he was here under questioning and therefore likely to expand on what he had previously said. In this regard, we have particularly borne in mind that to the court the petitioner stated that the second respondent had made the speech about being opposed by the petitioner both at 10.55 and at 11.55 am, while in the statement there is only one such reference. But we think the result of Mr Swaraj Singh's cross-examination was, in many instances, to elicit further facts which were indicative of the petitioner's veracity. In particular we have in mind his evidence regarding the OCPD, Mr Sakaja, as follows:

"The OCPD said 'if you are killed by the mob it would be different to say who did it and I could only open an inquest file'. I did not say that in my statement but I well remember that is when I despaired".

14. This, we think, is very probably what a police officer would have said, given that such circumstances as the petitioner testified to, obtained.
15. The second witness for the petitioner was Mr Isaac Wambua Nzioka, an ex- education officer and school headmaster and at present the treasurer of the Kenya National Union of Teachers, who was the proposer of the petitioner. He had accompanied the petitioner to the district commissioner's offices at Machakos, when the petitioner went to present his nomination papers. His evidence was substantially similar to the petitioner's except that he did not enter the district commissioner's boardroom or the other room into which the petitioner had allegedly been forced by the second respondent and other persons. Mr Nzioka had made a statement to the police on December 3, 1974, and he was closely cross-examined on it. Again Mr Swaraj Singh succeeded in establishing that certain matters which Mr
16. Nzioka stated in evidence were not specified in his statement. This in his testimony Mr Nzioka stated that the second respondent referred to the petitioner as "the little man" on three different occasions. There is no mention of this at all in his police statement. He mentioned the name of the vice president in his evidence but not in his statement. Again he testified that a gentleman called David Nzuki started to collect money which was to be refunded to the petitioner but made no mention of him in his police statement. His explanation was that the statement was recorded as a result of his replies to questions put to him and therefore did not contain all details. Other inconsistencies were also pointed out. In his statement Mr Nzioka said that the petitioner went out to look for the receipts from the crowd, that Mr Ngei stood on the table to address the crowd (at about 11.30 am) that about two other men attempted to take Mr Mbondo to the crowd, that when the district commissioner and the OCPD, got into the little room they were followed by a few others, and that after the announcement of the withdrawal of the petitioner, the petitioner himself did speak to the crowd when he climbed on the table (though he could not hear what the petitioner said as the crowd was shouting). On all these matters Mr Nzioka has given a slightly different version on his evidence before the court. Mr Nzioka's explanation was that his police statement was recorded from the answers which he gave to specific questions put to him and,



therefore, was not full in every detail. That would perhaps explain the omission in the statement but not the inconsistencies, and we are not able to say that the remarks we have made in this respect about the evidence of the petitioner are necessarily applicable to Mr Nzioka's testimony. We think that the best that can be said of this witness is that his memory was at fault on certain points and that we should accept his evidence only where it is supported by other credible testimony.

17. The third witness for the petitioner, Mr Peter Manthe Nguku, was chairman of the red cross at Wamonyo. He attended the nomination in support of Mr Kioko, a candidate for Mbooni constituency. He saw the petitioner arrive at 9 am and again at 10.55 am Mr Ngei arrived at 10.30 am, spoke to people there and referred to the need for good roads, water and hospitals. He said that there was a person who was opposing him and they would "know about that later". Then, when the petitioner returned, the second respondent said, "That little man is opposing me and I should not be opposed since I am a senior minister". He also mentioned being the deputy leader of government business and third in the government. If he was opposed the Mkamba tribe generally would not have a good position in the government. The second respondent became, according to this witness, "very furious" at being opposed. After the suggestion of refunding the petitioner's deposit was made he went and grabbed the petitioner and manhandled him into an office. Some of the crowd were at the window shouting, "kill kill". (We note that in cross-examination by Mr Kakuli later he denied that he said this but said "withdraw, withdraw"). Subsequently the first respondent announced the petitioner's withdrawal and said that the second respondent would be unopposed. Finally, the second respondent addressed the crowd as chairman of KANU and said he would telephone the good news (that he was unopposed) to the president.
18. This witness was cross-examined as to the sequence and timing of the various incidents by Mr Shields, but inter alia, said that if he or anyone else had attempted to intervene in support of the petitioner he would have received like treatment. Under cross-examination by Mr Kakuli, Mr Nguku agreed that he was in Mr Kioko's group and therefore primarily concerned with their own problems, and had no particular interest in the petitioner. He said, however, that when the second respondent addressed the crowd they became excited. He agreed that he volunteered to come and give evidence when he saw the newspaper announcement of the filing of this petition. He agreed also that some of the times he gave in his evidence in chief were only estimates. He was not concerned with one Kalulu who, apparently, was an opponent of Mr Kioko. He admitted seeing S/Sgt Mulinge at the time the petitioner was dragged into the office.
19. This witness went on to say that the crowd were saying that the second respondent should not be opposed and urged the petitioner to withdraw. He denied counsel's suggestion that he had come to give evidence for the petitioner because the second respondent did not support Mr Kioko and that, consequently, he was trying to remove him from parliament. He frankly admitted having discussed the case with the petitioner, but concluded by saying, "Even though it is a year ago I cannot forget what I saw". This witness stood up well under cross-examination. We think he told the substantial truth and that his impression of the morning's events was an accurate one.
20. The petitioner's fourth witness, Mr John Mwangangi Musyoka had served in the police for nearly six years and resigned in 1954 as a sergeant. He was also at the nomination as a supporter of Mr Kioko. He saw the petitioner arrive at 8.30 am, leave, and return at about 11 am. He described the second respondent's first address to the assembled crowd at about 10.30, when he spoke of the desirability of electing good candidates because the Machakos district generally had lagged behind in matters such as hospitals and roads. The second respondent also referred to his position in the government and said that it was shameful thing that he should, for this reason, be opposed. This witness also spoke of the reference to the petitioner as the little man; and that the crowd wanted to kill him. He mentioned the



man Nzuki and the chinking of money being collected for the return of the petitioner's deposit, or, alternatively, for his coffin. He said that the second respondent then grabbed the petitioner and said that if he (the petitioner) did not withdraw he would kill him. He then pulled him into the office. He also testified as to the first respondent subsequently saying that they were "solving" something and then announcing that the petitioner had withdrawn. The petitioner was assisted on to the table by the first respondent who raised his hand. He did not, however, address the crowd.

21. Under cross-examination by Mr Shields the witness said he did not think the second respondent was assisting the petitioner to escape the physical danger he was in by taking him into the room. Under cross-examination by Mr Kakuli, he said he did not know the petitioner was in fact a candidate until he was pointed out by the second respondent. He agreed with counsel's suggestion that he was primarily there because he was a supporter of Mr Kioko (who, in turn, supported him as a councilor) and had no special interest in the candidates for the Kangundo constituency. In his own words, "my interest was to see if Kioko would be admitted as a candidate". He maintained, nevertheless, that he was telling the court what he had seen to take place. The witness agreed he was amongst the crowd, but said that the crowd was very angry and that if he had attempted to help the petitioner they would also have attacked him. He also saw Mr Onesimas Musyoki (the man who, the petitioner said, pleaded with him in the office to withdraw for the sake of his life), Mr Isaac Nzioki and Mr Nguku in the crowd. In our opinion this witness was demonstrably reliable and accurate, and quite unshaken in cross-examination.
22. The fifth witness for the petitioner, Mr David Kimenyi Ilenge, a local farmer and also a supporter of Mr Kioko, gave similar evidence. He particularly referred to the second respondent saying that big people like him were not generally being opposed in the elections. He emphasized that the crowd were impatient for the first respondent's announcement as "the time" (ie the time for nomination) "was over". He admitted under cross-examination by Mr Raballa that he, too, was hostile, as were the rest of the crowd, to the petitioner, because of the "strong words" used by the second respondent. Under cross-examination by Mr Kakuli he, likewise, agreed that he had no particular interest in the petitioner or the second respondent but said, "If a bad thing is done, let's say to a nation outside, one must know". He said that neither the first respondent nor the OCPD attempted to intervene when the second respondent grabbed the petitioner. We consider Mr Ilenge generally to be a good and honest witness who told a consistent story.
23. The next witness for the petitioner was Mr Francis Philip Wambua, an unsuccessful candidate for Yatta constituency in the parliamentary elections. He had also gone to the district commissioner's office at Machakos on August 24, 1974, to present his nomination papers. He saw the second respondent addressing the crowd outside the district commissioner's office at about 11.00 am and telling them that as a senior cabinet minister it would be hard for the mkamba people if he was opposed. He so aroused the crowd that some people shouted that his opponent should withdraw and one man started to collect money to refund the deposit of the second respondent's opponent, while some said that if the opponent refused to accept the money they should use it to buy his coffin. At about 11.50 am Mr Wambua came back to the district commissioner's offices and collected his symbol, which was a hurricane lamp, and, shortly thereafter, the petitioner also came out of the district commissioner's offices with the same symbol. As he and the witness were conversing about their common symbol, the second respondent pointed out the petitioner to the crowd of people as the man who was opposing him and asked the people what should be done with him. The crowd was angry and shouted that either he should withdraw or he should die. The second respondent was also very angry at that time and he grabbed the petitioner by the arm and warned him to withdraw otherwise he would kill him. He pulled the petitioner, who was being pushed behind by some people, into an office. The first respondent and the OCPD also went into that office. The crowd was very restive and the first respondent came out shortly afterwards to tell them to be quiet as they were trying to solve something to their advantage (in



- the office). A few moments later the district officer also appealed to the crowd to be quiet. At about 12.05 or 12.10 pm, the first respondent, the OCPD, the second respondent and the petitioner came out of that little room and the first respondent announced to the crowd that at last the petitioner had agreed to withdraw in favour of the second respondent. The people wanted to see the petitioner and he was helped to climb on the table where he raised his hand to the crowd but immediately came down without saying anything.
24. Under cross-examination by Mr Shields, Mr Wambua stated that it was his first time to learn on that day that the petitioner was also a candidate in the general elections and that the second respondent had worked up the crowd to a fever pitch by his oratory. In his opinion, the second respondent was more dangerous than the crowd to the petitioner, and when they were chatting about their common symbol, the petitioner appeared a “bit” frightened.
 25. When Mr Kakuli cross-examined Mr Wambua, he agreed that he had been defeated twice at the elections but did not know that the candidate who defeated him had the support of the second respondent. He denied that the petitioner had spent a lot of time campaigning for him or that he was the master-mind behind this petition, or that the symbols were given at the time the candidates presented their nomination papers. He reiterated that the second respondent grabbed the petitioner’s arm, although he could not remember which arm, and that the second respondent jumped on the petitioner “like a lion jumping on a lamb”. He agreed that the petitioner was a candidate at the same time as he was in the Yatta constituency election of 1970 but stated that the petitioner was his rival and that the petitioner polled the lowest votes. As to his reason for coming to court to testify, he stated that the petitioner had approached him, after filing the petition, and he had agreed to say in court what he had seen. He denied that he had any grudge with the second respondent and stated that on the contrary the petitioner had been his rival and that he had not joined hands with him.
 26. The witness impressed us favourably and was not in any respect shaken under cross-examination. We are satisfied that he has not come to court out of any ulterior motives and that he spoke the truth.
 27. Lastly, the petitioner called the present assistant minister for commerce and industry, Mr Aaron Nthenge Mutunga, who was also at Machakos to present his nomination papers for the neighbouring Iveti North constituency on the 24th August. He arrived shortly after 8.30 am, but did not notice the petitioner until later. He saw the second respondent addressing the crowd in the district commissioner’s compound shortly after 10.30 am Although he was not at the district commissioner’s offices continuously throughout the morning, his evidence agreed with that of the other witnesses where it covered the same ground, save that three of the petitioner’s witnesses called earlier, Mr Nguku, Mr Musyoka and Mr Ilenge stated that the reference to the “little man” was not made by the second respondent until shortly before midday, when he specifically pointed out the petitioner saying “The one who is opposing me is that little man”. Mr Mutunga, however, said this occurred in the second respondent’s first address to the crowd, (just after he had collected his own symbol) when he said he understood he was being opposed by a small man. This would support Mr Kakuli’s interpretation of the Kikamba word “kamundu”, which this witness said was used by the second respondent, as meaning insignificant or of no consequence.
 28. A significant part of this witness’ evidence was to what he observed through the window of one of the offices when he returned from the sports club at about 11.40 am. Inside were, *inter alia*, the petitioner, the returning officer, the second respondent and the OCPD. Outside the offices the crowd was shouting that the petitioner should withdraw or be killed. The OCPD then said that he was no longer in a position to guarantee his (the petitioner’s) safety against the mob. Thus the petitioner’s evidence was confirmed in this important respect. Mr Mutunga also confirmed that the first respondent and the district officer 1 respectively appealed to the crowd to be calm and patient



“as he would have some good news for them”. Finally, he corroborated the petitioner in saying that when he and other candidates were becoming restive (as the time for nomination had closed), an announcement was made by the first respondent to the crowd that the petitioner had withdrawn, and that the petitioner then climbed on the table and raised his hand. Under cross-examination by Mr Raballa, the assistant minister agreed that he suspected something was wrong.

29. Immediately the nominations were announced Mr Mutunga left the area. But shortly after, in the Machakos general store, the petitioner told him he had withdrawn his nomination under duress. In further cross-examination Mr Kakuli asked this witness in some detail about his career, but we do not think he was shown to be otherwise than of good character. He denied that he was hoping to become a substantive Minister and would thus not be sorry to bring about the second respondent’s downfall – a situation which might be enhanced in view of the fact that he is himself the only assistant minister from Ukambani. We think that this witness was accurate as to what he saw and heard on that day and that he responded well to some very searching questions put to him in the course of his cross-examination. He impressed us as a witness of credit. We note in this connexion that while the OCPD, Mr Sakaja, specifically said that at the time he and the other officials were in the establishment office with the petitioner and the second respondent close to midday Mr Mutunga was not nearby, the district officer, Mr Kitiabi, said that not only nearby, the district officer, Mr Kitiabi, said that not only was the assistant minister on the verandah and wanted to go into the office, but he pushed him away from it and off the verandah.
30. We must now return to the evidence of the first respondent, Mr Luke Daudi Galgalo, who, on nomination day was district commissioner, Machakos, and the returning officer for the Kangundo constituency and a number of other constituencies in the Machakos area, and that of the witnesses called on his behalf.
31. The first witness called on behalf of the first respondent was Mr Norman John Montgomery, who is supervisor of elections and is in the office of the Attorney General. Mr Montgomery said that the petitioner saw him on August 26, 1974, the Monday after nomination day, and told him on Saturday, nomination day, he had presented his papers for the preliminary elections for Kangundo constituency, and after he had done so another candidate Mr Paul Ngei (the second respondent) had addressed a crowd of people outside the returning officer’s offices, and that as a result the crowd had become hostile to the petitioner. Shortly after Mr Ngei had taken him into one of the rooms in the district headquarters and told him that if he contested the election he would be killed, and if he wished to save his life he should withdraw. The petitioner said that he had withdrawn his candidature, but had done so because he was afraid of what might happen to him.
32. The petitioner told Mr Montgomery that he had withdrawn after 12 midday, which was the closing time for the nomination, and wanted him, Mr Montgomery, to declare that he was still a candidate as his withdrawal was out of time.
33. Mr Montgomery drew the petitioner’s attention to section 9 of the *Election Offences Act* and advised him to make a complaint regarding his allegation of undue influence to the police at Machakos, and that if he did not obtain satisfaction from the police he could inform the Attorney General of the facts in writing. This the petitioner did and his letter to the Attorney General was admitted into evidence. As far as the contention that the withdrawal was out of time, Mr Montgomery told the petitioner that he would investigate this and if it was in time he must wait until the election was over, when he would consider whether he should file an election petition.
34. Mr. Montgomery said that his concern was whether the withdrawal had been before or after 12 noon, and that was the petitioner’s primary concern. As a result he telephoned Mr Bonaventura Andrew



- Omuse, the deputy returning and district officer 1, at Machakos, who said that the first respondent was not there. On the following day, Mr Montgomery telephoned the first respondent and both he and Mr Omuse assured him that the petitioner's withdrawal of his nomination had taken place before midday.
35. Mr Montgomery had a brief discussion on the petitioner's allegation of duress and the first respondent had said that there had been a crowd hostile to the petitioner. That the first respondent and Mr Paul Ngei had had a discussion and that the petitioner had withdrawn because he was afraid.
36. Mr Galgalo the first respondent said that he spent most of the morning of nomination day in the boardroom accepting nominations and allocating election symbols. That there was a large crowd outside in the compound who were singing, chanting and performing traditional dancing, but as he understood only a few words of the Mkamba language, he did not understand what was being said.
37. Mr Galgalo confirmed that when the petitioner first presented his papers they were not in order, that he pointed out the defect and that the petitioner returned at about 10.50 with the papers which were then in order and accepted. Mr Galgalo explained that candidates selected their election symbol immediately after the nomination papers had been accepted and this was recorded in pencil. That candidates were told to come back later to ascertain if there was any dispute over symbols and if there should be, and there had been in the case of one constituency, there would be a ballot on the symbols. If, when all the nominations were in for a constituency there was no dispute over symbols, they were then inked in. Mr Galgalo said that the second respondent filed his nomination papers immediately after the petitioner, and as the second respondent chose a symbol different to that selected by the petitioner, and there were no other nominations, he inked in the symbols and told one of his officers to inform the petitioner that he need not return to obtain confirmation of his symbol. On this aspect of the case it will be remembered that the petitioner insisted that he had been instructed to return just before the close of nominations to collect his symbol and that he had done so at about 11.50. We consider that this may well be so. The symbol allocated immediately after the nomination was accepted was provisional. It was not put to the petitioner that an officer had informed him that the chosen symbol had been confirmed nor was there any evidence of this. It would not be known that there were no further nominations until midday; and it is probable that all candidates were told to return just before midday to confirm their symbols.
38. Mr Galgalo did not hear the second respondent address the crowd, he did not notice it to be hostile, nor did he see the second respondent manhandle the petitioner. He said that about 11.45 am S/Sgt James Nthiani Mulinge, an administrative police officer, came up to him and said that the petitioner wished to see him. Mr Galgalo saw the petitioner standing in the compound opposite the establishment office and went up to him. Asked why he wanted to see him the petitioner replied that it was a private matter and they started walking towards the establishment office. As they did so the second respondent came up and asked the petitioner why he wanted to see him. Mr Galgalo asked the petitioner if he wanted to see him alone or with Mr Ngei and the petitioner replied, "with Mr Ngei please". They then entered the establishment office with the OCPD, Mr Elijah Murmet Ole Sakaja, a special branch officer Mr William Taiswa Matankonya and Mr Omuse the district officer 1. The door of the room was closed. Mr Galgalo was sure of that.
39. In the room the petitioner was the first to speak and said to Mr Galgalo, "Sir I wish to withdraw my nomination". Mr Galgalo asked the petitioner why he wished to withdraw when he had accepted his papers only about an hour before and the petitioner replied as far as Mr Galgalo could remember, "I have decided to withdraw in favour of Mr Paul Ngei for the sake of peace in the district and for the unity of the Mkamba". Mr Galgalo asked the petitioner if he was sure that he wished to withdraw and the petitioner replied that he was quite sure.



40. Mr Galgalo then asked for a district officer, he thought it was Mr Ellam Chibuyi Kitiabi, to ask his secretary to bring the petitioner's nomination papers and when they arrived Mr Galgalo told the petitioner that if he wished to withdraw then he should do so in writing, and sign it, which the petitioner then did. The second respondent then thanked the petitioner and they shook hands.
41. They all left the establishment office and Mr Galgalo went to collect the papers. He then climbed on to a table to make the announcement of the candidates who had been nominated. Mr Galgalo started by announcing that every seat had been contested by more than one candidate but that before 12 noon one candidate had withdrawn voluntarily, that this concerned Kangundo constituency and that he would like the candidate to confirm his withdrawal to them there. The petitioner then joined him on the table and told the crowd in Swahili and Mkamba that for the peace and unity of the Mkamba he had decided not to oppose Mr Ngei. This was wildly applauded by the crowd and the petitioner climbed down from the table. Mr Galgalo then announced that in view of the withdrawal of the petitioner in the office and what they had heard now Mr Ngei stood unopposed in the Kangundo constituency. This was again applauded and Mr Galgalo then announced the names of the candidates in the other constituencies.
42. Mr Galgalo agreed that he had had the conversation with Mr Montgomery over the telephone and that the subject was the time of the withdrawal and an allegation of duress. Mr Galgalo said that the withdrawal was before noon. Informed of the alleged hostility Mr Galgalo had replied that he did not see any hostility and that the petitioner appeared to be happy to withdraw. Reminded that Mr Montgomery's evidence was that he, Mr Galgalo, had said that there had been a crowd hostile to the petitioner. That he and Mr Paul Ngei had had a discussion and that the petitioner had withdrawn because he was afraid, Mr Galgalo said that he was in court when Mr Montgomery gave evidence, but that he, Mr Montgomery, was mistaken reminded also that Mr Montgomery's evidence had not been refuted, Mr Galgalo said that he had questioned it, but that was after Mr Montgomery had completed his evidence and later, outside the court.
43. The evidence of Mr Bonaventura Andrew Omuse, the district officer 1 and deputy returning officer, the second witness called on behalf of the first respondent was of little assistance. He said he did not speak Mkamba and said he did not hear the second respondent address the crowd nor did he see the petitioner being manhandled. He did not go into the establishment office. He said that Mr Montgomery had telephoned him on the Monday after nomination day and informed him that the petitioner had complained that he had withdrawn because he had been manhandled by the second respondent and Mr Montgomery asked if that was true. Mr Omuse had replied that there was no such hostility. This was not put to Mr Montgomery and Mr Omuse said that had the second respondent manhandled the petitioner he would have known only if his attention has been drawn to it.
44. Mr James Nthiani Mulinge, a senior sergeant of the administrative police and the third witness called on behalf of the first respondent, said that on nomination day he was at the district commissioner's offices, Machakos, and his main duty was to assist the first respondent in keeping order mainly near the offices and the verandah. S/Sgt Mulinge said that at about 10.15 am when he was on the verandah, someone called him and it was the petitioner who asked him if he would call Mr Ngei and the district commissioner. At the time the petitioner was sitting on a table at the entrance of the establishment office. S/Sgt Mulinge found the second respondent and gave him the message. Asked why the petitioner wanted to see him, S/Sgt Mulinge said he did not know and, being asked, pointed out where the petitioner was.
45. S/Sgt Mulinge found the first respondent, who was on the grass near the boardroom, gave him the message and saw the first respondent walk towards the establishment office. As the first respondent



- reached the room, followed by the OCPD and the special branch officer, the second respondent reached it, and all of them went into the office.
46. After about 20 minutes they all came out of the establishment office and the first respondent climbed on to a table and announced that the petitioner had withdrawn in favour of the second respondent. The first respondent then told the petitioner to tell the crowd how he had withdrawn.
 47. The petitioner then climbed on to the table and said that he had withdrawn his nomination because it was not good to stand for the second respondent's seat. The people in the crowd applauded him and the petitioner then climbed down from the table and shook hands with the second respondent.
 48. In cross-examination by Mr Kakuli and again by Mr Gautama, who appeared for the petitioner, S/Sgt Mulinge confirmed that the petitioner called him at about 10.15 am and asked him to call the first and second respondents. S/Sgt Mulinge said that there was no one on the verandah when the petitioner and others went into the establishment office, that the crowd were in good humour and took no notice of the room, and that the door and window were both open for all the time that they were in that room.
 49. The fourth witness called on behalf of the first respondent, the OCPD Mr Elijah Murmet Ole Sakaja, who was then a senior superintendent of police. In his evidence he described the security arrangements he had made on nomination day at the district commissioner's office, Machakos. Mr Ole Sakaja spent most of the morning in the Boardroom with the first respondent going into the compound occasionally to check that all was peaceful. There was a large crowd of about 2,000 people who were singing, shouting, dancing, talking in groups, their mood being peaceful. He did not understand Mkamba so did not know what was being said and shouted.
 50. At about 11.45 am S/Sgt Mulinge came up to the first respondent and told him that the petitioner wished to see him. The first respondent went towards the door of the establishment office and Mr Ole Sakaja saw the second respondent walking towards the office. Mr Ole Sakaja being curious as to what was happening, accompanied by a special branch officer, hastened after the first respondent. They reached the office door at about the same time as did the first and second respondents and they all went in together. Inside the petitioner told the first respondent that he wanted to withdraw for the sake of Mkamba peace and unity, whereupon Mr Ole Sakaja suggested to the first respondent that this should be done in writing. The first respondent then sent for the petitioner's papers and the petitioner wrote on them his withdrawal. Mr Ole Sakaja then described the events at the announcement of the nominations as did the first respondent.
 51. Mr Ole Sakaja said that during the whole of the time they were in the room the door was open, he was sure of that because he stood near it. The window was also open and no one was on the verandah. That there was no hostility from the crowd which was quiet.
 52. The fifth witness called on behalf of the first respondent was inspector William Taiswa Matankorya, an officer in the special branch, and his evidence was that he was on duty at the district commissioner's offices, Machakos, on nomination day and spent most of his time with the OCPD in the boardroom with the first respondent helping him receive nomination papers from the candidates.
 53. The crowd was peaceful, there was signing and the people were happy but when inspector Matankorya left the boardroom at about 11.50 am the crowd was excited and there were "embittered" shouts of many people of "withdraw" "withdraw" in Mkamba and English. Inspector Matankorya saw S/Sgt Mulinge on the verandah and asked him what the shouts were for. S/Sgt Mulinge said nothing and pointed towards an office, which the Inspector thought was the establishment office. Inspector Matankorya went to the office, opened the door and went in. He thought that he closed the door, and inside he saw the petitioner and the second respondent. They were alone and talking to one another in



Mkamba which he did not understand. Their tone was not friendly. Then the first respondent came in accompanied by the OCPD, and a district officer, Mr Kitiabi, he thinks that the door was closed. Inspector Matankorya heard the petitioner ask the OCPD for some security from the police, for some policemen to protect him. The OCPD replied but Inspector Matankorya did not remember his exact words. At all events, the petitioner was not given any police protection. Then the petitioner said he would withdraw. The first respondent sent for the petitioner's nomination papers, he thought that Mr Kitiabi fetched them, and the petitioner wrote on them his withdrawal. They then left the room and the first respondent got on to a table and announced the withdrawal and invited the petitioner's to confirm his withdrawal, which he did and the crowd applauded.

54. The evidence of the district officer Mr Ellam Chibuyi Kitiabi, the sixth witness called on behalf of the first respondent, was that he was at the district commissioner's offices, Machakos, on nomination day and assisted the first respondent, in processing the nominations of candidates. This was in the boardroom. Mr Kitiabi went out into the compound from time to time. At about 11.30 am he left the boardroom, and was working on the arrangements for the first respondent to make the announcement of the nominations, when the first respondent and the OCPD came out of the boardroom. Mr Kitiabi saw S/Sgt Mulinge speak to the first respondent who, accompanied by the OCPD, went into the establishment office.
55. Mr Kitiabi followed them in and inside he saw the petitioner and the second respondent and many other people. Mr Kitiabi ordered these people out and they left leaving the petitioner, the first and second respondents, the OCPD, and the special branch officer in the room. Mr Kitiabi was then so fully engaged in preventing people, including candidates who were shouting from getting into the room and moving people from the verandah and from the window, that he did not know what was happening in the room. One of the those that was trying to get into the room and who he pushed away and off the verandah was as we have said, the assistant minister, Mr Mutunga.
56. Mr Kitiabi went into the room and the first respondent asked him to get the petitioner's nomination papers. This he did and handing them to the first respondent he returned to prevent people from getting in the door, and moving them away from the window and verandah, and again did not know what was happening inside the room.
57. Mr Kitiabi saw the first respondent and the others come out of the room and the first respondent get on the table. He then went to ask the VOK people to move their land rover nearer to the place where the announcements were being made and when he returned the second respondent was addressing the people.
58. The second respondent, Mr Paul Ngei, gave evidence and two witnesses were called on his behalf.
59. The second respondent's evidence was that on nomination day he went by car to Machakos. He did not take any supporters with him and went with his wife and driver. He arrived at the district commissioner's offices at about 10.30 am and went into the boardroom. His nomination papers were checked and accepted and he chose 'lion' as his symbol. Coming out he went into the compound and spoke to other candidates, greeting them and answering their queries regarding the conduct of their campaigns.
60. Mr Ngei said that he had read the allegations made against him in the petition and he had heard the evidence of witnesses who said he made a speech to the crowd inflaming them against the petitioner, calling on him to withdraw, and manhandled him into the establishment room, all of which was untrue.



61. Speaking of the petitioner's withdrawal Mr Ngei said that he was in the compound moving from one place to another when at about 11.30 – 11.40 S/Sgt Mulinge came up and told him that the petitioner, the other candidate for Kangundo constituency, wanted to speak to him. Mr Ngei asked what he wanted to see him for and S/Sgt Mulinge replied that he did not know. Mr Paul Ngei then asked where the petitioner was and S/Sgt Mulinge indicated a place between the boardroom and near the door of the establishment office. Mr Ngei stayed for about 5 minutes, as he did not want to associate with the petitioner. He then went towards the petitioner and as he arrived the first respondent, the OCPD and the special branch officer came up. As they were going into the room the first respondent asked the petitioner what he wanted and the petitioner replied that he wanted to withdraw in favour of Mr Ngei. The first respondent asked the petitioner why he wanted to withdraw and the petitioner replied asking for the return of his papers as he did not wish to contest the election. The first respondent replied that he could not be given the papers as they were legal documents and once they were handed in the became public property. The petitioner said he had decided to withdraw from the election. The first respondent replied, "are you sure?" and the petitioner said, "yes", and that he knew that he could not win the election in any case and wanted his papers. The first respondent sent for the papers and when they were brought the petitioner took them and the first respondent told him he could write what he liked. The petitioner wrote, "withdrawn", and the first respondent asked him to sign, which he did. Throughout Mr Ngei did not say anything, and the door of the room was open.
62. The second respondent then described the events at the announcement of the candidates as did the first respondent.
63. In cross-examination by Mr Gautama the second respondent said that as they were going into the establishment office the petitioner spoke to him in Mkamba, saying that he had been given Shs 20,000. The second respondent was interrupted and when pressed by Mr Gautama to continue, said that the petitioner stated that he had been persuaded by Mr Henry Muli and given Shs30,000/- to contest the seat. As he had got the money he was no longer interested. We are not concerned with the truth of this matter but the allegation that the petitioner spoke to the second respondent is a contradiction of the second respondent's evidence in chief that as they were going into the room it was the first respondent who spoke to the petitioner, and that throughout he, the second respondent, did not say anything.
64. The first witness heard on behalf of the second respondent was Mr Onesmas Musyoki Mutisya, who was a candidate for one of the other constituencies and was at the district commissioner's offices on nomination day. Mr Mutisya arrived at about 10.45 am and saw nothing unusual. There was a large crowd and people were singing and dancing and in good humour. The witness could give little information regarding detail as he was thinking how he would conduct his campaign. However, he did not see anyone collecting money, he did not hear anyone shouting about a coffin or killing the petitioner, or that he should withdraw. He did remember that sometime after 11.00 am he had seen the petitioner, the first and second respondents, the OCPD and the special branch officer go into a small room. The door was shut and he did not go to see what was happening. He denied that he had gone into the room or that he urged the petitioner to withdraw as was alleged by the petitioner. After a short while they came out. Mr Mutisya then described the events at the announcement of the candidates as did the first respondent.
65. The second witness called on behalf of the second respondent was Mr Harrison Mulwa, an advocate of this court. He arrived at the district commissioner's office on nomination day at about 10.30 am. There was a large crowd there who were in a good mood singing and dancing. Some were in groups with candidates. Mr Mulwa did not hear any shouts of withdraw or kill, nor did he hear the second respondent address the crowd or see him push the petitioner to a small room.



66. Mr Mulwa said that at about 11.30 am he saw the first and second respondent, the OCPD and the special branch officer enter a small room and the petitioner was inside. He Mr Mulwa, stood on the verandah about one step from the door which was open throughout. There were very few people on the verandah and although he could see those in the room he could not hear what was said. Mr Mulwa saw the district officer, Mr Kitiabi go into the room and when he came out asked him what was happening inside. Mr Kitiabi replied that he did not know exactly but he thought that someone was going to withdraw his candidature.
67. After about 5 or 7 minutes, those in the room came out and Mr Mulwa then described the event at the announcement of the candidates, as did the first respondent.
68. That is a summary of the evidence of the first and second respondent and their witnesses. It is seen that the evidence of both the first and second respondents, the OCPD S/Sgt Mulinge, Mr Mutisya and Mr Mulwa is at variance with that of the first respondent's own witnesses, the supervisor of elections, Mr Montgomery, the special branch officer, inspector Matankorya and the district officer, Mr Kitiabi. The evidence of the first and second respondents and the witnesses as we have indicated, was that the crowd was peaceful, few, if any, people were on the verandah, the door of the establishment room was open and the proceedings therein a voluntary withdrawal on the part of the petitioner. The evidence of inspector Matankorya and Mr Kitiabi was that the mood of the crowd was violent, that people were trying to go into the room and that the crowd was hostile to the petitioner who, failing to obtain protection from the police, withdrew. The evidence of these two witnesses and that of Mr Montgomery was wholly consistent with, and supported that of, the petitioner and his witnesses, and we accept it. We do not accept the evidence of the first and second respondents and the witnesses we have mentioned where it conflicts with that of the petitioner and his witnesses.
69. Having set out at some length the evidence given by the witnesses called by each party and, before expressing our final conclusions on the case, we must deal in some detail with the question of the time of the petitioner's withdrawal, which has been very much in issue throughout.
70. The evidence of the petitioner and his witnesses as to the time of the announcement was reasonably consistent, bearing in mind that they would have reason to notice the times at which the various events occurred because of the deadline for nominations. The petitioner, Mr Nzioka (PW2), Mr Njuki (PW3) and the assistant minister (PW7) each said that the first respondent started to make the announcements at 10 minutes past 12, Mr Nzioka explaining that the time of 12.20 pm mentioned in his police statement Ex R1(3) was incorrectly recorded. The petitioner, who was the only one of them in the small office at the time, said that he wrote the word "withdrawn" at about 10 past 12. His police statement is to the like effect, as he said that he was being advised by Mr Onesmus Musyoki and others to withdraw at a few minutes past 12 and that, after further conversation, he wrote and word on the paper the first respondent produced to him.
71. Although Mr Ilenge (PW5) only mentioned the time inasmuch as he said it was "7, 6 or 5" minutes to 12 when the second respondent caught hold of the petitioner, both Mr John Mwangangi Musyoka (PW4) and the candidate for Yatta, Mr Mwambua (PW6), said that the first respondent came out and told the crowd to be quiet "as they were solving something" at about 10 past 12. The latter said that the district officer came out at about 12.05 or 12.10. Mr Omuse (RW3) said that this was at about 5 minutes to 12.
72. S/Sgt Mulinge clearly had little idea of the time. The OCPD, said that the first respondent came out of the boardroom about 11.45 am, after which S/Sgt Mulinge called him and they all went into the office. He did not give the precise time of the withdrawal but said he was about 2-3 minutes in the



- little room. The special branch officer, inspector Matankorya, said that “the whole operation” (ie the withdrawal) only took about 5 minutes.
73. The only other person who witnessed the withdrawal was the first respondent who said it took place “immediately after 10 to 12” and of course the evidence of Mr Montgomery (who was principally concerned with the time) carries the matter no further in this respect, for he merely testified as to what the first respondent and the district officer had told him.
74. Dealing first with the announcement, it is manifest, we think, that this must have been after the time of the close of nominations, because until then the first respondent could not be sure that no one else was intending to come forward as a candidate. Indeed Mr Galgalo himself said that he began his announcement by saying that all the seats were contested except Kangundo, for which one candidate had withdrawn before the deadline of 12 noon, and we think he would not have so expressed it had the announcement itself been made before midday. It follows that the second respondent’s statement that the first respondent mounted the table in order to make the announcement between 11.40 am, and 12 midday, and in any event before midday, cannot be right.
75. We therefore reject the evidence of the respondent’s witnesses insofar as it suggests that the time of the announcement was before midday. It is difficult to be precise as regards the time of the actual withdrawal: as we have just said the only witnesses who specifically dealt with this were the petitioner, the first respondent and the second respondent. It is clear that the withdrawal must have been very close to midday, and in view of the evidence that both the first respondent and the district officer had to come out of the office and urge the crowd (who were shouting that the time for nominations was over) to be calm and quiet, and, (as we find) that the announcement was made at about 12.10 pm we think it more probable than not that the actual withdrawal did occur, in point of time, after midday.
76. Accepting that this was so, it remains for us to consider briefly what, if any, effect it has if we find that the petitioner withdrew his nomination as a result of undue influence.
77. Sub-paragraph (c) of section 9 of the *Election Offences Act*, cap 66, provides that the offence of undue influence is committed if any person, directly or indirectly, *inter alia* makes use of or threatens any force or violence for the purpose of inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate;”
78. We have no doubt that a person “becomes a candidate” when his nomination is validly accepted, as that of the petitioner was at 10.50 am on the August 24, 1974.
79. The construction we place upon the remainder of this paragraph is that the offence of undue influence is complete if and when the inducement or compulsion is proved to have taken place. It follows that whether or not the actual or purported withdrawal in this case occurred respectively before or after the close of the time for nominations is immaterial. It seems to us quite impossible to hold that because the withdrawal occurred, fortuitously or by mischance, after midday, that there was no offence, if such undue influence is proved otherwise to have occurred.
80. We would very much like to be able to say that these allegations, of which evidence has been led before us, are without foundation. The second respondent is a senior minister and has been in the government for many years. He was, in our opinion, acutely conscious of his position, and it was this which moved him, as we think, to a sense of outrage when he learned during the morning of nomination day that he was to be opposed by the petitioner, who was relatively unknown, and to whom he slightly referred as a “little man”. For we are perfectly satisfied that the events described to us took place as the petitioner and his witnesses said. We are equally satisfied that the differences between the evidence of these witnesses, which we have endeavoured to instance in this judgment, are attributable to normal



variations which may be expected from witnesses who are each describing events from where they respectively were at each stage of the proceedings – particularly where there is a prevailing atmosphere of excitement and tension and where (as one witness agreed with counsel for the first respondent) the crowd was at fever pitch. The general picture or pattern of events which each witness described was the same. As we have said, we reject as false the evidence of the two respondents and their witnesses where it conflicts with that called on behalf of the petitioner, supported, as we think it was, by the evidence of Mr Montgomery, Inspector Matamkorya and Mr Kitiabi.

81. Whatever may have been the relative position in society of Mr Mbondo and Mr Ngei and whatever the likelihood of the former's success or otherwise at the polls against so famous a politician, Mr Mbondo was clearly entitled to contest the seat. as would any other person duly qualified, however popular the announcement of his withdrawal may have been.
82. We are satisfied, as we have indicated, that the petitioner has proved the allegations in his petition, which we set out at some length at the commencement of this judgment, up to the hilt. Accordingly we find that there is abundant evidence that the petitioner was compelled to withdraw his candidature for the nomination for KANU, and thence for the national assembly, by undue influence. We have further no hesitation in stating that such evidence satisfies us that the second respondent not only took part in threatening the petitioner with either death, or at least injury, unless he retired from the contest, but actually incited the crowd present outside the district commissioner's offices at Machakos to become violently antipathetic to the petitioner. He also, in our judgement, assaulted the petitioner and dragged him into the office, assisted by other persons. It is small wonder therefore (without in the least seeking to justify their actions) that the officials present, and particularly the first respondent, were overawed by the power and position of Mr Ngei and brought such influence as they possessed to add to the forces already bearing upon the petitioner to withdraw. This was a lamentable situation, but in our view there is no doubt that it happened.
83. In conclusion, having found that the petitioner was induced to withdraw his candidature on the morning of nomination day, and that the second respondent blatantly coerced and threatened the petitioner into so doing, by the means we have described, we allow this petition upon the ground of undue influence and we name the second respondent as having committed that offence.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER 1975,

.....

S. J.WICKS

CHIEF JUSTICE

.....

A.R.W HANCOX

JUDGE

.....

S.K SACHDEVA

AG JUDGE

