



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Election Petition 64 of 1993**

**IN THE MATTER OF:**

**THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTION ACT**

**(CHAPTER 7 LAWS OF KENYA)**

**AND THE REGULATION MADE THEREUNDER AND IN THE MATTER OF:**

**ELECTION FOR WEBUYE CONSTITUENCY**

**BETWEEN**

**JOSEPH MALOBA ELIMA.....PETITIONER**

**AND**

**CHARLES OHARE.....1<sup>ST</sup> RESPONDENT**

**MUSIKARI KOMBO.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The petitioner Joseph Maloba Elima filed this petition against Mr. Charles Ohare (1<sup>st</sup> Respondent) who was the Returning Officer for Webuye Constituency and Hon. Musikari Kombo who was the successful candidate for the said constituency during the parliamentary Election held on 29<sup>th</sup> December 1992. Initially the petitioner was seeking nullification of Hon.Musikari Kombo’s election on various grounds but as a result of some of these grounds being withdrawn or struck out the petition proceeded on one ground only which was as follow:-

“it is evident and on record that the second Respondent organized and administered traditional oath on voters thereby causing fear amongst voters that may not have wished to vote for the 2<sup>nd</sup> Respondent.”

It was the petitioner’s case that on the night of 25<sup>th</sup> December 1992 the 2<sup>nd</sup> Respondent caused to be organized and administered an oath at the house of one Ben Wafula at Wabukhonyi Village where the object of the oath was to compel or bind voters to vote for 2<sup>nd</sup> Respondent during the parliamentary election of 29<sup>th</sup> December 1992.

The petitioner gave evidence on his own behalf and called five witnesses in support of this ground of administration and taking of traditional oath.

The petitioners evidence was to the effect that on 26<sup>th</sup> December 1992 he received information to the effect that on the previous day (25<sup>th</sup> December 1992) an oathing ceremony had been performed to bind people to vote for Hon. Musikari Kombo during the Parliamentary election on 29<sup>th</sup> December 1992. The petitioner being a candidate in that parliamentary election was naturally concerned about this oathing ceremony which he thought would deny him votes and so he reported to the village elder one Richard Njuya and to the assistant chief of Mukuselwa sub-location one Patrick Khisia for further investigation. Then on 10<sup>th</sup> January 1993 the petitioner was at Michimeru Market East Sangalo sub-location where he met Elly Khamala who stated that he (Khamala) and others had administered an oath in favor of Hon. Musikari Kombo which oath led to Hon. Kombo's victory in the parliamentary election of December 1992. The petitioner visited Elly Khamala on 20<sup>th</sup> January 1993 where Elly Khamala and Bileti confirmed that they had administered the oath in favor of Hon. Musikari Kombo which enabled him to win in the parliamentary election. After this confirmation the petitioner filed this petition and requested Elly Khamala and Simon Bireti to come and give evidence in court.

Elly Khamala (pw2) testified to the effect that he was a witchdoctor known as Francis Wafula who requested him (Khamala) to assist in administering an oath called "khulia silulu" so that voters would vote for Hon Musikari Kombo of FORD KENYA in the parliamentary election. Then on 25<sup>th</sup> December 1992 at about 4.00 p.m. Bireti Wawire (pw3) another witchdoctor Francis Wafula and Elly Khamala (PW2) went to Hon Kombo's house where it was agreed that the fee for administration of this oath would be Kshs.70, 000/- of which Kshs.20, 000/- was paid as deposit by Hon Kombo. They left Hon Kombo's Office in 2 vehicles up to the house of Ben Wafula where they arrived at about 8.00 p.m. It was at the home of Ben Wafula that the oathing ceremony took place. The following is what Elly Khamala Wanyama (PW2) states in his affidavit as regards this ceremony:-

5. THAT on arrival at Ben Wafula's house we found people gathered outside. We entered the house where introductions were made
6. THAT we left the house and Ben Wafula brought a black ram and handed it to Bileti Wawire. Bileti placed the ram into Musikari Kombo's feet fed it with a mixture of herbs then killed it by twisting its neck
7. THAT we went back into the house and left Bileti to slaughter the ram.
8. THAT Bileti later sent into the house the ram's skin, intestines, intestinal refuse blood and the remaining mixture of herbs which I mixed together.
9. THAT I stretched the ram's skin on the floor of the house and told Musikari Kombo to sit on it after removing his clothes save the under pants. I bathed him with the herbal mixture and collected the bath waste. I cut Kombo on the chest and back three times and rubbed medicines into the cuts. I then pierced his left hand index finger and drew blood. I mixed the bath waste and blood with the herbal mixture and passed it out for Bileti to treat the meat with.
10. THAT I placed the ram's intestines on Kombo's head while he stood astride at the door and he treated roast meat on a stick was passed between his legs from outside into the house.
11. THAT Musikari Kombo plucked a piece of meat from the stick and swore "I Musikari Kombo swear that from now on I shall continue Masinde Muliro's journey without fear until president Moi is removed from power"
12. THAT after Musikari Kombo had eaten the piece of meat people came forward and each plucked a piece of meat from the stick and swore "I swear that I shall vote for Musikari Kombo in the coming election. If I don't May I die" then ate the meat.
13. THAT thereafter the mixture was poured on money which was distributed among the people present.
14. THAT after the ceremony people left for their homes."

Simon Bileti Wawire (PW3) testified that he was a witchdoctor and that on 24<sup>th</sup> December 1992 Elly Khamala (PW2) a fellow witchdoctor came to his house and informed him to collect the necessary herbs required for

administering an oath. Bileti (PW3) was told that the oath was to be administered for Musikari Kombo to win the parliamentary election of 1992 by changing people's attitudes to vote for him (kombo). Bileti (PW3) then collected the necessary herbs and on 25<sup>th</sup> December 1992 went with the herbs to Elly Khamalas (PW2) house from where Francis Wafula another witchdoctor came and collected both witchdoctors and took them to Hon Musikari Kombo's house. At Hon kombo's house it was agreed that the witchdoctor's will administer an oath called "KHULIA SILULU" for which Hon. Kombo paid Kshs.20,000/= and the balance of Kshs.50,000/= was to be paid upon successful outcome of the oathing. On that same day in the evening Bileti (PW3) in the company of Hon Kombo, Francis Wafula, Elly Khamala and some ford-Kenya officials went to Ben Wafula's house at Wabukhonyi village where the oath was to be administered. The following is what Simon Bireti Wawire (PW3) in his affidavit as regards this ceremony:-

7. THAT at Ben Wafula's house we found people gathered. Greeted them and we entered the house where Francis Wafula introduced us.
8. THAT after the introduction we went out where ben Wafule handed me a black ram to start the ceremony. I placed the ram at Kombo's feet and fed it with herbal mixture we had brought with us then I broke its neck by twisting.
9. THAT Francis Wafula and Elly Khamala with Kombo returned into the house while I proceeded to slaughter the ram with the help of some people outside. We skinned the animal and removed the intestines and intestinal refuse and trapped the blood into a bowl – the blood and refuse were added to the mixture in the container and the meat was cut into small pieces.
10. THAT I sent into the house the oathing mixture into a container the intestines and the skin for Francis Wafula and Elly Khamala to treat Kombo.
11. THAT I struck the piece of meat on a special stick.
12. THAT Elly Khamala returned to us outside the oathing mixture into which he had added Kombo's bath waste and blood from Kombo's left hand ring finger. The oathing mixture was sprinkled into the meat then it was roasted.
13. THAT Musikari Kombo with intestines placed on his head and in his underpants only stood astride at the door and I passed the treated meat in between his legs to Elly Khamala in the house where Elly Khamala was to administer the oath to Kombo and those inside the house.
14. THAT after people in the house had taken the oath, I administered the oath to the people outside who plucked pieces of meat from the stick and swore "I swear I shall vote for Musikari Kombo in the coming elections. If I don't may I die" before eating the meat.
15. THAT after the oathing, the remaining oathing mixture was poured on money which was distributed to the people.
16. THAT thereafter people left for their homes
17. -----“.

The fourth witness on the petitioners side was Ben Simiyu Laini (PW4) who testified that on 24<sup>th</sup> December 1992 one Ben Wafula purchased a Black ram from him at a price of Kshs.1,000/- of which he was paid Shs.300/- as deposit while the balance was to be paid the following day. On the following day (25<sup>th</sup> December 1992) he went to Ben Wafula's house and was paid the balance of Shs.700/- for the black ram. Ben Wafula invited Laini (PW4) to come back in the evening as Wafula said he would be having visitors. That evening Laini (PW4) attended the oathing ceremony and saw two vehicles arrive in the compound and Hon Kombo emerged from one of the vehicles. Laini (PW4) took the oath like everyone present by swearing "I shall vote for Musikari Kombo in the coming elections. If I don't may I die."

The fifth witness was Frojas Wamalwa Mulongo (PW5) who testified that in 1992 he was working as a conductor in a Public Service Vehicle belonging to Douglas Murefu who was a ford-Kenya's vice chairman at Mukuselwa sub-location and who was a son of Ben Wafula of Wabukhonyi village. Mulongo (PW5) went on to state that on 25<sup>th</sup> December 1992 in the evening he transported some people to Ben Wafula's home who had been invited for

christmas by Hon Kombo . he saw Hon Kombo arrive by two vehicles at 8.00 p.m. and thereafter Mulongo (PW5) was sent to collect native liquor. After bringing the native liquor he was assigned the task of skinning the ram which had been slaughtered. After skinning the animal he sent into the house the skin, intestines, intestinal refuse, blood and then cut the meat into smaller pieces which were struck on sticks. Then the meat was roasted and taken into the house being passed between Hon. Kombo's legs as he (Hon Kombo) stood at the door dressed in underpants only with his legs astride. After this a few old men came out with the roasted meat and each person took a piece of meat swearing that "I swear that I shall vote for Musikari Kombo in the coming elections. If I don't may I die". Mulongo (PW5) confirmed that he took this oath and as a result voted for Hon Kombo. Then Hon Kombo emerged from the house and thanked the people for coming and gave Shs.30/- to each person before he (Hon Kombo) was driven away.

The last witness for the petitioner was Patrick Tabu Posta (PW6) who testified that on 25<sup>th</sup> December 1992 he attended an oathing ceremony in the house of Ben Wafula at Wabukhonyi village and that the purpose of the oathing ceremony was to bind people to vote for Hon Musikari Kombo in the parliamentary election. He went on to state that the oath was administered by three witchdoctors Francis Wafula, Elly Khamala and Bileti Wawire and that the oath consisted of a piece of roasted sheep meat eaten after swearing to vote for Hon Kombo. Posta (PW6) said that he was given a piece of meat from a stick by Elly Khamala and he swore as follows "I swear that I shall vote for Musikari Kombo in the coming elections. If I don't may I die". He then ate the meat and as a result of the oath he too voted for Hon Kombo for fear of death. It was the evidence of posta (PW6) that all the people present in that compound that evening took the oath.

The foregoing is the summary of the evidence given in support of this ground an oathing ceremony at the house of Ben Wafula. It should be pointed out that all the allegations about oathing ceremony were directed against 2<sup>nd</sup> Respondent (Hon Kombo) and hence the Returning officer (1<sup>st</sup> Respondent) had nothing to repudiate. Hence there was no evidence tendered by 1<sup>st</sup> Respondent.

When Hon Kombo (2<sup>nd</sup> Respondent) rose to testify it was obvious that the evidence of the petitioner and his witnesses disappointed him. He denied each and every allegation levelled against him. In his affidavit Hon. Kombo deponed inter alia

6. "THAT I have read and understood the affidavits sworn by all the witnesses for the petitioner and I have also heard their testimonies before this court.
7. THAT I deny all the allegations contained in the affidavits filed in the court and testimonies of each of the witness in every material aspect and more particularly the allegations regarding the oathing and the administration of oath which has been described in this court as "KHULIA SILULU".
8. THAT I find the allegations regarding the oathing and the administration of the oath described embarrassing, scandalous, Primitive, Obnoxious and without basis.
9. THAT as a Christian who does not believe in witchcraft, sorcery and charms; and as a person who has undergone modern education as I sat in this court hearing the allegations of oathing I found them most repulsive repugnant and against my personal morals and norms.
10. THAT these allegations have been fabricated to lend credence to all election petitions which has no factual basis or foundation."

These paragraphs from Hon Kombo's 54 paragraph affidavit sets out clearly Hon Kombo's stand in this matter. Put briefly he is of the view that this is an election petition which has no factual basis of foundation and that all these allegations about oathing are embarrassing, scandalous, primitive, and obnoxious and without basis and that as a Christian who does not believe in witchcraft, sorcery, or charms and having undergone modern education he found what was being said about him most repulsive, repugnant and against his personal morals and norms.

The 2<sup>nd</sup> Respondent (Hon Kombo) denied having met the self confessed witchdoctors Elly Khamala Wanyama and

Simon Bireti Wawire. He denied having agreed with the witchdoctors to pay them Shs.70, 000/= as their fees. He denied having taken part in the oathing ceremony as described by the petitioner and his witnesses. The 2<sup>nd</sup> respondent explained in details his movements during 25<sup>th</sup> December 1992. On that day at about 10.00a.m he attended Christmas service at the salvation Army Chebosi church where service was presided over by among others the former Territorial commander of the Salvation army East Africa Col (Rtd) Wanakuta and Capt. Waswa. After the service at about 2.30p.m the 2<sup>nd</sup> Respondent went to his house in Webuye for lunch. Then Hon. Kombo left his house for Misikhu hospital where he arrived at about 4.00p.m. he was given permission to enter the hospital where he was taken round by the matron Miss Margaret Asewe (2RW3). This lady Miss Asewe (2RW3) supported Hon. Kombo's hospital visit. From Misikhu Hospital hon.Kombo visited friends Lugulu hospital where he arrived at about 6.30p.m. and was received by Dr.Lumarai David Lugalia (2RW2). During the visit Hon Kombo met Mrs. Lumukule whose child had died. Hon. Kombo eventually left Lugulu Hospital at about 8.00p.m and went home. During al these movements Hon. Kombo was accompanied by John Wanjala Musakali (2PW12) who was his campaign manager during the electioneering period leading to the general elections of 29<sup>th</sup> December 1992.

The evidence of col(Rtd) Charles Wanakuta (2RW3) was to the effect that on 25<sup>th</sup> December 1992 he attended a Christmas service at about 10.00a.m where he saw 2<sup>nd</sup> Respondent (Hon Kombo).this service ended at about 2.00.

Margaret Asewe (2RW4) testified that she was the matron of Misikhu Hospital and that on 25<sup>th</sup> December 1992 between 4.00 and 6.00p.m. she conducted Hon Kombo (2<sup>nd</sup> Respondent)round the wards of the hospital.

Then we heard the evidence of Proffesor Simiyu Wandiba (2RW5) who was called to give expert evidence on Bukusu culture. Prof. Wandiba explained to this court how hw had carried out research on Bukusu culture and explained that a ceremony known as "khulia silulu" is a trial by ordeal which is a counter measure against the forces of evil or witchcraft. He pointed out that the ceremony is administered by those who are elderly and above 60 years of age. It was Prof. Wandibas evidence that this is arare occurrence among the Bukusu and that it is performed with a goat and never with a ram.

Fernandes Ndiera Mabonga (2RW6) was an elderly man born in 1908 who said that he understood Bukusu customs and practices. He had served as an accessor/arbitrator in the African Tribunal during the colonial days. He said that he was not a witchdoctor but had performed several "khulia silulu" ceremonies. He testified that this ceremony is performed when one suffers long illness and it is feared that he has been bewitched. The animal used is a goat not a ram. He explained how the ceremony is conducted and stated that the ceremony is conducted in broad day light and never at night. He went on to state that "khulia silulu" is never performed for anyone in good health. This witness stated that as recent as June 1994 he had performed this ceremony at the home of Chief Fredrick wamalwa of North Bukusu at Khachonge. He said that the sick person does not sit on the skin of the animal used in the ceremony. It was Mabonga's (2RW6's) evidence that there were no such oaths as described in the affidavits of Elly Khamala Wanyama, Simon Biret Wawire, Patrick Posta and Frojas Wamalwa Mulongo, and that the Bukusu have no oath which is meant to create fear or bind people to do a certain thing in future. This old man concluded his evidence by asserting that if scholars had taken the task of putting in writing records of customs and practices of the Bukusu people it would not be possible for conmen to misled and give false testimony relating to ceremonies such as "khulia silulu" before our courts as is the case with this petition. It would appear that Mabonga(2RW6) regards the petitioner and all its witnesses who testified on the ceremony of "khulia silulu" as conmen. He appealed to scholars to research on such matters. Perhaps mabonga's call is not misplaced since Prof. Wandiba is already doing research on Bukusu culture.

Benjamin Wafula Sahani (2RW7) denied all that was stated in the affidavits of Joseph Maloba Elima, Elly Khamala Wanyama, Simon Bireti Wawire, Patrick Taabu Posta, Frojas WAmalwa Mulongo and BenLaini. He went on to state that on 25<sup>th</sup> December 1992 at 4.00p.m. He attended a friends church service at Wabukhonyi village and went back home at 6.00a.m. He stayed home the whole day and he did not receive any visitor. He said that his son Douglas Murefu Wafula was at home on 25<sup>th</sup> December 1992 and that his vehicle registration number

KQT 354 was parked at home and never used to transport voters.

Francis Wafula (2RW8) denied all that was stated by the petitioner and his five witnesses. He denied being a witchdoctor but admitted that he was a herbalist. He denied having accompanied the two self confessed witchdoctors to the home of the 2<sup>nd</sup> Respondent, and he denied having taken part in an oathing ceremony at the home of Benjamin Wafula Sahani. Francis Wafula explained that on 24<sup>th</sup> December 1992 he went to makunga in ongaren where he was constructing a house and returned to Wabukhonyi on 29<sup>th</sup> December 1992 and then went back to Tongaren.

Grace Nasimiyu Lumukule (2RW9) testified that on 25<sup>th</sup> December 1992 she had taken her daughter to Lugulu hospital where her daughter unfortunately died. Before the body of her daughter could be released she was required to clear a bill of Shs.240.55/-. She was then directed to John Wanjala Musakali the campaign manager of 2<sup>nd</sup> Respondent and Mr. Musakari cleared the hospital bill and provided a pick-up to transport the body home.

The tenth witness on the 2<sup>nd</sup> Respondent side was Dr. Maurice Wambani (2RW10) a registered medical practitioner in Nairobi. He has been in medical practice for the last 15 years. He has known 2<sup>nd</sup> Respondent (Hon Kombo) for the last 20 years and he is his family doctor. Dr. Wambani testified that on 12<sup>th</sup> September 1992 he examined Hon Kombo over his entire body and found no marks of any traditional therapeutic or traumatic in nature. The only mark seen on Kombo's left arm was that of small pox vaccination. Dr. Wambani prepared a medical report which was produced in evidence.

Douglas Murefu Wafula (2RW11) testified that he was from Wabukhonyi village and that a vehicle registration no. KQT 354 was registered in his name. He said that Frojas Wamalwa Mulongo was not his employee but a busaa and chang'aa brewer within Wabukhonyi Village. He denied all that was stated by the petitioner and his witnesses as regards the bathing ceremony on 25<sup>th</sup> December 1992.

The last witness to be called by 2<sup>nd</sup> Respondent was John Wanjala Musakali (2RW12) who was his campaign manager during the general election in 1992. In his 17 paragraph affidavit Mr. Musakali explain in detail how he accompanied 2<sup>nd</sup> Respondent to Chebosi Salvation Army church from 9.00a.m. on 25<sup>th</sup> December 1992. The service ended at 2.00p.m. and 2<sup>nd</sup> respondent and his group went home for lunch. From 3.30p.m. 2<sup>nd</sup> Respondent and his group visited Misikhu mission hospital and Lugulu hospital. This visit to the two hospitals ended at about 8.00p.m. And the group went to the house of 2<sup>nd</sup> Respondent. Musakali (2RW12) went on to testify that he cleared the bill for the woman who had lost her daughter. He also provided transport for the body to kituni village. This he did on instruction of the 2<sup>nd</sup> Respondent. After dinner at 2<sup>nd</sup> Respondent's house Mr. Musakali discussed the program for next day and at about 11.00p.m. he organized transport for the visitors and he too left for his home at about 11.30p.m. leaving Hon. Kombo at his home.

We have given brief summary of evidence adduced before this court and we wish to analyze and make our conclusions arising there from. We appreciate the assistance of counsel appearing to the parties. This petition is based on the ground only that there was administration of traditional oath known in Kibukusu as "khulia silulu".

We must start with ascertaining the existence of such a oath among the bukusu people. As far as the petitioner and his witnesses are concerned this traditional oath of "khulia silulu" does not only exist but it was also performed on 25<sup>th</sup> December 1992 at the home of Mr. Ben Wafula at wabukhanyoni village. Five witnesses (Elly Khamala Wanyama, Simon Biret Wawire, Ben Simiyu Laini, Frojas Wamalwa Mulongo and Patrick Taabu Posta ) explained in detail how the oathing ceremony was conducted. The 2<sup>nd</sup> Respondent called two expert witnesses to testify on this matter. These were Prof. Simiyi Wandiba (2RW5) and Fernandes Ndiera Mabongo (2RW6). These two witnesses were of the view that there is a ceremony called "khulia silulu" among the Bukusu people but these witnesses dismissed what is alleged to have taken place at Ben Wafula's home as a sham. They pointed out that the animal used in a proper ceremony is not a ram but a goat. Then they said that "khulia silulu" ceremony is performed in broad day light and never at night. It was their evidence that "khulia silulu" is trial by ordeal and not

a ceremony meant to bind people to do something in future.

Arising from what we heard from all the witnesses on this issue of “khulia silulu” we are satisfied that a ceremony known as “khulia silulu” indeed exist among the Bukusu. This is a traditional ceremony which is still practiced. Indeed the elderly man Fernandes Ndiera Mahonga stated that he had performed several ceremonies of this nature. The latest he performed was in June, 1994 at the home of a Chief Fredrick Wamalwa of North Bukusu.

We now move to the most crucial part of this judgment and that is to determine whether Hon. Kombo (2<sup>nd</sup> Respondent) caused to be administered the traditional oath taking ceremony of “khulia silulu.” We have two versions before us and we have set out evidence adduced by both sides. There is the version by the petitioner who relied on evidence of his five witnesses. These witnesses gave graphic explanation of what took place at the home of Ben Wafula. The 2<sup>nd</sup> Respondent on his part gave detailed explanation of his movement on 25<sup>th</sup> December 1992 showing how it was impossible for him to have participated in a ceremony he termed “repulsive, repugnant, and against his personal morals and norms.” It was the 2<sup>nd</sup> respondent’s contention that what the petitioner and his witnesses told this court were mere allegations fabricated to lend credence to an election petition which has no factual basis or foundation. On our own part we would say that allegations of administration of traditional oath is extremely serious since if this court accepts the petitioners version then the 2<sup>nd</sup> Respondent would not only lose his parliamentary seat but would be disqualified from offering himself as a candidate in a subsequent by-election. For that reason we had to treat the evidence of the petitioner and his witnesses with great care. Mr. Orengo for the 2<sup>nd</sup> Respondent invited us to treat the evidence of these witnesses with caution. We agree with Mr. Orengo’s observation that the more serious the charge the surer the court must be. We have considered the decisions in election petition No.26 of 1979: Nicholas Wanyama Okada vs Moffat Kamau Mburi Mugwe and James Charles Nakhwanga Osogo and Election petition No.7 of 1983. Yuda Komoro vs Israel Lekwa Ddaiddo and Mbuo R. Waganagwa which were on traditional oathing ceremonies. In election petition No.7 of 1983: Yuda Komoro (Supra) the court said:-

“If the allegation is proved to the satisfaction of those who hear the evidence then the consequences automatically follow. But the above passages indicated that the courts are so conscious of the disastrous effect of stigmatizing a party with a serious allegation that they will examine the evidence in support of it with the utmost care, which is what we have done in our treatment of the oathing witnesses which follows in this judgment remembering that in these and the other allegations the burden of proof throughout rests on the petitioner and that we can only hold that the petition succeeds in any respect if that burden has been satisfactory discharged. ”

Coming back to our present petition can it be said that the petitioner has discharged the burden of proof in respect of this serious allegation of oathing ceremony" The second respondent has explained how he moved from Chebosi Salvation Army Church in the morning of 25<sup>th</sup> December 1992 then visited Misikhu hospital and friends Lugulu hospital before retiring to his house in Webuye for dinner. He was with his campaign manager John Wanjala Musakali (2RW12) the whole day. John Wanjala Musakali (2RW12) supported the evidence of 2<sup>nd</sup> respondent on how they moved on that material day. It is the 2<sup>nd</sup> Respondents case that there is no way he could have participated in the ceremony of “khulia silulu.” at the home of Ben Wafula as from 8.00p.m. on 25<sup>th</sup> December 1992. But the five witnesses (Elly Khamala Wanyama, Simon Biret Wawire, Ben Simiyu Laini, Frojas Wamalwa Mulongo and Patrick Taabu Posta ) for the petitioner were adamant that this took place and it was for the benefit of Hon. Kombo (2<sup>nd</sup> Respondent) these witnesses were of the view that it was this ceremony which contributed towards towards Hon. Kombo’s success in the parliamentary election for Webuye constituency seat.

The five witnesses (PW2, PW3, PW4, PW5, and PW6) were subjected to intense cross-examination by experienced lawyers but these witnesses remained unshaken. PW2 went as far as confirming he had been administering oaths to prominent politicians even before 1992. we have carefully considered the evidence of 2<sup>nd</sup> Respondent and his witnesses regarding his movements on 25<sup>th</sup> December 1992 and we find that he was unable to account for his movements as from 8.00p.m. until midnight. This was a crucial period. The oathing ceremony is said to have taken

place in the evening of 25<sup>th</sup> December 1992 as from 8.00p.m when Hon. Kombo (2<sup>nd</sup> Respondent) arrived in two vehicles. He greeted the people in the compound and then entered the house where the ceremony was to take place. He is said to have remained there until 11.10p.m. In his own evidence 2<sup>nd</sup> Respondent said he was at his house as from 8.00p.m. until he went to bed. His campaign manager supported him. Although we were told there were some visitors in 2<sup>nd</sup> Respondents house that evening none of these visitors was called as a witness. Against this we have evidence of five witnesses (PW2, PW3, PW4, PW5, and PW6) who testified to the effect that they saw the 2<sup>nd</sup> respondent at the home of Ben Wafula that evening as from 8.00p.m each witness described in his own way how the ceremony was conducted.

We saw and heard the five witnesses (PW2, PW3, PW4, PW5, and PW6) give evidence and these witnesses struck us as simple straightforward rural men hardly capable of concocting or maintaining a made up story of this nature. We found it a little surprising that none of the 2<sup>nd</sup> Respondents advocates cross-examined PW2 and PW3 on what went on inside the house. Something must be said about Dr. Wambani's evidence as regards any marks on Hon. Kombo. It should be remembered that the oathing ceremony is said to have taken place on 25<sup>th</sup> December 1992. we were not told how deep the cuts on Hon. Kombo's chest and back were. The advocates appearing for 2<sup>nd</sup> Respondent did not cross-examine the two witnesses on this matter. Then we have Dr. Wambani (2RW10) who is not a skin specialist but a general practitioner examining Hon. Kombo on 12<sup>th</sup> September 1994 almost two years after the incident. All we can say is that it is not surprising that Hon. Kombo had no marks or scars since from the explanation given by PW2 and PW3 Hon. Kombo was not being assaulted but merely treated and hence the cuts were not likely to be deep. We shall say no more on that point.

We would also like to say that although Benjamin Wafula Sahani (2RW7) and his son Douglas Murefu Wafula (2RW11) were called as witnesses they impressed us as evasive in their evidence. Each of them talked of being alone the whole day of 25<sup>th</sup> December, 1992. They visited nobody and nobody visited them. We found them untruthful witness.

Going back to the ceremony of "khulia silulu." It was suggested by Prof. Wandiba (2RW5) and Fernandes Ndiera Mabonga (2RW6) that what was described by the petitioner's witnesses was not in conformity with the actual ceremony. To this we can do no more than quote what was said in Election Petition No. 6 of 1979: Kiano v. Matiba and Another and quoted in Election Petition No. 26 of 1979: Nicholas W. Okada vs. M.K Mugwe and Osogo:-

"As we have said in another case however the authenticity of oath is irrelevant. A candidate wishing to bind people to vote for him would not necessarily follow strictly the procedure of a well known traditional oath. All he requires is something which will sufficiently resemble a traditional oath to influence voters and perhaps at the time confuse the police and administrative officers."

We are satisfied that a traditional ceremony called "khulia silulu." Or something akin to it took place on 25<sup>th</sup> December, 1992 as from 8.00p.m. at the home of Ben Wafula of Wabukhonyi village as described by the five witnesses (PW2, PW3, PW4, PW5, and PW6) for the petitioner. Before we conclude this judgment we wish to say something about Elly Khamala Wanyama (PW2) Simon Bilet Wawire (PW3) and the petitioner Joseph Maloba Elima (PW1) described himself as a herbalist and traditional circumciser Wanyama (PW2) and Wawire (PW3) stated that they were witchdoctors. They also said that they are licensed to practice traditional medicine by the government. These witnesses could not be licensed to practice witchcraft since they cannot be licensed to do that which is prohibited by law (witchcraft Act – cap 67). We would like to think that they are herbalist or traditional medicine men. It would appear that the line between traditional healers and witchdoctors is not very clear. But we shall leave that to the Hon. Attorney General to investigate.

In conclusion we are on the view that having considered all the evidence before us and having been satisfied by the evidence adduced by the petitioner and his witnesses as regards the ceremony of "khulia silulu." We find that the

2<sup>nd</sup> Respondent indeed participated in that ceremony. His intention was to bind voters to vote for him during the general election. We are satisfied and find that 2<sup>nd</sup> Respondent is guilty of having committed the offence of undue influence under section 9 of the Election Offence Act (cap 66 laws of Kenya) this petition is therefore allowed and the election of 2<sup>nd</sup> Respondent as Member of Parliament for Webuye Constituency nullified. Costs of the petition awarded to the petitioner and 1<sup>st</sup> Respondent.

Under Section 31(1) of National Assembly and Presidential Election Act (cap 7 laws of Kenya) we shall report in writing to the speaker that election offence contrary to section 9 of the Election Offences Act has been proved and has been committed by the 2<sup>nd</sup> Respondent

Order accordingly

Delivered at Nairobi this 17<sup>th</sup> day of November, 1994

E.O'OKUBASU

JUDGE

G.P. MBITO

JUDGE

J.W. MWERA

JUDGE



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