THE ALL-KENYAN MOOT COURT COMPETITION

10th EDITION (2022)

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THE MOOT CATEGORY COMPROMIS

Dates:

Venue: KENYATTA UNIVERSITY SCHOOL OF LAW PARKLANDS CAMPUS

Theme: ELECTORAL JUSTICE; BUILDING A SYSTEM THAT ADHERES TO THE RULE OF LAW

REPUBLIC OF MBWAKNI

IN THE HIGH COURT AT WARAZI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 10 OF 2022

IN THE MATTER CONCERNING THE ALLEGED VIOLATION OF THE CONSTITUTIONAL RIGHT TO FREE,FAIR AND REGULAR ELECTIONS BASED ON UNIVERSAL SUFFRAGE.

BETWEEN

KUTESA HUMAN RIGHTS COMMISSION…….PETITIONER

VERSUS

ATTORNEY GENERAL…… 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE……. 2ND RESPONDENT

OMONDI TIMON……. INTERESTED PARTY

1. The Republic of Mbwakni is situated on the Eastern side of the Nauwo continent. Its capital city is Warazi which is the most developed county. It is bordered by Machozi in the north, Taratibu in the south and Vita and Maskini in the east and west respectively. Mbwakni has a Gross Domestic Product (GDP) of approximately 95.5 Billion USD and an economic growth rate of 2.5 per cent per annum. Mbwakni has a population of approximately 48 million, according to the census conducted in 2019 by the Mbwakni National Bureau of Statistics (MNBS).
2. Mbwakni is a Presidential Representative Democratic Republic. Elected officials represent the people with the president as the head of state and government. There is a devolved system of government with 47 counties governed by democratically elected leaders. Mbwakni is a multi-ethnic society with 42 tribes distributed in the 47 counties.
3. Mbwakni is a member of the **United Nations, World Bank, COMESA** and a party to **International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Nauwo Charter on Human and People's Rights (NCHPR), Nauwo Charter on Democracy, Elections and Governance (NCDEG)** and **United Nations Convention Against Corruption (UNCAC).**

4. Prior to the 2010 constitution, elections in Mbwakni had been characterized by violence, clashes between communities supporting different political parties, displacement and so on. This was due to political contests that saw the use of constitutional amendments to win political battles.

5. In 1982, the constitution was amended to make Mbwakni a one-party state. The response to this was a coup by the armed forces to overthrow the government. At this time, the country used the ***mlolongo method*** of voting. Candidates used this opportunity to intimidate voters who did not vote for them. The constitution was amended again to allow citizens to form alternative political parties.

6. In 2007, the world became aware of the risks involved in Mbwakni election. There has always been a turn to violence but the violence following the 2007 poll was unprecedented. This registered the highest number of deaths in history. The Electoral Commission of Mbwakni (ECM) was pressured to announce results even before tallying was complete. It was noted the election was flawed and ECM had failed to establish the ' *credibility of the tallying process to the satisfaction of all parties and candidates'* . The country had 'real concerns' about elections, a situation that called for the 2010 constitutional amendment. The ECM was later disbanded and replaced by the Electoral Board Commission.

7. Mbwakni established its Electoral Body (Electoral Board Commission) in 2011 which supervises the elections and referenda in the country. Parliament has

enacted substantive legislation governing the electoral process which include *inter alia,* The Constitution of Mbwakni, 2010; The Elections Act, 2011; The Political Parties Act, 2011 and The Electoral Board Commission Act, 2011. All these laws are analogous to those of Kenya.

8. In August 2019, the Cabinet Secretary for Health announced the outbreak of a contagious disease referred to as Wuhan-19. Several patients who had been diagnosed were in critical conditions and 10 of them had died. In mid September 2019 the government adopted measures with the hope of containing the disease to no avail. Wuhan-19 was declared a public health emergency on 29 October 2019. By April 2020, the death toll had risen to 4,635 with 233,000 confirmed cases.

9. At this time, the elections were fast approaching. The Electoral Board Commission Chairperson, Mr. Sheria called for a press conference in May, two months before the general election, and stated as follows;

'Owing to the fact that infection cases of Wuhan-19 increase everyday and the violence related with elections, it has been decided that the only safer way that elections can be carried out is through voting online. It is for these reasons that we introduce E-Voting that will be carried out through the government's website. This platform requires everyone to have a national ID so as to register themselves as voters before they avail themselves at the polling stations for elections. We assure every citizen that they will get

to be taken through the process and be taught the basics before the elections.'

10. Mr. Sheria's speech raised a controversial debate in Mbwakni with others questioning how it will be possible for citizens to vote online. The next 2 months prior to elections, Mbwaknians were taken through the basics of E-Voting. E-voting is a Biometric Voter Registration System (BVRS). It consists of a laptop, fingerprint scanner and a camera that captures an individual's fingerprints, facial features, gender and identification number. These would be aired live in Mbwakni's No.1 channel, Mbogi Media Services every evening from 7.00pm. The same would be repeated everyday at 1.00 p.m. in various TV and Radio Stations.
11. The Campaigning period started off at full tilt. Despite the government's ban on public gatherings due to the spread of wuhan-19, Aspirants were seen persuading voters in rallies in various counties and constituencies while targeting areas where the youth were situated. With the surge in the use of technology, aspirants also used social media tools including websites, whatsapp, twitter, Instagram among others.
12. The most sustained and zealously pursued campaigns were witnessed in Warazi County. Ndovu Kuu and Omondi Timon, were the rival aspirants for the gubernatorial seat therein. In one of his rallies, Ndovu Kuu raised concerns regarding the credibility of upcoming elections. "*We shall defeat these people even when they decide to have their friends and relatives in the electoral commission. We shall*

fight for our rights. Dear Citizens, let us not allow them to infringe your right to vote and to corrupt the system. We must be seen!" He was heard saying.

13. Shortly after his speech, enraged youth rioted and protested against the alleged conflict of interest. Roads were blocked and valuable amounts of property destroyed as they threw stones at police and set fire to an EBC voter registration centre. Eventually, the police were able to take control of the situation and a few of the youth that vandalised property were arrested.
14. About a week before the elections, Mr. Mwaminifu, the deputy IT manager for Mbwakni's EBC, appeared in a television interview concerning the upcoming elections. He was responsible for designing the electronic system to ensure a fair and accurate vote. "*I would like to assure all citizens of Mbwakni that the elections will be transparent, open and accountable."* He was heard saying on the Mbogi Media Services show dubbed, 'Mwananchi'. He also showed confidence in the new system that used biometric identification to prevent people from voting twice, provided polling updates every three hours, and had chosen the strongest wireless network through which the results would be sent.
15. A few days later, concerns were raised as to the whereabouts of Mr. Mwaminifu. Family members reported that they had not been in touch with him since a day after the interview. A missing person's report was made at the police station and investigations started.

16. On July 29th, 8 days before the election, Mr. Mwaminifu's body was found in a forest about 12 miles northwest of Warazi Town. Police reports indicated that he had suffered several cuts to his arm and other signs of torture. A few protests arose with the Director of Criminal Investigations assuring that the perpetrators of Mr.Mwaminifu's gruesome murder would be found and brought to book.
17. On the day of elections, 85% of voters participated in the elections- a notably high turnout compared to the preceding elections. However, it was marred with certain discrepancies. In some polling stations the Biometric Voter Registration [BVR] kits failed to work at the start of voting and instead the manual register was used. It was not clear whether the election staff had negligently failed to charge the kits or that the kits in fact malfunctioned.
18. In Warazi county, two polling stations were moved from their gazetted areas to non-gazetted areas, which had a detrimental effect on the voter turnout. A survey conducted by the Mbogi Centre for Democracy[MCD] indicated that this had led to about 24% of citizens not being able to access the polling stations. Many voters including the older members of the society and persons living with disability had required assistance from the presiding officers but there was alleged intimidation of voters. Adittionally, some of Ndovu Kuu's campaigners and agents were also seen handing out bags of flour and money to youth in some polling stations.

19. The polling stations across the state of Mbwakni closed at 6 pm, but in Warazi County, those who were still in the queue were allowed some latitude. Thereafter, counting of the votes began immediately. However, the electoral board commission directed that all the agents leave the tallying center to avoid overcrowding, which has been touted as a recipe for the spread of Wuhan-19. Despite the protests by the agents, they were barred from accessing the tallying center, yet the votes were tallied, and results were subsequently announced in their absence.

20. Ndovu Kuu was declared the governor-elect of Warazi County in the morning, after garnering 78562 Votes, whilst his competitor had 31452 Votes. This saw a lot of excitement emanate from his supporters. They took to the streets to celebrate their victory. However, Mr. Omondi Timon, the losing candidate, contended that the results were rigged and that the Electoral Board commission manipulated the electoral system to his detriment, mainly because the agents were barred from over-sighting the tallying process. He mobilized three hundred youths, who were his supporters. He reportedly gave them three hundred shillings each, with instructions to picket on the streets and fight the supporters of Ndovu Kuu, who were still celebrating.

21. This situation created a lot of tension in Warazi City. The uncertainty was compounded by the spread of propaganda between Mr. Omondi Timon and Mr.

Ndovu Kuu. For three days after the declaration of results, violence erupted in the city. The supporters of Omondi Timon looted shops, destroyed property, and lit a fire on major highways to block access to the City's Central Business district. Many people were thus unable to open their businesses due to the wanton looting conducted on their premises.

22. This situation prompted the minister of Internal Security to deploy about 1500 police officers and directed them to act decisively to remedy the situation. The police became quite vicious in their undertakings because they deployed teargas canisters on the protesters, with a view of containing them. 7 people were reportedly clobbered by the police for adamantly refusing to stop shouting at the Police.

23. On the 4th Day of the protest, police raided Ufukara Constituency, where a crowd was gathering to start the demonstrations. One police officer arbitrarily shot in the air to disperse the crowd. Unfortunately, Matatizo was killed by a stray bullet while playing with his friends on the balcony. This sparked more demonstrations, as people demanded that the police should shelve their excessive conduct. The demonstrators accosted the police with stones, and spears, threatening to avenge Matatizo's death.

24. Later that evening, a raid was conducted on people's homes, where police officers assaulted Mama Amani, one of Ufukara's residents. They severely

injured her baby, Amani, who she was carrying on her back. Unfortunately, Baby Amani Succumbed to the head injury as she was being rushed to the hospital.

25. Meanwhile, due to public outcry and the delayed police investigations regarding the murder of Mr Mwamifu, Mbogi Media Services through their 'Mwananchi TV Station conducted investigations into his death. This was done through interviews with members of his family, workmates and people who had last been seen with him. They then initiated a documentary dubbed 'who killed Mwaminifu' that was disseminated to the public.
26. The documentary revealed that Mr.Mwaminifu in the months leading up to his death had received abusive threats that he had reported to the police. Unfortunately, nothing was done for him. Additionally, it came to light that there had been inconsistencies in the police version of events leading up to his gruesome murder that was a major pointer to why it had not been resolved. " *The leading clues were so many and yet not one of the suspects has been arrested and brought in for questioning. It goes on to show that the investigations were probably leading to the 'untouchable' in the government and therefore the reason for the delay"* One of the interviewees, a former colleague and government employee, was heard saying.
27. Shortly after this information was relayed to the public, the journalists involved in the documentary and the Mwananchi TV show was threatened with the revocation of their licences unless they brought down the documentary from

their website. Upon their failure to do so, the government went on to shut down the media station claiming that the allegations made were false, without evidence and were damaging the government's reputation.

28. Aggrieved by this situation, Kutesa Human Rights Commission, after consultations with the families of the victims, have filed a petition at the High Court at Warazi. Mr Omondi Timon has successfully requested to be joined as an interested party in this suit. The petition is asking the court to adjudicate on the following issues;

a) **Whether the political rights of the people of Mbwakni were denied, infringed, and/or violated.**
b) **Whether the irregularities committed before and after the elections vitiated the credibility of the entire process.**
c) **Whether the shutting down of Mbogi Media services violated their freedom of expression and the media.**
d) **Whether the police breached their constitutional and International obligations with respect to protection of human Rights.**

Aside from the merits, participants should also prepare submissions on jurisdiction and locus standi.