IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2026/HP/EP/037

IN THE MATTER OF:	THE PARLIAMENTARY ELECTION PETITION FOR WUSAKILE CONSTITUENCY SITUATE IN THE KITWE DISTRICT OF THE COPPERBELT PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON 13TH AUGUST, 2026
IN THE MATTER OF:	ARTICLES 73 (1) OF THE CONSTITUTION OF ZAMBIA AS READ WITH SECTION 98 (C) OF THE ELECTORAL PROCESS ACT NUMBER 35 OF 2016
IN THE MATTER OF:	SECTION 83 OF THE ELECTORAL PROCESS ACT No. 35 OF 2026
IN THE MATTER OF:	SECTION 97 OF THE ELECTORAL PROCESS ACT No. 35 OF 2016
IN THE MATTER OF:	SECTIONS 98, 99 AND 100 OF THE ELECTORAL PROCESS ACT No. 35 OF 2016;
IN THE MATTER OF:	THE SCHEDULE TO THE ELECTORAL PROCESS ACT No. 35 OF 2016
IN THE MATTER OF:	THE ELECTORAL (CODE OF CONDUCT) REGULATIONS OF 2011 STATUTORY INSTRUMENT 52 OF 2022
IN THE MATTER OF:	THE ELECTORAL COMMISSION ACT No. 25 OF 2026

BETWEEN:

KATAYI CHIBESA	PETITIONER
AND	
KALOBO PAVYUMA	1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
07 SEP 2026
PRINCIPAL REGISTRY 6
P.O. BOX 50067, LUSAKA

1ST RESPONDENT'S
ANSWER TO THE PETITION

The 1st Respondent, ***KALOBO PAVYUMA,*** in answer to the Petition responds as follows:

1. As to paragraph 1 of the Petition, the same is a matter peculiarly within the knowledge of the Petitioner, and the 1st Respondent neither admits nor denies the same and puts the Petitioner to strict proof thereof.

2. Paragraph 2 of the Petition is admitted as correct.

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3. Paragraph 3 of the Petition is denied. The 1st Respondent avers that there was no violence in the Wusakile Parliamentary Constituency, whether affecting the said Constituency or otherwise, during the campaign period or the General Elections held on 13th August, 2026, and the Petitioner is put to strict proof thereof.

4. As to paragraph 4 of the Petition, it is admitted that five (5) candidates validly contested the Wusakile Parliamentary Constituency seat, namely Chibesa Katayi (UPND), Pavyuma Kalobo (NRPUP) – the 1st Respondent herein, Mumba Ernest (Citizens First), Kamboyi Ricky and Chizinga F. Noah, the last-named two (2) candidates having stood and contested as independent candidates.

5. Paragraph 5 of the Petition is denied in its entirety. The 1st Respondent avers that at no material time did he or his campaign team clash with the Petitioner or the Petitioner's campaign team, that his campaign was at all times conducted strictly in accordance with the campaign timetable issued by the 2nd Respondent, and the Petitioner is put to strict proof of the allegations contained therein, including the alleged police reports.

6. The allegations contained in paragraph 6 of the Petition are false and are denied in their entirety. The 1st Respondent avers that at no time did he engage, deploy or put forward any persons to bully, threaten or intimidate any voter or member of the public, and the Petitioner is put to strict proof thereof.

7. Paragraph 7 of the Petition is denied and is not true. The Petitioner is put to strict proof of the allegations contained therein.

8. Paragraph 8 of the Petition is denied. It is not true that the 1st Respondent, at any point, engaged in vote buying or voter manipulation, or that agents canvassed on his behalf after the close of campaigns, and the Petitioner is put to strict proof thereof.

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9. Paragraph 9 of the Petition is denied and is not true. The Petitioner is put to strict proof thereof.

10. Paragraph 10 of the Petition is denied. The 1st Respondent avers that there is no video recording, or any other evidence, in which he declared himself winner of the Wusakile Parliamentary Constituency seat, and the Petitioner is put to strict proof thereof.

11. The 1st Respondent makes no comment on paragraph 11 of the Petition and puts the Petitioner to strict proof thereof.

12. As to paragraph 12 of the Petition, the particulars pleaded thereunder are denied as follows:

    (a) It is denied that the 1st Respondent clashed, attacked or had any confrontation with the Petitioner or any other candidate at any time, including on or about 23rd June, 2026 in Chibote Ward, or at all, and the Petitioner is put to strict proof of the alleged police report. The 1st Respondent shall aver at trial that his campaigns were according to the ECZ time table and the campaigns were conducted peacefully without causing any trouble to the Petitioner or indeed any other candidate and their supporters.

    (b) It is not true, and it is denied, that the 1st Respondent at any point placed any agents or persons at strategic points around any polling station to intercept guide or bribe voters, and the Petitioner is put to strict proof thereof. The 1st Respondent shall on trial aver that the 1st Respondent was never at any polling station as after casting his vote he left for home and started waiting for results to be announced.

    (c) It is not true and is denied, and the Petitioner is put to strict proof thereof. The 1st Respondent shall at trial aver that all his supporters and campaign team were never assigned to do anything on the polling day in relation to the elections and that if

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anyone did anything that is being alleged the same was done without the knowledge, consent or approval of the 1st Respondent or the 1st Respondent's agents.

(d) It is not true and is denied, and the Petitioner is put to strict proof thereof. The 1st Respondent shall on trial repeat the contents of the preceding paragraph herein.

(e) It is not true and is denied, and the Petitioner is put to strict proof thereof. The 1st Respondent shall at trial aver that the 1st Respondent never assigned anyone to do anything on the polling day in relation to the elections and that if anyone did anything that is being alleged the same was done without the knowledge, consent or approval of the 1st Respondent or the 1st Respondent's agents.

13. Paragraph 13 of the Petition is denied. The 1st Respondent avers that no acts of illegality or malpractice, whether as alleged or at all, occurred in any of the said wards or elsewhere within the Constituency, and the Petitioner is put to strict proof thereof.

14. Paragraph 14 of the Petition is denied. The 1st Respondent avers that there was full compliance with the Electoral Process Act and the Electoral Code of Conduct throughout the campaign and voting process by himself and his sponsoring party, the NRPUP.

15. Paragraph 15 of the Petition is denied. The 1st Respondent avers that the declared result was not affected by any malpractice, as none occurred.

16. Paragraph 16 of the Petition is denied. The 1st Respondent avers that no intimidation of voters or vote buying, whether as alleged or at all, took place in the said wards or the Constituency generally.

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17. Paragraph 17 of the Petition is denied. The 1st Respondent avers that no ward within the Constituency, or any part thereof, was affected by any irregularity as alleged.

18. Paragraph 18 of the Petition is denied. The 1st Respondent avers that the quality and integrity of the elections in Wusakile Constituency were not compromised in any manner.

19. Paragraph 19 of the Petition is denied. The 1st Respondent avers that his polling agents at all material polling stations were duly accredited by the 2nd Respondent, and the Petitioner is put to strict proof of the allegations therein. The 1st Respondent shall at trial aver that if what is alleged happened then the same was done without the 1st Respondent's knowledge and consent or approval.

20. Paragraph 20 of the Petition is denied. The 1st Respondent avers that at no point did he declare himself winner of the Wusakile Parliamentary Constituency seat and the Petitioner is put to strict proof thereof.

21. Paragraph 21 of the Petition is denied. The 1st Respondent avers that he did not, at any time, announce or declare himself winner, and accordingly the premise of paragraph 21 is denied, unsubstantiated and an imagination.

22. As to paragraph 22 of the Petition, it is admitted that the Returning Officer declared the 1st Respondent duly elected as Member of Parliament for Wusakile Constituency, save that the 1st Respondent denies that the declaration was made on or about 17th August, 2026. As to the remainder of the paragraph, the 1st Respondent avers that the conduct of the counting and totaling process, and whether or not to permit a recount, was a matter entirely within the powers of the 2nd Respondent and not the 1st Respondent, and the 1st Respondent is accordingly not in a position to admit or deny the same and puts the Petitioner to strict proof thereof.

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23. As to paragraph 23 of the Petition, the 1st Respondent makes no comment as to why the Petitioner's agents did not sign the GEN 20 form, this being a matter between the Petitioner and the 2nd Respondent, and puts the Petitioner to strict proof thereof.

24. The 1st Respondent makes no comment on paragraph 24 of the Petition, this being a matter between the Petitioner and the 2nd Respondent. And the 1st Respondent shall at trial aver that the election in Wusakile Constituency were substantially conducted according to law.

25. Paragraph 25 of the Petition is admitted as correct.

26. Paragraph 26 of the Petition is denied. The 1st Respondent shall at trial aver that he was validly elected as Member of Parliament for Wusakile Constituency in the General Elections held on 13th August, 2026. The 1st Respondent shall further aver that the Petitioner is not entitled to any relief being sought or at all and that the petition lucks merit and should be dismissed with costs to the 1st Respondent.

27. The 1st Respondent shall aver at trial that he did not participate in, authorize or sanction any of the alleged violations of the Constitution or the Electoral Process Act, or any acts of corruption, bribery or intimidation alleged by the Petitioner. The 1st Respondent shall further aver that voters in Wusakile Constituency exercised their right to vote freely and without inducement, intimidation or undue influence and that no voter was prevented from voting for a candidate of his or her choice. The 1st Respondent shall further aver that the election in Wusakile Constituency was conducted in substantial conformity with the law.

28. The 1st Respondent shall further aver at trial that, contrary to the allegations contained in the Petition, it was the Petitioner who engaged in electoral malpractices, corruption and acts of intimidation and who sought to scandalize the 1st Respondent and his party NRPUP by calling

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him and the party *'ba pompwe'* meaning *"thieves"* and create hostility against him for the Petitioner's electoral advantage.

29. The 1st Respondent shall contend that the Petition discloses no sufficient constitutional, statutory or factual basis upon which the 1st Respondent's election as Member of Parliament for Wusakile Constituency may lawfully be invalidated.

30. The 1st Respondent shall further contend that the burden of proving the allegations contained in the Petition rests upon the Petitioner and that the Petitioner has failed to plead and establish material facts sufficient to support the reliefs sought.

31. The 1st Respondent shall further aver at trial that neither the 1st Respondent nor his agents engaged in any of the acts alleged in the Petition. In the alternative, and without prejudice to the foregoing, if any agent of the 1st Respondent engaged in any corrupt practice, illegal practice or other misconduct in connection with the election, which is denied, such conduct was undertaken without the 1st Respondent's knowledge, consent, authorization or approval and that such conduct was neither widespread nor of such a nature or extent as to have prevented, or been likely to prevent, the majority of voters in the Wusakile Constituency from freely electing the candidate of their choice.

32. The 1st Respondent shall further aver at trial that the Parliamentary Election for Wusakile Constituency held on the 13th August, 2026 was conducted in substantial conformity with the Constitution of Zambia, Chapter 1 of the Laws of Zambia, the Electoral Process Act No. 35 of 2016 and all other applicable laws. The 1st Respondent shall further aver that no voter in Wusakile Constituency was unlawfully prevented, restricted or otherwise impeded from voting for a candidate of his or her choice.

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33. WHEREFORE, the 1st Respondent shall contend that the Petition is devoid of merit and the reliefs set out in paragraph 26 of the petition are untenable and the petition ought to be dismissed, with costs, and that the Respondent's election as Member of Parliament for Wusakile Constituency be upheld.

.....
Respondent

Dated at Lusaka this ..... day of 2026

Settled by: _____

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Advocates for the 1st Respondent

To:

The Petitioner
c/o Messrs. L. M. Chikuta Legal Practitioners
Plot No. 4880, Elm Road
Woodlands, P.O. Box RW 50896
Lusaka, Zambia.

And To:

The 2nd Respondent
The Electoral Commission of Zambia
Haile Selassie House
P.O. Box 50274
Lusaka, Zambia.

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
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(Civil Jurisdiction)

2026/HP/EP/037

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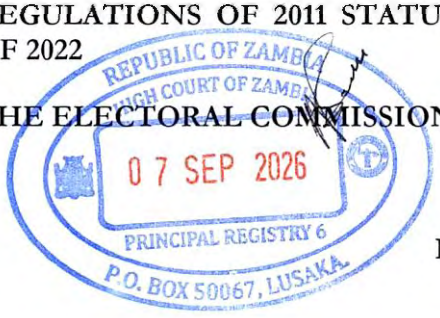

BETWEEN:

KATAYI CHIBESA — PETITIONER

AND

KALOBO PAVYUMA — 1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT

1ST RESPONDENT'S SKELETON ARGUMENTS

Cases Referred to:

1. Lewanika & Others vs. Chiluba (1998) ZR 79
2. Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017
3. Margaret Mwanakatwe v Charlotte Scott, Selected Judgment No. 50 of 2018

These Skeleton Arguments were prepared and filed in by Messrs James & Doris Legal Practitioners 9th Floor Premium House Independence Avenue, P.O. Box 34302 Lusaka and email: jamesdoris.lus@gmail.com

Legislation Referred to:

Section 97, 98 and 99 of the Electoral Process Act N0. 35 of 2016

These Skeleton Arguments were prepared and filed in by Messrs James & Doris Legal Practitioners 9th Floor Premium House Independence Avenue, P.O. Box 34302 Lusaka and email: jamesdoris.lus@gmail.com

May it please this Honorable Court.

1.0 Introduction

1.1 These are Skeleton Arguments filed in by Messrs. James & Doris Legal Practitioners for and on behalf of Mr. Kalobo Pavyuma, the 1st 1st Respondent in this matter, in fulfilment of Rule 10 (2) (b) of the High Court (Election Petition) Rules, Statutory Instrument No. 31 of 2026 of the Electoral Process Act No. 35 of 2016.

1.2 On the 31st August, 2026 the Petitioner filed into this court this petition challenging the election of the 1st Respondent herein. The Petitioner has alleged in the Petition that the 1st Respondent and his agents engaged in violence, bullying, bribery, intimidation corruption and illegal practices, during and after elections contrary to part VIII of the Electoral Process Act No. 35 of 2016 in that, according to the Petitioner, the 1st Respondent and his agents, allegedly involved themselves in bribery, undue influence, threats, intimidation, violence, and that they conducted campaigns at polling stations on the voting day in all the wards of the constituency.

1.3 In support of the said allegation the Petitioner filed an Affidavit verifying facts in the petition.

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1.4 The 1st Respondent hereby strongly and vehemently opposes the petition on the ground that the petition lacks merit, that the reliefs being sought are not tenable at law and that 1st Respondent was validly elected by the voters in the Wusakile Constituency.

1.5 The 1st Respondent argues that the Petitioner has failed to show that ***a corrupt practice, illegal practice or other misconduct was committed in connection with the election —***

(i) by the 1st Respondent; or

(ii) by any other person, with the knowledge and consent or approval of the 1st Respondent or of the 1st Respondent's election agent or polling agent;

and that consequent thereof, the majority of voters in Wusakile constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.

1.6 Further it is our contention that there was substantial compliance with the provisions of the Electoral Process Act in the conduct of the election relating to Wusakile Constituency and that the election was conducted in accordance with the principles laid down in the

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provisions of the law and that if there were any non-compliance, such non – compliance did not affect the result of the election

1.7 It is further argued here that if there were any corrupt practice or illegal practice that were committed, we submit that such corrupt practice or illegal practice was not committed by the 1st Respondent personally or by 1st Respondent's election agent, or with the knowledge and consent or approval of the 1st Respondent or the 1st Respondent's election agent.

1.8 It is further submitted that throughout the electoral process, the 1st Respondent and his election agent took all reasonable means to prevent the commission of any corrupt practice or illegal practice at the election and that in all other respects the election was free from any corrupt practice or illegal practice on the part of the 1st Respondent or the 1st Respondent's election agents.

1.9 It is also argued that the election that took place in Wusakile Constituency cannot be declared void by reason of any alleged act or omission by any election officer in breach of that officer's official duty in connection with the election as the election was conducted in a manner that was substantially in accordance with the provisions of the Electoral Process Act No. 35 of 2016 and that such acts or omissions did not affect the result of that election.

2.0 **The Law**

2.1 The burden of proof in an election petition lies upon the Petitioner. The standard of proof is different from that of an ordinary civil matter. The standard remains higher and distinct from that required in an ordinary civil matter, but lower than the standard of beyond reasonable doubt required in criminal matters.

2.2 Parliamentary election petitions are required to be proved to a standard higher than on a mere balance of probabilities and issues raised are to be established to a fairly high degree of convincing clarity. This position was stated in the case of **Lewanika & Others vs. Chiluba (1998) ZR 79** where the Supreme Court stated that:

> ***"Parliamentary election petitions are required to be proved to a standard higher than a mere balance of probabilities."***

2.3 Thus, as an established principle of law, in an election petition like in any other civil matter, the burden of proof lies with the Petitioner to prove any of the malpractices alleged to have been committed. The Burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matter that he who

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alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity.

2.4 Thus, it can be safely stated that election petitions require that the alleged malpractices are proved to a standard higher than on a balance of probabilities by petitioners. Therefore, it is common cause that the Petitioner's evidence must have weight and cogency to discharge the required burden.

2.5 Under section 97 (2) (a) of the Electoral Process Act No. 35 of 2016 it is provided that an election of a Member of Parliament, Mayor, Council Chairperson or Councilor can be voided only in two circumstances. These are;

i. where it is proved that a candidate, in connection with the election, has committed corrupt practices, illegal practices or any other misconduct: or

ii. where it is proved that some other person has committed corrupt practices, illegal practices or other misconduct and that such vices were committed with the knowledge and consent or approval of a candidate or his/her election agents or polling agents;

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and that because of proof of (i). or (ii). above, the majority of voters in a constituency were prevented from electing the candidate in that constituency whom they preferred.

2.6 Further, a reading of the provisions of section 97 (2) (a) of the Act clearly reveals that the election of a candidate as, Member of Parliament, mayor, Council Chairperson or Councilor can only be nullified if the person challenging the election of the candidate proves to the satisfaction of Court that the candidate in question personally committed a corrupt practice or illegal practice or other misconduct in relation to the election or that the corrupt practice or illegal practice or misconduct was committed by another person with the candidate's knowledge, consent or approval or that of the candidate's election or polling agent.

2.7 Where it is proved that a corrupt practice or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of the candidate's election or polling agent, the Petitioner must further prove that as a result of that corrupt or illegal practice or misconduct, the majority of the voters in the constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.

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2.8 It is not sufficient for a Petitioner to prove only that a candidate committed a corrupt practice or illegal practice or engaged in other misconduct in relation to the election without proof that the corrupt practice or illegal practice or misconduct was widespread and prevented or may have prevented the majority of the voters in the constituency from electing a candidate of their choice.

2.9 In the case of **Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017,** the Constitutional Court stated that:

> ***"The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater***

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number of registered voters were prevented or might have been prevented from electing their preferred candidate."

2.10 Therefore, it can safely be said that in order for a Petitioner to successfully have an election annulled pursuant to section 97(2)(a) there is a threshold to surmount. The first requirement is for the Petitioner to prove to the satisfaction of the court, that the person whose election is challenged personally or through his duly appointed election or polling agents, committed a corrupt practice or illegal practice or other misconduct in connection with the election, or that such malpractice was committed with the knowledge and consent or approval of the candidate or his or her election or polling agent.

2.11 Further, in addition to proving the electoral malpractice or misconduct alleged, the Petitioner has the further task of adducing cogent evidence that the electoral malpractice or misconduct was so widespread that it swayed or may have swayed the majority of the electorate from electing the candidate of their choice.

2.12 The Constitutional Court, in **Margaret Mwanakatwe v Charlotte Scott, Selected Judgment No. 50 of 2018**, found that the 1st 1st Respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the election

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by preventing the majority of the electorate from electing their preferred candidate and so rendered the election a nullity.

2.13 The above authorities aptly demonstrate the import of the majority provision under section 97 (2) (a) of the Act. It should be noted that a candidate is liable only for a corrupt or illegal act or other misconduct that he or she committed in connection with the election and those committed by his election agent or polling agents or those done with his or her knowledge, approval or consent.

2.14 We have also looked at the list of reliefs the Petitioner is seeking. To that end, we shall refer this court to section 99 of the Electoral Process Act No. 35 of 2016. Under the said provision, the law has stated what reliefs a court can grant in an election petition. And recount of votes is not one of the reliefs provided under the law.

3.0 **Conclusion**

3.1 Reading the Petition and its attendant affidavit verifying facts, and the law and authorities concerning this petition, it is so clear that there is no material upon which this court can nullify the election of the 1st Respondent.

3.2 Further, the relief being sought by the Petitioner of recount is not provided for by law as such that relief is not available.

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3.3 The Petition must therefore be dismissed with costs to the 1st Respondent.

We are most obliged.

Dated at Lusaka the day of 2026

Drawn By: .....

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Advocates for the 1st Respondent

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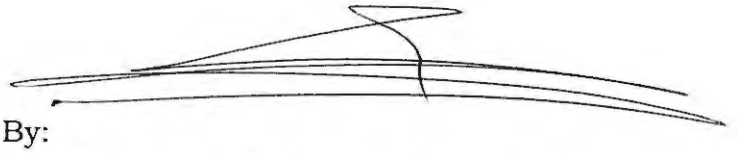
1st RESPONDENT'S LIST OF AUTHORITIES

Cases to be referred to:

1. Lewanika & Others vs. Chiluba (1998) ZR 79
2. Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017
3. Margaret Mwanakatwe v Charlotte Scott, Selected Judgment No. 50 of 2018

Legislation Referred to:

Sections 97, 98 and 99 of the Electoral Process Act No. 35 of 2016



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IN THE MATTER OF:	THE ELECTORAL COMMISSION ACT No. 25 OF 2026

BETWEEN:

KATAYI CHIBESA — PETITIONER

AND

KALOBO PAVYUMA — 1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT

REPUBLIC OF ZAMBIA
HIGH COURT
07 SEP 2026
PRINCIPAL REGISTRY 6
P.O. BOX 50067, LUSAKA

1st RESPONDENT'S COPIES OF AUTHORITIES

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IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2026/HP/EP/037

IN THE MATTER OF:	THE PARLIAMENTARY ELECTION PETITION FOR WUSAKILE CONSTITUENCY SITUATE IN THE KITWE DISTRICT OF THE COPPERBELT PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON 13TH AUGUST, 2026
IN THE MATTER OF:	ARTICLES 73 (1) OF THE CONSTITUTION OF ZAMBIA AS READ WITH SECTION 98 (C) OF THE ELECTORAL PROCESS ACT NUMBER 35 OF 2016
IN THE MATTER OF:	SECTION 83 OF THE ELECTORAL PROCESS ACT No. 35 OF 2026
IN THE MATTER OF:	SECTION 97 OF THE ELECTORAL PROCESS ACT No. 35 OF 2016
IN THE MATTER OF:	SECTIONS 98, 99 AND 100 OF THE ELECTORAL PROCESS ACT No. 35 OF 2016;
IN THE MATTER OF:	THE SCHEDULE TO THE ELECTORAL PROCESS ACT No. 35 OF 2016
IN THE MATTER OF:	THE ELECTORAL (CODE OF CONDUCT) REGULATIONS OF 2011 STATUTORY INSTRUMENT 52 OF 2022
IN THE MATTER OF:	THE ELECTORAL COMMISSION ACT No. 25 OF 2026

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INDEX TO 1st RESPONDENT'S COPIES OF AUTHORITIES

	DESCRIPTION	PAGE
1.	Lewanika & Others vs. Chiluba (1998) ZR 79	1 -75
2.	Jonathan Kapaipi v Newton Samakayi, CCZ Appeal No. 13/2017	76 - 137
3.	Margaret Mwanakatwe v Charlotte Scott. Selected Judgment No. 50 of 2018	138 - 230

4. Section 97 and 98 of the Electoral Process Act N0. 35 of 2016 231 -232

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1

AKASHAMBATWA MBIKUSITA LEWANIKA, HICUUNGA EVARISTO KAMBAILA, DEAN NAMULYA MUNGOMBA, SEBASTIAN SAIZI ZULU, JENNIFER MWABA v FREDERICK JACOB TITUS CHILUBA (Constitutional Jurisdiction)

IN THE MATTER of an Application under Article 41(2) of the Constitution of Zambia and IN THE MATTER of the eligibility of a candidate in respect of Article 34(3) of the Constitution of Zambia and IN THE MATTER of regulation 1 5 made pursuant to the Electoral Act, 1991 and IN THE MATTER of the Presidential Election held in Zambia 'on the 18th day of November, 1996, S.C.Z. 8/EP/3/96, S.C.Z./SIEP/3196, S.C.Z./8/EP/4/96, S.C.Z./8/EP/4196 (1998) Z.R.49 (S.C.)

SUPREME COURT

NGULUBE,C.J., BWEUPE, D.C.J., SAKALA, CHIRWA AND LEWANIKA, JJ.S.10TH FEBRUARY, 1997 AND 7TH JANUARY,1998 AND ONTO 10TH NOVEMBER,1998. (S.C.Z. JUDGMENT NO. 14 OF 1998)

Flynote

(1) Constitutional law – Presidential election – Candidate – Qualifications – Citizenship – Constitutional requirements that presidential candidate and parents be Zambian citizens – Successful candidate taking office as president – Petition challenging election alleging disqualification – Citizenship of president challenged – Whether president satisfying citizenship requirements – Proof of parentage – standard of proof – Northern Rhodesia (Constitution) Order in council 1963, AI 1963/2088 – Zambia Independence Act 1964, s 2(1), Sch 2, ss 3, 16(3) – British Protectorates, Protected States and Protected Persons Order in Council 1949, s 9 – Constitution of Zambia Act 1991 (as amended), Sch, art 34(1), (3), (4).

(2) Constitutional Law – Presidential election – Election petition – Jurisdiction – Constitution vesting jurisdiction in 'full bench of the Supreme Court' – Meaning of full bench – Constitution of Zambia Act 1991, Sch, art 41 (2).

(3) Legal profession – Counsel – Right to appear – Requirements of professional independence – Conflict of interest – Cabinet minister holding practising certificate – Whether entitled to appear as counsel on behalf of individual litigant.

2

Headnote

The five petitioners challenged the election on 18 November 1996 of the respondent as President of Zambia on the ground that he was not qualified to be a candidate for election as president and be elected because neither he nor his parents were citizens of Zambia by birth or by decent as required by art 34(3) of Sch 2 to the Constitution of Zambia Act 1991 as amended in 1996. They pleaded that his identity and that of his parents had never been ascertained, contended that he was the illegitimate son of one of the witnesses born from an illicit liaison with the mother while she was married to a Mozambican and that he was born in the then Belgium Congo (Zaire) in 1944 when his father, the witness was an alien. They also gave evidence touching upon the respondent's citizenship qualifications and of the possible nationalities of his father. There was no dispute that the respondent's mother 'belonged' to the British protectorate of Northern Rhodesia, within the meaning of s 16(3) of the 1963 Constitution, before it became the Independent state of Zambia on 24 October 1964, and would therefore, but for her prior death, have become a citizen of Zambia at independence by virtue of the 1964 Order and the 1963 Constitution. The petitioners also alleged electoral flaws in the electoral system, and asked for the avoidance of the election on the ground that it was rigged and not free and fair. Certain preliminary points arose, namely (i) what would be 'full bench of the Supreme Court' to hear the case as required by art 41 of the Constitution; (ii) the propriety of Cabinet ministers who were lawyers holding practising certificates appearing as counsel for the respondent, and (iii) the standard of proof required.

Held: Petition dismissed

(1) The respondent was already a Zambian citizen and was not disqualified from election as president. Whichever of the several biographies proposed to the court was adopted, before independence the respondent had been a British protected person 'belonging' to Northern Rhodesia, in terms of the Constitution of Northern Rhodesia 1963, having been born in Northern Rhodesia or whose parents were ordinarily resident there. In requiring a presidential candidate to be, inter alia, a Zambian Citizen aged 35 years or more, both of whose parents were citizens by birth or decent, art 34(3) of the Constitution of Zambia (as amended) had to be construed as referring to those who became Zambian citizens at independence or would, but for their prior deaths, have then become Zambian citizens. When Zambian citizenship was created at independence on 24 October 1964, the Zambian Independence Order 1964 s 3, had conferred such citizenships on every British protected person who had been born in the former Protectorate of Northern Rhodesia or, if born outside the protectorate, whose father became, or would but for his prior death, have become, a citizen by birth in the protectorate. It was unnecessary to determine where the

prior death. Since the various accounts presented to the court of his paternal parentage were irreconcilable, the petitioners had failed to establish to the necessary degree of convincing clarity that the respondent's father was an alien; there was no basis for foisting a father upon the respondent nor for finding against the one he had officially declared. In any event, even the finding most favourable to the petitioners, the father proposed for the respondent was a former British protected person belonging to Northern Rhodesia who had become a citizen of Zambia at independence (see pp 163–165, 170-171, post). *Motala v. A-G* [1993] 1 LRC 183 considered.

Per curiam. The parentage qualification for election as president introduced into the Constitution of Zambia 1991 by the amendment in 1996 pose a number of difficulties apparently without solution, eg whether the reference is to legitimate or biological parentage and whether adoptive parentage is included (see p 169, post).

(2) The requirement of a 'full bench of the Supreme Court', which by art 41(2) of the Constitution of Zambia 1991 was given jurisdiction to determine whether any provisions of the Constitution or any law relating to the election of the President had been complied with, was satisfied when the maximum available odd number of judges of the court were empanelled to hear the case (see p 144, post).

(3) Although it was undesirable for Cabinet Ministers to be in active practice at the bar it was not contrary to law for them to exercise the right of audience and to represent a litigant. Any advocate should decline to accept instructions when there were circumstances which would render it difficult for him or her to maintain the requisite professional independence or which would in some way impair or undermine his ability to promote the best interests of the administration of justice. Ideally an advocate should not appear as such in his own cause as in any other situation of possible want of independence or conflict of interest or embarrassment generally. There was no conflict of interest in the present case. If anything, there might have been a case of common vested interests on both sides, having regard to the number of advocates, even on the petitioners' side, who were themselves senior members or leaders of some of the political parties on whose behalf the petition was brought (see p 144, post). *Re Lord Kinross* [1905] AC 468 comsidered.

(4) Parliamentary election petitions were required to be proved to a standard higher than on a mere balance of probability and therefore in this, where the petition had been brought under constitutional provisions and would impact upon the governance of the nation and deployment of constitutional power, no less a standard of proof was required. Furthermore the issues raised were required to be established to a fairly high degree of convincing clarity (see p 145, post).

(5) (i) As to the allegations of bribery and corruption: the government's established programme of selling council houses, which was taken advantage of by giving discounts in election year, did not amount to the corrupt practice of bribery under reg 51 of the Electoral

amount to the corrupt practice of bribery under reg 31 of the Electoral (General) Regulations so as to be caught by the spirit of s 18 of the Electoral Act and, in any event, it was doubtful whether the house sales could have significantly affected the election result in a nationwide constituency; although treating was established, it had not been shown that it prevented the majority of voters from electing the candidate of their choice; the donation by the respondent and various ministers of public funds to public causes before, during and since the elections was not prohibited by the regulations (see p 173, post).

(ii) As to the allegations of irregularities, although there was some evidence of irregularities and malpractices there was no evidence that the respondent personally or his lawful election agent was privy to them. In any event, since the constituency was nationwide it was not established that the proven irregularities were such that nationally the majority of the voters ere or might have been prevented from electing the candidate of their choice or that such irregularities affected the election result to any significant extent (see p 182, post)

(iii) Although the flaws in relation to the electoral system, including the duplication of national registration cards, the fact that some people had two or more voters' cards, complaints about the registers, the polling districts, the sitting of the polling stations and the results, did not reflect well on those managing the electoral process; they did not by their very nature go to the general integrity of the system and did not necessarily suggest that the electoral system had been comprehensively massaged or predisposed in advance to grant an unfair or any advantage or disadvantage to any candidate. It followed that although the elections were not perfect and some aspect of them were quite flawed they had been conducted substantially in conformity with the law and practice governing elections (see p 191, post).

Per curiam. (i) During election period there should be a closed season for any activity suggestive of vote-buying, including any public and official charitable activity involving public funds and not related to emergencies or any life-saving or life-threatening situations (see p. 175, post).

(ii) Elections are the sole lawful constitutional and legitimate method for the peaceful and legal acquisition of political power and the culmination of the exercise of some of the most basic fundamental rights. The various flaws in the electoral process which had been established should be addressed by the authorities (see p 191, post).

[Editors' notes: Articles 34(3) and 41 of the Constitution of Zambia Act 1991 (as amended) are set out at pp 145-146, respectively, post. Section 16(3) of the 1963 Constitution, so far as material, is set out at pp 157-158, post.

Section 2(1) of the Zambia Independence Act 1964 is set out at p 158, post.
Section 18 of the Electoral Act 1991 is set out at pp 171-172, post.

5

Cases referred to in judgment

A-G v Clarkson [1990] 1 QB 156, UK CA
Akar v A-G of Sierra Leone [1969] 3 ALL ER 384, [1970] AC 853, [1969] 3 WLR 970, SL PC

Cape Brandy Syndicate v IRC [1921] 2 KB 403, UK CA
Capper v Baldwin [1965] 1 ALL ER 787, [1965] 2 QB 53, [1965] 2 WLR 610, UK DC
Kinross, Re Lord [1905] AC 468, UK HL (C of P)
Miyanda v Handahu [1994] SCZ Judgment No. 6, unreported
Motala v A-G [1993] 1 LRC 183, [1991] 4 ALL ER 683, [1992] 1 AC 281, UK HL; rvsg [1991] 2 ALL ER 312, UK CA
Ormond Investment Co. Ltd v Betts [1928] AC 143, [1928] ALL ER Rep 709, UK HL
Shamwana v People [1985]] LRC (Crim) 120, (1985) SR 41, Zam SC

Legislation referred to:

(1) Halsbury's Laws of England, 4th Ed. Vol.3, Paragraph 1143

(2) Constitution of Zambia, Article 34 (3) (a), (b) and (e)

(3) Electoral Act (1991) as amended by Act No.23 of 1996

(4) Northern Rhodesia Order-In-Council, 1911

(5) The Barotziland-North-Western Rhodesia Orders-In-Council of 1899, 1902 and 1909

(6) The North Eastern Rhodesia Orders-In-Council, 1900, 1907 & 1909 and Northern Rhodesia Gazettes of the period (e.g. 1923 and 1924)

(7) British South Africa Company's Northern Rhodesia Government Gazette number 209 of Friday 21st March, 1924

(8) Government Notices No. 153 of 1924; No. 89 of 1926, No. 107 of 1927 and No. 149 of 1928)

(9) Halsbury's Laws of England, 3rd Edition, Volume 5 from paragraph 1273

(10) Government Gazette 213 of 1962

(11) Government Notice No. 25 of 1964

(12) Zambia Independence Order, 1964, Section 6(1) and (2)

(13) The Constitution of Zambia (1964) Sections 3, 4, 5 and 6

(14) British Nationality Act,(1948), Section 32

(15) Halsbury's Laws of England 3rd Edition, Volume 1, in Note (i) at page 528

(16) Government Notice number 91 of 1934, Government Notices of Northern Rhodesia at page 109

(17) Affiliation and Maintenance of Children Act Cap 64 of the Laws of Zambia (1995) Edition

(18) Citizenship of Zambia Ordinance number 61 of 1964, Section 3 (Now section 11 of Cap 124 of the Laws of Zambia (1995) Edition

(19) Electoral Act, Cap 13 of the 1995 Laws of Zambia, Section 18

Electoral (General) Regulations

For the Petitioners: Mr. M Chona SC. of Mahachi Chambers,

Mr. E.J.Shamwana SC. of Shamwana and Co,

Mr. D. M. Lisulo SC. of Lisulo and Co,

Prof. Mvunga of Mvunga and Associates,

Mrs. N. Mutti of Lukona Chambers,

Mr. S. Sikota of Central Chambers

Mr. Lungu of Andrea Masiye and Co,

Mrs. M. Zaloumis of Dove Chambers, and

Mr. S. Sitwala of Light House Chambers.

For the respondent: Mr V. Malambo and Mr E. Silwamba of Malambo and Co.

Judgment

NGULUBE,C.J.: delivered the judgment of the court.

Delay in rendering this judgment is regretted but was occasioned in part by the length and complexity of the case and by the heavy work load and schedule of other cases which the members of the court had to contend with. There were over a hundred witnesses; the transcript of the record runs into well over three thousand pages; there was a vast quantity of documentary exhibits and it was necessary to analyze all this evidence. The court was mindful also of the constitutional importance of a case of this kind and magnitude and the need which is self-evident for thorough reflection and consideration of the law and the facts. The hearing of the case occupied the greater part of the period between 10th Feburary and 7th January ,1998. During the course of such hearing, we were called upon to render and did deliver several rulings on a variety of issues. We also received detailed submissions for which we are indebted to counsel on both sides. It should also be noted, as a novel point, that this was the first time ever when this court which is essentially an appellate court had to sit as a trial court of first and last instance under the very special jurisdiction given by the constitution for the trial of presidential election petitions. Quite early in the proceedings, we had to construe what would be the "full bench of the Supreme Court" to hear the case as required by Article 41 of the Constitution when it became apparent that there were practical difficulties and the distinct possibility of the trial never taking off. The requirement was found to be fulfilled by construing it to mean the maximum available odd number of the judges of the court that could be mustered to hear the case. Both sides agreed and the trial commenced.

One of the preliminary points raised on which we said we would give our reasons in the judgment concerned the propriety of the Cabinet Ministers who are lawyers holding practising certificates appearing as counsel for the respondent. Objection was taken that it was morally, ethically, professionally and otherwise improper for the Cabinet Ministers to appear as counsel for the respondent, among other reasons, the because in the process they had to neglect their full time ministerial responsibilities. The gravamen of the submission was that members of the bar who are members of the executive and also of the legislative branches should not appear on behalf of an individual though they can appear for the State. One reason for this was the possibility of a conflict of interest and another was the need to enhance the separation of powers. Commenting on certain precedents and instances in this country where Ministers who were practising advocates actually

character as Attorney-General) - counsel for the petitioners .submitted that it was now time to initiate a correct and more acceptable legal culture which would disallow this sort of thing. The case of In re: LORD KINROSS (1905)A.C. 468 was cited in support. This was a case in which the House of Lords (Committee for Privileges) held that a barrister who is also a peer may argue as counsel on an appeal at the bar of the House of Lords, but may not appear as counsel to argue before committees of the house, or before the house when sitting under the presidency of the Lord High Steward on a criminal case. In our considered opinion, this case is infact authority to support the general proposition alluded to in our brief ruling at the time that any advocate whatsoever must decline to accept instructions when there are circumstances which would render it difficult for him/her to maintain the requisite professional independence or which would in some way impair or undermine the advocate's ability to promote the best interests of the administration of justice. Ideally, an advocate should not appear as such in his own cause as in any other situation of possible want of independence or conflict of interests or embarrassment generally: See Halsbury's Laws of England, 4th Ed., Vol. 3 paragraph 1143 et seq. We did not see any conflict of interest in this matter. If anything, there may have been a case of vested common interests on both sides, judging from the number-of advocates even on the petitioners' side who are themselves senior members or leaders of some of the political parties on whose behalf the petition was brought. It is not contrary to law for practitioners with current practising certificates who also happen to be Ministers to have audience and to represent a litigant. It is certainly undesirable for Ministers to be in active private practice at the bar but the matter can not be put higher than that.

By their petitions which were consolidated, the petitioners advanced a number of prayers arising from the several allegations and averments in the petition. The prayers were in the following terms:

"1. That it may be determined and declared that the provisions of Article 34 (3) (a), (b) and (e) in respect of the Respondent have not been satisfied and accordingly that the Respondent did not qualify to contest the election and to be elected President of the Republic of Zambia and that his election way void.

2. That it may be determined and declared that the Respondent has falsely sworn as to the citizenship of his parents and is in contravention of Section 9 of the Electoral Act 1991 as amended by Act No. 23 of 1996.

3. That it may be determined and declared that the Electoral Commission neglected its statutory duty to superintend the election process thereby allowing a fraudalent exercise favouring the Respondent.

4. That it may be determined and declared that the election process was not free and fair and that the election was rigged and therefore nulland void.

5. That the Petitioners may have such further or other (relief) as may be just."

The petitioners challenge the election of the respondent as President of Zambia. By their prayers, the petitioners have raised issues concerning the respondent's qualifications under the Constitution in respect of his own citizenship and that of his parents. They have questioned the electoral process and the way it was handled by the Electoral Commission and they have asked for the avoidance of the election for the reason that it was rigged and not free and fair. The prayers arose out of a number of allegations pleaded in the petition and with which we will be dealing.

As part of the preliminary remarks which we make in this matter, we wish to assert that it can not be seriously disputed that parlimentary elections petition have generally long required to be proved to a standard higher than on a mere balance of probability. It follows, therefore,. that in this case where the petition has been brought under constitutional provisions and would impact upon the governance of the nation and the deployment of the constitutional power and authority, no less a standard of proof is required. It follows also the issues raise are required to be established to a fairly high degree of convincing clarity. In a moment we will be examining the evidence and making our finds with this yard stick in mind. The preliminary observations would not be complete if we did not set out, at the very outset, the relevant provisions of the constitution with which we are here concerned. The constitutional provisions in the question include the controversial parentage amendments of 1996 so that article 34(1), (3) and (4) read:

"34. (1) The election of the President shall be direct by universal adult suffrage and by secret ballot and shall be conducted in accordance With this Article and as may be prescribed by or under an Act of parliament.

(3) A person shall be qualified to be a candidate for election as President if:

(a) he is a Zambian citizen;

(b) both his parents are Zambians by birth or descent;

(c) he has attained the age of thirty-five years;

(d) he is a member of, or is sponsored by, a political party;

(e) he is qualified to he elected as a member of the National Assembly; and

(f) has been domiciled in Zambia for a period of at least twenty years.

(4) A candidate for election as President (hereinafter referred to as a Presidential candidate) shall deliver his nomination papers to the Returning Officer in such manner, on such day, at such time and at such place as may be prescribed by or under an Act of Parliament."

Article 41(2) reads:

"41.(2) Any question which may arise as to whether:

(a) any provision of this Constitution or any law relating to election of a President has been complied with;

(b) any person has been validly elected as President under Article 34; shall be referred to and determined by the full bench of the.Supreme Court "

The other law referred to in these Articles is the Electoral Act and we will be alluding to it from time to time.

THE RESPONDENT'S QUALIFICATIONS

We now turn to that part of the case which concerned the respondent's qualifications.

The issues which arose included who the respondent was; where he was born; who are or were his parents; what is his citizenship and what is or was the citizenship of his parents? We heard evidence from basically three categories of witness, namely the petitioners themselves, the category of relatives or alleged relatives and acquaintances, and the others who included officials and writers. It was the petitioners position by their pleading that the identity of the respondent and the identity of his parents has been and still is a subject of contradictory public records, public controversy and public concern and has never been ascertained. Since the petitioners had to establish an affirmative case and not simply to confirm the controversy, their final submission was that we should find that the respondent was the illegitimate son of the witness PW3 Luka Chabala Kafupi who it was claimed had an illicit liaison with the mother while she was married allegedly to a Mozambican Jim Zharare Nkhonde; that we should find that the respondent was born at Chibambo Mission Hospital in the then Belgian Congo; and that the biological father alleged was at the time an alien as he himself claimed. The petitioners proceeded on the premise that PW3 is a Zairean (now Congolese) but who also claims to be a Zambian. They also proceeded on the footing that the parents of a presidential candidate referred to in the constitution are the biological and not necessarily the legal parents. It will thus be necessary to deal with all these aspects.

The petitioners gave evidence touching upon the citizenship qualifications of the respondent and the possible nationalities of his parents as PWs I(Zulu) 2(Lewanika),8 (Kambaila), 6(Mrs Phiri) and 16(Mungomba). To this list can be added the petitioner PW35(Dr.

Chongwe) though not a petitioner of record. The petitioners simply made the allegation of want of qualification and obviously had no personal knowledge or direct evidence to give. They depended on the other witnesses of fact. Without a doubt, the petitioners were genuinely and truly aggrieved by the amendments of 1996 which introduced a requirement that even the parents of a candidate must be Zambian citizens by birth or by descent, pointing out that the amendments had managed to knock out in advance of impending elections the former president of the country and proposed candidate for a major opposition party which could not even field its deputy leader because another amendment barred traditional chiefs from active politics.

The next group of witnesses was that of relatives or alleged relatives and acquaintances.

These were PWs 3(Kafupi), 4(Ngosa), 5(Musangu), 7 (Chilekwa), 13 (Kasuba),14(William Banda), 28(Kakonde), 29(Musonda) 32(Anna Chilekwa), 33 (Lengwe), 34(Musendeka), 5I(Chikonde), 59(Kenani), 80(Chaziya), 83(Sikazwe) and 102(Mumba). For reasons of economy and practicality since their evidence is on record, we give only a digest containing the essentials of their evidence as follows:- PW3, Mr Kafupi, said that the respondent under the name of Titus Mpundu is his illegitimate son conceived of an adulterous affair between him and the mother in 1943. He said the respondent was born in 1944 at Chibambo in Zaire by caesarean section and all this he was told by the mother. He saw the baby at five months old and next saw him at thirty-six years in 1980 in the house of one mother-of -Kapaya (a maternal relative of the respondent) at Musangu village in the presence of one the late Bismark Chonaula who queried why the young ones should "promote" him - i.e. acknowledge and recognise him - when the elders had not. The respondent is alleged to have said in Swahili a remark to the effect that a lion when stranded could even eat grass, a reference to PW3's attempt to be accepted so late in the day.

PW3 was seventy-eight years old when he testified, which meant he was born in about 1919. He said his own parents had settled in Zambia although he did not specify whether .this was during the last or at the turn of this century. He said he was both a Zambian and a Zairean because, although his parents had settled in Zambia and he had been conceived in Zambia at Musangu villlage, he was born at a place in Zaire where his then pregnant mother was visiting a sick relation. He has a green national registration card which is reserved for Zambian

nationals.

As will be seen later in this judgment, PW3 was born at a time when the former British protectorate of Northern Rhodesia (as Zambia was called before independence) was divided into North Western Rhodesia and North Eastern Rhodesia. Together with Barotseland, the territory was then being governed by an Administrator of Northern Rhodesia from the British South Africa Company on behalf of a High Commissioner based at Cape Town. This was before that company handed over the administration of Northern Rhodesia to the British Crown on 1st April,1924, under the Northern Rhodesia Order in Council, 1924.

The next witness in this line was PW4, Mr Thomas Ngosa who gave his evidence with much undisguised bitterness against the respondent whom he claimed to be some sort of second cousin. He deposed that he knew the respondent as Titus Mpundu Chabala; that the respondent's mother lived in Luanshya with mama Kapoma Bangwa; that the respondent's mother was married in Luanshya to a Tukuyu man and that she was put in a family way by PW3 when she visited the village. He said as a result her husband then chased her. The witness said he was eight years old at the time of the events to which he was deposing. He said at age nine years, he visited the respondent's mother in Chibambo Hospital in Zaire where the respondent (the survivor of twins, a girl and a boy) was born by operation at the hands of one Dr. Dixon.

This witness fared rather badly under cross-examination, even claiming he could not know fellow children and relatives living in the same village allegedly because he was from a poor family. We found his explanations to be as incredible as his other claim that at eight years old he attended a meeting at which PW3 was warned not to claim the pregnancy as his. This was a witness who was untruthful when he said he was visiting a relation of the respondent's known as the mother-of Blaston up to 1984 when she had died in the fifties. This was the witness who failed to identify two gentlemen by the names of Bunkum and Blaston whom he had earlier claimed were his relations and were also relations of the respondent when they were paraded in court. It was highly improbable that PW4 could have been personally privy as a young lad to the kind of facts he sought to speak to. In any event, he withered under cross-examination.

Next, there was PW5, Mr. Gilbert Musangu Chipulu. His evidence was that he knew the respondent as Titus Mpundu while they were schoolmates in the villages and they played together after the respondent had been expelled from Kawambwa Secondary School. He also knew PW34, Champo Thom Musendeka. Later, he learnt that the respondent who was then in the Zambia Congress of Trade Unions was now going by the name of Frederick Chiluba.

The next witness in this category was PW7, Mr. Mark Chilekwa who was called to establish another possible father different from PW3. He said he knew the respondent to be Titus Mpundu Jim Zharare Nkhonde whose father was Mr. Jim Zharare Nkhonde, a miner and part-time herbalist of House number D.4/190 Wusakile Mine Township, Kitwe. He said he ate and played together with jim and Titus, the sons of Mr Nkhonde, during school holidays when they would come from schools in Luapula. According to PW7 Mr. Nkhonde who was a widower was a close friend of their family and used to say he came from Lourenco Marques, Tete Province, Zumbo District, in Mozambique. He disputed the details of the father given by the respondent at nomination. He said he had associated with the respondent from 1955 to 1959, and next saw him in 1977 (according to the evidence in chief) or in 1976 (under cross examination). He was surpirsed to hear that the names had changed to Frederick Chiluba. He said he had resigned from employment with Zambia National Tourist Board voluntarily but accepted when pressed that he was in fact imprisoned for an offence involving dishonesty.

We can interpose two small observations here. One is that there can be no doubt whatsoever that the respondent started life under the names Titus Mpundu and later changed them to his current names. During the course of the hearing, a question arose whether persons could change their names informally, more or less. The short answer seems to be that name – changes before the coming into force of the National Registration Act could apparently take place quite informally so that any formalities and official practices since introduced can not be resorted to in a discussion of name – changes that occurred prior to registration under that Act. The second observation is a passing comment arising from the evidence of PW7 viewed against the evidence of PW4 who said that the father chased the mother when he discovered that she was pregnant by another man: One wonders then how come the father kept the child who was the result of the illegal pregnancy.

The next witness in this line was PW13, Mr. David Kasuba, President of a very minor political party. He did his early primary schooling in Mambilima in Zambia and did the rest in Zaire where he even held political posts, as well as the post of Chief Executive Secretary in that country's Ministry of Health. He oversaw the Africanisation programme at Chibambo Mission. He produced the certificate of registration - the "Chitupa" - of his grandfather one Moses Kabambale a Northern Rhodesian working at Chibambo Mission Hospital under Dr. Dixon whom he knew personally. Subsequently he was told that the respondent was his relative and that one of his parents was not a Zambian, while the respondent himself may have been born outside Zambia. Being aggrieved by the citizenship and domicile provisions in the 1996 amendments to the constitution, he resolved to investigate by conducting an opinion poll in the villages as to who the villagers considered to be the respondent's father. All this multiple hearsay was ruled inadmissible. Mr. Kasuba's evidence was of doubtful value even on the question of whether PW3 was the father or not.

Next was PW14, Mr. William K. A. Banda who was sixty-one years old when he testified. He said he came to know the respondent as Titus Mpundu in 1960 in Mufulira: where the respondent was then staying with an elder sister in Kankoyo township. The witness testified that the respondent was then a street vendor of vegetables. Towards the end of 1962 to mid 1963, he kept the respondent at his house together with one John Kapapi Mwansa, who was another relative of the respondent. He found a job for the respondent with Central African Road Services (CARS). In mid 1963, the respondent was transferred to Kitwe. Mr. Banda said the respondent used to say his father was "Kafupi" who was somewhere in Zaire. He said the respondent spoke Lingala - a Zairean language - and not Swahili to the Zairean lady vendors. Subsequently, he heard that CARS had sent the respondent to open a branch in Tanzania. Later, he met the respondent in Ndola in 1976 when he was now called Chiluba.

There were some witnesses called by the petitioners whose evidence was to be classified with that of the witnesses testifying to the respondent's personal history and background but whose evidence was so utterly useless that we will not waste time reviewing it. An example of this was the testimony of PWI Mr Chalo Wisdom Muwowo whose evidence flew in the teeth of many other perfectly acceptable accounts when he tried to show that the respondent never went to Kawambwa Secondary School. The witness infact went to that school long after the respondent had been expelled. Of the same flavour was evidence called to show that the respondent never lived in Kitwe.

The next witness of some substance in this line was PW28, Mr. Elijah, Mwape Kakonde who was bom in 1943. He was called upon to recall events when he was seven or so years old. He hails from Musangu Village and knew the respondent there as Titus Mpundu. He said in the early 1950s he lived with the respondent in a mutual relative's home, namely in the house of one Mr. Chonaula. As far as he had heard, PW3 Mr. Kafupi was the "real" father of the respondent. In reference to PW4 (Mr Ngosa), the witness said in one breath that he lived in town and in the next that he lived in the village. The witness got confused with the names of the people he intended to refer to. He was able to tell the court that Mr. Ngosa's relatives included Bunkum Mwenya who was Headman Kaombe, the mother-of-Kapaya, and Zharare the elder brother of Titus Mpundu.

The witness lost his temper and fumbled very badly under cross-examination. He got thoroughly confused in his references to Ngosa and also in reference to when he started schooling allegedly in 1950. According to him, the respondent had started school earlier than him. Other evidence which was more acceptable showed that the respondent started school in 1952. PW28 fared rather badly in the witness box, particularly under cross-examination. We found him not be a witness of credit.

The next witness in this group was PW29 Mr. Jonathan Musonda who was 39 years old and could only depose to what he had been told and what he heard, which was all hearsay. He had heard that the respondent was Titus Mpundu and that PW3 was his father. He was able to say that the respondent's relatives included Bunkum, Blaston, the witness Ngosa (PW4) and the respondent's brother Jim Nkonde.

PW32 was Anna Mwansa Chilekwa, the sister of PW7 Mark Chilekwa. She testified that as an eleven-year-old in 1955, she came to know Jim Zharare Nkhonde and his younger brother Titus Mpundu Jim Zharare Nkhonde who is now known as Frederick Chiluba. She said that they lived with their father a Mozambican called Jim Zharare Nkhonde who was a widower and underground miner but who was also a herbalist and helped their mother conceive and have the youngest sister Zuze now living in Zimbabwe. The youngest sister was named Zuze by Mr. Nkhonde. The witness said that the parents became close friends; PW7 slept at Mr. Nkhonde's house and when, his two sons came for holidays (between 1955 and 1959) they played and ate together. She testified

that she has since visited the respondent at State House and has been given some money. She said that after the public debate had started over the respondent's identity, government functionaries drove her to Luanshya with a view to seeing her mother whom they did not find. They threatened her if she talked about knowing the respondent as a result of which she sought an appointment with the respondent. When she saw him, he disclaimed the threateners and gave her a gift of money.

The next was PW33, Mr. Jonathan Mulundu Lengwe. He testified that a Mr. Maxwell Kalesha Chisoko, his mother's true brother, lied on a television programme to say the respondent was his (Kalesha's) nephcw from his sister when the respondent is not a relative of theirs at all.

PW34 was Ruben Champo Thom Musendeka. He told the court that he knew the respondent as Titus Mpundu in 1956 when they were in the same class in standard three at Lubunda Primary School. They continued to be classmates until they completed standard six in 1960 at Johnston Falls. In August 1960, they went together for Form 1 at Kawambwa Secondary school. From what he heard, the respondent's father was PW3. The witness said that in 1961 in the last term of Form 1, the respondent, the witness and twenty others were expelled from school for a protest demonstration and refusing to cart firewood on the head when the Headrnaster had a vanette which he refused to be used for the purpose. He said he and the respondent were the ringleaders and had been emboldened because they had smoked dagga. He told the court that the Headmaster delivered all the expellees to their villages in the vanette. He continued to visit the respondent until one evening the respondent and two companions of his arrived at his home on foot, carrying their suitcases, en route to Mufulira. He next saw the respondent in Mufulira in 1965 when, still as Titus Mpundu, he was working for CARS as a bus conductor. The witness next saw the respondent at an MMD rally in 1991 and marvelled that Titus Mpundu was now called Frederick Jacob Chiluba.

He tried to see him without success and finally decided in 1995 to go to the Post Newspaper to reveal what he knew of the respondent's identity.

PW51 was Mrs. Evelyn Chikonde. When she was nine or ten years old,

she knew the respondent as Titus Mpundu at Kawambwa where he was a friend of her brother. She said he got expelled for smoking dagga. The witness - who was the UNIP Women District Chairperson for Ndola - told the court that the respondent said his father was Kafupi Chabala and that her own father assisted Titus with transport money after the expulsion from school. This was in contrast with PW34 who said the school principal delivered the expellees to their parents' homes. PW51 said that during the run up to the 1991 general elections, the respondent had vowed to deal with her for not supporting his campaign and she believes that most probably it was the respondent who engineered her dismissal from her job at the Ndola Central Hospital. PW51 came through as a most unimpressive witness.

PW59 was Mr. J.P. Chibwe Kenani, the UNIP District Chairman for Chingola. He said he went to the Post Newspaper to refute media claims by his long-standing friend, one Maxwell Kalesha Chisoko that he was the respondent's uncle. He said that in 1990 during a discussion about certain problems in the Mine Workers Union of Zambia where Chisoko was a branch chairman, the respondent was allegedly heard to remark that he did not know this Maxwell Kalesha Chisoko.

Next in this line of witnesses was PW80 Mr. John Jamale Chaziya who was 69 years old and who migrated from Mozambique, as the former Portugues East Africa is known. He told this court that he was related to one Zhuwao Sixpence Tembo and his cousin one Jim Zherari who left Mozambique and went to Salisbury (now Harare) to seek work in the 1920's. In 1943, the witness trekked to Salisbury in the then Southern Rhodesia where he learnt carpentry. From there, he moved to Ndola in the then Nothern Rhodesia in April 1950. In 1954, he met a fellow Mozambican called Kamuchacha who told him about Sixpence being in Mufulira. He cycled to Mufulira and found Sixpence who called Jim Zherari from his own house in the Mufulira mine township. Sixpence introduced the witness to Zherari who came with his son aged about twelve years old who was introduced as Titus Zherari and who was said to be the survivor of twins who were both males. From the various accounts before the court the respondent would have been about ten or eleven years old in 1954. However, to continue with the summary, the witness said he next saw the respondent then known as Frederick Chiluba at Atlas Copco in Ndola in 1976 and the respondent started visiting the witness, sometimes in company of his father-in-law a Mr. Ndhlovu, said to be the father of the first lady.

The witness said that in 1979, when the respondent felt harassed by

other trade unionists, he (the respondent) reported that he had met and talked to Honourable Joachim Chissano (President of Mozambique but at the time its foreign Minister) who said the respondent could go home to Mozambique any time. PW80 hotly disputed any claims to the respondent by Zaireans or alleged Zaireans.

Next was PW83 Mr. Rodwell Kasonteka Sikazwe who, apart from alleging that the respondent had manipulated the constitution of a certain trade union, testified that his brother-in-law Maxwell Chisoko Kalesha can not possibly be the respondent's uncle, as he had falsely claimed on television.

Finally in this group of witnesses, there was PW102, Mr. Harry John Mumba who said that he came from the same area as the respondent who was known as Titus Mpundu. He said they went to the same primary schools and that he had heard that PW3 was the respondent's father.

Then there was the category of witnesses whom we have referred to as the others whose evidence in some way touched upon the issue of the respondent's qualifications. These included PWs 9,10,11,12,23,25,38, 48,52,61, 62,87,88,94,95,96,103,104,105,106, and 107. PW9 was Mr. Basil Kabwe whose evidence on the issue was of no value. He grew up and attended school in Wusakile, Kitwe, and said that during that time he did not know the respondent. The evidence of PWIO, Mr. Sketchley Sachika along the same lines was equally of little assistance. He also said that he knew the respondent in Kitwe in the 60's as Titus Mpundu but that later in Ndola in 1967 or 68 he learnt that he was now Frederick Titus Chiluba. PW11 was Mr. Charles Simpute from the Registrar General's office. He produced the official records of the respondent as Fredrick Jacob Chiluba, NRC No. 168118/67/1. He also talked about the procedures for change names under the National Registration Act, CAP. 126, and the Regulations. The Act came into force in July 1964 and regulations in 1965. A perusal of this law shows that only a registered person was required to follow the procedure for a change of name, especially the surname. It follows therefore - as we have previously observed - that the statutory procedures are irrelevant to changes made prior to the date of the Act and prior to registration. It follows also that the Act was irrelevant to persons who died before any registrations started. PWI2 was Mr. Thilasi, the Chief Passport and Citizenship Officer. He produced the official file on Frederick Jacob Chiluba, which showed that the father was given as Jacob Titus Chiluba of Musangu Village, Chief Lubunda, Mwense District. There was no

record on file to show that the father was also known as Jacob Titus Chiluba Nkonde of Lengwe Village, Kawambwa District, as set out in the respondent's oath at nominations.

The next witness under this category was PW23 Jumbe Ngoma who said that his company - Multimedia - printed the book by the respondent called "Democracy – The Challenge of Change" which was produced as an exhibit. It has a brief auto-biographical note about the respondent. PW25 was the learned Mr. John Mwanakatwe, S.C. who wrote the book "End of Kaunda Era" which the petitioners produced in evidence to show the conflicting biographical details of the respondent. The witness wrote in that book that the respondent was born in Musangu Village as Frederick Jacob Titus Mpundu; that the father was a miner while the mother died when the respondent was very young; and that the respondent started primary school in Wusakile, Kitwe. While PW25, alleged in his book that the respondent was born in Musangu started in Wusakile, all other books and articles, including books, affidavits and official forms attributable to the respondent talked about birth in Wusakile, Kitwe. The only other publication produced in evidence which suggested birth in Luapula Province was the book (which was Exhibit P.7) by the National Democratic Institute of the United States of America who were involved in monitoring the landmark elections of October 1991. As far as schooling goes, all other evidence was that the respondent went to schools in Luapula province only. In fairness to PW25, he was not adamant and graciously acknowledged that a mistake may have been made.

PW38 was Mr. Hamusankwa of the Chronicle Newspaper who said he had read the contradictory biographical materials in Mr. Mwanakatwe's book and in the respondent's book. He sent a questionnaire to Mr. Mwanakatwe and published his reply and an article calling upon those concerned to come forward and clear the air. They did not come forward.

PW48 was Mr. Justine Mwiinga of the Zambia Daily Mail newspaper. He informed their Lordships that he wrote about the President's origins, nationality and place of birth. He was in a delegation co-sponsored by the government which travelled to Zaire and found no documentary evidence that the respondent was born at Chibambo Mission Hospital. He wrote an article about it which was produced in evidence and which was pro-the respondent and highly critical of other earlier reports by other newspapers as to the respondent's alleged place of birth. He also wrote that contrary to other reports there was no Zambia Electricity

Supply Corporation powerline from Musangu Village to Chibambo Mssion Hospital. The witness wrote that Chibambo Hospital did not exist at the time of the respondent's birth. This assertion is to be contrasted with other evidence that it did exist as far back as 1930 or oven earlier.

PW52 was Mrs. Pauline Banda of the Zambia Daily Mail who did not make any useful contribution to the case. She was called to produce an article which she had written about a protest staged against the then MMD Publicity Secretary Mwangilwa who was reported in the Post Newspaper to have confirmed that the respondent was born in Zaire. PW61 was Dr. Mwacalimba, the UNZA Librarian whose evidence added nothing useful. He was called ostensibly to produce the respondent's Master of Philosophy Dissertation where there is an autobiography that he was born in Kitwe at Wusakile to Titus Jacob Chiluba Nkonde and Daina Kaimba. Another unhelpful contribution was made by PW62 Mr. Jabani of Zambia Information Services (ZIS who was called to produce a pamphlet since unauthenticated on the respondent, giving his background and academic qualifications. The pamphlet was rendered even more useless when PW87, Mr. Muyunda Sibeso from the Government Printer, was called to say that the government Printer did not in fact print the exhibited pamphlet for ZIS on the respondent so that the legend on it to that effect was false.

PW88 was Mr. Phiri an artist whose contribution was not usable. He sought to show that a picture of the respondent can be "aged" to look like PW3 and the latter's picture can be "rejuvenated" to look like the respondent. He did the same for Dr. Kaunda and his son Panji. If anything reliance even to a very tiny degree can be placed on mere resemblance of persons, the court's own ocular observation would be more trustworthy than the liberties taken by a fertile artistic imagination. If entertained, Mr Phiri would have us believe that sons and fathers can be transmuted at different ages into virtually identical likeness almost of the identical twins kind. We have discounted Mr. Phiri's evidence.

PW94 was Mr Kaira from the Times of Zambia Newspaper whose evidence was not useful to the issue being discussed. He reported on the death of one Edward Chiluba described as the respondent's brother without verification.

PW95 was Mrs. Mutiti of the National Archives. She produced the file

on Chibambo Mission Hospital in Congo-Belgium which had been heavily tampered with by a person or persons unknown. She said the file went missing for some days only to re-appear mysterously on her desk. Someone went to a great deal of trouble to "doctor" the file so that there should be no documents showing the hospital existed even before the respondent's birth. The documents showed it was a Christian Missions in Many Lands (CMML) Church Mission Hospital which was grant-aided by the Northern Rhodesian government because of its service to the local inhabitants of the border area.

PW96 was Masautso Phiri of the Post Newspaper who was an active collaborator with the petitioners. His evidence dealt with issues of the respondent's qualifications as electoral issues. We digest here the evidence as he touched upon the question of qualifications. The witness told this court that he had seen documents generated by various persons or authorities which gave conflicting bio-data on the respondent, for instance, the official MMD bio-data of 1991 said he was born somewhere in Luapula. He said an anonymous circular suggested PW3 as the respondent's father. In March 1995 out of curiosity while on a trip to Luapula, he decided to call on PW3 at Musangu Village and interviewed him. He re interviewed him on a subsequent occasion and wrote PW3's story in the Post Newspaper. He also photocopied the entire Chibambo Mission Hospital file at the National Archives when it was still intact and which was later nobled. The photocopy file was admitted in evidence. He also produced books on the Hospital. He said the Post investigated and published stories about Chibambo which were duly countered in the government media for instance, by the "In search of truth" project and press conferences by Minister Ben Mwila. Cross examination revealed that the witness has sent two persons called Bondo Lusato and Simusokwe to cook up documents from Chibambo recording the alleged birth of the respondent and that both his parents (in this context Daina and Kafupi) were Zaireans. To his credit, it should be stated that the witness did not attempt to produce the alleged birth certificate.

PW103 was Mr. Vicent Tembo, Deputy Chief Inspector of Schools. His evidence was not useful and was to the effect that he failed to find any record at any school in the names Titus Mpundu or Titus Mpundu Chabala or Frederick Jacob Chiluba or Frederick Chiluba as records were not kept by the various schools. PW104 was Mr. Joseph Phiri, the Archivist for Zambia Consolidated Copper Mines (ZCCM) whose evidence was equally not useful. He said he had checked the personnel records from 1929 and found none in the names Jacob Titus Chiluba Nkonde, or Jacob Chiluba, or Jacob Nkonde, or Titus Chiluba, or any combinations of these names. He did not check for house occupancy

records. When counsel for the respondent showed him a record for a Jacob Chiluba he said another team of researchers must have pulled it out. It seemed possible that the records had all been nobled. PW105 was Mr. Msimuko of ZCCM whose evidence was equally unhelpful. He produced records cards for employees with the names Jacob Chiluba or Titus but none under Nkonde or Nkhonde. Equally unhelpful was the evidence of PWs 106 and 107, Dr. Siatwinda of ZCCM Luanshya and Dr. Simukonde of ZCCM Kitwe respectively. They did not find any records of birth that might have been for the respondent.

In a nutshell, the foregoing was the evidence concerning the issues of qualification which was placed before us. The issues to be addressed included where the respondent was born; who are or were his parents; what is his own citizenship and what is or was the citizenship of the parents. In paragraph 9 of the petition, the petitioners averred that the identity of the respondent and the identity of his parents has been and was a subject of contradictory public records, public controversy and public concern and has never been ascertained. It is a fact that there was public debate and controversy in the media regarding the respondent's place of birth and parentage especially in respect of his father. However, controversy alone does not take the matter very far. It is also a fact and we so find that Chibambo Mission Hospital contended for by some existed and operated long before the respondent's birth; but so did Wusakile, Kitwe and Musangu Village the other places mentioned. Indeed, so did Luanshya mentioned by PW4 Mr. Thomas Ngosa. It follows that purely as a matter of possibility and technically, he could have been born in any one of these places. From the petitioner's point of view, the most desirable finding would be that the respondent was born at Chibambo. If, for the sake of argument that were the case, would birth at a nearby hospital in another country render a person a non-Zambian citizen? The current and latest position under the Constitution (In fact since 1973 – see Act 27/73) is that a person born in or outside Zambia becomes a citizen at birth if at least one of his parents is a citizen, thus ensuring citizenship by birth and descent. However, the position is that we have to consider the citizenship of persons who become Zambians on 24th October, 1964, a matter which is governed by the Zambia Independence Order and the Constitution which was scheduled to it.

We had to research into the Constitutional and other legal instruments applicable from the beginnings of any kind of nationhood or statehood for this country. We took note of African migrations and the partition of Africa as recorded by historians. Zambia was formerly the protectorate of Northern Rhodesia in which the British Crown acquired jurisdiction under concessions and undertakings of protection at various times

under concessions and undertakings of protection at various times between 1891 and 1900. The King of the Lozi's gave what was North-Western Rhodesia to the British, while four or so other chiefs signed away what was North-Eastern Rhodesia. The protectorate was first administered under Charters and Orders in Council by the British South Africa Company. An administrator of Northern Rhodesia governed the territory on behalf of a High Commissioner who was based at Cape Town. An all-white Advisory Council acted as some kind or non-binding legislature: see generally The Northern Rhodesia Order in Council, 1911 and the previous orders which it revoked, namely The Barotseland-North-Western Rhodesia Orders in Council, 1899, 1902 and 1909 and the North-Eastern Rhodesia Orders in Council, 1900, 1907 and 1909. As a nascent but coherent political entity, this country started off as a white man's country and it was viewed as suitable for European settlement. A perusal of the Northern Rhodesia Gazettes of the period (e.g. for 1923 and 1924) shows that some whites were even applying for letters of naturalization under the Northern Rhodesia Naturalization Order in Council, 1914. The minutes of the Advisory Council meetings with the Administrator gazetted in 1923 and 1924 show that even as the British South Africa Company prepared to hand over the administration and governance of Northern Rhodesia to His Majesty's direct jurisdiction, European settlement was uppermost in their minds. This was to be reflected in the formal "Constitutional" instrument promulgated, which was the Northern Rhodesia Order in Council, 1924 published in the British South Africa Company's Northern Rhodesia Government Gazette No. 209 of Friday, 21st March, 1924. This order in Council (a) constituted the office of Governor and defined his powers; (b) constituted an advisory Executive Council; (c) provided for a Legislative Council; (d) provided for the courts; and (e) provided for native affairs. There were also detailed royal instructions given to the Governor (see page 27 of the Gazette) clause 23 of which enjoined the Governor to ensure the welfare and interests of the native inhabitants, especially their religion and education. The natives were not directly or indirectly involved in the legislature which was outlined in a separate order in Council.

On Tuesday, 1st April,1924, Herbert James Stanely, former Imperial Secretary under the High Commissioner for South Africa became the first Governor of Northern Rhodesia. Between 1924 and 1928 (see for example Government Notice No. 153 of 1924; Government Notice No. 89 of 1926; and Government Notice No. 107 of 1927) Commissions of Inquiry were set up to recommend the establishment of Native Reserves for the benefit of natives along the line of rail and in other districts who would be affected in their occupancy of land by actual or probable European Settlement along or near the railway line or by actual or probable mineral development or near the same. Elsewhere in the territory, it was found necessary to set aside land for the

exclusive use of the natives and which would not be available for expansion of white settlement. The exercise was crowned by the Crown Lands and Native Reserves Order in council, 1928 and the Regulations (see page 69 for the Order in Council and Government Notice No. 149 of 1928 for the Regulations).

As far back as 1927, the European settlers discussed plans to merge Northern Rhodesia with other East African dependencies or with Southern Rhodesia or even to split it up and add the parts to other adjacent territories – see the Governor's speech to the Legislative Council at page 247 et seq of the Gazette. The reason advanced for this was the alleged sparse population which made it necessary – according to the Governor – for the native labour to circulate freely to and from Nyasaland, Portuguese East Africa, Katanga, Southern Rhodesia and Tanganyika. the natives were viewed as a source of cheap labour and were to be encouraged free movement in all the surrounding countries and within the territory –see the governor's speech to the Legislative council on 16th April 1928 (page 56 et seq). And so it was that for the purposes of native tax, the colonial administration taxed two categories of native, that is to say, natives with a village and domiciled in the territory and natives domiciled in some other country but resident in the territory. And so it was too that under the Native Registration Ordinance, CAP 59 of the Laws of Northern Rhodesia 1930, indigenous natives of working age had had to register while alien natives of working age had to register under the Alien Natives Registration Ordinance, CAP 60 of the Laws of Northern Rhodesia, 1930. Under the latter statute, alien natives who had shown an intention to settle in the territory could be treated as natives of the territory.

Meanwhile, the European settlers brought in the ill-fated Federation of Rhodesia and Nyasaland. Northern Rhodesia continued to be a protectorate. As from 1948 when two Africans got into the Legislative Council, the so-called natives steadily began to make in-roads into the political organs of Government. A useful summary of this can be read in Halsbury's Laws of England, 3rd Edition, vol. 5 from paragraph 1273. We are taking some time to outline the constitutional progression to statehood for a good reason which will soon become apparent.

The next "Constitutional" milestone was the passing of The Northern Rhodesia (Constitution) Order in Council, 1962 –see Gazette 213 of 1962. This Order (a) revoked the previous "Constitutional" Orders in

Council; (b) made provision for the governor, the Executive Council, the Legislative Council, the High Court and the House of Chiefs; (c) provided for a power-sharing arrangement between the Europeans and the Africans; and also the Coloureds and Asians; (d) it divided the voters into higher franchise and lower franchise voters; (e) such voters had to be, inter alia, a citizen of the United Kingdom and Colonies or of the Federation of or a British protected person by virtue of his connexion with Northern Rhodesia. Under this arrangemesnt the right to vote was given to any British protected person by virtue of his connexion with the Territory; or any British subject or a British protected person who had been resident for an aggregate of at least four years out of the preceding seven years; or a resident registered under a chief's area; or any person who had been continuously resident for seven years during the preceding ten years; or the wives of any of the foregoing.

The Order of 1962 was revoked by that of 1963 – see Government Notice No. 25 of 1964 vol. 1 of Government Notices from page 228. The 1963 Constitution introduced a bill of rights which included a non-discrimination clause excepting, inter alia, "with respect to persons who do not belong to Northern Rhodesia". It also introduced a Constitutional Council. Up to this point in time the British nationality law both statutory and common laws applied and there was in none of what may be termed the "Constitutional instruments" thus far any talk of "Citizenship" of Northern Rhodesia. Instead, chapter 1 of the 1963 Constitution talked of persons belonging or not belonging to Northern Rhodesia. Section 16(3) of the 1963 Constitution provided as follows:-

> *"16 (3). For the purposes of this chapter a person shall be deemed to belong to Northern Rhodesia if he is a British subject or a British protected person and:*
>
> *(a) was born in Northern Rhodesia or of parents who at the time of his birth were ordinarily resident in Northern Rhodesia;*
>
> *(b) has been ordinarily resident in Northern Rhodesia continuously for a period of seven years or more and since the completion of such period of residence has not been ordinarily resident continuously for a period of seven years or more in any other part of the common wealth;*

(c) is a citizen of the United Kingdom and colonies by virtue of registration in Northern Rhodesia, or the grant of naturalisation in Northern Rhodesia, under the British Nationality Act, 1948;

(d) is the wife of a person to whom any of the foregoing paragraphs applies not living apart from such person under a deed of separation; or

(e) is the child, stepchild, or child adopted in a manner recognised by law under the age of eighteen years of a person to whom any other foregoing paragraphs applies."

A little later, we will be citing the House of Lords' decision in Motala And Others v Attorney -General (1991)4 ALL E.R. 682 among other things in connection with the automatic though there unwelcome acquisition of Zambian Citizenship by operation of law by the children of parents who had migrated to Northern Rhodesia from India. For the moment, we rely on it too as very persuasive authority for considering the question of citizenship against the backdrop of the pre-existing or previously existing state of the law and official practice. We would figuratively speaking underline the constitutional provision which in 1963 said a person "belonged" to Northern Rhodesia if born there or even if only born"....of parents who at the time of his birth were ordinarily resident..." There were thus no persons known as citizens of Zambia prior to 24th October ,1964.

Zambia Citizenship came with the grant of independence and it is the legal instruments of that time which made provision for the very first time for citizenship of Zambia. In this connection we wish to refer to some salient provisions in the Zambia Independence Act 1964; The Zambia Independence Order, 1964, and the Independence Constitution which it ushered in.

We wish to quote Sections 2(1) and 3(2) and (3) of the Zambia Independence Act 1964 which read:

Independence Act 1964 which read:

"2. *Operation of existing law----(1) Subject to the following provisions of this Act, on and after the appointed day all law which,whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that day or has been passed or made before that day and comes into force thereafter, shall, unless and until provision to the contrary is made by Parliament or some other authority having power in that behalf, have the same operation in relation to Zambia, and persons and things belonging to or connected with Zambia, as it would have apart from this subsection if on the appointed day Northern Rhodesia had been renamed Zambia but there had been no change in its status."*

3. *(2) A person who, immediately before the appointed day, is for the purposes of those Acts and of the said Order in Council of 1949 a British protected person by virtue of his connection with Northern Rhodesia shall not cease to be such a British protected person for any of those purposes by reason of anything contained in the proceeding provisions of this Act, but shall so cease upon his becoming a citizen of Zambia.*

(3) Except as provided by section 4 of this Act, any person who immediately before the appointed day is a citizen of the United Kingdom and colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Zambia."

Thus, it is seen that those who granted this country its nationhood made provision that, until replaced, the existing law, that is to say the law existing before independence day, should continue to operate in relation to the country as well as to "persons and things belonging to or connected with Zambia" as if Northern Rhodesia had simply changed its name without change in status. We should also draw attention to the fact that the terms of the citizenship provisions at independence which we are about to set out made no suggestion that being native or indegenous or of any particular race would be part of the definition of criteria. Section 6(1) and (2) of the Zambia Independence Order, 1964 read as follows:

"6. *(1) Any person who, at the commencement of this Order, is entitled to be registered as a citizen of Zambia under section 4 or 8 of the constitution shall, until he becomes a citizen of Zambia or until 24th October 1966 (whichever is the earlier)*

Zambia or until 24th October, 1966, (whichever is the earlier) and subject to the provisions of subsection (3) of this section, have the status of a citizen of Zambia.

(2) Any person who has the status of a citizen of Zambia by virtue of the provisions of this section shall be regarded as such a citizen for the purposes of the provisions of the Constitution (other than Chapter II or section 66 (1) and the provisions of any other law for the time being in force in Zambia (other than a law made or having effect as if made in pursuance of section 11 of the Constitution)."

The Constitution which was a schedule to the Zambia Independence Order dealt with citizenship in chapter II. Sections 3, 4, 5 and 6 of that Constitution were in the following terms:--

"3. *(1) Every person who, having been born in the former Protectorate of Northern Rhodesia, is on 23rd October,1964, a British protected person shall become a citizen of Zambia on 24th October,1964.*

(2) Every person who, having been born outside the former Protectorate of Northern Rhodesia, is on 23rd October,1964, a British protected person shall, if his father becomes, or would but for his death have become, a citizen of Zambia in accordance with the provisions of subsection (1) of this section, become a citizen of Zambia on 24th October, 1964."

"4. *(1) Subject to the provisions of this section, any woman who, on 23rd October, 1964, is or has been married to a person--*

(a) who become a citizen of Zambia by virtue of section 3 of this Constitution; or

(b) who, having died before 24th October, 1964, would but for his death, have become a citizen of Zambia by virtue of that section,

shall be entitled, upon making application in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(2) Subject to the provisions of this section, any person who, on 23rd October,1964, is a citizen of the Untied Kingdom and Colonies, having become such a citizen by virtue of his having been naturalisedor registered in the former Protectorate of Northern Rhodesia under the British Nationality Act 1948, shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen as a citizen of Zambia:

Provided that any person who is under the age of twenty-one years (other than a woman who is or has been married) shall not be competent to make an application for registration under this subsection, but an application may be made on behalf of that person by his parent or guardian.

(3) Subject to the provisions of this section, any woman who-

(a) is on 23rd October, 1964, married to a man who after that date becomes a citizen of Zambia; or

(b) is on 23rd October, 1964, married to a man who becomes entitled to be registered as a citizen of Zambia under subsection (2) of this section but whose marriage is terminated after that date by death or dissolution and before that person exercises his right to be so registered,

shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(4) Subject to the provisions of this section, any woman who on 23rd October 1964 has been married to a person who becomes or would, but for his death, have become entitled to be registered as a citizen of Zambia under subsection (2) of this section, but whose

marriage has been terminated by death or dissolution before 24th October 1964, shall be entitled, upon making application before such date and in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Zambia.

(5) An application for registration as a citizen under this section shall not be made by or on behalf of any person who, under any law in force in Zambia, is adjudged or otherwise declared to be of unsound mind."

"5. Every person born in Zambia after 23rd October 1964 shall become a citizen of Zambia at the date of his birth;

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

(a) neither of his parents is a citizen of Zambia and his

father possesses such immunity from suit and legal process as is accorded to the envoy of a foreign soverign power accredited to Zambia; or

(b) his father is a citizen of a country with which Zambia is at war and the birth occurs in a place then under occupation by that country."

"6. A person born outside Zambia after 23rd October 1964 shall become a citizen of Zambia at the date of his birth if at the date of his birth his father is a citizen of Zambia otherwise than by virtue of this section or Section 3(2) of this Consitition."

The scheme of the Constitution at independence was such that some became citizens automatically; some became entitled to that status and could register as of right; while others who were potential citizens could apply to naturalize. Even the law enacted to facilitate registration and

apply to naturalize. Even the law enacted to facilitate registration and naturalisation introduced another element of automatic acquisition of citizenship by adoption: See, the Citizenship of Zambia Ordinance, 1964 (61 of 1964) and subsequent legislation. The Constitutional provisions at independence defined a "British protected person" by reference to the British Nationality Act, 1948, Section 32 of which provided that a British protected person meant a person who was a member of a class of persons declared by order in Council to be protected persons by virtue of their connection with the relevant protectorate, state or territory. The British Protectorates, Protected States and Protected Persons Order in Council, 1949, gave various instances of such protected persons including, under Section 9, those born in a protectorate or a trust territory and those born elsewhere but whose fathers were born in a protectorate or a trust territory. As will be seen shortly when we refer to the MOTALA Case, the state of affairs brought about by the British Nationality Act, 1948 as read with the citizenship provisions in the instruments which ushered in our independence must be viewed in light of the pre-existing state of the law on the subject. Viewed in this way, it is seen that the Legislation of the Untied Kingdom dealing with nationality and elaborated subsequently begins with the British Nationality and Status of Aliens Act, 1914. Under that law, there was a common British nationality for all subjects of the Crown throughout the Commonwealth and Empire which had grown out of the common law doctrine of allegiance to the King. As the learned authors of Halsbury's Laws of England, 3rd ED: vol. 1 point out in Note (i) at page 528---

> *"Before 1st January 1949, the terms "British national" and "British nationality" were generally used to indicate a British subject and the status of a British subject. In fact, there existed at that time another group of British nationals, i.e. British protected persons, but in strict law they were treated as aliens, although they were deemed not to be aliens for the purposes of any provision having effected by virtue of the Aliens Order, 1920....."*

The Act of 1948 radically changed the whole of the citizenship law of the United Kingdom. We have already mentioned the Order in Council dealing with protected persons which was made under this Act. However, as early as 1934, there was promulgated the British Protected Persons Order, 1934: See Government Notice No. 91 of 1934 in the 1934 Government Notices of Northern Rhodesia, at page 109. The object of that Order in Council was to define which persons were to "regarded as belonging" to the affected territories and therefore British protected persons. The persons to be regarded as belonging included

those born in the territory and those whose fathers belonged by their own birth in the territory. We have previously quoted Section 16(3) of the 1963 Constitution in which an extended and more expansive definition of the persons who belonged to Northern Rhodesia was given. This was long after 1934 and 1948. This was an expanded list of the persons – to use the language of the recitals in the 1934 Order in Council – regarded as belonging to the territory and who were afforded Her Majesty's protection and were known as British protected persons.

The Zambian citizenship provisions at independence were considered in the Court of Appeal as well as in the House of Lords in the MOTALA case reported respectively in (1991) 2 ALL E.R. 312 (CA) and 1991) 4 ALL E.R. 682 (HL). The claimants Safiya and Farug Motala were born in British Protectorate of Northern Rhodesia. Their parents were Indian citizens born in Gujerat who married at Fort Jameson (now Chipata) in Northern Rhodesia in July, 1950 and brought up a family of eleven children there. Their father had gone to live in Chipata in 1946 and had carried on a successful business as a trader until he went to live in Manchester, England, shortly before he died in 1984. The father applied to become a citizen of the Untied Kingdom and Colonies by registration. It was granted to him on 13th February, 1953, at Lusaka by a certificate signed by the Chief Secretary of the Government of Northern Rhodesia. Subsequently, Mrs. Motala also registered as a citizen of the United Kingdom and Colonies. The two claimants were citizens of the United Kingdom and Colonies by descent at birth under Section 5(1) of the British Nationality Act 1948 because their father, who had been born in India, had already become a citizen of the United Kingdom and Colonies by registration in Northern Rhodesia. In 1979, the claimants were refused United Kingdom passports on the ground that they were not citizens of the United Kingdom and Colonies and were in any case illegitimate because their parents' marriage was not valid. In 1983, they applied successfully for a declaration that they were legitimate and that they were citizens of the United Kingdom and colonies. The Attorney General appealled, contending that although the claimants had been entitled to citizenship of the United Kingdom and Colonies by descent they had also been British protected persons as defined by the 1948 Act and therefore by virtue of Section 3(3) of the Zambia Independence Act 1964 and Section 3(1) of the Constitution of Zambia which was scheduled to the Zambian Independence Order, 1964 they had lost their status as citizens of the United Kingdom and Colonies by descent on 23rd October 1964, the day before Zambia became independent, and had become citizens of Zambia on Independence Day, 24 October 1964. The Court of Appeal reject the Attorney General's contention, holding that under the 1948 Act the status of a British Protected person and that of a citizen of the United Kingdom and Colonies were inconsistent and mutually exclusive so that a person could not be both at the same time. Accordingly, the

claimants were not British protected persons immediately before Zambia's independence and, in the absence of express provision in the 1964 Act, they did not become Zambian Citizens on Independence Day but retained their status as citizens of the United Kingdom and Colonies. The Court of Appeal simply considered the language of section 3(3) of the Zambia Independence Act 1964 and section 3(1) of our Independence Constitution and proceeded to construe it in light of the 1948 Act and the British Protectorates, Protected States and Protected Persons Order in Council 1949. They looked at the law against the background of the common law which traditionally considered protected persons to be aliens and held that it was not necessary for the draftsman to state in the 1948 Act that a citizen of the United Kingdom and Colonies was not and could not at the same time be a British protected person. This was considered to be implicit in the law. The Court of appeal upheld the trial judge's finding that the claimants had become British Overseas Citizens. The Attorney General took the matter to the House of Lords and was rewarded with success. Their Lordships held that although the status of a British protected person was different from that of a citizen of the United Kingdom and Colonies, the one status was not inconsistent with the other and therefore a British protected person did not cease to be such on becoming a British subject. The claimants were from their birth in Northern Rhodesia until Zambia became independent both citizens of the United Kingdom and colonies by descent under Section 5(1) of the 1948 Act and British protected persons by virtue of Section 32(1) of that Act, read with Section 9(1) of the British Protectorates, Protected States and Protected Persons Order in council 1949, and therefore by virtue of section 3(3) of the 1964 Act they ceased to be citizens of the United Kingdom and Colonies and became citizens of Zambia on 24th October 1964 under Section 3(1) of the Constitution of Zambia.

The question in the MOTALA case was whether the claimants were British protected persons who became Zambian citizens under section 3(1) of the Constitution or if, inspite of the wording of section 3(3) of the Zambia Independence Act 1964 they continued to be citizens of the United Kingdom and Colonies by descent. The question was also whether the status of a protected person and an overseas citizen were mutually exclusive. The House of Lords considered the common law and the pre-existing law in order to construe the 1948 and 1949 legislation in the proper context and to demonstrate that the Court of Appeal had misapprehended the common law position which preceded the 1948 Act precisely because it did not attempt to look at the pre-existing law. We can do no better than to quote from the leading opinion of Lord Bridge from page 685 where he said:

"Hence the critical question is whether from birth until 23rd October,1964, they each had the dual status of citizen of the United Kingdom and Colonies and British protected persons or whether, under the 1948 Act, that was an impossibility.

Before addressing that question I must say at once that the courts below were denied the advantage which your Lordships have enjoyed of being referred to J Mervyn Jones British Nationality Law and Practice (1st edn. 1947), which is a valuable source of information with respect to the status of British protected persons at common law, or to the British Protected Persons Order 1934, SR & 01934/499, which shows how the status was treated in previous legislation.

As an inevitable consequence the Court of Appeal approached the issue which arose on the construction of the 1948 Act and the British Protectorates, Protected States and Protected Persons Order in council 1949, SI 1949/140, made under the 1948 Act, without reference to their proper context.

As will appear, when construed in the context of the pre-existing law, the 1948 and 1949 legislation wears a very different aspect.

Mr. Mervyn Jones' book is a most useful starting point. It appears to have been the first comprehensive textbook on the subject matter of its title. It carries a foreword by Mr W E Becket, who was then the legal adviser to the Foreign Office Apart from giving the work his laudatory imprimatur, Mr Beckett points out that;

'in the field of British Nationality law very few cases have ever gone to the courts at all, whereas a very large number of problems have confronted the two Departments of State, the Home Office and the Foreign Office, and have been dealt with administratively.Mr Mervyn Jones has been able to see the papers of these two departments where cases of interpretation have arisen. Not being an official, he has been entirely free to form his own judgement upon them, and in fully exercising this

freedom, he has shown his own qualities as a scholar and as a lawyer.

This inspires confidence that the ensuing text accurately reflects both contemporary practice and accepted contemporary opinion in matters of nationality and status."

The most significant passage from the text, for present purposes, appears where the author states (p279):

"It may often happen that a person may be, at one and the same time, both a British subject and a British protected person. for instance, a number of British subjects also possess Palestinian citizenship. There are a large number of people from India who are, at one and the same time, British subjects by virtue of their connection with British India, and British protected persons by virtue of connection with some Indian state. It is a sort of domestic double nationality.

In many territories under British protection, eg the Indian native states, the several states in what is now Malaysia and the protected states on the shores of the Persian Gulf, the question who was entitled to be regarded as a British protected person was determined by the local law in the sense that whoever was recognised as a subject of a protected state was also recognised as a British protected person."

But, as Mr Mervyn Jones points out (at p 294) in the British protectorates, being:

"territories mainly in Africa where there is no native ruler..... the rules defining who can claim the status of a British protected person, by virtue of their connection with protectorates, have to be laid down by the British Crown."

It was for this reason that the British Protected Persons Order 1934 was enacted. The territories to which the order applies are the British protectorates, including Northern Rhodesia, and mandated areas set out in the schedule. The order recites:

> *".....And whereas certain persons who are regarded as belonging to those territories are afforded His Majesty's protection, and are known as British protected persons: and whereas it is expedient to define in relation to those territories the persons who are so regarded as belonging thereto....."*

Again, after dealing with various aspects of the decision in the Court of Appeal, Lord Bridge continued, at pages 688 to 689:

> *"The 1948 Act came into force on 1 January 1949. The British Protectorates, Protected States and Protected Persons Order in Council 1949 and the order in council revoking the British Protected persons Order 1934 were made on the same day, 28 January 1949. The draftsmen of the new legislation must have been perfectly familiar with the pre-existing law and, if it had been intended that henceforth British protected persons could not at the same time be citizens of the United kingdom and Colonies and vice versa, it is inconceivable that this would not have been made clear in express terms, in the same way as it was made clear in express terms that henceforth British protected persons would no longer be aliens."*

Even if there was an ambiguity in the 1948 Act, there is available one further aid to its construction which was not brought to the attention of the Court of Appeal. Your Lordships are indebted to Mr Collins, whose industrious research unearthed a relevant provision in the Solomon Islands Act 1978; which he very properly brought to the attention of Mr Holman, Q.C., who naturally relies on it. It is s4(1),

which provides:

> *"A person who immediately before Independence Day is a British protected person by virtue of his connection with the Solomon Islands protectorate;*

(a) shall cease to be a British protected person on that day if he then becomes a citizen of Solomon Islands or is then a citizen of the United Kingdom and Colonies...."

This provision clearly assumes that prior to Independence Day there may be some Solomon Islanders who are both British protected persons and citizens of the United Kingdom and Colonies. In the words of Lord Sterndale, MR, in Cape Brandy Syndicate v IRC (1921) 2 K.B. 403 at 414, approved by your Lordships' House in Ormond Investment Co Ltd v Betts (1928) A.C. 143 at 156 (1928) ALL E.R. Rep 709 at 715-716:

"I think it is clearly established in Attorney-General v.Clarkson (1900) 1 Q.B. 156) that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier. Hence, if the 1948 act were ambiguous on the point in question, s.4(1) of the Solomon Islands Act 1978 would resolve the ambiguity."

We consider the House of Lords' decision as ample persuasive authority for having taken the expedition into the history of the instruments of the constitutional developments in this country. In context, therefore, the people said by the 1963 Constitution to "belong" to Northern Rhodesia were all British protected persons by virtue of their different kinds of connection with Northern Rhodesia. The legislation of 1963 being subsequent to 1948 and 1949 threw considerable light on the question of British protected persons by virtue of their connection with Northern Rhodesia and hence who became citizens. Using the House of Lords' approach, we are quite satisfied that belonging to Northern Rhodesia on any ground listed in the 1963 Constitution constituted the necessary connection for one to be a British protected person to that the non-repetition or specific mention of each and every category of the 1963 British protected persons in the 1964 legislation did not result in any lacunae so as to deprive the affected of their right to claim citizenship of Zambia or of the United Kingdom and Colonies as the

case may be.

In light of the law discussed, the respondent "belonged" to Northern Rhodesia and was clearly a British protected person whichever biography out of the several proposed is or were to be adopted. In light of the law, therefore, the respondent's own citizenship cannot be in any doubt. He is a Zambian citizen. It must be stressed and sight should not be lost of the real issue here which is the citizenship of the respondent himself which cannot be affected by being born at Chibambo, if that is where he was born. As already shown, it was not solely one's own birth within Northern Rhodesia which resulted in "belonging" and being a British protected person. The contention in the petition was that if he was born at Chibambo he would be a foreigner: The law says otherwise, as already discussed. In the event, we are of the considered view that it would be idle, otiose and pointless to make a positive finding as to where the respondent was born although we note that the preponderance of the evidence of the available official records favours Kitwe.

The next question is who are or were his parents? a number of other questions arise such as whether the Constitution is concerned with legal or biological parents and whether in the event of a person being legally fatherless or illegitimate such a person is not entitled to become the President. Other questions arising include whether parents born before independence can be regarded as citizens of Zambia by birth or descent or if the provision should be construed as including only the parents who are or were literally Zambians by birth or descent (none of whom would be older than our independence so as to have any child of not less than 35 years old as required for presidential candidates).

We begin with the evidence. From the evidence given, there was no dispute who the mother of the respondent was, namely the late Daina Kaimba Mulaye of Musangu Village. The evidence has shown that the she belonged to that village and to Northern Rhodesia and she would, but for her prior death, have become a citizen of Zambia at independence. Three fathers have been proposed for the respondent in the evidence before the court and the question is: was it (a) PW3; (b) Jim Zharare Nkhonde or (c) Jacob Titus Chiluba Nkonde? In favour of PW3 Luka Chabala also known as Kafupi – "the short one" – was firstly PW3 himself. He laid his claim with much conviction and gusto. Then there was PW4 Mr. Ngosa a relative of the respondent who harboured undisguised bitterness and who fared very badly in the witness box. He was discredited and we

found his evidence to be unreliable. It can not be resorted to in order to afford support to PW3. Then there was PW13 Mr Kasuba whose evidence on the point was all multiple hearsay and inadmissible. Next was PW14 Mr. Banda who claimed that the respondent himself told him in 1962 in Mufulira that his father was a Zairean called Kafupi who had other children in Zaire and that his home was in Zaire. He said the respondent spoke Lingala, a typical Zairean language, thereby suggesting that the respondent associated with or was brought up by or among Lingala-speaking folk. Mr Banda's evidence was in sharp contrast with that surrounding the respondent's educaion and that of PW3 himself who was either working on the Copperbelt or living in the villages in Luapula province and had all his children in Zambia. While it is quite possible that PW14 knew the respondent and even kept him and procured the employment he had as a bus conductor with C.A.R.S., we gained the distinct impression that he was overly keen to embellish and colour his evidence, especially on the issue of the respondent's paternity.

The other witness to support PW3 was PW28 Mr. Kakonde. However, his evidence on the point was patently hearsay and, as already observed, he was in any case thoroughly discredited and not credible. Again as already noted when we recited a digest of the evidence, there was the inadmissible hearsay evidence of PW29, Mr Musonda. PW34 Champ Thom Musendeka the schoolmate, said he had heard that PW3 was the real father. This was obviously hearsay. There followed the evidence of PW51 Mrs. Chikonde who was not a credible witness and was contradicted by PW34. It was she who alleged that the respondent (then known as Titus Mpundu) had himself said his father was Kafupi Chabala when the respondent and her brother were expelled from school. Her allegation that her father gave the respondent transport money after the expulsion conflicted sharply with the account given by PW34 who said that the Headmaster delivered them to their homes in his vanette. Again, we have already commented upon the evidence of PW102, Mr Mumba, which was all hearsay. The position therefore is that PW3 largely stands alone with any kind of direct evidence, with no or very little support mainly of the hearsay type from the relatives and acquaintances. We now turn to the evidence in favour of Zharare Nkhonde, of Mozambican origin. The evidence given by PW7, Mr Mark Chilekwa and his sister PW32 Mama Anna Chilekwa was agreed that they lived in Wusakile and came to know the respondent and his father. The auto biography of the respondent agrees that he lived in Wusakile. These witnesses put the period at 1955 to 1959. We have also noted the similarity between the name Nkhonde (with an "h given by PWs7 and 32 and the name Nkonde (without an "h") given by the respondent himself at his nomination as a presidential candidate. In a general way, PW80 Mr. Chaziya was in support of the father being of Mozambican origin and known as Jim Zharare, without any other

surname. It was PW80 who described how Sixpence and Zharare had worked at Bwanamkubwa and then transferred to Mufulira; thence to Chambeshi for two years until the mine collapsed thence back to Mufulira Mine where he found them in 1954. It was a notorious fact that Mufulira Mine – and Luanshya Mine suggested by PW4 – used to belong to Roan copper Mines Limited while Nkana – Kitwe used to belong to what was then Nchanga Consolidated Copper Mines Limited, before the companies merged in the seventies to form the Zambia Consolidated Copper Mines Limited. We were troubled by some aspects of the accounts relating to Mufulira and Kitwe which we found difficult to reconcile. Quite apart from the unlikelihood of transfers of miners between different companies those days, there was the timing of the events in Mufulira and Kitwe; the surnames used; and the claim by PW80 that Titus Zherera was the survivor of twins who were both male. The evidence relating to Kitwe was in agreement and tallied with other evidence that the respondent lived in Luapula where he was attending school, coming to Kitwe only during the school holidays. In contrast, PW80 suggested that the respondent and his father were living in Mufulira.

The evidence in favour of the respondent's father being Jacob Titus Chiluba Nkonde came from the published biographies and also from the documents which were produced by the witnesses, such as PW11 Mr. Simpute and PW12 Mr. Tilasi. There was also support from the documents in the bundles of documents at the trial. The rest of the evidence of the others, as already discussed when we summarised their evidence is peripheral.

From the evidence discussed, all the accounts as to which one might have been the father are quite plausible; but they are irreconcilable. PW3's evidence was otherwise quite believable; but so was the version supported by the Chilekwas and Mr. Chaziya regarding Mr Zharare which was otherwise also quite believable. Although there was no viva voce evidence to support the third father named in the official documents, that story too was plausible and was not positively discredited. In the absence of an affirmative case in support of a specific father, the petitioners finally urged that PW3 be found to be the father and proposed – without any evidence to support the linkage – that it be taken that the respondent was the illegitimate son of PW3, the product of an illicit affair while the respondent's mother was married to a Mozambican who brought him up. Assuming PW3 to have been the biological father but without making any finding to that effect, what would be the position? Would the respondent have been unqualified to stand on account of the citizenship of the presumed father? In other words, is PW3 a Zairean (or now Congolose)? PW3

testified that his parents settled in Northern Rhodesia and he was born in the Congo as it were by accident of circumstance when his mother visited a sick relative. The birth in that country would have the same flavour as the mothers in the border areas of this country who had to resort to Chibambo Mission Hospital which was grant-aided by the Northern Rhodesian Government. Their children did not cease to belong to Northern Rhodesia where they themselves belonged. The case proceeded on the assumption that PW3 who is otherwise a Zambian with a Zambian National Registration Card had a village where his own parents become a foreigner by birth in the then Belgian Congo. We have already dealt at great length with what will be the consequence had the respondent infact being born in Chitambo in the Congo. The reasoning and the law which we set out in relation to the respondent's position applies with equal force PW. By law, he belonged to Northern Rhodesia and was British protected person born of parents – to lift an expression directly out of the 1963 Constitution – "who at the time of his birth were ordinarily resident in Northern Rhodesia." One of the counsel for the petitioners submitted that PW3 became a Zambian by registration – if we understood correctly – under the National Registration Act. This Act is concerned with the registration of all persons in Zambia who are over 16 years of age and whether they are Zambians, commonwealth citizens or aliens. It is not the Act for obtaining citizenship by registration for which a separate Act exists. The fallacy of assigning citizenship by registration for which a separate Act exists. The fallacy of assigning citizenship by registration to PW3 is self-evident. But in fact, by operation of law as already demostrated he became a citizen at independence so that if the law in the constituion were concerned with natural or biological parents, and if he were the father as he claims, the respondent would not have been disqualified.

We did pose the question whether the Constitution had in contemplation biological parents or legal parents. The citizenship law at independence traced its roots to the British legislation on the subject and if such legislation is resorted to, one finds that the law is concerned with legitimate. Thus, for example, Section 32(2) of the British Nationality Act 1948, provides as follows:

"32(2). Subject to the provisions of section twenty-three of this Act, (which considered the position of children legitimated by the subsequent marriage of their parents) any reference in this Act to a child shall be construed as a reference to a legitimate child; and the expressions "father ", "ancestor" and "descended" shall be construed accordingly."

The words in brackets are ours. Again, if the respondent were a non-marital child or filus nulius - to use an obsolete latin expression - the legal position appears to have always been that such a child has derived domicile and personal status through the mother. On the facts of the case at hand, that is, if the case were that the respondent was the illegitimate son of PW3 but brought up by the legal parents, he would undoubtedly have been considered to be a marital child - see for instance, the Affilliation and Maintenance of Children Act, CAP 64 of the 1995 edition of the Laws of Zambia. The parentage qualifications indeed raise a number of questions. For instance, it was suggested in the submissions that the reference to parents who are or were Zambians by birth or descent was intended by the legislature to disqualify those who are not indigenous. As we have pointed out in a number of cases in the past - for example in Samuel Miyanda v Raymond Handahu S.C.Z. Judgment No. 6 of 1994 - the fundamental rule of interpretation of all enactments to which all other rules are subordinate is that they should be construed according to the intent of the parliament which passed the law. Such intent is that which has been expressed and when the language used is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, political exigency, motive of the framers and the like; see also Capper v Baldwin (1965)2 Q.B.53 by Lord Parker, C.J., at page 61. Accordingly, it is not possible to read the provisions as requiring or permitting only the indegenous sons and daughters who belong to one of the tribes native to Zambia and who have a village and chief in Zambia. Applying the fundamental rule, the provision would not disqualify for example a person born in Northern Rhodesia or in present day Zambia 35 years ago of Chinese parents (say who died) who has since been adopted by Zambian parents who are Zambian by birth or by decent; See for instance the automatic acquisation of citizenship by adoption introduced by section 3 of Ordinance 61 of 1964, that is the citizenship of Zambia Ordinance which read:

> "3. A child adopted, on or after the commencement under the provisions of any law relating to the adoption of children shall, if he was not a citizen at the date of such adoption, become a citizen by adoption on the date of that adoption if the adopter, or, in the case of a joint adoption, the male adopter, was at the date of the adoption a citizen."

(Now see s. 11 CAP 124 of the 1995 Edition of the Laws)

In the not too distant future, there will be second and third generation Zambians descended from ancestors who originated from a variety of continents and countries all over the world which ancestors are now "disqualified" Zambians. We have also pointed out a number of other questions which arise, including whether or not "biological" parents were intended and whether or not persons who were or are non-marital children are thereby excluded. We consider that the point has to be made that the parentage qualifications introduced into the constitution in 1996 pose a number of apparently solutionless problems and difficulties. In giving the example of the adopted Zambian of Chinese origins, we mean no disrespect to that great race but illusrate some of the difficulties. We doubt if the framers of the amendments had these problems in mind. If the aim was to provide for indigenous presidents only as suggested by counsel, then quite clearly the language of the amendments actually employed did not and could not achieve this. Had explicit language to that effect been employed, such language might conceivably have run the risk of infringing the non- discrimination provisions in the part of the constitution which is entrenched. This was not an issue here and we make no finding. However, we should mention the case of Akar v Attorney -General Of Sierra Leone (1969) 3 ALL E.R. 384 which we considered during our research. In that case, the appellant was born in 1927 in the former British protectorate of Sierra Leone of an indigenous mother and a Lebanese father who was born and bred in Senegal but who had lived in Sierra Leone for the last 56 years, and never been to Lebanon. On the attainment of independence by Sierra Leone on 27th April 1961 the appellant by virtue of Section 1(1) of the Constitution became a citizen of Sierra Leone. Act No. 12 of 1962, by Section 2, purported to amend the Constitution retrospectively to limit citizenship to persons of negro African descent. This, by the definition of the term (defined as meaning "a person whose father and his father's father are or were negroes of African Origin")- excluded the appellant. By Section 23 of the Constitution, laws discriminating, inter alia, on the ground of race, were prohibited except, inter alia, in cases where a disability imposed having regard to its nature and to special circumstances pertaining to persons on whom it was imposed, was reasonably justifiable in a democratic society. By a majority of four to one, the House of Lords affirmed the Chief Justice of Sierra Leone and reversed their Court of Appeal by holding that Act No. 12 of 1962 was unconstitutional; it was discriminatory within the meaning of Section 23 of the Constitution since different treatment was accorded to different people and the differentiation was attributable to wholly or mainly to respective descriptions by race. while their Lordships expressly stated with the wisdom or desirability or fairness of passing such a measure, nonetheless they commented as follows, at page 393:....

"In view of the conclusions which their Lordships have

expressed they need not refer further to the problems which have been raised. The circumstances that they are posed... is commentary enough of the difficulties which have been created by the scheme of legislation which it was thought appropriate to attempt to adopt."

The comment was rather apt. Another point already dealt with but worth noting again was the assertion by the petitioner Mrs. Phiri and other witnesses that there were no Zambian citizens as such prior to independence and that Zambian citizenship and nationality only commenced on 24th October 1964. This assertion which we accept as technically and legally correct means that the constitutional provision regarding parents or anyone born prior to independence who are or were Zambian by birth or by descent can meaningfully only be construed as a reference to those who became Zambians on 24th October 1964 or who would, but for their prior death, have become Zambians on that day.

To conclude on the question of the respondent's qualifications, we find that the various accounts as to the paternal parentage were irreconcilable in consequence of which an affirmative case has not been proved to the necessary degree of convicing clarity. In the circumstances, there is no basis for foisting a father upon the respondent nor for finding against the one he has officially declared. Above all we have already explained how even the most favourable finding from the petitioners' point of view would not have resulted in the respondent becoming unqualified.

ELECTORAL FLAWS

We now turn to the aspect of the petition which related to the election, including the whole of the electoral process. The issues raised under this part according to prayers of the petition were that the election process had been neglected by the Electoral Commission, thereby facilitating fraud and that the election was rigged and not free and fair, therefore null and void. The detailed particulars in the petition and the evidence raised issues of (i) bribery and corruption; (ii) irregularities and (iii) flaws in the electoral system. Since a presidential election is conducted under the practices and procedures set out by or under the Electoral Act, cap 13 of the Laws of Zambia (1995 Edition), this court

Electoral Act, cap.13 of the Laws of Zambia (1995 Edition), this court had determined quite early in the proceedings that guidance would be sought from that Act on many of the issues that arose, for example, the grant of indemnities to witnesses. In the same vein, we had to look to the Act and the Regulations when considering the issues of bribery and corruption; irregularities; and the flaws. We also had to borrow from the principles set out in Section 18 of cap.13 which reads:

"18. (1) No election of a candidate as a member of the National Assembly shall be question except by an election petition presented under this Part.

(2) The election of a candidate as a member of the National Assembly shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petion, that is to say:

(a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred; or

(b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;

(c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents;

(d) that the candidate was at the time of his election a person not qualified or a person disqualified for election.

(3) Notwithstanding the provisions of subsection (2), where, upon the trial of an election petition, the High Court finds that any corrupt practice or illegal practice has been committed by or with the knowledge and consent or approval of any agent of the candidate whose election is the subject of such election petition, and the High Court further finds that such candidate has proved that:

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

(b) such candidate and his election agent took all reasonable means to prevent the commission of corrupt practice or illegal practice at such election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of such candidate or his election agent; then the High Court shall not, by reason only of such corrupt practice or illegal practice, declare that election of such candidate was void.

(4) No election shall be declared void by reason of any act or omission by an election officer in breach of his official duty in connection with an election if it appears to the High Court that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election."

The evidence on these issues came from a fairly large number of witnesses.

(I) **Bribery and Corruption**

Thus, under bribery and corruption can be listed firstly the witnesses whose evidence touched upon the Sale of Council houses. These were PWs 53, 55, 56, 57 and 27. Then there was evidence touching upon what the Regulations terms as "treating" in the form of for example the distribution of meat and grinding mills in the Western Province and salt and cement in Mbala. The witnesses included PWs 24, 30, 49, 67 and 68. Then there was evidence of cash gifts given mostly by the witnesses from Chongwe and by some of the peititioners who complained of Ministers donating money to various causes. the witnesses under this head included PWs 26, 84, 85, 90 and 91. For the sake of economy, we summarise the gist only of the evidence of these witnesses as follows:

PW53 was Mr. Muyakwa of Mongu district Council. He told their Lordships that, acting on a circular from the Ministry of Local Government, Council houses were sold at valuation less discounts ranging from 100% for pre-1959 houses to 20%. In September 1996, the respondent visited and fixed a maximum of K750,000. Under cross-examination, the court learnt that the respondent and the MMD candidates came off worst in all the Mongu constituencies during the elections. PW55 was Mr Chibbonta, Town Clerk of Livingstone. His evidence was that the Council had already decided to sell the houses and got permission to sell some and that the circular from the government was welcome and had better prices. He said the residents made representations to Lusaka and the houses had to be sold at the prices determined by the Council which were lower, less discounts. He informed us that the respondent had visited Livingstone before the government circular came out. PW56 was Mr. Mumbi, the Solwezi Town Clerk. He informed us that his council already had a programme to sell houses in 1995 and sought permission to sell. He said the government circular of May 1996 resulted in 229 houses being offered for sale, 44 of them "free" at 100% rebate. Under cross-examination, he informed the court that the respondent and the MMD infact fared very badly in Solwezi. PW57 was Mr Ali Simwinga, the Kitwe Town Clerk. He said that the Council decided to sell its houses as far back as 1993 as the minutes would show. The Council applied for permission to sell 5% of its 13,500 units and the Minister gave approval in February 1994. He said that the Council hoped to expand and develop the City more by selling so that the government circular was welcomed. by then, 530 units had already been sold. He said the respondent did not fix the

prices; the circular set out the procedure and rebates. He informed their Lordships that Kitwe City council persuaded the government to reduce the prices even further below the circular's prices. PW27 was Mr. Munga of Zambia National Broadcasting Corporation who produced and showed us some video tapes. The first tape showed the respondent opening the MMD Southern Province Conference and it was not relevant to the issues. The second dated 18 April 1996 showed the respondent touring Council houses in Livingstone when the respondent was clearly compaigning against UNIP and for himself and his Party as he indicated there would be discounts. The third date 20 April 1996 showed the respondent on tour of Council houses in Ndola where he even handed over some Certificates of Title. The fourth tape recorded his tour of Western, North-Western and Luapula provinces and where he directed reductions on Council houses and generally held campaign rallies. The firth was an irrelevant film of 7 March 1991 titled "personalities in politics". The sixth and last film was his interview in Kabwe on 6 January 1996 when he made donations to public causes like the waterworks and also urged people to register as voters.

On the evidence we are satisfied and it is our finding that programmes for the sale of Council houses were long already in place and were otherwise unexceptionable but for the timing of the discounts in an election year. The exercise was clearly used to assist the campaign. The question we had to consider was whether the government exercise which was taken advantage of could amount to the corrupt practice of bribery under Regulation 51 of the electoral (General) Regulations so as to be caught by the spirit of Section 18 of the Electoral Act, CAP 13. The Regulation has eight paragraphs and we have read them most carefully but cannot find that the activity complained of falls within any of those paragraphs. We note also that had that been the case, it would have been extremely doubtful that the house sales could have significantly affected the result of the election in a nation-wide constituency. the results in Mongu and Solwezi where the respondent fared very badly are quite telling.

With regard to <u>treating</u>. PW24 Mr. Sikazwe, a polling agent for ZADECO, said that the MMD parliamentary candidate in Mbala was dishing out cement, salt and cash to the headmen and the villagers and gave some salt to the witness, urging them all to vote for the MMD candidates. PW30 Mr. Chituse was the ZADECO parliamentary candidate for the Luampa Constituency in Kaoma. He testified that the MMD parliamentary candidate Mr. Manjata was campaigning using a Government vehicle; that he tried to disrupt a public meeting called by

Government vehicle; that he tried to disrupt a public meeting called by ZADECO. He also said the MMD candidate used the installation of a public grinding mill to campaign for his party and to threaten those who would not vote for MMD. He said about six days before the elections day he found that at one place the people were feasting on the meat of three head of cattle slaughtered for the occasion by Mr. Manjata. PW49 was Mrs. Ruth Emelio, the ZADECO candidate for Sinjembela who testified on this point that the MMD parliamentary candidate donated a boat to the people on nomination day. He also bought beers and food and killed an animal to feed the people as they shouted "Vote for the hand that feeds you!" PW67 was Mr. Muteba, the ZADECO candidate in Lukulu who testified on the point that the MMD Parliamentary candidate dished out free meat to the people who began to query what ZADECO could do for them. PW68 was Mr. Wayoya, an election agent for ZADECO. He told us on this point that during the campaigns in Lukulu, only MMD supporters were allowed to use a grinding mill at Kakulanda Women's Club. He also told us that a few days before the voting, MMD killed cattle and dished out free meat, urging the people to vote for MMD candidates.

From the foregoing evidence, we accept and find that there was treating. The instances given were proved. We are also mindful of the provisos in the Electoral Act so that a candidate is only answerable for those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's election agent since, under Regulation 67 of the electoral (General) Regulations, an election agent has to be specifically so appointed. We have borne in mind that the constituency for the presidential candidates is national and were not satisfied that the treating established may have prevented the majority of voters in the country from electing the candidate whom they preferred.

There was evidence of cash gifts being given to some voters, which would amount to bribery, a corrupt practice. PW26 Mr. Rex Sinkonde was a ZADECO polling agent at one of the polling stations in Mbala. He informed us that he caught the MMD Chairlady in the area giving money – amounting to one pin (one thousand kwacha) – to a voter just outside the polling station and telling her to vote for the MMD. Then there were allegations of money being given to some voters by the MMD Councillor a Mr. Kasongo in the Chongwe area to persuade them to use his pre-marked ballot papers and surrender their own which they would be given in the polling station. The witnesses were PW84 Mr. Kabanje, PW90 Mr. Nkalamu and PW91 Mr. Nyeleti. It transpired that PW90 was a discreditable character and an outright liar who had posed as Mr. Martin Nkalamu but it turned out that the fellow's actual names were Boniface Mwansemeka. The evidence of these witnesses from the

were Boniface Mwansomeka. The evidence of these witnesses from the Chongwe area was characterised by improbability, placing Kasongo in several far distant places at the same time. The most notable was the pair of PWs 98 and 99 (Mr. Kanyembe and Mr. Lubansa) who said that Councillor Kasongo drove them and twelve others that morning from Chongwe to Ngwerere to ghost-vote in fictitious names at a non-existent polling station. It was highly improbable, in fact clearly impossible, that Kasongo could have been that ubiquitous. The evidence from this group of witnesses both as to allegedly voting with Kasongo's pre-marked ballot papers and with regard to obtaining national registration cards and ghost-voting in fictitious names was not credible. PW99 whose performance collapsed under cross examination had clearly never entered a polling station in his life. Above all the evidence of PWs98 and 99 rendered it impossible that Kasongo could have been in Chongwe at distantly located polling stations waylaying the voters and paying them to use his pre-marked ballot papers while he was also far away in Ngwerere. The allegations from these witnesses have not been established satisfactorily or at all. The single instance testified to by PW26 was insufficient to affect the national election.

There was evidence from some of the petitioners who complained that various Ministers and the respondent donated public funds to public causes, which donations were widely reported in the media. The donations have taken place before the elections, during and since. They continue to date. We have anxiously examined the Regulations in which various kinds of conduct or misconduct is prohibited or made an offence. We have tried to see where the allegation in the petition and in the evidence of various political leaders donating to community projects might fit in, without success. The timing of such public philanthropic activity must have had some influence on the affected voters yet the Regulations are silent on such matters and on any possibly improper donations when not directed at individual benefit. As at the present moment, public philanthropic activity is not prohibited by the Regulations and we can do no more than to urge the authorities concerned to address this lacuna so that there can be a closed – season at election time for an activity suggestive of vote buying; including any public and official charitable activity involving public funds and related to emergencies or any life-saving or life threatening situations.

(ii) **IRREGULARITIES**

The irregularities which were canvassed consisted of nine distinct subcategories which we have identified and which consisted of the

subcategories which we have identified and which consisted of the following:

(a) The suggestion that unregistered persons could vote;

(b) Election materials were thrown away or destroyed obviously to cover up malpractices;

(c) That some voted twice; others even had two identities;

(d) That some election officials at polling stations were partisan and even allowed wrongful campaigning at polling stations;

(e) That voting procedures were not properly followed;

(f) That results were altered without proper justification or explanation;

(g) That some people were wrongfully prevented from voting;

(h) That voting certificates were wrongly used and wrongly issued; and

(i) That pre-marked ballot papers were in use.

As to (a), there was firstly the evidence of PW17 Mr. Meleba who is also Headman Joshua. He produced a note from the local school headmaster Muloya who had written urging that those who did not register as voters could still go and vote if they had national registration cards and were 18 years or more. The witness did not see any unregistered person actually vote, which would have been illegal. Then there was the evidence of PW44 Mr. Collins Chimgukuma. He testified that he was one of those who campaigned for the MMD parliamentary candidate in the Bwacha Constituency of Kabwe. He said the Kabwe Mayor produced twenty (20) blank voters' cards which he used to fill in the names of the witness and nine other MMD cadres who were each given two voters cards. The witness said because he was promised some money for doing so he voted twice at two polling stations despite not being registered. He said he voted only in the parliamentary election; not in the presidential election. To put it mildly, Mr. Chimbukuma withered under cross-examination when it was

shown that his name allegedly unregistered friends who allegedly voted twice with him using fake voters' cards were in fact duly registered and voted in their proper polling stations. PW44 was thoroughly discredited. He was effectively and completely contradicted by the evidence of two of his friends who testified as RWs 1 and 2. RWI was Mr. Edward Phiri who was actually a registered voter and who said PW44 was simply a member of an MMD choir during the election campaigns. RW2 was Mr. Masumba who testified that, contrary to what Mr. Chimbukuma said, he was duly registered and voted regularly. The evidence in rebuttal of PW44 was fully corroborated by the evidence of CWI Mr. Kalale of the Elections Office who produced documents to show that the persons said by PW44 to have been unregistered were actually duly registered as voters. In the event Mr. Chimbukuma's story was not believable and we have rejected it. Finally under this part, there was the evidence of PWs 98 and 99. PW98 was Mr. Kanyembe of Chongwe who said that in expectation to be paid K300,000 he and fourteen others who had neither national registration cards nor voters' cards agreed to be given national registration cards and voters' cards in the names of fictitious persons. He said that on polling day, they were driven by MMD Councillor Kasongo from Chongwe to Ngwerere and there voted in the fictitious names. PW99 was Mr. Lubansa of Chongwe who testified to the same effect and also said they were taken to Ngwerere early in the morning. Cross-examination destroyed him utterly. We have already made reference to the evidence of PWs 98 and 99 when we were considering the allegations of cash gifts made by PWs 84, 90 and 91 and when we noted that the two accounts nullified each other and rendered it highly improbable that Kasongo was way laying voters at various polling stations in Chongwe and paying them to use his pre-marked ballot papers while he was also so far away in Ngwerere. The evidence of these witnesses was discredited and it can not be believable, In the result, there was no credible evidence to support the suggestion that unregistered persons could vote and did vote. We find the irregularity alleged not established.

As to (b), there was firstly the evidence of PW18, Mr. Chita, the parliamentary candidate for ZADECO in Muchinga Constituency. Acting on reports received he went to check where a much-delayed truck carrying election material had parked in the bush. He found a parcel under a Musuku tree in the bush which contained election materials, including the official marks and the ballot paper counterfoils for both parliamentary and presidential elections. These were produced in evidence and estalished beyond any doubt that in the affected constituency – where most of the election materials have to date not been delivered to the Elections Office as required by law – someone threw away these materials in the bush in order to cover up some wrongdoing and a fiddle of some kind. Secondly under this part, there was the evidence from the Bwacha Constituency in Kabwe and which

was the evidence from the Bwacha Constituency in Kabwe and which came from PWs 40, 41, 42, 54, 63 and 82. PW40 was Mrs. Febby Ngosa a supporter of Mrs. Nyirongo (PW82) in the Bwacha Constituency. She told the court that on Monday 2nd December 1996 she happened to go to the Recreation Club hall and found the returning officer for Bwacha a Mr. Chintu and two other persons had an open ballot box on which was written the work "parliamentary". They were holding some ballot papers. The witness informed her husband (PW41) about what she had seen and he informed Mrs. Nyirongo. PW41 was Mr Ngosa, a polling agent for Mrs. Nyirongo and he relayed to her what his wife had reported. His other evidence was that there were election monitors from FODEP and ZIMT at the polling station where he was on duty on election day. The presiding officer stopped the FODEP monitor from crossing out the names being called out from his copy of the register. Other than that some MMD cadres wore T-shirts with campaign material on them within the prohibited radius of the polling station, he saw nothing wrong with the voting or the counting at his polling station. However, at the place for the tallying of all the votes, the returning officer, was making alterations to all the results brought to him. Another odd circumstance which he observed was that the parliamentary box from one polling station strangely took five hours to arrive at the counting hall. PW42 was Mr. Chisha, another polling agent for Mrs. Nyirongo. At the polling station where he was, the presiding officer refused to allow the polling agents to sit close to the table where the count took place with the result that they did not properly witness the count by the presiding officer who was miscounting Mrs. Nyirongo's votes. This evidence did not touch upon the election of the respondent as such. PW54 was Pastor Jim Nyirongo, the husband of PW82. He testified that the returning officer Mr. Chintu was altering all the results when he received them from the polling stations, as the MMD cadres were openly boasting of having played their cards well. Subsequently, the returning officer was caught opening ballot boxes and burning some ballot papers. A report was made to the police. PW63 was Mrs. Edith Banda who said she was a pre-school teacher. She told the court that the returning officer for Bwacha and other officials opened the ballot boxes, sorted out the ballot papers and asked her on 25 November 1996 to burn some ballot papers which were in a carton box and which were for both parliamentary and presidential elections. PW82 was the woman of God Pastor Gladys Nyirongo.

The upshot of her evidence was that she was an independent candidate in the parliamentary elections for the Bwacha constituency. She said that the election officials in that constituency altered the results from the polling stations allegedly in order to balance but they were later caught destroying some ballot papers for both the presidential and the parliamentary elections and this was after she had already lodged an election petition. When she confronted the returning officer, he pleaded

for mercy and forgiveness. She reported these happenings to the police.

Related to the foregoing was the evidence of two witnesses called on behalf of the respondent. RW4 was Mrs. Chikoti of Kabwe Municipal Council who produced a file on PW63 showing that she was a general cleaner and not a preschool teacher at the Council's nursery school as she had claimed. RW5 was Mr. Mwale also from the Kabwe Municipal Council who was mentioned as one of the persons who were with the returning officer when destroying some papers. He was an Assistant Returning Officer for Bwacha under Mr. Chintu. He denied ordering PW63, a general worker and others to burn any ballot papers saying that he had only asked them to clean up the hall which was littered with scrap paper and to burn the litter. These were papers used to compute the results and torn posters. He told the court that a verification of ballot paper accounts was duly done from 12 to 30 December 1996 during which the papers were physically recounted to see if there was any overcounting or undercounting from the polling stations. He denied the allegations by PWs 40, 63 and 82 that ballot papers were being sorted out and burnt. He conceded that the official results which were published and reflected in the official documents which were exhibits before the court and which showed that there were no rejected ballot papers in Bwacha were false.

We have considered the evidence from Bwacha Constituency. The records of the verification of ballot paper accounts referred to by RW5 were nowhere to be found. It should also be noted that he described a rather strange way of conducting the verification when there is Regulation 47 in the Electoral (General) Regulations which sets out what ought to be done. In our assessment of the evidence, we find that we are persuaded by the combined weight of the petitioner's witnesses' evidence the substance of which had a distinct ring of truth to it. Mr. Chintu did destroy some papers obviously in an effort to cover up a fiddle. No wonder the results in the official documents were described by RWS as false. We will consider the consequence of this finding after we have discussed the other irregularities.

As to (c), that is regarding some voting twice or even having two identities, we heard evidence from PWs 19,22, 44, 75, 78, 79 and 81. PWI9 informed the court-and there is no reason to disbelieve her - that she was properly in possession of a national registration card in the names of Theresa Kalo but that in 1995 she got a second national registration card while posing as a much, younger person by the name

of Evelyn Mutale. She registered as a voter twice using the two national registration cards and actually voted twice using the two sets of documents. She said that she had registered twice at the request of the MMD constituency Chairman for Mandevu and that she had decided to come forward and testify because the rewards promised by the MMD official did not materialise. PW22 was Mr. Musonda from the Elections Office. He confirmed the assertion made by PWI and others about a Mr. Zgyambo: The official documents showed that Zgyambo registered three times in three different places and was in three registers. He actually voted twice. PW22 explained that the Electoral Commission had authorised the issue of voters' cards to two or three people having identical national registration card numbers provided some other detail was different, such as name or date of birth or an address. Zgyambo exploited this and it is a matter to which we will return later when we come to consider some of the flaws in the system. Next, there was PW44 Mr. Chimbukuma whose evidence we have already discussed and discounted. PW75 was Mr Munamwela of the Lima Party. He testified that four MMD officials were caught having been allowed to vote twice each by the presiding officer at one of the Bweengwa polling stations. He was supported by PW78 Mr. Miyanda who was the election agent for the Lima Party candidate in Monze. He said at that polling station three people were apprehended who had voted twice. The presiding officer even apologized. The matter was reported to the police. PW79 Mr. Moonga was the polling agent for the ZDC candidate at the same polling station. His evidence was the same as that given by PWs 75 and 78 saying that some MMD chaps were caught having voted twice each; at first using their voters' cards and later using voting certificates. PW81 Mr. Hampondo also testified to the same event. He said that at Bweengwa three people were caught voting twice: in the daytime with a vote's card and at night with a voting certificate.

The instances of double voting were well proved. In the case of PW19, it is understandable that the dishonest could device this method of cheating by posing as two different persons. In the case of Zgyambo, a decision of the Electoral Commission facilitated the fraudulent multiple registration and double voting. In the Bweengwa incident, the electoral process was deliberately massaged by the dishonest voters with full collaboration of a dishonest and partisan presiding officer. We will consider the consequence of this finding on the nationwide election later.

As to (d), that is, that some election officials at polling stations were partisan and allowed wrongdoing, we considered the evidence of PWs 20, 24, 45, 46, 49, 58 68 and the witnesses from Bweengwa whom we have just talked about. PW20 was Mr. Sinyangwe, the ZDC candidate

for Mpulungu Constituency who said that polling assistant issuing ballot papers would in the course of explaining to the illiterates keep overstressing on the MMD symbol and telling the voters they could vote on the clock if they wished without similar stress or suggestion for the other parties. He also said that the MMD were allowed to sing and dance and to campaign freely within the prohibited radius at some polling stations. PW24 of ZDC in Mbala also testified similarly both in relation to the MMD being allowed to campaign within the prohibited radius and to the polling assistant issuing the ballot papers explaining who the candidates were but stressing the desirability of voting for the respondent's side. PW45 was Mr. Mwila of Kabwe, a supporter of the candidate Mrs. Nyirongo. He saw a woman police reservist and an MMD official using their wrist watches to campaign for the MMD at and within a polling station. Upon his complaint, the offenders were expelled from the polling stations by the presiding officer. PW46 Mr. Kandeke voted at a polling station in Kabwe which was established at a beer tavern belonging to the local MMD Chairman who sat within the prohibited radius wearing an MMD campaign T-shirt. He said that the police officers on duty at that polling station confisticated wrist watches. PW49 was the ZDC candidate in Sinjembela. She testified that the MMD campaigned too near the polling station where she voted and at other stations. She said that at several polling stations some election officers were openly campaigning for the MMD and describing other political parties in derogatory terms. PW58 Mr. Nyemba was a polling agent for ZADECO at Mufuchani polling station in Kitwe. He said that prior to election day, the MMD candidate Mr. Newstead Zimba used his official government vehicles on his campaign tours and in his attempts to disrupt ZADECO meetings. On polling day, one polling assistant kept on stressing the desirability of voting for the MMD candidates while an MMD official campaigned on the voters' queue and was not stopped. PW68 Mr. Wayoya who was an election agent for the ZDC candidate in Lukulu spoke of some polling assistants who consorted openly with MMD officials at campaigns and elsewhere. He told the court that on election day, one polling assistant did not stamp the official mark on the ballot papers of all those he knew to be ZDC members and this affected ten (10) voters out of the over 250 voters at that polling station. Upon consideration and careful evaluation of the evidence, we are satisfied that some election officials at polling stations were indeed partisan in an overt fashion and unfit for election duties. The evidence itself, however, disclosed that such officials were largely countered by the vigilance of the polling agents and any other election monitors there may have been. Above all, we take judicial notice that the Zambian voters are extremely intelligent and enlightened; only an insignificant proportion can be so fickle as to allow any official at a polling station to subvert their freedom of choice. However, with regard to the consequence of the finding on the presidential election, this we will discuss after we have dealt with all the irregularities.

As to (e), which is that voting procedures were not followed properly, we considered the evidence of PWs 46, 58 and 97. PW46 who voted at a polling station in Kabwe established at a tavern belonging to the local MMD Chairman complained that his voter's card was not perforated. PW58 who was at Mufuchani polling station in Kitwe informed the court that of the nine voting certificates which were issued, some were issued to officials on election duties who are registered in a different constituency. This was, of course, quite wrong and contrary to the relevant Regulations. PW97 was Mr. Sumaili of Petauke who was on duty at a polling station. He told their Lordships of one registered voter, a lady, who was allowed to vote without her voter's card. We considered this type of irregularity to have been insignificant. The instances deposed to by PWs 46, 58 and 97 were not shown to have been so widespread that the elections could no longer be considered as having been conducted in substantial conformity with the lawful procedures.

As to (f), that is, that the results were altered without proper justification or explanation there was the evidence of PWs 49, the Bwacha group (including PW54), PW93 and PW96. PW49 Mrs. Ruth Emelio informed us that her returning officer had altered her results from one of the polling stations from 80 to 30 and only corrected the records after protests on her behalf. We have already dealt with the Bwacha group of witnesses who talked of the returning officer Mr. .Chintu routinely altering almost all the results as he received them from the polling stations. We propose to set out the evidence of PWs93 and 96 when we come to deal with the flaws in the system but for the moment mention only that in their analyses, they had identified the alterations which were made to the results in various places. This related to the variances between the initial results released by the Electoral Commission and subsequent results released by the same authority. We are satisfied that the irregularity contended for was established.

As to (g), which is that some people were wrongfully prevented from voting, there was the evidence of PWs 50, 67, 75 and 92. There was a category of voters who could not vote because of various flaws in the system which we propose to come to when we consider such flaws. However, under the present subheading, PW50 Mr. James Mulenga Chasaya of Ndola informed us that despite being duly registered as a voter to vote at Chintu polling station in Ndola, the officials refused to allow him to vote because the particulars on his voter's card had faded off. PW67 Mr. Muteba of ZDC in Lukulu spoke of a polling station where the voting opened late in the afternoon but closed early, leaving many

voters stranded outside. PW75 Mr. Munamweia of the Lima Party in Bweengwa said that he had seen a 53 years old voter and a 45 years old voter turned away as being underaged, despite being on the register. In the course of the hearing, we had asked an official from the Elections Office who confused that the officials were not allowed to use their common sense to allow such voters to vote on the basis that they were registered and their national registration cards showed that they were not toddlers, as shown on the register. They were needlessly prevented from voting when the mistake was that of the persons who compiled the register. We are satisfied that this type of irregularity was established. For completeness, we should also mention that there were some voters who were wrongly prevented from voting by some of the petitioners, especially from the parties that had decided to boycott the elections and had gone further to collect the voters cards. Thus, PW92 Mr. Lukonde, Deputy Commissioner of Police, produced 28,000 unused voter' cards which the police had retrieved from a house in the Chilenje township of Lusaka.

As to (h), which is that voting certificates were wrongly used or wrongly issued, there was firstly the general allegation voiced by PW35 Dr. Chongwe that voter certificates "flew like flies" at the polling stations. Then there was the evidence of PW58 Mr. Nyemba to which we have already made reference. His complaint was genuine to the extent that the wrong kind of certificate of authority to vote was given to the officers on duty, and in some cases for the wrong constituency. There were only nine certificates issued at Mufuchani. We have also already dealt with the Bweengwa group of witnesses (i.e. PWs 75, 78, 79 and 81) whose evidence established that three or four MMD officials who had already voted during the day time using their voters' cards were again issued with voters' certificates in the evening to enable them each to cast a second vote. Again there was the evidence of PW76 Mr. Joseph Tembo, a polling agent for Dr. Guy Scott, the Lima candidate in Chongwe. His testimony which was fully corroborated by the registers and the documents in court established that three people were wrongly allowed to vote at his polling station using certificates of authority to vote when they were not on official duties there; and in the case of one of them, when the person was a voter in Rufunsa which was a different constituency altogether. Then there was the evidence of PW31 Mr. Kabinda, the election agent for Mr. Pikiti the Lima Party parliamentary candidate in the Munali Constituency of Lusaka. Mr. Kabinda complained that there was misuse of the certificate of authority to vote at a polling station and the voting certificate. He said that some voters were even filling in their own certificate and they were allowed to use the certificate to vote obtained on the very voting day instead of at least four days before election day as required by the regulations. On the latter point other evidence received in the case from the officers of the Elections Office showed that the Electroral Commission had authorised the issue of certificates even on the polling day in order to

authorised the issue of certificates even on the polling day in order to counter the boycott and the burning of boters' cards by the United National Independence Party. PW31 said that his candidate was trounced so badly that he the witness wept. CW1 Mr. Kalale of the Elections Office was called to open the marked registers for Munali when it transpired that there were relatively only a few voting certificates. They were not as rampant as PW31 had alleged. In fact, it turned out that some people who got them were bona fide registered voters who were otherwise entitled to vote while others were officials on elections duties. The Court learnt from CW1 that the Electoral Commission allowed certificates to be issued up to 10% of the total registered voters which was in the case of Munali up to 4,300 although only 135 certificates were actually used in the constituency. This we consider was an insignificant number. In the case of the Munali Constituency, a verification exercise ordered by this court and carried out by the Registrar of the High court in the presence of the advocates for the parties established that only 135 voters' certificates were completed and used. The marked registers for two of the Munali polling stations were not available at the verification, otherwise for the remainder it was established that the total number of names cancelled in the marked registers was 23,377 while the total number of ballot papers actually used for the constituency was found to be 25,388. We are satisfied that in the examples given and most probably countrywide as well, certificartes did not fly like flies; they were used in moderation and in all instances well within the range of quantities acceptable to the Electoral Commission. There was thus no rampant misuse of the voting certificates and therefore it can not be said that the respondent was in anyway unduly assisted to win through the use of voting certificates.

As to (I), which is that premarked ballot papers were in use, there was firstly the evidence of the Chongwe group of witnesses who alleged that MMD Councillor Kasongo waylaid them and gave them pre-marked bsallot papers. We have already dealt with their evidence which we have discounted as unbelievable. This is the group which included PW90 Mr. Nkalamu who was actually Mr. Mwansomeka testfying under a fictitious name. Then there was the evidence of PW60 Mr. Katunasa, ZDC parliamentary candidate in the Chembe Constitutency. He told the court that acting on a report he had received and with the help of a police officer who was on duty at one of the polling stations, he chased and caught an MMD gentleman who had a bag containing 350 pre-marked presidential ballot papers. The police took those papers. At another poliing station, he found that his younger brother who was his agent had been in a fight with some MMD gentlemen from whom he had confiscated eight premarked presidential ballot papers. He said the eight ballot papers were kept by his younger brother. The younger brother was not called to testify and this court has not been shown either the eight or the three hundred and fifty premarked papers as none were produced in evidence. The non-production of at the very

none were produced in evidence. The non-production of at the very least the eight ballot papers said to have been in the custody of PW60's young brother detracted quite considerably from his credit, rendering his story to be unbelievable.

Some of the irregularities which we have found to have been established by the evidence were quite serious, though not widespread. They revealed that there were those who were prepared by dishonest means to massage the elections, oblivious of the risk that the elections might thereby be nullified to the disadvantage of the candidates who might themselves have been quite innocent and free of any personal wrongdoing. On a perusal of the whole of the evidence reviewed under this part, we have not found any evidence that the respondent personally or by lawful electoral agent was privy to the irregularities and malpractices described. In the event and having regard to the type of constituency concerned, which is nation-wide , it was not established to our satisfaction that the proven irregularities were such that nationally the majority of the voters were or may have been prevented from electing the candidate whom they preferred or that the extent, frequency and nature of the irregularities was such that they must have affected to any significant extent the national result of the election. It is clearly not possible to hold that by reason of the irregularities the result of the election nationwide was not substantially the true reflection of the free will and choice of the voters who went and cast their votes.

(iii) **FLAWS**

This brings us to the flaws in the system. From the evidence, we identified that there were raised or alleged some flaws associated with (a) national registration cards (b) voters cards (c) the registers (d) the polling districts (e) the siting of the polling stations and (f) the results.

(a) **NATIONAL REGISTRATION CARDS**

As to (a), that is national registration cards, we considered the evidence of RW3, PW22, CW1 and also PWs93 and 96 who analysed the registers. Apart from RW3, the other witnesses covered other aspects apart from the question of national registration cards and it is perhaps more convenient to set out the precis of all their other evidence at this

more convenient to set out the precis of all their other evidence at this point in time. RW3 was Mr. Mwiinga from the National Registration Department. We learnt from him that the problem of the same national registration card number being held by two persons surfaced in 1988 when registration forms were printed which bore old or repeat numbers which were pre-printed on the forms. There were shown to the court examples of sets of forms printed by the Government Printer which contained numbers which had already earlier been issued to other citizens. Apparently, the department even ignored the district codes when issuing a repeat booklet. Mr. Mwiinga told us – and we have absolutely no reason to doubt his word – that the situation country-wide is very bad and that there could be more than 500,000 duplications since 1987. The witness told us that, upon a query from the Electoral commission in 1996, the department deleted the last applicant's name from the list supplied but as other evidence showed, the Commission itself decided to keep both sets of persons on the registers.

PW22 was Mr. Musonda from the Elections Office. His evidence which touched upon the question of national registration cards also dealt with the other flaws which we will be considering and it is now convenient to summarise all his evidence at once. In his testimony, Mr. Musonda described the voters registration process conducted by the Electoral Commission, including the attempts to correct the mistakes made. He explained that the Electoral Commission authorised NIKUV who were doing the data processing to issue voters' cards to two or three people having identical national registration card numbers provided some other detail was different, such as names or date of birth. He also explained that some registration officers made mistakes in the coding of the polling districts which necessitated the making of corrections and the issuance of replacement voters' cards. It was in evidence that because of such replacements some voters ended up with two voters' cards where the first card was not physically withdrawn. Mr. Musonda explained that where corrections were made, the voters could not use the earlier card and could not vote twice, but only once and in the corrected register. The witness admitted that massive misplacement of voters occurred due to wrong coding but that attempts were made to effect corrections. He also readily admitted that the voters, especially those in the rural areas, may not have heard about the corrections and they certainly did not read the Gazette notices which described the polling districts. Mr. Musonda conceded that in the process of correcting the registers, some voters were put in polling districtsd where they did not register. In part because of such confusion, some voters never collected their voters cards. The witness also asserted, and we agree with him that registration officers and not NIKUV made the errors and that the inclusion of duplicated national registration cards was a decision of the Electoral Commission, not NIKUV. We accept Mr. Musonda's evidence

Musonda's evidence.

CWI Mr. Daniel Kalale of the Elections Office also explained that the duplicate national registration card cases had been allowed by the Electoral Commission to remain on the registers, He said there were on the registers 52,703 duplicate national registration cards cases with different names and 9,540 duplicate national registration cards with the same names but different dates of birth. We also learnt from this witness that they were 33,444 double registrations by a person where the decision made by the Electoral Commission was to leave him or her where he or she registered first. He further informed us that there were 3,545 duplicates of the same person but with different serial numbers, a mistake by the assistant registration officers: The Commission removed one and left one, We accept the evidence of this witness. CWI also informed us that some Polling districts returned a nil registration.

From the evidence of Messrs Mwiinga, Musonda and Kalale, it seems to as that there is a much more serious problem with the national registration cards than with duplicate voter registrations. We will comment further on this matter a little later but for the moment we do have to observe that even the statistics show that we should be really worried about the national registration cards which was supposed to be but apparently no longer is the most distinctive and the most reliable means of identifying each other for all manner of purposes, including elections.

PW93 talked about the national registration cards problem and also covered all the other flaws to be discussed. It is appropriate to set out the summary of the whole of his testimony at this stage. PW93 was Dr. Steven Moyo. He had carried out, on behalf of the petitioners (especially UNIP) a detailed faulty – finding analysis of the electoral process and found flaws in three areas, namely the polling districts, the registers and the results. With regard to the POLLING DISTRICTS, he queried the discrepancies in the official documents as to numbers of polling districts in 1996 when compared to the position in 1991. He said that the gazette notices did not reflect all the polling districts and in any case queried why the Electoral Commission had chosen to increase the number of polling districts. He informed the court that his research uncovered the fact that there were nineteen (19) polling districts which were not reflected in the official electoral documents but which were in the gazettes while there were sixteen (16) polling districts which were reflected in the official electoral documents but which were ungazetted. The witness further informed the court that some polling districts had been shifted from one constituency to another without the sanction of a

been shifted from one constituency to another without the sanction of a delimitation Commission. He gave the example of ten (10) polling districts in Ndola which had been shifted farm Chifubu to Kabushi without a delimitation Commission. With regard to the shifting or non-gazetting or listing of some polling districts, the witness gave other examples from Nakonde and Isoka and also from Kabwe and Petauke. His research had even uncovered two unnamed polling districts in the Southern Province; one in Mapatizya and the other in Itezhitezbi. Dr. Moyo also complained that some polling districts though accounted for were not numbered in logical serial sequence. He queried the logic of creating so many new polling districts in some areas of very low voter population.

With regard to the REGISTERS, Dr. Moyo analysed twenty-four (24) constituencies which were randomly selected. He set out to make a comparison between the provisional registers and the final registers. He told us that he carried out a statistical analysis between the provisional and the final registers and this showed that they tallied. He said he detected a number of faults and drew our attention to examples in the documents. These related to omissions of voters' names where for instance only one name would be given; duplication of voters' national registration cards and multiple listing of some voters which to him indicated the possibility of double-voting. The other faults related to misplacement of voters in certain polling districts and, incomplete particulars against certain voters. The witness agreed that in some cases; the final registers showed that corrections had been made though some faults persisted into the final registers.

With regard to the RESULTS, the witness referred the court to a document containing provisional results and another containing what he termed- the final results. He drew attention to the altered results as well as to the initial results which had reflected identical scores for the candidates in various constituencies. The witness informed us that there were variances between the provisional and the final results so that the Copperbelt had a variance of 4,857 votes; the Eastern Province 1,185 votes ; Luapula nil; Lusaka Province 1,741 votes; Northern Province 279 votes; North- Western Province 64 votes; Southern Province 1,679 votes; and Western Province 1,302 votes. The witness found that the variances totalled country wide 16,788 for the rejected ballot papers and 52,857 for the total votes cast. Dr. Moyo had truly gone to great lengths to find faults. Thus, he gave examples of altered results between the provisional and the final results and he gave the national variance total of 62,037. The witness then drew attention to the identical results which were initially given. These were the pair of Chipata and Luangeni Constituencies where the first results were identical but corrected to different figures in the final results. Then

identical but corrected to different figures in the final results. Then there were the pairs of Lukashya and Malole; Liuwa and Lukulu West; Kankoyo and Kafulafuta; and Shiwang'andu with Isoka East. In all cases, the final results reflected that corrections had been made and the results were now different. The witness also drew attention to Mansa and said that the votes cast exceeded the maximum number of registered voters by 2,000. He also gave examples of what he considered to be an odd coincidence of the presidential candidates getting the same number of votes in various places.

All the foregoing was during his examination in chief. PW93, and to lesser extent PW96, can be credited with provoking and inspiring much of the distruct of the registers and the electoral processes during the last general elections. However, when Dr. Moyo was cross-examined he wilted completely in many respects and had to concede - very graciously we must say - that many of the major faults he had highlighted were as a result of his having formed a view on insufficient evidence or inadequate research or that he had taken a view of the facts which can infact not reasonably be entertained. Thus , for example, in relation to the polling districts in Ndola which were allegedly wrongfully shifted from one constituency to another, Dr. Moyo had to concede when shown the gazettes and the maps that the polling districts in question were infact PHYISICALLY LOCATED in one place though inadvertently listed under another in some 1991 Elections Office documents. The witness very propery admitted that he had seen the gazettes and the maps and he would not have made the allegation as he had done. The witness was also shown some gazettes which established that the allededly ungazetted polling districts were infact gazetted in various government gazettes containing corrigendar, which Dr. Moyo had not previously seen. This obliged him to withdraw his earlier assertions. Again, it was shown to the witness that the allegedly unlisted polling districts were in fact reflected in various documents, including the gazettes and that the Electoral Commission bad simply made a few mistakes in listing some polling districts for one place under another. When it came to the results, the witness was shown the voter registration figures for Chembe and Mansa and it was demonstrated that the results were transposed by error so that there were infact no 2,000 extra votes beyond the maximum number of registered voters. In the typical fashion of the gentleman that he proved himself to be, Dr. Moyo graciously conceded this; just as he readily admitted that there were no pairs of identical results in the results acknowledged as authentic by the Elections Office. It was also shown to the witness that there were indeed duplicate national registration cards entries on the registers due to a decision of the Electoral Commission as well as due to the mistakes of the Department of National Registration so that different people shared the same national registration card and registered as voters in different places. We should mention in fairness that the witness was on firm ground on

some points, such as the fact that in the final registers there were still a few uncorrected errors of polling districts which had been shifted to the wrong place, for instance in Mumbezhi..

PW96 was Mr. Phiri of the Post Newspapers who had actively collaborated with some of the petitioners.His evidence disclosed in effect that he and his newspaper wrote a number of stories whipping up suspicion about the whole electoral process including, "Ghost voters" on the electoral rolls (which was a reference to duplicate national registration cards). They wrote that the Electoral Commission was partisan and that there were pre-marked ballot papers which would be used. Like PW93, he too analysed the results from an initial document availed him by an officer from the Elections Office when compared with the final results released later. He noted the discrepancies and the odd coincidence of having idential pairs of results affecting ten constituencies and the odd coincidence of having identical pairs of results affecting ten constituencies, that is five pairs. He also drew attention to the instances in more than forty constituencies where the results were later varied or altered. The witness also attempted – without much succcess – to show that there was a predetermined set pattern in the number of votes received by (or perhaps "allotted" to) each of the presidential candidates.

As previously indicated we have digested and made some comments upon the whole of the evidence of PWs93 and 96 only for convenience at this stage since the specific item being discussed pertains to the problems associated with national registration cards. On the evidence of the witnesses reviewed, we consider that the situation and the state of affairs revealed amounts to a near national disaster. It is unacceptable and improper, indeed it is contrary to the plain intention of the legislature which enacted the National Registration Act, that there should be any, let alone hundreds of thousands of, national registration card with identical numbers shared by two or three Zambians. The franchise and the electoral system's integrity has relied quite heavily on the national registration cards as a means of identifying and vouching for the Zambian voter. We take judicial notice that the national registration card plays a major role in identifying a person in connection with many other things, such as employment and social security. It seems to us that, as long as the concerned Department and the authorities do not correct this anomaly, the electoral system will continue to be seriously undermined and questioned. The statistic for duplicate national registration cards reflected in the voters' registers given by Mr. Kalale pale into insignificance in camparison with the far worse problem of national registration cards revealed by Mr. Mwiinga. At the end of the day,

however, it can not be said that the flaws associated with the national registration card – which are harmful to the system as a whole – benefitted or disadvantaged any one of the presidential candidates any more or less than the others.

(b) **VOTERS CARDS**

As to (b), that is voters cards, we considered three areas of concern raised by the witnesses. firstly there was the problem of fading which PW2, PW50 and others spoke about. We saw such cards and we accept that it is a weakness of the new card that it fades and can even be rubbed clean. We note that the problem of fading cards could be mitigated by the facility of the voting certificate – when not misused – and replacement during a revision exercise. However, the mischief which was not acceptable and which could have been avoided had the officials used some common sense was the unwarranted refusal to allow voters like PW50 the chance to exercise their right to vote on account of the fading of the card. The second problem concerning the voters' cards was that some people ended up with two voters' cards each, leading to the suspicion on the part of the petitioners that they could vote twice. We saw such cards which were produced by the witnesses. However, it was also explained to us by the witnesses from the Elections Office (notably PW22 Mr. Musonda) that there had been a lot of misplacement of voters in the wrong provisional registers on account of errors of the coding of polling districts which were committed by the officials at the time of completing the registration forms. This necessitated corrections which entailed the issue of replacement cards and the transfer of voters' names to the correct final registers. In the process, some voters ended up having tow voters' cards because the earlier one was not always physically withdrawn. This confusion also resulted in many affected voters not collecting their replacement cards and not voting. In some cases, the corrections were still not made in final register. We accept the evidence of PW22 and find that where a second voters' card was issued in replacement of an earlier one affected by misplacement in the registers on account of the wrong coding, the result was simply that the whole process become rather untidy. However, we accept that the concerned voters could not vote twice; they could not use the first card. The mischief of double voting which was apprehended can safely be ruled out.

The third problem regarding voters' cards concerns the category of crooked and dishonest persons like Zgyambo and Ms Kalo who had more than one voter's cards and successfully voted two or more times.

This category are illustrated not a flaw in the system but a fraud on the system. The sad part is that Zgyambo's tricks were facilitated by an official decision to accept the same national registration cards and treat it as representing different persons even when obviously not.

(c) THE REGISTERS

As to (c), that is the registers, the evidence much of which we have already outlined pointed to four main complaints. We should first make the observation, which is trite, that the exercise of the right to vote in periodic, genuine, free and fair elections is predicated upon the availability of a decent and acceptable register of voters in which all the eligible Zambians who took the trouble to register should be reflected. It is a fact also that while a provisional register can have mistakes which are expected to be corrected through the process of the publication of such registers, the final registers should generally reflect a high degree of accuracy so that no registered voter is disenfranchised. We should also make the observation that in this trial, there was no single witness who was a potential voter who came to say that he was refused registration. The only examples of unjustified disenfranchisement we heard were of the two voters in Bweengwa who were reflected as toddlers and the many who were the victims of uncorrected misplacements due to wrong coding. Otherwise the frontal attack on the integrity of the registers came mostly from PW93 as we have already seen. He spent a lot of time on the provisional registers but his criticisms were valid only in respect of any mistakes which were not corrected.

Of the four areas of complaint, the first related to the unpopular decision of the Electoral Commission to authorise identical national registration cards to remain on the registers. This was confirmed by PW22 and CWI as well as the provisional and final registers exhibited in the case. This resulted in 52,703 duplicate national registration card cases with different names representing different individuals. We also accept that there were 9,540 other duplicate national registration cards with the same names but different dates of birth and which could conceivably mean that some people appeared twice and had potentially two votes. We also accepted the evidence of CWI who told us that there were 33,444 double registrations by the same individuals where a correction was made in the final register by leaving them where they registered first. In the last case, although leaving a person where he/she registered last would be more logical, we accept that the necessary correction had been made to prevent double voting. In

relation to the whole complaint of duplicates remaining on the registers, we note that all of them put together do not exceed or even reach 100,000 which, when looked at proportionately and in the context of a nation-wide election which a presidential election is, speaks for itself. We have already made reference to the fact that the decision to allow duplicates also facilitated multiple registration by crooks like Zgyambo who must have been assisted by partisan officials. PW93 also gave instances of multiple listing of a voter, a phenomenon which was so isolated and so rare that it required the keen-eyed vigilance and virtually microscopic scrutiny of this witness to spot it.

The second area of complaint related to the use by some election officials of provisional or final registers indiscriminately at the polling stations. The complaint was voiced by PW93 and the phenomenon was confirmed by PWs 21 and 22. Apart from showing carelessness and untidiness in the performance of the election officials' duties, no specific mischief or baneful consequence was shown to have resulted.

The third area of complaint related to the misplacement of voters in the registers which was not corrected in the final registers. PW93 spoke about this and was on firm ground on Mumbezhi. There was other evidence suggesting that some voters were affected by this in the Isoka, Mbala and Mporokoso areas. There was also the evidence of PW39 Mr Andrew Bwezani Banda, one of the ZADECO Vice Presidents and a candidate in the Chipata Central Parliamentary Constituency. His evidence touched on a number of aspects, including the flaws resulting from the misplacement of voters. Mr. Banda complained about the MMD's use of government motor vehicles in their campaigns when they were also distributing medicines in the rural clinics in the Lumezi Constituency in neighbouring Lundazi. He talked about how the leaders dished out money to schools and other public projects and also how the respondent visited Chipata and announced sale of council houses at give-away prices, urging the voters to vote for him. We have already dealt with these aspects of the case. However, Mr. Banda also informed the court that a lot of polling stations (which he named) were wrongly listed or misplaced. We learnt that there was much confusion due to the misplacement of polling districts and polling stations belonging to Chipata Central into Luangeni which resulted in some voters not voting. Some of the voters ended up having two voters' cards while the gazetting of any corrections made was not brought to everyone's attention. The confusion was, needless to say, attributable to the elections administrators and there was no suggestion that this flaw in the system benefitted any particular candidate or disadvantaged one any more than the other.

Finally, PW93 complained of instances of incomplete personal particulars such as a missing first name or an incomplete residential address of a voter.

Having examined the flaws on the registers, we can confirm - and it is our finding - that there were indeed flaws or faults which did not contribute to building confidence in the system and which could and should have been avoided. Flaws which facilitated the possibility of more than one vote per person conduced to illegality since the democratic system we have embraced which is underpinned by the Constitution and the Electoral Act envisages and confers only one vote in each election. However, having reviewed and analysed all the evidence, it is our finding that there is nothing to support the suspicion which was voiced of a built-in majority for the MMD or anyone.

(d) **POLLING DISTRICTS**

As to (d), that is the polling districts, we considered the complaints and the flaws, if any, in the light of the evidence given by PWs 93, 96 and 39. Having carefully considered the evidence, it is our finding that the evidence of the increase in the number of polling districts was not evidence of any flaw in the system. There was nothing in the evidence to warrant the raising of suspicion by PWs 93 and 96 nor was the increase itself evidence of some sinister development to do with rigging or something of the sort. The other flaw testified to by PW93 was the allegation that some polling districts were not gazetted. As we have already seen, this was shown not to be true and the witness had to concede under cross-examination. Similarly, the suggestion that there were or there may have been sinister and subterranean adjustments to the constituencies was not borne out. Thus, the allegation of ten polling districts in Ndola being shifted from Chifubu to Kabushi when some 1991 documents had listed them under Chifubu had to be abandoned and PW93 conceded he would not have raised the complaint had he seen the maps, the gazettes and the other documents. However, it is to be noted that PW39 at least was on firm ground when he complained about the polling districts and polling stations which were wrongly listed or misplaced in Chipata. It was true to say that the corrections in the gazette, if any, would not have been seen by many. Some of the misplacements persisted up until the polling day, thereby preventing the electorate from voting. The evidence of PW39 Mr. Andrew Banda on this point was not rebutted and the point was

well-taken. The misplacements ought to be rectified so that none is disenfranchised and dissatisfaction and unwarranted suspicion avoided.

(e) **POLLING STATIONS**

As to (e), that is flaws associated with the siting of polling stations we heard three types of complaint. The first was that in this day and age when the values of multiparty democracy ought to be evident both in practice and in perception there actually were some polling stations established at premises belonging to party officials. This was obviously wrong and conducive to malpractice, Examples were given by PWs 69, 77 and 46. PW69 was Mrs. Prisca Nkhoma, a polling agent for the Lima Party in Chongwe. We heard from her that her polling station was a tent erected at the local MMD Chairman's house. The Chairman kept telling the people to vote on the clock; his wife offered free traditional beer and drew a clock on the voters' palms before they went in to vote. The witness saw at least one voter who collected her voter's card from the Chairman who was keeping a batch of them. The evidence of PW77 Mr. Machina, a polling agent for Dr. Guy Scott was to the same effect as that of PW69. Apart from the foregoing, we have already alluded to the example given by PW46 Mr. Kandeke who voted in Kabwe at a polling station established at a beer-hall or tavern belonging to the local MMD Chairman. The second type of complaint concerned the misplacement of polling districts which resulted in the loss of polling stations or their own misplacement so that some people could not even vote. This came out of the evidence of PW39. The last kind of complaint under this part was that by PW49 Mrs. Emelio who complained of the vast distances many voters were expected to walk to the polling stations in Sinjembela as a result of which people did not vote. This was a valid complaint of general interest and occurrence and which should be considered by the authorities concerned, notwithstanding that some people - like PW93 - would probably still not favour the creation of any more polling districts.

(f) **RESULTS**

As to (f), that is flaws in the results, the main evidence was that given by PWs 93 and 96 a precis of which we have already given. One complaint related to the initial results announced which had five identical pairs of results farm ten constituencies, provoking the suspicion or allegation that the results were predetermined and cooked

up or plucked from the blue. We accept that corrections were made but nonetheless such identical sets were there at first. Whether this was as a result of gross negligence or carelessness or not (in the prevailing climate of political distrust, hatred and mutual dislike), it led to a lot of suspicion on the part of the petitioners. The second complaint related to non-identical results but which were nonetheless altered. We accept that all this weakened confidence and belief in the system and did not redound to the credit of those managing the electoral process. The third complaint we consider not to have been well-taken and this was that candidates got a similar number of votes in a variety of constituencies; suggesting that there was an allocation of predetermined figures which had been conjured up. We examined the evidence very closely and did not discern odd coincidences of the kind to arouse this type of suspicion in an objective observer. The trouble is that there was very little objectivity and too much distrust.

The flaws of all types which we have said were established, of course, did not reflect well on those managing the electoral process. Many of them can and should be addressed in order to enhance our democratic profile and in order to engender greater confidence in the electoral process. Elections, it goes without saying, are the sole lawful, constitutional, and legitimate method for the peaceful and legal acquisition of political power. They are the culmination of the exercise of some of the most basic fundamental rights such as the rights of free association, free assembly and free speech the maintenance of which is vital in order to sustain free political discussion and free political choices. Those in power should govern with the consent and by the will of the governed expressed in periodic genuine open, free and fair elections where the result reflects the exercise of free choice. If it be the will of the people, through the electorate, that there be changes, elections guarantee that the changes desired shall be obtained by peaceful means. We repeat: The flaws identified need to be addressed by the authorities. However, flaws by their very nature go to the general integrity of the system and do not necessarily suggest that the electoral system has been comprehensively massaged or predisposed to grant an unfair or any advantage or disadvantage to any one, in advance.

CONCLUSION

Having reviewed the evidence, it is necessary to conclude. Admittedly, there are some witnesses whose evidence we have not specifically alluded to and which we considered to be unhelpful to the issues before us. Persons like PW70 Mr. Jerade Sekeleti, PW71 Mr. Kayanda and

PW72 Mr. Jackson Sekeleti who complained that the MMD candidate Mr. Nkausu visited their polling stations and greeted some people did not make any useful contribution to this case. Neither did PW43 Mr. Tiyaonse Kabwe who - having read the evidence of PWI2 in the Post newspaper - wished to comment on it and to dispute his assertions. There were a number of witnesses from the media who produced various newspaper articles which did not advance the case in any useful fashion. There were other witnesses not specifically mentioned - such as PW37 a polling agent for PW82 - because the point they covered has been adequately dealt with by reference to the evidence of other witnesses.

We should also mention that, from the evidence of the petitioners PWI, Mr Zulu, PW2 Mr. Lewanika, PW8 Mr. Kambaila and PWI6 Mr. Mung'omba, the petitioners had a number of grievances which are largely if not purely of a political nature. The resolution of such political issues would have more naturally sounded in another forum than in a courtroom where the parties have vented their feelings in default of meaningful dialogue among our politicians. Thus, they complained of the manipulation of the constitution by the amendments of 1996 which appeared to them to have been selectively and advisedly targeted. One of the them, Mr. Kambaila, even went so far as to call upon their Lordships to declare the 1996 amendments requiring the parents of a candidate to be citizens as null and void. Such call, of course, went beyond the ambit of an election petition which was not constituted for such a purpose. Some of the petitioners raised concerns about the need for a mutually agreed independent Electoral Commission to manage the elections; concerns about the use of the public media and the limited access to it by the opposition; and concerns about the Public Order Act. There were complaints concerning the use - or perhaps more accurately the misuse - of public or government resources, concerns some of which the Electoral Commission endeavoured to address when it set out a code of conduct (by Statutory instrument 179 of 1996) apparently more honoured in breach than in observance. It seems to us that resolution of political issues in the political arena is to be preferred to litigation. For example, some measures which may be considered offensive, provocative, unjust or unfair in the political arena so as not to be universally acceptable may yet strictly speaking be "legal" as a matter of strict law. It seems to us that in such event where the court may be unable to pronounce upon their validity based on their possible illegality or unconstitutionality, the politicians owe it to the citizens - (who are undoubtedly entitled to peace and the quiet enjoyment of life) - to resolve the political issues and to underight the political well-being of the nation. This we find to be the challenge facing our politicians on some of the grievances brought to our attention by the petitioners. It is certainly not part of the remit of any court (to borrow from the language in the Akar case) to start debating the wisdom or

desirability.or fairness of some of the measures if a legal or constitutional challenge is unavailable.

We are also aware that there were allegations made in the petition which have either not been supported by any evidence or not been proven. Examples of this include the allegation 'that at the poll, the polling stations and rooms where people cast their votes had intimidating presence of heavily armed soldiers and policemen there through bullying voters into voting for the respondent and his party in government as the particulars of the voters were also endorsed on their ballot papers thereby ensuring that the vote was not secret, and a voter's choice could be traced." There was not an iota of evidence tendered; not a single witness, of the many who testified 'to events at a polling station, said there were the alleged "heavily armed solders" at all or any police officers bullying any one. Not one person said particulars were written on the ballot papers unless the reference was to the voter's serial number which is written on the ballot counterfoil; a practice which has always been there in Zambia. There was also an allegation that double-voting was facilitated by the provision of substandard ink that could be washed off and by the failure "to put measures in place to detect and stop the use of invisible rubber hand gloves" which allegedly allowed many people with more than one voter's cards to vote as many times as they had cards. While there was some evidence of double voting by the dishonest like Zgyambo and Miss Kalo who washed off the ink, no one came to talk about invisible rubber gloves. We have already dealt with the case of the voter who had two voters' cards because of coding errors and we have already found as a fact that such voters could not vote twice, even if they tried to do so, because their names only appeared once in the final registers in respect of the corrected polling district.

There was yet another allegation that the Electoral Commission created new polling stations which were secretly used. No evidence was led to support this claim. There was an allegation that persons who had died prior to the election somehow voted in the election using MMD cadres who were supplied with the requisite documents. This allegation may have been intended to be proved by the witnesses from Chongwe who claimed to have been given false identities and to have been driven to Ngwerere to vote in those other names. We have already discussed this evidence which was not believable, as already found.

When all is said and done, we accept that there was on the whole reasonable cause for complaint and for bringing this petition which it

was in the public interest to ventilate in court. Some of the grievances and issues taken up were certainly well- taken while obviously some could not have been pursued had the complainants been possessed of the full facts or explanations which emerged during the trial. For reasons we have given, we decline to determine and declare that the provisions of Article 34(3) (a), (b) and (e) of the constitution have not been satisfied in respect of the respondent. We find that he was qualified to contest the election. It follows also that we do not find that he falsely swore as to the citizenship of his parents. We were asked to declare that the election process was not free and fair and that the election was rigged and therefore null and void; The election process had flaws and irregularities, as we have already pointed out. The bottom line, however, was whether, given the national character of the exercise where all the voters in the country formed a single electoral college, it can be said that die proven defects were such that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the defects seriously affected the result which could no longer reasonably be said to represent the true free choice and free will of the majority of the voters. We are satisfied, on the evidence before us, that the elections while not perfect and in the aspects discussed quite flawed were substantially in conformity with the law and practice which governs such elections; the few examples of isolated attempts at "rigging" only served to confirm that there were only a few superficial and desultory efforts rather than any large scale, comprehensive and deep rooted "rigging" as suggested by the witnesses who spoke of aborted democracy.

The petition is unsuccessful and it is dismissed. However, it is clearly in the interests of the proper functioning of our democracy that challenges, to the election of a president which are permitted by the constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs.

Petition Dismissed

76

IN THE CONSTITUTIONAL COURT OF ZAMBIA 2016/CC/A048
HOLDEN AT LUSAKA APPEAL NO. 13/2017

(Constitutional Jurisdiction)

IN THE MATTER OF: ARTICLE 73 (1) OF THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA

AND

IN THE MATTER OF: SECTION 98 (c) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: MWINILUNGA CONSTITUENCY PARLIAMENTARY ELECTIONS HELD ON 11TH AUGUST, 2016

BETWEEN:

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
29 JAN 2018
REGISTRY 5
P O BOX 50067, LUSAKA

JONATHAN KAPAIPI APPELLANT

AND

NEWTON SAMAKAYI RESPONDENT

Coram: Sitali, Mulenga, Mulembe, Mulonda and Munalula, JJC on 13th July, 2017 and 29th January, 2018

For the Appellant: Mr. K. Kombe of Andrew and Partners

For the Respondent: Mr. P.G. Katupisha of Milner & Paul Legal Practitioners

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J U D G M E N T

Sitali, JC, delivered the judgment of the Court.

77

Cases cited:

1. Philip Mhango v Dorothy Ngulube and Others (1983) Z.R. 61.
2. Anderson Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) Z.R. 138.
3. Sithole v The State Lotteries Board (1975) Z.R. 106.
4. Mlewa v Wightman (1995/1997) Z.R. 106.
5. Annard Chibuye v Zambia Airways Corporation Limited (1985) Z.R. 4.
6. Hollington v F. Hewthorn and Company Limited [1943] 2 All E.R. 35.
7. Mubita Mwangala v Inonge Mutukwa Wina SCZ Appeal No. 80 of 2007.
8. Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114 of 2007.
9. Akashambatwa Mbikusita Lewanika, Evaristo Hicuunga Kambalala, Dean Namulya Mung'omba, Sebastian Saizu Zulu and Jennifer Mwaba Phiri v. Frederick Titus Jacob Chiluba (1998) Z.R. 49.
10. Brelsford James Gondwe v Catherine Namugala SCZ Appeal No. 129 of 2012.
11. Attorney-General v Kakoma (1975) Z.R. 212.

Legislation referred to:

1. The Electoral Process Act No. 35 of 2016, section 97 (2) (a) and (4).

This is an appeal against a judgment of the High Court by which the Court dismissed the appellant Jonathan Kapaipi's petition and declared that the respondent, Newton Samakayi, was duly elected as Member of Parliament for Mwinilunga Constituency.

The appellant and the respondent were candidates in the parliamentary election for the Mwinilunga Constituency held on 11th August, 2016. The appellant was the candidate for the Patriotic Front (PF) Party while the respondent was the candidate for the United Party for National Development (UPND). The respondent

obtained 32,645 votes in the election while the appellant obtained 2,900 votes. Thus, the respondent was declared as the duly elected Member of Parliament for the Mwinilunga Constituency.

The appellant petitioned the High Court and alleged that the respondent was not validly elected because, during his campaign, the respondent engaged in illegal practices of publishing false statements against the appellant and his party and spreading hate speech against Mr. Lungu, the PF presidential candidate. The appellant's allegations, in a nutshell, were that the hate speech was to the effect that Mr. Lungu and the appellant had imported 250 ritual killers called matumbula into Mwinilunga Constituency to kill people in the area and that six PF youths who were in Mwinilunga Constituency to assist with PF campaigns were matumbulas who were armed with machetes and guns; that the respondent through one Mr. Mbimbi of the New Covenant Church published hate speech to the Christian community; that as a result of the hate speech an aspiring PF councillor in Ntambu ward in Mwinilunga Constituency was accused of killing a person and people in the area subsequently burned three village kitchens and a house belonging

to PF members; that the respondent and or his agents intimidated PF supporters and pulled down the appellant's campaign posters.

That on nomination day, the respondent sent his supporters to disrupt the appellant's nomination and they assaulted the appellant's supporters; that at Kanyihampa polling station the respondent's cadres assaulted and stopped three PF polling agents from performing their duties as polling agents.

The appellant further alleged that Mr. Andrew Kanyabu, who had applied to stand as a councillor under the UPND was recruited as a polling assistant while Mr. Jonathan Chiyezhi who had posters of the respondent on his motor vehicle was recruited as a presiding officer at Kabanda polling station; that on 10th August, 2016, the respondent and or his agents removed two polling assistants, whom they suspected of being PF sympathisers, from the group of polling assistants who were being deployed to various polling stations while Kennedy Katong'i who spread hate speech about Mr. Edgar Lungu was presiding officer at Mulumbi polling station. Lastly, the appellant alleged that the respondent and or his agents continued to campaign after the official close of campaigns at 18.00 hours on

10th August, 2016; and that the respondent's cadres were campaigning on the queues while voting was taking place on polling day, 11th August, 2016. The appellant alleged that as a consequence of the illegal practices outlined above, the majority of the voters in the constituency were prevented from voting for their preferred candidate.

The appellant thus sought the following reliefs in his petition:

i) **That it may be determined and declared that the said NEWTON SAMAKAYI was not duly elected Member of Parliament for Mwinilunga Constituency.**

ii) **That it may be determined and declared that the said election was void and therefore a nullity.**

iii) **That the Petitioner may have further or other relief as may be just.**

iv) **That costs occasioned by this petition be borne by the Respondent.**

The respondent filed an Answer in which he denied being involved in any corrupt or illegal practices prior to the elections as alleged by the appellant. He specifically denied preaching hate speech against the PF Party presidential candidate Mr. Edgar

Lungu and the PF members, either personally or through his agents. He denied that the people who burnt the three houses in Ntambu ward were his agents.

The respondent further denied intimidating PF supporters and pulling down PF posters or that he instructed his supporters or agents to disrupt the appellant's nominations or to physically assault the appellant's supporters.

He asserted that allegations to do with the conduct of elections were for the Electoral Commission of Zambia to respond to. Lastly he denied campaigning after the official close of campaigns and asserted that he was legally elected as Member of Parliament for Mwinilunga Constituency.

At the trial of the petition, the appellant testified in support of his petition and called 14 other witnesses. In rebuttal, the respondent testified in his defence and called 16 other witnesses.

The Electoral Commission of Zambia which was made a party to the petition as 2nd respondent, was subsequently removed from the proceedings by consent of the parties through a consent order dated 3rd October, 2016.

The learned trial Judge analysed the evidence adduced by the parties and found that the appellant had failed to prove all the allegations to the required standard except for one allegation. The allegation which was found to have been proved was the allegation about the presiding officer Katong'i communicating a clearly partisan message intended to sway the recipient to vote in a particular manner. The learned trial Judge, however, observed that there was evidence that the recipient of the message did not forward it to any other person and that he voted for his preferred candidate. For that reason, the learned trial Judge held that she was not satisfied that the non-compliance affected the result of the election in a substantial manner. The learned trial Judge, therefore, declared that the respondent was duly elected as Member of Parliament for Mwinilunga Constituency and accordingly dismissed the petition.

Dissatisfied with the decision of the lower Court, the appellant appealed to this Court advancing five grounds of appeal.

The first ground of appeal was that the learned trial Judge erred in law and fact when she held that there was no evidence that

the respondent accused PF members or the appellant of the ritual killing of Pethias Katanga to influence the vote in his favour.

The second ground of appeal was that the learned trial Judge erred in law and fact when she held that there was no cogent evidence adduced by the appellant to rebut the respondent's evidence that the respondent did not spread hate speech against the appellant after the Nyaunda ceremony and that there was no evidence that in the instances where the term "matumbula" was used by local people and UPND cadres, its use was so widespread that it covered the whole Mwinilunga Constituency and the majority of voters were or may have been prevented from electing their preferred candidate.

The third ground of appeal was that the learned trial Judge erred in law and fact when she held that there was no evidence which proved that the assaults on PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or that of his election agents or polling agents.

The fourth ground of appeal was that the learned trial Judge erred in law and fact when she held that Katong'i's action in sending the SMS clearly proved his partisan inclination and

contravened the Electoral Process Act No. 35 of 2016 (hereinafter referred to as the Act) but that the contravention did not compromise the election which was conducted as to be substantially in accordance with the provisions of the Act and that Katong'i's act did not affect the result of the election.

The fifth ground of appeal was that the learned trial Judge erred in law and fact when she held that the allegations by the appellant that the respondent and or his agents were campaigning after close of campaigns were general and lacked specificity.

Both the appellant and the respondent filed written heads of argument.

In the appellant's heads of argument Mr. Kombe argued grounds one and two together. Regarding the first ground of appeal, counsel submitted that the appellant strongly contended that there was sufficient evidence adduced during trial to show that the respondent and or his agents linked the death of Pethias Katanga to the appellant and alleged that the appellant and or his agents had killed Pethias Katanga because the appellant and his agents were called "matumbulas", a derogatory term used to describe ritual killers. Counsel submitted that the appellant's evidence on record

shows that the use of the derogatory and offensive term "matumbula" against the appellant and other PF members was all over Mwinilunga Constituency and that this greatly affected their campaigns before the elections and ultimately, the results of the election.

It was submitted that the evidence of the appellant and PW6 Binwell Nkala was that because of the matumbula tag, when Pethias Katanga died in Ntambu Chiefdom, UPND cadres alleged that the PF had killed him. That as a result of that accusation three kitchens which belonged to PW6, his brother Collins who stood on the PF ticket as a councillor and a third person were burned.

Counsel submitted that it was a fact that the kitchens were burnt by known people after the death of the deceased and that the trial Judge erred when she found that there was insufficient evidence on this point and believed that the kitchens were burnt mysteriously. Counsel contended that this implied that the learned trial Judge believed in witchcraft.

On ground two, counsel submitted that the appellant laid sufficient evidence before the trial Court to prove that the respondent spread hate speech that the appellant and the PF were

matumbulas after the Nyaunda ceremony. He submitted that the learned trial Judge fell into gross error when she stated that the appellant needed to adduce evidence to rebut the respondent's evidence when the appellant had already given his evidence. It was contended that it was not for the appellant to adduce evidence to rebut what the respondent said in examination in chief but for the trial Court to make a finding on the evidence of the appellant and that of the respondent.

Counsel submitted that the appellant had testified that on 23rd July, 2016, after a Nyaunda ceremony in Chief Sailunga's Chiefdom to which he and other PF members were invited, and at which the respondent was also present, the respondent and his agents started a story that the appellant had brought 250 "matumbulas" into Mwinilunga Constituency to kill people. That the term "matumbula" was all over the place to the extent that Chief Ntambu told all the village headmen to stop calling the appellant "matumbula" as they were tarnishing the Chief's image. It was contended that according to the appellant, once a person is tagged as "matumbula" in his language, he risks not only the votes but also his life and cited an

incident were two taxi drivers were killed after they were called matumbula.

It was submitted that, in rebuttal, the respondent merely stated that he never referred to the appellant as a "matumbula" because it was late when he left the Nyaunda ceremony and that there was no network in the area at that time.

Counsel contended that the tagging of the appellant as a "matumbula" affected his election because no one wants to associate with a person alleged to be a "matumbula" in a rural area. That the appellant was perceived as a threat to the community due to the tag of "matumbula" which was placed on him and other PF members and which was all over the Constituency.

Mr. Kombe submitted that there was cogent evidence on record for the election to be nullified. He contended that the learned trial Judge did not properly view the evidence before her and therefore misdirected herself when she held that the appellant's evidence should have rebutted the respondent's evidence. That it was not the duty of the appellant to rebut the respondent's evidence but vice versa. Counsel contended that the learned trial Judge's findings of fact were made in the absence of relevant evidence and

upon a misapprehension of facts and were findings which, upon a proper view of the evidence, no trial court acting correctly could reasonably make.

Counsel cited the case of **Philip Mhango v Dorothy Ngulube and Others**[1] in support of his submission that an appellate court can reverse the findings of fact made by a trial Judge if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.

On ground three, Counsel submitted that the learned trial Judge erred in law and in fact when she held that there was no evidence which proved that the assaults on PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or that of his election agent or polling agent. He argued that the appellant testified that on nomination day, the respondent and UPND supporters attacked him and his supporters until they were rescued by the police and taken to the police station for safety. That some of his supporters including Susan Maladi

(PW4), Womba Maladi and Jameson Kapita were injured in the incident and were issued with medical reports.

Counsel further submitted that PW4, Susan Maladi, testified that she and her sister Womba Maladi were assaulted by two UPND cadres Anton and Shafi on nominations day. This was after they were chased from the Council office where she and other PF supporters had accompanied the appellant to file his nomination papers. That according to PW4, the respondent was seen in a motor vehicle whose doors were open as the UPND cadres shouted "muchikasa" meaning on the hand. That PW4 sustained injuries and said that she was still unwell and failed to vote for the appellant on polling day, hence the loss.

He submitted that regarding the issue of violence, PW3 also testified that he was assaulted by UPND cadres who included John Kapeso and Robert on polling day at Kanyihampa polling station where he was stationed as a PF agent, for reporting two UPND agents, Mr. Franco and Mr. Kachiza to the police for campaigning at the polling station. He sustained injuries and was issued with a medical report by police.

Counsel contended that going by this evidence, the trial Court should have found that the acts of violence were committed with the knowledge and approval or consent of the respondent as he was present when UPND cadres assaulted PF cadres on nomination day and that he did nothing to restrain the UPND cadres from assaulting innocent female PF cadres.

He submitted that PW4 ably corroborated the evidence of the appellant in the Court below that the violence on nomination day occurred in full view of the respondent. That the highlighted acts of violence show that the respondent and his agents were involved in these illegal practices and other misconduct.

Counsel went on to submit that the reference in section 97 (2) (a) of the Act to the majority of voters in a constituency being prevented from electing a candidate of their choice does not entail that the appellant should have rounded up all the witnesses from the 75 polling stations in the constituency to prove that a corrupt or illegal practice or other misconduct was so widespread as to affect the outcome of the election. He further submitted that section 97 (2) of the Act provides for instances where a Court can draw necessary inferences from the evidence on record to conclude, for

instance, whether or not the majority of the voters were, or could have been, affected by the violence perpetrated by the respondent's party so as to affect the outcome of the election.

Counsel submitted that the evidence adduced by the appellant and his witnesses established or proved the allegations in the petition to a fairly high degree of convincing clarity which is the standard to which allegations in an election petition must be proved as was held in **Anderson Mazoka and Others v Levy Patrick Mwanawasa and Others**[2]. Counsel argued that the trial Judge did not make an adverse finding of fact against the appellant and his witnesses when she stated that she believed the respondent's witnesses. That it was shown in the Court below that the respondent's witnesses contradicted each other and that they gave inconsistent statements in examination in chief and in cross examination. Counsel contended that the evidence of the respondent's witnesses was mostly impeached in cross-examination and that the learned author Steven Lubet in his book entitled **Modern Trial Advocacy** at page 137 states that the impeachment of the testimony of a witness is intended to discredit the witness as a reliable source of information.

Thus, Counsel urged us to substitute our opinion for that of the trial Court and find that the respondent and or his agents had knowledge and consented to or approved of the assault of PW3, PW4, PW5 and PW8, as according to Counsel, the evidence on record reveals that they were present when these witnesses were assaulted. Counsel cited the case of **Sithole v The State Lotteries Board**[3] to support his submission that where an appellate court is in as good a position as the trial court to draw inferences, it is at liberty to substitute its own opinion for any opinion which the trial court might have expressed.

Regarding ground four, Counsel contended that the learned trial Judge erred in law and fact when she held that Katong'i's action in sending the SMS clearly proved his partisan inclination and contravened the Act but went on to find that the contravention did not compromise the election which was conducted as to be substantially in accordance with the provisions of the Act and that Katong'i's act did not affect the result of the election.

Counsel cited section 89 (1) (j) of the Act and submitted that it is clear from the evidence on record that there was serious non-compliance with the provisions of the Act as it related to the

conduct of elections. That the evidence of PW2, Mulenga Chishimba, had shown that UPND cadres forcibly removed him and other election officers whom they perceived to be politically inclined to the PF from the group of election officers and that this evidence was not disputed. He contended that the conduct of the UPND cadres highly compromised the credibility of the elections in Mwinilunga Constituency.

After citing the provisions of section 97 (2) of the Act, counsel submitted that the conduct of the UPND cadres was so grave in nature that it adversely affected or may have adversely affected the outcome of the election. He cited the case of **Mlewa v Wightman**[4] in which it was stated that an election can be nullified if there was wrong doing of the type and scale which satisfies the Court that it had adversely affected or may have affected the election. It was submitted that it was evident from the evidence of PW2 that the elections in Mwinilunga Constituency were not conducted within the principles laid down in the Act and that it was shown in evidence that the respondent was aware of these illegalities and did nothing to prevent them from being committed.

Counsel further submitted that there was evidence on record which revealed that Katongi's partisan inclination and participation in the elections as a polling assistant compromised the elections substantially. He contended that the appellant in the Court below had testified that he found a lot of anomalies in Parliamentary results in Indalu and Lukokwa polling stations, which are in remote rural areas where there is a lot of illiteracy, and yet both polling stations recorded zero rejected votes. It was submitted that at Ntambu polling station out of two streams, the PF presidential candidate recorded zero votes and yet the PF councillor and his family live in that area. That the appellant testified that out of 75 polling stations, he won at Inkenyaule polling station where he polled more than 500 votes while the respondent only had 07 votes and that this polling station had a problem with declaring the winner and that there was unwillingness to take the results from the polling station to the totaling centre. It was submitted that all these anomalies arose because of the way presiding officers were chosen as they were only screened by UPND cadres. Further, that it is on record that campaigns were conducted on the election day in direct contravention of the Electoral Code of Conduct and the

Act. It was submitted that this was a clear indication that election officers were highly compromised as seen from the acts of Kennedy Katong'i an election agent who was very partisan.

Under ground five, it was submitted that the trial Judge did not consider the evidence on record when she held that the allegation by the appellant that the respondent and or his agents were campaigning after close of campaigns was general and lacked specificity. Counsel contended that the evidence of the appellant and his witnesses regarding that allegation was specific to the extent of identifying the individuals who were campaigning on election day. That the trial Judge totally disregarded that evidence when she held that the allegations by the appellant were general and lacked specificity. Counsel again cited the case of **Philip Mhango v Dorothy Ngulube and Others**[1] and contended, in conclusion, that the findings of fact made by the trial Judge should be reversed as there was ample evidence on record based on which, if properly viewed, the trial Judge acting correctly would have made reasonable conclusions.

In augmenting the arguments on grounds one, two and three, Mr. Kombe submitted that there were pertinent issues in the

interpretation of section 97 (2) (a) of the Act which the learned trial Judge did not take into account when she dismissed the petition. He contended that the trial Judge took a narrow and restrictive interpretation of section 97 (2) (a) with regard to the majority of voters in a constituency being prevented from electing a candidate of their choice. He submitted that the trial Judge did not take into account the evidence led by the appellant (as petitioner) and his witnesses.

Mr. Kombe submitted that grounds one, two and three relate to the hate speech propagated by the respondent and his agents and violent activities which are illegal practices and misconduct under the Electoral Process Act. That the record of appeal will show that evidence was led to show the extent of these illegal practices and misconduct by the respondent and his agents. That for instance, the trial Judge ruled that there was no evidence which proved that there was hate speech and violent activities carried out with the knowledge and consent or approval of the respondent and yet there was strong evidence led by the appellant and by PW2, PW3, PW5 and PW8 regarding violence. Counsel submitted that regarding the hate speech, RW3 had announced in church that the

appellant and his agents were matumbulas. That in spite of all that evidence on record, the learned trial Judge ruled that there was no evidence to prove the allegations.

Counsel contended that the learned trial Judge did not address her mind to whether the witnesses who testified represented a constituency, district or ward. That bearing in mind that election petitions are time bound, most witnesses were from one ward called Kanyihampa ward and that if the evidence of those witnesses was considered by the trial Judge, she would have arrived at the decision that the witnesses did represent the majority of voters in that particular ward. Counsel submitted that by inference, the illegal activities which the witnesses from Kanyihampa ward testified about were common and wide spread. Mr. Kombe submitted that it would be impossible to call all the residents of a particular ward to testify in order to prove that the majority of voters were or may have been prevented from voting for their preferred candidate. Counsel invited us to substitute our opinion for that expressed by the learned trial Judge, as according to counsel, we are in as good a position as the learned trial Judge was

to draw inferences from the evidence on record. He cited **Sithole v The State Lotteries Board**[3] as authority for his proposition.

Counsel submitted that it was the appellant's position that the majority of voters in the constituency were, or may have been prevented from voting for a candidate of their choice, due to the alleged illegal practices that occurred in the one ward, namely Kanyihampa ward. Counsel therefore urged us to uphold the appeal and reverse the learned trial Judge's decision.

In opposing the appeal, Mr. Katupisha, Counsel for the Respondent relied on the Respondent's written heads of argument which he augmented with brief oral submissions.

In opposing grounds one and two, Counsel submitted that there was no witness who testified before the lower Court that he or she saw or heard the respondent or his election agents accuse PF members or the appellant of the ritual killing of Pethias Katanga to influence the vote in his favour. It was submitted that according to the evidence of PW6 the death of Pethias Katanga was not related to ritual killing which was why PW6 took the matter to the traditional court at the chief's palace because witchcraft was suspected. That PW6 told the Court that what caused the death of Pethias Katanga,

according to the nurse, was beer which he took on an empty stomach. Counsel submitted that that cannot be said to be ritual killing.

He further submitted that the evidence of RW10, was that people in the village accused members of the deceased's family of putting medicines on the grave of the deceased so that the dead person could burn the shelters in the village. It was contended that going by that evidence, it could not be said that the respondent and or his agents accused PF members and the appellant of being ritual killers. Counsel submitted that ritual killing takes a different form in that a person is physically murdered with the motive of removing special body parts. That in this case, Pethias Katanga was not physically murdered by anybody and therefore ritual killing was not in issue. Counsel submitted that the appellant's allegation that the respondent accused him of being a ritual killer was a figment of his imagination calculated to sway the trial Court's decision in his favour.

Counsel contended that in order for the appellant to have succeeded in his petition, he ought to have brought a witness who personally heard the respondent accuse PF members or the

appellant himself of being "matumbula" or a witness who personally heard either of his two election agents accuse PF members or the appellant of being ritual killers. It was submitted that the Act specifically provides that in order for an election to be nullified, a corrupt practice, illegal practice or other misconduct has to be committed in connection with the election by a candidate or with the knowledge and consent or approval of the candidate or that of the candidate's election agent or polling agent. That the appellant further needed to prove that because of the illegal act committed by the candidate or with the candidate's knowledge and consent or approval or that of his election or polling agent, the majority of voters in the constituency were, or may, have been prevented from electing their preferred candidate.

Counsel submitted that the standard provided for under section 97 (2) of the Act is very high and that, in the present case, there was no evidence on record to show that the respondent had knowledge of the alleged illegal practice or that he consented to it. That there was equally no evidence to show that the respondent's election agents or his polling agents committed such an illegal act.

Counsel submitted that the trial Judge was therefore on firm ground to hold as she did and that ground one must, therefore, fail.

With regard to ground two, it was submitted that no witness testified to the effect that the respondent spread hate speech against the appellant after the Nyaunda ceremony and that it is on record that after the ceremony, the respondent remained behind in an area where there was no network to communicate with people in the Boma. That the respondent testified in chief and maintained in his cross examination that he remained behind after the ceremony.

Counsel therefore submitted that the trial Court cannot be faulted in its finding that there was no cogent evidence to prove that the respondent spread hate speech against the appellant after the Nyaunda ceremony because, in cross examination, the respondent's evidence remained unshaken. Counsel submitted that the appellant failed to prove the allegation to the required standard and that the trial Judge was on firm ground to dismiss it. He urged that ground two should, therefore, also fail.

In opposing ground three, Counsel submitted that the learned trial Judge was on firm ground in holding that there was no evidence which proved that the assaults on PW3, PW4, PW5 and

PW8 were carried out with the knowledge and consent or approval of the respondent or that of his election or polling agents.

That the respondent told the Court that on the nomination day, 30th May, 2016, it was his team that was attacked by PF cadres as they were coming from Kabwiku going to his campaign centre through the Boma on the only road leading to the campaign centre.

He submitted that it was, therefore, not true that the respondent and his team attacked the appellant and his cadres but that, on the contrary, it was the appellant and his cadres that attacked the respondent's team, especially the women who were pulled out of the motor vehicles and one person who was pushed off his motor cycle. That Susan Maladi (PW4), Womba Maladi and Jameson Kapita were not assaulted by the respondent's team as members of his team were in motor vehicles and proceeded to the campaign centre after the police intervened.

It was submitted that the trial Court cannot be faulted in its finding that there was no evidence to prove that the respondent's agents assaulted PF cadres as the people who were mentioned by PW3, PW4, PW5 and PW8 as their assailants were not the

respondent's agents and were not allowed to do what they did, if at all they did anything of that sort. It was submitted that PW4 took the case to Court but the alleged UPND cadres were acquitted. Counsel argued that the appellant cannot rely on the result of the criminal trial to prove his case as the law clearly states that the result of a criminal trial cannot be referred to as proof of a fact which must be established in a civil case. To that effect, counsel cited the case of **Annard Chibuye v Zambia Airways Corporation Limited**[5] and the English case of **Hollington v F. Hewthorn and Company Limited**[6] in support of the submission that the criminal proceedings in the subordinate court which were relied upon by the appellant and PW4 and others were not relevant to the election petition proceedings in the lower Court and could not be relied upon in those proceedings.

Regarding the allegation that UPND cadres assaulted Teddy Kachiza (PW3), a PF agent on polling day, it was submitted that the evidence of PW3 was in fact not the correct position of what transpired, and that John Kapeso and Robert who were alleged to have beaten PW3 were not the respondent's polling agents and that they were not allowed to assault PW3, as it was alleged they did.

Counsel submitted that on polling day no one is allowed to wear party regalia and that it was therefore difficult for anyone to identify party cadres.

It was submitted that RW6 Francis Ilenda denied beating PW3 and that he told the Court in cross examination that he did not know that Mr. Kachiza was assaulted or that he reported the matter to the police.

Counsel further submitted that RW9 Kachiza Kabwita, whom the appellant alleged had beaten PW3 Teddy Kachiza at Kanyihampa polling station, told the Court that he left Kanyihampa polling station at 07.00 hours and went to Kanyama to take food to polling agents and that he was in Kanyama until 04.00 hours on 12th August, 2016. Counsel contended that it was therefore not possible that RW9 was present at Kanyihampa polling station at the time he is alleged to have assaulted PW3.

It was contended that if PW3 was assaulted, it was not with the respondent's knowledge and consent or approval or that of his election or polling agents. That the assault of PW3 therefore, could not be the basis upon which the respondent's election could be nullified.

With regard to the alleged assaults on nomination day, Counsel submitted that the acts of violence were not committed with the knowledge and consent or approval of the respondent, as alleged by the appellant, as the respondent's witnesses had testified that it was they that were in fact attacked by PF cadres on their way to their campaign centre, as they were unaware, at that time, that the PF candidate was filing his nomination papers.

Counsel referred us to the nomination time table at page 217 of the record of appeal which, he submitted, shows that the PF candidate was the first candidate scheduled to file his nomination papers from 09.00 hours to 09.50 hours. Counsel contended that at the time the UPND campaign team left Kabwiku to proceed to their campaign centre and found the road blocked, it was well after the respondent had filed his nomination papers between12.00 and12.50 hours. It was submitted that the respondent's team did not expect the appellant and his team to be at the Civic Centre as according to the time table, the PF candidate had already filed his nomination papers prior to that time.

Mr. Katupisha further submitted that section 97 (2) (a) of the Act has set a very high standard of proof in election petitions and

that, in terms of that section, the trial Court cannot be called upon to draw inferences from the evidence adduced by a party as submitted by Counsel for the appellant. He argued that a petitioner in an election petition has to prove, on a standard higher than a mere balance of probabilities, that a candidate, whose election is challenged, committed a corrupt or illegal practice or other misconduct or that the corrupt or illegal act in issue was committed with the knowledge and consent or approval of the candidate or that of the candidate's election agent or polling agent. He submitted that a perusal of the appellant's petition reveals that the appellant made general allegations against the respondent and or his agents without specifying whether it was the respondent or a particular election or polling agent of the respondent who committed a specified corrupt or illegal practice or other misconduct. Counsel submitted that the appellant ought to have precisely stated that the respondent or his named agent committed the corrupt or illegal practice or other misconduct to enable the respondent to respond precisely to every allegation.

It was contended that although Mwinilunga Constituency is a vast rural constituency, the appellant only adduced evidence of

alleged violence in Kawiku ward to prove that the majority of voters in the 19 wards of the constituency were prevented from electing the candidate whom they preferred.

Counsel contended that whereas the appellant submitted that section 97 (2) of the Act provides for instances where the Court can draw necessary inferences from the evidence on record to conclude whether or not the majority of the voters could have been affected by the violence from the respondent's party, the law provides that the corrupt practice or illegal practice or misconduct must be widespread in the Constituency so as to affect the majority of the voters. Further, that the law provides that the Court must be satisfied about the scale or type of wrong doing. That this Court cannot do this by drawing inferences.

The case of **Mubita Mwangala v Inonge Mutukwa Wina**[7] was cited in support of this submission in which the Supreme Court held that:

> **In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct it must be shown that a majority of the voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.**
>
> **It is clear to us that the corrupt practice or illegal practice or indeed any misconduct must affect the majority of the voters in a**

alleged violence in Kawiku ward to prove that the majority of voters in the 19 wards of the constituency were prevented from electing the candidate whom they preferred.

Counsel contended that whereas the appellant submitted that section 97 (2) of the Act provides for instances where the Court can draw necessary inferences from the evidence on record to conclude whether or not the majority of the voters could have been affected by the violence from the respondent's party, the law provides that the corrupt practice or illegal practice or misconduct must be widespread in the Constituency so as to affect the majority of the voters. Further, that the law provides that the Court must be satisfied about the scale or type of wrong doing. That this Court cannot do this by drawing inferences.

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> **In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct it must be shown that a majority of the voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred.**
>
> **It is clear to us that the corrupt practice or illegal practice or indeed any misconduct must affect the majority of the voters in a**

constituency. In other words, the corrupt practice or illegal practice or misconduct must be widespread in the constituency so as to affect the majority of voters.

...We did indicate in the case of Mlewa v Wightman[4] that the Court must be satisfied about the scale or type of wrong doing. By scale, it is meant widespread as to influence the majority of voters in the constituency not to vote for their preferred candidate."

It was contended that the appellant's evidence generally failed to satisfy the standard of proof set in the case of **Anderson Mazoka and Others v Levy Patrick Mwanawasa and Others**[2] which is to a fairly high degree of convincing clarity and that it also failed to meet the standard set out in section 97 (2) (a) of the Act. That the case of **Sithole v The State Lotteries Board**[3] cited by the appellant does not apply. Counsel urged that ground three should therefore fail.

In opposing ground four counsel submitted, after citing section 97 (4) of the Act, that the issue of Katong'i's SMS arose out of the evidence of PW13, Peter Banda, who said after he received the message from Katong'i, he kept it to himself and that he voted for his party. That in the circumstances, that act alone did not affect the outcome of the election.

Counsel proceeded to submit that Kennedy Katong'i's act of sending the SMS on a date in June, 2016, before he was appointed as an election officer, could not be the basis to declare an election

void as he was not an election officer performing official duties in connection with the elections held on 11th August, 2016 and that the act did not relate to the conduct of elections.

It was submitted that the learned trial Judge was on firm ground when she held that Katong'i's action in sending the SMS clearly proved his partisan inclination and contravened the Act but that the contravention did not compromise the election which was conducted as to be substantially in accordance with the provisions of the Act, and that Katong'i's act did not affect the result of the election.

It was further submitted that the respondent's election could not be nullified based on the conduct of UPND cadres but that it could only be nullified based on a proven corrupt or illegal practice or other misconduct committed by the respondent personally as a candidate in relation to the election or with his knowledge and consent or approval or that of his election agent or polling agent. That section 97 (2) (a) of the Act has prevented casting the net wide.

Counsel contended that since the appellant had removed the Electoral Commission of Zambia as a party to the petition by consent of the parties, the appellant could not bring an allegation

relating to the conduct of elections by Electoral Commission officers against the respondent, as the respondent did not employ election officers.

It was submitted that based on the case of **Mlewa v Wightman**[4], the evidence adduced before the lower Court by the appellant was insufficient to warrant the nullification of the election as the said wrong doing by Katong'i could not be said to be of a type and scale which satisfied the lower Court that the act had adversely affected or may have affected the election, when the text message was only shared between two people in a constituency that has 75 polling stations. Counsel urged that ground four must accordingly fail.

Lastly, in opposing ground five, it was submitted that the learned trial Judge was on firm ground in holding that the allegations by the appellant that the respondent and or his agents were campaigning after the close of campaigns were general and lacked specificity. That the appellant as a petitioner knew or ought to have known that up until the close of the campaign period, the respondent had only two election agents. That in order to prove this allegation, the appellant needed to adduce specific evidence as

to whether it was the respondent or his agents who were campaigning after the close of the campaign period instead of merely saying the respondent and or his agents were campaigning after the close of the campaign period. It was contended that the appellant generalised because he did not know who allegedly continued to campaign after the close of the campaign period. That the appellant in his pleading cast the net wide in the hope of catching either the respondent or his agents.

It was further argued that the appellant did not adduce any evidence to establish how the respondent and his agents were campaigning after the close of the campaign period and so the allegation remained speculative. Counsel urged for that reason that ground five must fail.

Counsel submitted, in conclusion, that the appellant failed to prove his allegations against the respondent to the required standard as provided by section 97 (2) of the Act. He therefore prayed that this appeal be dismissed with costs.

We have considered the grounds of appeal, the heads of argument and the authorities cited therein and the judgment of the lower Court.

Before we consider the grounds of appeal, we wish to examine the law regarding the circumstances in which an election of a candidate as a Member of Parliament, among others, may be declared void. Section 97 (2) (a) and (b) of the Electoral Process Act No. 35 of 2016 (which we shall refer to as the Act) on which the petition was based provides as follows:

> **"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-**
>
> **(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –**
>
> **(i) by a candidate; or**
>
> **(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and**
>
> **the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;**
>
> **(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election."**

The provisions of section 97 (2) (a) of the Act are clear and unambiguous. An election of a candidate cannot be nullified unless the person challenging the election of the candidate proves to the

satisfaction of the Court that the candidate in question personally committed a corrupt practice, an illegal practice or other misconduct in relation to the election or that the corrupt or illegal practice or other misconduct was committed by another person with that candidate's knowledge and consent or approval or with the knowledge and consent or approval of the candidate's election agent or polling agent.

A further requirement of section 97 (2) (a) is that where it is proved that a corrupt or illegal practice or other misconduct was committed by a candidate or with the knowledge and consent or approval of the candidate or that of his election agent or polling agent, the petitioner must further prove that as a result of that corrupt or illegal practice or misconduct, the majority of the voters in the constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred.

Thus, it is not sufficient for a petitioner to only prove that a candidate committed an illegal or corrupt practice or engaged in other misconduct in relation to the election without proof that the illegal or corrupt practice or misconduct was widespread and

therefore prevented or may have prevented the majority of the voters from electing a candidate of their choice.

To that effect, the Supreme Court in the case of **Mubika Mubika v Poniso Njeulu**[8] stated that:

> **"The provision for declaring an election of a Member of Parliament void is only where, whatever activity is complained of, it is proved satisfactorily that as a result of that wrongful conduct, the majority of voters in a constituency were, or might have been prevented from electing a candidate of their choice, it is clear that when facts alleging misconduct are proved and fall into the prohibited category of conduct, it must be shown that the prohibited conduct was widespread in the constituency to the level where registered voters in greater numbers were influenced so as to change their selection of a candidate for that particular election in that constituency; only then can it be said that a greater number of registered voters were prevented or might have been prevented from electing their preferred candidate."**

Further, in **Mubita Mwangala v Inonge Mutukwa Wina**[7] the Supreme Court said:

> **"In order to declare an election void by reason of corrupt practice or illegal practice or any other misconduct, it must be shown that the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred..."**

In the earlier case of **Josephat Mlewa v. Eric Wightman**[4] the Supreme Court held that:

> **"The Court must be satisfied about the scale or type of wrong doing. By scale, it is meant widespread as to influence the majority of voters in the constituency not to vote for their preferred candidate."**

The above authorities, which are persuasive, demonstrate the import of the majority provision under section 97 (2) (a) of the Act. We duly endorse them.

Under section 97 (2) (b) of the Act, the election of a candidate may be declared void if it is proved to the satisfaction of the Court that the provisions of the Act were not complied with in the conduct of an election and that as a result of the non-compliance, the results of the elections were affected. Where it is demonstrated that despite the non-compliance with the provisions of the Act, the election was conducted as to be substantially in accordance with the provisions of the Act and further, that the act or omission complained of did not affect the result of the election, the election will not be declared void.

In this case, the appellant's election petition was premised on section 97 (2) (a) of the Act. Thus, the appellant was obliged to prove not only the commission of the corrupt or illegal practices or other misconduct by the respondent or with his knowledge and consent or approval or that of his election or polling agent, but also that the majority of voters in the constituency were or may have been prevented from electing their preferred candidate.

We also wish to restate that in an election petition, just as in any other civil matter, the burden of proof is on the petitioner to establish the electoral offence complained of. However, the standard of proof in an election petition is higher than that required in an ordinary civil action. A consideration of Zambian jurisprudence reveals that the evidence adduced in support of allegations made in an election petition must establish the issues raised to a fairly high degree of convincing clarity. In the persuasive authority of **Lewanika and Others v Chiluba**[9] the Supreme Court said this regarding the standard of proof:

> **"As part of the preliminary remarks which we make in this matter, we wish to assert that it cannot be seriously disputed that Parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability.... It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."**

In **Brelsford James Gondwe v Catherine Namugala**[10] the Supreme Court said:

> **"The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity:"**

Thus in the present case, the evidence adduced by the appellant in the Court below needed to have established the issues

raised in the petition to a fairly high degree of convincing clarity and to have demonstrated that the proven electoral offences were so widespread that the majority of voters were or may have been prevented from electing the candidate whom they preferred.

It is with these principles in mind that we shall consider the respective grounds of appeal.

Grounds one and two relate to the allegation in the petition that the respondent and or his agents preached hate speech against the PF presidential candidate Mr. Lungu and the appellant to the effect that they had imported 250 ritual killers called matumbula into Mwinilunga Constituency to kill people in the area. That as a result of the hate speech, an aspiring PF councillor in Ntambu ward was accused of killing Pethias Katanga and people in the area burned three village kitchens and one house belonging to PF members as a result of the accusation.

The evidence on the death of Pethias Katanga in Ntambu ward was adduced by PW6 Binwell Nkala and RW10 Jessy Kambungu. PW6 essentially testified that when Pethias Katanga died on 30th July, 2016, mourners from the UPND alleged that PF members had killed him as he could not have died from drinking beer.

Subsequently, PW6's kitchen and the kitchen of his brother, a PF member and that of another man were burned. A brother of the deceased told PW6 that his kitchen was burnt because PW6 was one of the ritual killers who killed the deceased.

PW6 testified that the police visited the scene of the burnt hut and after they left, people said if the police had picked anyone from the area, PF supporters, especially the Nkala family, would have been taught a lesson. PW6 said because of the death of Pethias Katanga, and the resulting threats, they stopped campaigning and wearing PF regalia.

In cross examination, PW6 said he and his brother Collins Nkala sued Chris Ngolofwana in the traditional Court because he accused them of witchcraft.

On the other hand, RW10 testified that on 27th July, 2016 her nephew Pethias Katanga died. A week later the shelters of Binwell Nkala (PW6), his brother Collins Nkala and Mr. Kauta were burnt in the night. RW10 stated that people in the village accused the family of the deceased of putting charms on his grave so that the dead person could burn shelters in the village. She denied that the family

placed charms on the grave of the deceased and said that the shelters and houses burnt mysteriously.

The learned trial Judge analysed the evidence and stated that although the appellant alleged that due to the hate speech, an aspiring PF councillor in Ntambu ward in Mwinilunga Constituency was accused of killing the deceased, which accusation led people in the area to burn three village kitchens and a house, she was of the view that the death of Pethias Katanga had nothing to do with the spreading of hate speech. The trial Judge believed the evidence of RW10 who said the death of her nephew was not linked to ritual killing but was linked to witchcraft and that the community, including RW10, believed that it was the deceased who mysteriously burnt the kitchens and houses of people who caused his death.

We have considered the evidence on record regarding this issue. We note that whereas the appellant challenges the trial Judge's finding that there was no evidence that the respondent accused PF members or the petitioner of the ritual killing of Pethias Katanga to influence the vote in his favour, an examination of the evidence adduced by PW6 reveals that this witness did not say that the respondent or either of his election agents accused the

appellant or PF members of the ritual killing of Pethias Katanga. Instead, PW6 clearly said that it was his family, the Nkala family, who were accused of the ritual killing of Pethias Katanga. He further said he and his brother Collins Nkala sued Chris Ngolofwena in the traditional Court because he accused them of witchcraft. RW10 confirmed that she and other people in the village believed the death of Pethias Katanga was due to witchcraft.

A careful consideration of the evidence on record also reveals that there was no evidence whatsoever that the death of Pethias Katanga was linked to the appellant and PF supporters by the respondent and his agents as alleged by the appellant or that the burning of the village kitchen, the house and the motor bike was caused by the hate speech allegedly propagated by the respondent and his agents.

The appellant did not adduce any evidence to show that the incidences of arson which occurred in Ntambu ward were as a result of hate speech.

We cannot fault the learned trial Judge when she accepted the evidence of RW10 as she had observed the witnesses and clearly resolved the conflicting evidence adduced by the parties based on

the credibility of the witnesses. It is settled law that a trial court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard the witnesses giving the evidence as held in the case of **Attorney-General v Kakoma**[11].

Going by the evidence on record, the trial Judge was on firm ground when she found no evidence that the respondent accused PF members or the appellant of the ritual killing of Pethias Katanga to influence the vote in his favour. We too have found no such evidence on the record of appeal. Ground one therefore fails and is dismissed.

Under ground two, the appellant attacks the learned trial Judge's finding that there was no cogent evidence adduced by the appellant to rebut the respondent's evidence that he did not spread the story that the appellant and his agents were matumbula after the Nyaunda ceremony. And the further finding that there was no evidence that in instances when the term matumbula was used by local people and UPND cadres, its use was so widespread as to cover the whole Mwinilunga Constituency so that the majority of

voters were or may have been prevented from electing their preferred candidate.

In support of this allegation, the appellant testified that after the Nyaunda ceremony which was held on 23rd July, 2016 in Senior Chief Sailung'a's Chiefdom, the respondent and his agents spread a story that PF had brought 250 ritual killers called matumbula to kill the people of Mwinilunga. The appellant stated that the respondent and his agents announced this on the radio and on a public address system. That the respondent's agent, Francis Imenda, continuously made the announcement from 08.00 hours to 18.00 hours every day at the old market and further that Derrick Chiyanyi drove around with Tolopo, who was commonly known as Chamwenini, in the respondent's car and announced that the appellant was a matumbula. According to the appellant, other people continued with the propanda until voting day.

In rebuttal, the respondent denied that he originated the story alleging that the appellant had brought 250 ritual killers into Mwinilunga Constituency and that the appellant and other PF members were matumbula.

He stated that after the Nyaunda ceremony he remained in Chief Sailung'a's area which had no cellular phone network for him to have originated the story. He said that if Derrick Chiyangi and Tolopo made announcements about the appellant being a matumbula, as the appellant alleged, he was not privy to the said announcements as the two men were not his agents.

RW6, Frank Silver Ilenda, alias Franco, who was alleged to have announced on a public address system at the market that the appellant was a matumbula, denied making such an announcement and said he only occasionally played UPND campaign songs on his music system.

Further RW3, Wilson Mbimbi denied publishing hate speech to the church and said his role as a preacher was to preach peace and unity. That due to the happenings in the Boma, he asked the congregation to pray for peace. RW3 said although he announced regarding the arrest of the six strange men in town, he reassured the congregants not to worry as the police had intervened. RW3 stated that at the time he made the announcement, the church was praying for peace during campaigns and also during and after the elections.

In evaluating the evidence on this issue, the learned trial Judge considered the definition of election agent and polling agent as provided in section 2 of the Act. The learned Judge observed that the legal position was that an agent had to be specifically appointed by the candidate as held in the case of **Akashambatwa Mbikusita Lewanika, Evaristo Hicuunga Kambalala, Dean Namulya Mung'omba, Sebastian Saizu Zulu_and Jennifer Mwaba Phiri v Frederick Titus Jacob Chiluba**[9]. That the respondent's testimony that he had appointed two election agents, namely William Mukang'ala (RW17) and Aaron Kakwimba was corroborated by the evidence of RW17.

The trial Judge found that there was no evidence that the respondent and or his agents used the term matumbula to refer to the appellant and his agents. The learned trial Judge further found that there was also no evidence that in instances when the term was used by local people and UPND cadres, its use was so widespread that it covered the whole Mwinilunga Constituency and that the majority of voters were or may have been prevented from electing their preferred candidate.

The trial Judge further found that while the appellant contended that there was evidence on record adduced by the appellant to the effect that the use of the offensive term matumbula placed on him and other PF members was all over the Constituency, which situation negatively affected his campaign before the elections and ultimately the results of the election, the appellant did not highlight that evidence.

Based on the evidence on the record of appeal, we agree with the learned trial Judge that the appellant's allegations regarding the preaching of hate speech were not proved to the required standard.

In view of the requirement that a petitioner must prove the allegations in the petition to a fairly high degree of convincing clarity, we agree with the learned trial Judge that in this case, not only did the appellant fail to adduce any evidence to prove that the respondent and his agents referred to him and his agents and supporters as matumbula, the appellant did not adduce any evidence to show that the use of the term matumbula was so widespread in the Constituency to the extent that the majority of the voters were or may have been prevented from electing their preferred candidate.

Ground two therefore has no merit and is dismissed.

Under ground three, the appellant challenges the learned trial Judge's finding that there was no evidence which proved that the assault of PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or of his election or polling agents. The appellant argued that the respondent was present when UPND cadres assaulted PF supporters on nomination day and he did nothing to restrain them from doing so until the PF supporters were rescued by the police who took them to the police station.

The evidence regarding the issue of violence was adduced by PW3, PW4, PW5 and PW8. PW3 Teddy Kachiza stated that he was the appellant's agent and that on polling day he was assaulted by UPND cadres at Kanyihampa polling station in Mulumbi ward because he warned a Mr. Franco and a Mr. Kachiza to stop campaigning by flashing the UPND symbol.

PW3, however, conceded in cross examination that voters at Kanyihampa polling station did not wear party regalia and so there was no way he could identify the party to which the men, whom he alleged assaulted him, belonged.

PW4 Susan Maladi testified that on nomination day, 30th May, 2016, she accompanied the appellant to the Council office to file his nomination papers. That she was subsequently assaulted and undressed by Anton and Shafi, whom she said were UPND cadres. The two men were charged and prosecuted for the assault but were acquitted although they admitted the charge after they sought her forgiveness. PW4 said she failed to vote on 11th August, 2016 as she was embarrassed after she was assaulted and undressed.

PW5, Fides Mutinta Chimba, also testified that she was assaulted by UPND cadres on polling day, 11th August, 2016, while she was at Kanyihampa polling station as a PF polling Agent. PW5 stated that she recognized her assailants as UPND cadres because of the regalia they wore. PW5 stated that she and other PF members were rescued by the police who took them to the police station for their safety. PW5 further stated that on the way to the police station, UPND cadres, who included Katong'i, Franco and John, threw stones at them.

PW8 Griffin Mulongesha testified that on 2nd August, 2016 he attended a PF meeting. After the meeting he and other people escorted their councillor to some shops. After the councillor left, a

person who appeared mad started beating PF members who wore PF party regalia with a stick. PW8 said he was hit on the nose with the stick and started bleeding. He further said he was also hit on the left hand by two UPND cadres namely Kasongo Kazhila and Stevenson Kazhila and he sustained injuries.

PW8 alleged that he did not vote on 11th August, 2016 as his face was still swollen after the act of violence. In cross examination, PW8 conceded that the person who appeared mad and assaulted people with a stick did not wear any party's regalia. He further conceded that it was that person who assaulted him.

Each of the four witnesses named specific individuals whom they said were UPND cadres as the persons who assaulted them. None of these four witnesses testified that the respondent or either of his appointed election agents were present when the alleged assault took place or that the assault was perpetrated with the knowledge and consent or approval of the respondent or that of his appointed election or polling agent.

It is trite that a candidate is responsible for the illegal or corrupt practices or other misconduct which he personally engages in or which are committed with his knowledge and consent or

approval or that of his election agent. Not everyone in a candidate's political party is his election agent in terms of the law as an election agent has to be specifically appointed. This was clearly stated by the Supreme Court in the case of **Lewanika and Others v Chiluba**[9]. In that case the Supreme Court observed thus:

> **"We are mindful of the provisions of the Electoral Act that a candidate is only answerable to those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's political agent since under regulation 67, an election agent has to be specifically so appointed."**

We endorse this sound principle of law. In the present case, we have examined the evidence on the record as given by PW3, PW4, PW5 and PW8. It is to the effect that the assailants of the named witnesses were alleged UPND cadres. In the circumstances, we are of the considered view that the learned trial Judge was on firm ground when she held that there was no evidence that the assaults on PW3, PW4, PW5 and PW8 were carried out with the knowledge and consent or approval of the respondent or of his election agents. We say so because according to the evidence, the respondent had appointed two election agents and neither of them was placed at the scene of the assault of any of the four witnesses who testified for the appellant regarding the allegation of violence.

Although PW4 said she saw the respondent in a motor vehicle on nomination day, she clearly stated that she and her sister Womba were assaulted by the two people she named at Kanyihampa primary school were they had taken refuge. From PW4's evidence neither the respondent nor his election agents were present in that place.

Further, the evidence on record is to the effect that all the alleged scenes of violence occurred only in one ward, namely Kanyihampa ward. The undisputed evidence is that Mwinilunga Constituency has 19 wards. Clearly in the circumstances, it cannot be said that the alleged acts of violence, even if they had been proven to the required standard, which they were not, could be said to have been so widespread as to have prevented the voters in the Constituency from electing their preferred candidate.

Given that allegations in an election petition must be proven to a fairly high degree of convincing clarity, we agree with the learned trial Judge that the evidence adduced by the appellant in relation to the alleged violence did not satisfy the stipulated standard. Ground three therefore fails on that basis.

Ground four relates to the allegation that Mr. Andrew Kanyabu who had applied for candidature as councillor under the UPND was recruited as a polling assistant and that Mr. Jonathan Chiyezhi who had posters of the respondent on his vehicle was recruited as presiding officer at Kabanda polling station.

The trial Court observed that the respondent denied that Andrew Kanyabu or Jonathan Chiyezhi were his agents and that he further denied giving his posters to Mr. Chiyezhi. The lower Court further noted that the respondent's evidence was that Jonathan Chiyezhi was not a presiding officer but a presiding assistant in charge of the referendum. That the respondent also said he did not employ the two officials as they were employed by the Electoral Commission of Zambia and that he had no control over who the Commission employed.

The learned trial Judge found that Andrew Kanyabu and Jonathan Chiyezhi were indeed employed by the Electoral Commission of Zambia and not the respondent and that the respondent could therefore not be blamed for the Commission's choice of polling assistants and presiding officers. The trial Court noted that the party which should have been answerable for the

appointment of the officers was the Electoral Commission of Zambia which was removed from the proceedings by consent of the parties. The Court ultimately observed that there was no breach of the electoral law by the ECZ through its appointments.

The trial Court further held that the allegation that the respondent and his agents removed the appellant's agents and supporters from the group of polling assistants but kept the suspected UPND presiding officer was not proved.

Regarding the issue of Kennedy Katong'i distributing hate speech in the form of an SMS, the trial Court found that there was evidence that the SMS was sent to Peter Banda (PW13) as alleged and was confirmed by Isaac Musadabwe Banda (PW15) as having been sent by Katong'i. That the message was clearly partisan but that PW13 said he did not forward it to anyone else and that it remained between Katong'i and himself. That PW13 said despite receiving the SMS, he still voted for his party, the PF.

The trial Court observed that PW13's evidence clearly showed that the message had no bearing on the outcome of the election as the recipient still voted for the candidate of his preference. The Court further observed that there was no evidence to prove that the

respondent was privy to or authorized Katong'i to communicate the message to Peter Banda (PW13). The Court thus found that although by sending the SMS, Katong'i's action proved his partisan inclination and contravened the provisions of the Electoral Process Act, she was of the view that the contravention did not compromise the election, which the trial Court found was conducted as to be substantially in accordance with the provisions of section 97 (4) of the Act. Thus, the learned trial Judge concluded that Katong'i's act did not affect the result of the election.

We have examined the evidence relating to the fourth ground of appeal. We entirely agree with the learned trial Judge that the appellant's evidence in support of the allegations relating to this ground did not satisfy the standard of proof for election petitions. As the trial Court rightly observed, and we agree with it, the conduct of elections vests in the Electoral Commission of Zambia as per Article 229 of the Constitution. Thus, if there were any shortcomings in the appointment of election officers, in this case, the right party to have responded to any allegation in that regard was the ECZ. As the ECZ was indeed removed from the proceedings

by consent of the parties, those allegations could not subsequently be directed at the respondent.

Further, and as the trial Judge again rightly observed, there is no evidence that Katong'i's act of sending the SMS to PW13 had any effect on the result of the election. This is particularly so as PW13 Peter Banda admitted that although he received the SMS from Katong'i, he was not influenced by it and he still voted for his preferred candidate. That being the case, we cannot fault the trial Judge for holding that the allegations relating to ground four were not proved. We therefore find no basis to upset the trial Court's findings in that regard, as Mr. Kombe invited us to do. Ground four clearly has no merit and we dismiss it.

Turning to ground five, the appellant submitted that the learned trial Judge erred in law and fact when she held that the allegation by the appellant that the respondent and or his agents were campaigning after the close of the campaigns were general and lacked specificity. The appellant in this regard alleged that the respondent and or his agents continued to campaign after the official close of campaigns at 18.00 hours on 10th August, 2016 and that the respondent's cadres were allowed to campaign even on the

polling day, 11th August, 2016. He gave the example of RW4 as one person who was campaigning on polling day. It was the appellant's position that RW4's case was not an isolated case. The appellant in his heads of argument contended that the trial Judge did not consider the appellant's evidence and that of his witnesses which was specific and by which specific individuals were identified as campaigning on election day.

We have carefully considered the evidence on record relating to the specific allegation that the respondent and his agents continued to campaign after the close of the campaign period. In his evidence, the appellant said Bishop Musesa, who testified as RW4, was one person who was campaigning after the close of the official campaign period.

We note that the specific allegation leveled against the respondent in the petition was that the respondent and his agents continued to campaign after the close of campaigns at 18.00 hours on 10th August, 2016. The appellant did not call any witness to testify that he or she saw the respondent personally or either of his election agents campaigning after 18.00 hours on 10th August, 2016.

According to the evidence on record, RW4, Bishop Musesa, was not the respondent's agent and neither was Pephious Kandela who was also alleged to have been campaigning after the close of the official campaign period.

The trial Judge, in agreement with Mr. Katupisha, observed that the appellant did not state in his petition whether the respondent was personally campaigning or whether it was his election agents who were campaigning and if so, which specific agents were campaigning, in what place and at what time.

Given the lack of evidence on the record of appeal to support the allegation in issue, we cannot fault the trial Judge's finding that the allegation that the respondent and or his agents were campaigning after the official campaign period closed, lacked specificity and were general. The trial Judge was on firm ground in arriving at that conclusion. Ground five thus lacks merit and is dismissed.

As all the grounds of appeal have failed, the appeal has no merit and we accordingly dismiss it. We uphold the lower Court's

decision to declare the respondent, Newton Samakayi, as duly elected Member of Parliament for Mwinilunga Constituency.

Each party will bear their own costs of this appeal.

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A.M. Sitali,
CONSTITUTIONAL COURT JUDGE

.....

M.S. Mulenga,
CONSTITUTIONAL COURT JUDGE

.....

E. Mulembe,
CONSTITUTIONAL COURT JUDGE

.....

P. Mulonda,
CONSTITUTIONAL COURT JUDGE

.....

M.M. Munalula,
CONSTITUTIONAL COURT JUDGE

138

(1830)

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

APPEAL NO. 14 OF 2016
2016/CC/A018
SELECTED JUDGMENT NO. 50 OF 2018

IN THE MATTER OF: THE PARLIAMENTARY ELECTION PETITON RELATING TO THE PARLIAMENTARY ELECTIONS HELD ON 11TH AUGUST, 2016

AND

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: ARTICLES 1, 2, 5, 8, 9, 45, 46, 47, 48, 49, 50, 54, 70, 71, 72 AND 73 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTIONS 29, 37, 38, 51, 52, 55, 58, 59, 60, 66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87 AND 89 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND

IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT

BETWEEN:

MARGARET MWANAKATWE — APPELLANT

AND

CHARLOTTE SCOTT — 1ST RESPONDENT

ATTORNEY GENERAL — 2ND RESPONDENT

CORAM: Chibomba, PC, Sitali, Mulenga, Mulembe and Musaluke, JJC on 11th April, 2018 and 31st October, 2018

For the Appellant:	Mr. B. Mutale, SC, Ellis and Company
	Mr. E. S. Silwamba SC and Mr J. Jalasi, Eric Silwamba, Jalasi and Linyama Legal Practitioners
	Mr. K.F. Bwalya and Miss Natalie Liswaniso, KBF and Partners
	Mr. Milingo Lungu, Lungu Simwanza and Company
For the 1st Respondent:	Mr. M.H. Haimbe, Malambo and Company
	Mr. K. Mweemba, Keith Mweemba Advocates
	Mr. G. Phiri, PNP Advocates
For the 2nd Respondent:	Miss L. Shula, Senior State Advocate

JUDGMENT

Sitali, JC, delivered the judgment of the Court.

Cases cited:

1. Chizonde v. The People (1975) Z.R. 66.
2. Mulondwe Muzungu v. Eliot Kamondo 2010/EP/001 unreported.
3. Priscilla Kamanga v. Peter Ng'andu Magande and Attorney-General (2008) Z.R. 7 volume 2.
4. Michael Mabenga v. Sikota Wina and Others (2003) Z.R. 110.
5. Steven Katuka and Law Association of Zambia v. The Attorney-General and 64 others, Selected Judgment No. 29 of 2016.
6. Mubita Mwangala v. Inonge Mutukwa Wina Appeal No. 80 of 2007.
7. Subramanian v. Public Prosecutor (1956) 1WLR 965.
8. Nkhata and Others v. Attorney-General (1966) Z.R. 124.
9. John Wamundila v. The People (1978) Z.R. 151.
10. Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others (2005) Z.R. 138.
11. Chizu v. The People (1979) Z.R. 225.
12. Austin Liato v. Sitwala Sitwala Selected Judgment No. 23 of 2018
13. Chrispin Siingwa v.. Stanley Kakubo Appeal No.7 of 2017
14. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49.

15. Brelsford James Gondwe v. Catherine Namugala SCZ Appeal No. 129 of 2012
16. Giles Chomba Yamba Yamba v. Kapembwa Simbao and others, Selected Judgment No. 6 of 2018
17. Zulu v. Avondale Housing Project (1982) Z.R. 172
18. Leonard Banda v Dora Siliya SCZ Judgment No. 127 of 2012
19. Examination Council of Zambia v. Reliance Technology Limited SCZ Judgment No. 46 of 2014
20. Sibongile Mwamba v. Kelvin M. Sampa and Electoral Commission of Zambia Selected Judgment No. 57 of 2017
21. Boniface Chanda Chola and two others v. The People (1988/89) Z.R. 163

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 229.
2. The Electoral Process Act No. 35 of 2016, section 97 (2) (a) and (b).

The Appellant, Margaret Dudu Mwanakatwe, who was the 1st Respondent in the Court below, appeals against the decision of the High Court to nullify her election as Member of Parliament for Lusaka Central Constituency. The Appellant and the 1st Respondent, Charlotte Scott, were two of five contenders for the Lusaka Central Constituency seat in the parliamentary election held on 11th August, 2016.

The Appellant was the candidate for the Patriotic Front Party (PF) in the election while the 1st Respondent was the candidate for the United Party for National Development (UPND). Three other candidates contested the election on the Forum for Democracy and

Development (FDD) Party ticket, the Rainbow Party ticket and as independent candidate, respectively.

The Appellant was declared as the duly elected Member of Parliament for Lusaka Central Constituency having received thirty thousand, two hundred and twenty-three (30,223) votes while the 1st Respondent was runner-up having received eighteen thousand, two hundred and ninety-five (18,295) votes. The other three candidates shared the remaining votes which were cast.

The 1st Respondent filed a petition seeking, inter alia, a declaration that the Appellant was not validly elected as Member of Parliament for Lusaka Central Constituency and that the election was void. In her amended petition, the 1st Respondent alleged that the Appellant used Government resources during her campaign; that she engaged in acts of bribery involving the purchase and distribution to congregants of two hundred pieces of chitenge material for a fundraising event at St Matthias Mulumba Catholic Church in Bauleni compound; a promise of one hundred bags of cement to Word of Life Church; and the procurement and commission of two boreholes in the State Lodge area; and that she

used racial arguments on the ZNBC Race to Manda Hill programme implying that the 1st Respondent was not a Zambian and, throughout her campaign, appealed to voters to vote for her as she was of their colour and was born at the University Teaching Hospital (UTH) where her umbilical cord was buried.

Further, that the Appellant's agents were openly campaigning by distributing their party regalia on polling day; that the Appellant's agents perpetrated acts of violence against the 1st Respondent and her supporters at the town centre; that the 1st Respondent's party's campaign materials were being pulled down. Lastly, that the Zambia police officers blocked the 1st Respondent from conducting door to door campaigns in Northmead and in Rhodespark residential area, because she failed to give prior notice to the police of the door-to-door campaign.

The trial Judge reviewed the evidence and held that the allegation regarding the pulling down of UPND campaign materials by the Appellant's agents had been abandoned as no witness had testified regarding it and dismissed it. The trial Judge found that five of the remaining six allegations had been proved to the required

standard except for the allegation that the Appellant's agents were campaigning on polling day. He, therefore, upheld the petition and accordingly declared the election void. He further declared that the Appellant was not duly elected as Member of Parliament for Lusaka Central Constituency.

Aggrieved by the decision of the lower Court, the Appellant appealed to this Court and advanced eleven grounds of appeal as follows:

1) **The Court erred in law and fact when it held that the 1st Respondent was unjustifiably barred from campaigning in Rhodespark and Northmead by the police despite not giving the prescribed seven days' notice of the meeting, assembly or procession to the police and that such a bar materially affected the outcome of the election.**

2) **The Court below erred in fact and law when it found in favour of the 1st Respondent on the bribery allegations relating to the sinking of the boreholes, purchasing of chitenge materials for a fundraising event and the purchase of cement without making adverse findings against the Appellant's witnesses who rebutted the 1st Respondent's evidence.**

3) **The Court below erred in fact and law when it held that the bribery allegations relating to the sinking of the boreholes and purchasing of chitenge materials for a fundraising event materially affected the outcome of the election.**

4) **The Court below misdirected itself when it held that the acts of procuring the sinking of a borehole for the community, purchase of chitenge materials for a fundraising event and purchase of cement for the church fell within the ambit and scope of bribery or vote buying contrary to section 81 of the Electoral Process Act.**

5) **The Court below misdirected itself when it held that an act or acts of violence fell within the ambit and scope of section 97 (2) (b) of the Electoral Process Act No. 35 of 2016 to the effect that the**

election was not conducted in substantial conformity with the Electoral Process Act.

6) The Court below fell into error when it generalised that the incidents of violence were of such a widespread nature so as to materially affect the outcome of the elections without evidence to the effect that the majority of the voters were prevented from voting for their preferred candidate.

7) The Court below erred in fact and law when it took into account events that occurred before the campaign period, namely, a donation of 100 bags of cement as an inducement that materially affected the outcome of the elections.

8) The lower Court fell into error when it held that the statements by the Appellant to the effect that she is a Zambian born at the University Teaching Hospital and understands the Zambian culture amounted to racial discrimination without evidence of any unfair prejudice occasioned by the said utterances or remarks to affect the outcome of the election.

9) The Court below erred in law and fact when it held that the Appellant's continued stay in office as Minister of Commerce created an irrefutable presumption that the Appellant abused Government resources during the campaign period and that such alleged abuse materially affected the outcome of the election.

10) The Court below misdirected itself when it relied on inadmissible hearsay evidence in the form of TV recordings and Facebook postings attributed to the Appellant without proper authentication.

11) The Court below misdirected itself when it took into consideration matters that were not pleaded or canvassed at trial, namely that violence by unidentified cadres amounted to non-compliance with the principles of the conduct of elections in the Electoral Process Act No. 35 of 2016, in nullifying the election.

At the hearing of the appeal, learned counsel for the Appellant, Mr. Milingo Lungu relied on the written heads of argument and orally augmented some of the arguments. The eleven grounds of appeal were argued as follows: ground one was argued on its own, grounds two, three, four and seven were argued together, grounds

five, six and eleven were also argued together while grounds eight, nine and ten were argued individually.

In ground one, the Appellant submitted that the 1st Respondent alleged in her amended petition that she was prevented from campaigning on two occasions during the campaign period. The first being in July, 2016 when her campaign team decided to drop off leaflets in Northmead area. The second occasion being in Rhodespark when she attempted to conduct door to door campaign meetings.

The Appellant submitted that the lower Court held that the actions by the police breached rules 3 (1) (f) and (h) and 6 (c) of the Electoral Code of Conduct and that the elections were not conducted in a free and fair manner. Further, that the non-compliance with these rules by the police materially affected the outcome of the elections because "anything that prevents a candidate from campaigning or communicating with the electorate in a particular area affects the result of the election."

The Appellant submitted that the findings and decision of the lower Court were a gross misdirection as the 1st Respondent did not

give the requisite notice to hold the meeting or procession on both occasions. That the meetings therefore were not legally convened and there was consequently no non-compliance by the police as alleged. The Appellant, therefore, submitted that the finding should be set aside.

In arguing grounds two, three, four and seven, the Appellant submitted that the 1st Respondent in her petition alleged bribery or vote buying contrary to section 81 of the Act and cited three incidents namely, the buying of chitenge pieces by the Appellant at Saint Matthias Mulumba Catholic Church in Bauleni, a cash donation of K6,400 by the Appellant to the Word of Life Church at Bauleni and the sinking of two boreholes in State Lodge.

It was submitted that regarding the purchase of the chitenge, two versions of events were given. One version was given by PW3 for the 1st Respondent and the other version was given in rebuttal by the Appellant and her witness, RW4. The Appellant submitted that the trial Judge chose PW3's version of events and discounted the Appellant and RW4's version without making any adverse finding against the Appellant and RW4 which was against the

principle in the case of **Chizonde v The People**[1]. The Appellant contended that the trial Court disbelieved the Appellant's evidence merely because she was a politician and that less weight should have been attached to PW3's evidence because she was a partisan witness according to the persuasive case of **Mulondwe Muzungu v Eliot Kamondo**[2]. The Appellant further submitted that no evidence was led to prove the widespread nature of the incident.

Regarding the sinking of the boreholes, the Appellant submitted that the lower Court found as a fact that the boreholes were sunk by the Muslim Society Trust at the request of the Chongwe District Medical Office and that the Appellant did not donate or finance the boreholes. That the lower Court, however, found that the Appellant's friends helped her to have the boreholes sunk and that she was personally involved in the borehole project. That the Court further found that the sinking of the boreholes was a corrupt act committed by the Appellant's friends with her knowledge and consent and fell within section 97 (2) (a) of the Act.

The Appellant submitted that the sinking of the boreholes by the Muslim Welfare Society was a philanthropic act which is

permitted by the electoral law as held in the case of **Priscilla Mwenya Kamanga v Peter Ng'andu Magande and Attorney-General**[3]. That even if it were to be deemed a corrupt or illegal act, no evidence was led to prove that the number of voters in the State Lodge area persuaded to vote for the Appellant, on account of the donation, was material to the outcome of the election.

The Appellant contended that the lower Court misdirected itself in holding that the Appellant committed a corrupt act when she and her election agents did not donate the boreholes.

On the donation of K6,400 for cement, the Appellant submitted that the uncontroverted evidence was that the donation was made on 8th May, 2016 before the campaign period, which fact the lower Court acknowledged in its judgment at page 73 of the record of appeal. That the lower Court, however, held that the donation was made with the election in mind to induce the congregants and that the act satisfied the requirements of section 97 (2) (a) of the Act. The Appellant contended that this was wrong as section 97 (2) (a) of the Act applies to candidates and their

election agents. That on 8th May, 2016 the Appellant was not a candidate for any election as defined by section 2 of the Act.

The Appellant further submitted that the 1st Respondent should have proved that the alleged corrupt act influenced the voters against voting for their preferred candidate.

It was submitted that the lower Court did not find that the alleged acts of bribery were widespread but relied on the case of **Michael Mabenga v Sikota Wina and Others**[4] wherein it was held that satisfactory proof of any corrupt or illegal practice or misconduct in an election petition is sufficient to nullify an election. That following the repeal of section 93 (2) of the Electoral Act 2006 which was replaced by section 97 (2) of the Electoral Process Act 2016, the **Mabenga**[4] case is no longer good law because section 97 (2) (a) requires the petitioner to prove the commission of the impugned electoral offence by the candidate or with the candidate's knowledge and consent or approval or that of the election agent and proof that the effect of the act was widespread.

In grounds five, six and seven, the Appellant submitted that although the 1st Respondent alleged in the petition that the

Appellant through her agents perpetrated acts of violence in the town centre twice during the campaign period, she failed to identify the youths who attacked her campaign team and conceded that the Appellant and her election agents were not present on both occasions. The Appellant submitted that the trial Judge found that the Appellant and her agents were not involved in the violence and did not consent to or approve of it and that she was out of town on the date of the second attack.

The Appellant submitted that the trial Court abandoned the allegation in the petition and substituted his own allegation by stating that the allegation did not fall to be considered under section 97 (2) (a) but under section 97 (2) (b) of the Act because it related to the general conduct of the election as to compliance or non-compliance with specific provisions of the Act.

The Appellant contended that the approach taken by the lower Court was unfair as there was no allegation at the trial that the violence amounted to non-compliance with the electoral law, and the parties did not have an opportunity to address the case alleged. That the lower Court erred by going beyond the pleadings and

considering matters that were not pleaded by the parties. That the trial Judge's reliance on section 97 (2) (b) of the Act in considering the allegation of violence was a gross misdirection.

The Appellant further impugned the lower Court's reasoning and reliance on the Code of Conduct and argued that section 97 (2) (b) is concerned with the conduct of elections by the Electoral Commission of Zambia and not with the actions of political actors. That the principles referred to in that section are set out in section 3 of the Act and not in the Code of Conduct, which principles only apply to the Electoral Commission of Zambia.

The Appellant submitted that the issues on violence raised by the trial Court on his own should be set aside.

In arguing ground eight, the Appellant submitted that although the 1st Respondent alleged that the Appellant used racist arguments against her, during the "Race to Manda Hill" television programme, when she said she was a Zambian born at the University Teaching Hospital where her umbilical cord was buried, and that she understood the Zambian culture, the statements did not refer to the 1st Respondent. She disputed PW4's allegation that

he heard her say the 1st Respondent would not perform because she was a white person.

The Appellant submitted that although the trial Court held that her statements contravened clause 15 (1) (m) of the Code of Conduct, there was no evidence that she discriminated against the 1st Respondent due to her race and further, that the words she uttered were discriminatory. That with regard to the alleged racial remarks made at a rally, the lower Court presumed that she would have no difficulties in using similar language in her campaign within the constituency, as alleged by PW4, because of her statements on the television program.

The Appellant contended that by assuming that she repeated the remarks, the lower Court released the 1st Respondent from the burden to prove the allegation. She reiterated that it was not open for the trial Court to find for one party without making findings on credibility and submitted that less weight should have been attached to the evidence of PW4 as he was a UPND official and therefore had a possible interest to serve.

In conclusion on this ground, the Appellant argued that even if the Court were to find that PW4's allegation was true, there was no evidence regarding how many people attended the rally and how the number compared to the overall electoral college of Lusaka Central Constituency. She submitted that the allegation by PW4 was not proved to the requisite standard.

In arguing ground nine, the Appellant submitted that whereas the 1st Respondent alleged that she held herself out as a Minister throughout her campaign, and that she used Government resources and a Government vehicle when she went to attend an interview on the ZNBC television programme, "Race to Manda Hill," on 20th June, 2016, the motor vehicle which was alleged to be a Government motor vehicle was a personal vehicle which she had purchased from the Government on 30th May, 2016, as evidenced by the exhibited receipt to that effect.

The Appellant submitted that the trial Judge disregarded her evidence without giving reasons and, instead, found that she had used a Government motor vehicle although the 1st Respondent did not state the make and registration number of the motor vehicle the

Appellant used to prove that it was a Government motor vehicle. The Appellant submitted that the lower Court held that her use of a Government motor vehicle and, inevitably, Government fuel and a Government driver to attend a campaign programme was a violation of clause 15 (1) (k) of the Code of Conduct.

The Appellant further submitted that the lower Court's finding that throughout the campaign period, she illegally held herself out as a Cabinet Minister was a misapprehension of the holding in the **Stephen Katuka and Law Association of Zambia v the Attorney-General and others**[5] case. She contended that the trial Judge's finding that her continued stay in office as a Minister constituted an illegal practice under the Act was a grave misdirection.

The Appellant submitted that the lower Court misdirected itself in holding that the 1st Respondent had discharged the burden of proof on the allegation that she used a Government motor vehicle for her campaign, as less weight should have been attached to her evidence because of her failure to recollect the registration number of the alleged Government motor vehicle.

The Appellant submitted that no evidence was led by the 1st Respondent to support the allegation that the Appellant used Government funds in her campaign and further, that the finding that she used her salary, as a Minister, in her campaign was perverse because the 1st Respondent conceded in cross-examination that she had no information that the Appellant used her ministerial salary in her campaign.

In the alternative, the Appellant submitted that even if the allegation that she used a Government motor vehicle and resources were proved, the lower Court could not nullify the election on this ground because no evidence was led as to how the use of the Government resources influenced the majority of the voters not to vote for their preferred candidate, in terms of section 97 (2) (a) (ii) of the Act. The case of **Mubita Mwangala v Inonge Mutukwa Wina**[6] was cited in support. The Appellant submitted that this allegation, too, was not proved to the high standard of convincing clarity.

Lastly, in arguing ground ten, the Appellant contended that the Court below misdirected itself when it relied on inadmissible hearsay evidence in the form of TV recordings and Facebook

postings, attributed to the Appellant, without proper authentication. She submitted that as proof of the matters alleged, the Court relied on Compact Discs (CDs) containing pictures downloaded from Facebook pages allegedly belonging to the Appellant and on recordings from television footage of an interview and of acts of violence. That the lower Court received the CDs as containing proof of the matters alleged without addressing its mind to whether or not the contents of the CDs were inadmissible hearsay.

The Appellant submitted that in terms of section 2 and 5 of the Electronic Communications and Transactions Act No. 21 of 2009, the record stored on the CDs is considered as a document and that the rule against hearsay applies equally to documents and to oral statements. She cited the case of **Subramanian v Public Prosecutor**[7] where the Privy Council stated that:

> **"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement."**

The Appellant contended that in this case, the person who created the Facebook pages from which the documents were

downloaded; the person or persons who took the pictures relied on as proof of the contents therein; and the persons who took the video recordings, ought to have testified in order to prove the matters contained in the CDs as there was no way of authenticating the pictures or recordings without calling these persons as witnesses. That the Court did not consider the issue of the admissibility of the CDs in its judgment. In sum, the Appellant argued that it was unsafe to rely on the pictures and recordings as they were not properly authenticated.

In conclusion, the Appellant submitted that the findings by the lower Court that the Appellant abused Government resources, and that her campaign was tainted with acts of bribery and corruption, that there was widespread violence in Lusaka Central Constituency, and that such acts materially affected the outcome of the election, were based on an unbalanced evaluation of the evidence and on extraneous and irrelevant evidence, and were a misdirection in law. Citing the case of **Nkhata and Others v Attorney-General**[8], the Appellant urged us to interfere with the trial Judge's findings of fact and set aside the declaration that her election as Member of

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Parliament for Lusaka Central Constituency was null and void. She further urged us to uphold her election as Member of Parliament and to award her costs in this Court and in the Court below.

In his oral submissions in support of the written arguments, Mr. Lungu more or less reiterated the written arguments. We will therefore not repeat them.

In opposing the appeal, the 1st Respondent filed heads of argument which Mr. Haimbe and Mr. Mweemba, Counsel for the 1st Respondent, relied upon and augmented with brief oral submissions. In opposing ground one, the 1st Respondent contended that the Appellant's argument that the failure by the 1st Respondent and her team to give the notice required under section 5 (4) of the Public Order Act, before embarking on their campaign activities in Northmead and NIPA, meant that the campaign activities were not legally organised and that, therefore, the police were entitled to disband them, and in doing so, did not violate the Act, did not aid her case. She argued that the distribution of campaign leaflets to the electorate during a campaign period falls outside the ambit of activities for which prior notice is required to

be given to the police under section 5 (4) of the Act. The 1st Respondent contended that the basis for the lower Court's decision under this ground was that the police failed to act professionally and impartially in the execution of their duties, contrary to the requirements of the Act.

That the conduct of the police fell short of conduct expected of them under rules 3 (1) (f) and (h) and rule 6 (c) of the Code of Conduct and that the learned trial Judge cannot be faulted for holding that the police conduct was a violation of section 97 (2) (b) of the Act and warranted the annulment of the election of the Appellant as Member of Parliament. That the lower Court made findings of fact regarding the conduct of the police based on the evidence before it and that, on the authority of **Nkhata and Others v. The Attorney-General**[8], this Court cannot interfere with those findings in the absence of any misdirection on the part of the trial Judge.

The 1st Respondent further submitted that section 97 (2) (b) states that the election of an MP will be declared void where the High Court is satisfied that there has been non-compliance with the

provisions of the Act, which provisions include the Code of Conduct contained in the Schedule to the Act.

That rules 3 (1) (h) and 6 (c) of the Code of Conduct enjoin the Zambia Police to be professional and impartial during the electoral process and not to use the office to oppress any political party, candidate or supporter. That the police violated these rules in this case. The 1st Respondent argued that ground one lacks merit and should be dismissed.

In opposing grounds two, three, four and seven, the 1st Respondent submitted regarding the donation of boreholes in the State Lodge area, that the learned trial Judge found that the Appellant could be linked to the boreholes by the letter written by RW2 in March, 2016 and by the evidence of PW2, regarding the involvement of PF youths in the clearance of the sites for the boreholes; that the timing of the sinking of the boreholes, being one month after the letter requesting the Appellant to find suitable sites for the boreholes was written, was curious, since the boreholes were intended to contain the emergency cholera outbreak in January, 2016; that the Appellant used the boreholes to enhance

her prospects of being elected by referring to the water projects undertaken in the State Lodge area, during the Race to Manda Hill programme, and by a posting on her Facebook page that the boreholes had just been completed and would soon be commissioned; and that RW2 expressly stated in cross examination, that the Appellant was personally involved with the boreholes even though she did not finance the donation.

The 1st Respondent submitted that the trial Judge based his findings on the evidence before him and that the findings were not perverse according to the plethora of authorities on the principles upon which findings of fact by a lower Court can be reversed.

In response to the Appellant's argument that the trial Judge erred when he accepted the 1st Respondent's version of events over her own version, without making specific adverse findings against the Appellant's witnesses, when the 1st Respondent's witnesses had an interest to serve, the 1st Respondent submitted that the lower Court properly discharged its duty in line with the case of **John Wamundila v. The People**[9] where it was held that a court is entitled to accept evidence of a witness with an interest to serve

where there is "something more" upon which the Court may rely to satisfy it of the truth of the evidence.

That in the present case, the lower Court relied, inter alia, on the letter of 24th March 2016; on the fact that PF youths were involved in clearing the site of the boreholes; and on the Appellant's own utterances during the Race to Manda Hill television programme. The 1st Respondent submitted that the question this Court must consider is whether or not the lower Court erred when it determined that the election could be annulled on the basis of this and other allegations.

The 1st Respondent submitted that the Appellant argued first that she could not be held accountable for the misdeeds of others; secondly, that in any event, there was nothing wrong with making a philanthropic donation; and thirdly, that there was no evidence that the donation affected the majority of voters in accordance with section 97 (2) (a) (ii) of the Act. In response to the first argument, the 1st Respondent submitted that given the evidence on record, and the findings of fact by the lower Court it could not seriously be argued that the Appellant was unaware of, and consented to, the

sinking of the boreholes, as shown by the letter of 24th March, 2016 and that the evidence of RW2 attested to this fact. She contended that the Appellant was caught up under the provisions of section 97 (2) (a) (ii) as rightly observed by the learned trial Judge.

The 1st Respondent argued that the donation of boreholes was not philanthropic in nature because the Appellant associated herself with the borehole project in her campaign to enhance her chances of being elected.

In response to the assertion that there was no evidence that the sinking of the boreholes had a widespread effect, the 1st Respondent invited us to consider the evidence before us, that Bauleni compound, where the boreholes were sunk, has the largest catchment area of the whole Constituency. She contended that the Appellant used the boreholes to campaign to a larger audience on both national television, during the Race to Manda Hill programme, and on her Facebook page which had a following of not less than 17,000 people. That in those circumstances, the trial Judge rightly held that the majority of voters were affected by the sinking of the boreholes since section 97 (2) (a) (ii) only required the 1st

Respondent to prove that the majority of voters may have been prevented from electing a candidate of their choice, due to the conduct complained of. The 1st Respondent submitted that the arguments under this limb, therefore, lack merit and must be dismissed.

The 1st Respondent further argued that the trial Judge was correct in finding that the sinking of the boreholes rendered the election of the Appellant void because section 97 (3) of the Act empowers the Court to nullify an election based on a single act of corruption or illegal practice and does not require proof that the corrupt or illegal action affected the majority of voters in the Constituency.

The 1st Respondent submitted that while section 97 (2) (b) of the Act is subject to the provisions of section 97 (4), subsection (4) only applies where the non-compliance is alleged to have been committed by an election officer in breach of that officer's official duty. That where the non-compliance is not alleged to have been committed by an election officer, the natural unqualified meaning of section 97 (2) (b) should be applied. The 1st Respondent contended

that the interpretation given to section 97 (2) (b) by the learned trial Judge was correct.

Regarding the submission that the learned trial Judge strayed from the pleadings when he determined that the violent conduct complained of violated section 97 (2) (b), and not section 97 (2) (a), the 1st Respondent submitted that this argument was misconceived because the Appellant was effectively saying that a Court cannot apply the law where it is confronted with facts that arise which, while establishing a legal position, fall short of the facts as pleaded.

It was submitted that the Appellant's assertion contradicts the holding in the case of **Mazoka and Others v Mwanawasa and Others**[10] that a Judge is not precluded from considering a matter that is not pleaded, if such matter is let into the evidence without objection. The 1st Respondent submitted that in the present case, the trial Judge was faced with uncontroverted evidence that violence took place in the Constituency. That the trial Judge was therefore not precluded from considering the facts before him against the law as contained in section 97 (2) (b) of the Act,

notwithstanding that, as it turned out, the violence was not attributable to the Appellant as alleged in the pleadings.

The 1st Respondent further submitted that contrary to the Appellant's allegations of unfairness, by properly applying the law to the facts, the trial Judge simply discharged his duty to deal with matters in controversy within his judgment. That he, therefore, cannot be faulted in any way. The 1st Respondent argued that grounds two, three, four and seven lack merit and should to be dismissed.

In opposing ground eight, the 1st Respondent submitted that the issues raised in support of this ground were practically the same issues that were canvassed in the Court below. That for that reason, she would rely on her submissions regarding the allegations of discrimination which she made in the Court below as set out in paragraphs 49 to 73 at pages 151 to 155 and on the video evidence submitted in the Court below, and annexed to the record of appeal marked CS1 and CS2.

The 1st Respondent added, in augmenting her submissions before the lower Court, that regarding the effect of the racial

discrimination she suffered, the evidence of PW4 was cardinal, especially when considered from the perspective of the trite principle of law that the evidence of a single witness is sufficient to prove a fact. That the case of **Chizu v the People**[11] is instructive on the point.

The 1st Respondent submitted that the lower Court accepted PW4's evidence on the strength of the Appellant's own admission that she used public address systems in her campaign and on the televised broadcast on the Race to Manda Hill programme which the Court took as corroboration. She submitted that the trial Court established the "something more" that was required for it to accept PW4's evidence as per authority of **John Wamundila v the People**[9].

The 1st Respondent contended that it was self-defeating for the Appellant to argue that the 1st Respondent's witnesses' evidence should not have been readily accepted by the Court below when the Appellant's own witnesses were similarly circumstanced. The 1st Respondent submitted that ground eight equally lacks merit and ought to be dismissed with costs.

In opposing ground nine, the 1st Respondent relied on her submissions in the lower Court at pages 146 to 151 of the record of appeal. She submitted that contrary to the Appellant's assertion that there was no evidence in the lower Court that she used a Government vehicle and resources during her campaign, the Appellant admitted, under cross examination, to using a Government pool vehicle and to drawing a salary in the sum of K25,000 and privileges, all of which, the 1st Respondent submitted, placed her at an advantage over the 1st Respondent in the campaign as a whole.

The 1st Respondent submitted that the Appellant's campaign was therefore inextricably tainted and that the learned trial Judge was in order to hold as he did. She submitted that ground nine lacks merit and ought to be dismissed with costs.

In opposing ground ten, the 1st Respondent submitted that although the Appellant attacked the trial Judge for relying on Compact Discs containing video and photographic footage, alleging that the same was inadmissible, the said CDs were admitted onto the Court's record by consent and, as such, the Appellant cannot

now be heard to raise any objection to them. The 1st Respondent submitted, in conclusion, that ground ten lacks merit and ought equally to be dismissed with costs.

Learned counsel for the 1st Respondent more or less reiterated the written arguments at the hearing. We shall, therefore, not recast them here.

The 2nd Respondent did not file any submissions and similarly made no oral submissions at the hearing.

We have considered the grounds of appeal, the respective parties' heads of argument and their oral submissions as well as the judgment of the lower Court. The main issue we have to determine in this appeal, is whether the lower Court was on firm ground when he nullified the election of the Appellant, in light of the law and the facts.

The law regarding the circumstances in which an election may be declared void is set out in section 97 (2) of the Electoral Process Act No. 35 of 2016 (henceforth referred to as the Act). Section 97 (2) (a) of the Act on which the petition in this case was based provides as follows:

"(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that-

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election –

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

A consideration of the above section of the Act reveals that the election of a candidate can only be nullified if the petitioner proves to the satisfaction of the Court that the candidate personally committed a corrupt or illegal practice or other misconduct in relation to the election or that the act in issue was committed with the candidate's knowledge and consent or approval or that of the candidate's election or polling agent.

Having proved the commission of the assailed electoral offence, the petitioner must further prove that, as a result of that offence, the majority of the voters in the constituency, district or ward were or may have been prevented from electing their preferred

candidate. As we held in **Austin Liato v Sitwala Sitwala**[12] and in **Chrispin Siingwa v Stanley Kakubo**[13], it is not sufficient for a petitioner to prove only that a candidate committed an electoral offence in relation to the election without further proving that the electoral offence was widespread and prevented or may have prevented the majority of the voters from electing a candidate of their choice.

We reiterate that as in all other civil cases, the petitioner bears the burden of proof in an election petition but the standard to which the electoral offence complained of must be proved is higher than proof on a balance of probabilities which is required in an ordinary civil action. The evidence adduced in support of allegations in an election petition must establish the issues raised to a fairly high degree of convincing clarity. We find authority for this in the persuasive case of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba**[14] wherein the Supreme Court said:

> **"...that parliamentary election petitions have generally long required to be proved to a standard higher than on a mere balance of probability... the issues raised are required to be established to a fairly high degree of convincing clarity."**

This was reiterated in **Brelsford James Gondwe v Catherine Namugala**[15] when the Supreme Court said:

> **"The burden of establishing the grounds lies on the person making the allegation and in election petitions, it is the petitioner in keeping with the well settled principle of law in civil matters that he who alleges must prove. The grounds must be established to the required standard in election petitions namely fairly high degree of convincing clarity."**

In the present case, it was incumbent upon the 1st Respondent (as the petitioner) to prove her allegations against the Appellant with cogent evidence to a fairly high degree of convincing clarity and to demonstrate that any electoral offences proven to have been committed by the Appellant or her election agents were widespread and that the majority of voters in the constituency were or may have been prevented from electing their preferred candidate.

We are guided by these principles and the law in determining this appeal.

In determining the appeal, we shall first consider ground ten as it relates to a procedural issue. Thereafter, for convenience, we shall follow the order in which the remaining grounds of appeal were argued by the parties.

In ground ten the Appellant challenges the lower Court's reliance on the television recording and the Facebook postings attributed to the Appellant on the ground that they were inadmissible hearsay evidence and were not properly authenticated. In considering this ground we note from the record of appeal that the DVD and CD containing the television recording of the Race to Manda Hill programme and the Facebook postings attributed to the Appellant were admitted into evidence without objection from the Appellant after the initial objection by counsel for the Appellant was waived. Mr. Bwalya as counsel for the Appellant in the lower Court in that regard said to the trial Judge at page 208 of the record of appeal:

> **"My Lord my instructions are quite clear. My instructions my Lord is to allow the introduction of the DVD and the CD in the interest of justice."**(sic)

That being the case, the Appellant cannot on appeal challenge the lower Court's reliance on that evidence for not being properly authenticated when she consented to the introduction of the evidence onto the lower Court's record. Having received the said evidence, the trial Judge was entitled to consider it in determining

the matter before him and he cannot be faulted for doing so. Ground ten therefore lacks merit and is dismissed.

In ground one of the appeal, the Appellant challenges the trial Court's findings that the 1st Respondent was unjustifiably barred from campaigning in Rhodespark and Northmead by the police and that the bar materially affected the outcome of the election. Although the Appellant took issue with the lower Court's finding that the police unjustifiably prevented the 1st Respondent from campaigning in Rhodespark and Northmead, the real issue we have to determine under this ground is whether there was non-compliance with the electoral law in the conduct of the election, which non-compliance affected the result of the election so as to warrant nullifying the election under section 97 (2) (b) of the Act.

The allegation to which ground one relates has to do with the conduct of the Zambia Police. In her evidence in support of the allegation, the 1st Respondent stated that during the campaign period in July 2016, she and her team decided to drop leaflets in the Northmead area. Before proceeding with their programme, they approached the Police to inform them of their presence in the area.

However, the officer-in-charge at Northmead Police Post refused to permit them to proceed with the programme as they had not made a prior written application to the police. The 1st Respondent said she then made the application to proceed but the officer-in-charge refused to permit them to proceed at short notice.

The second incident happened in the NIPA area in Rhodespark when she and her team were stopped from dropping leaflets under the doors of the flats by armed police officers who said their meeting was illegal.

In rebuttal, the Appellant denied the 1st Respondent's allegation that she used her ministerial position to influence the police to stop her door-to-door campaign in Northmead and Rhodespark. She asserted that Ministers did not possess power to influence police action.

The learned trial Judge considered the allegation and held that the police had breached rule 6 (c) of the Code of Conduct which directs them to refrain from disrupting a legally convened campaign, rally or meeting by a political party and consequently, that there had been non-compliance with the provisions of the law

in the conduct of the election by the Zambia Police in terms of section 97 (2) (b) of the Act.

The Appellant submitted that the learned trial Judge erred by holding that the police breached rule 6 (c) of the Code of Conduct when the 1st Respondent's evidence revealed that in both instances she did not give the requisite notice to hold the meeting to the police under section 5 (4) of the Public Order Act and that the meetings were therefore not legally convened. The Appellant contended that there was no non-compliance with the electoral law as alleged and that there was no evidence that the alleged non-compliance with rule 6 (c) of the Code of Conduct materially affected the outcome of the election. She urged us to set aside the lower Court's findings of fact.

The 1st Respondent, on the other hand, contended that the distribution of campaign materials did not require prior notice of the activity to be given to the police under section 5 (4) of the Public Order Act and that the trial Judge was right to hold that the police by their conduct breached rule 6 (c) of the Code of Conduct. She further contended that their conduct amounted to a violation of

section 97 (2) (b) of the Act, which violation warranted the annulment of the election of the Appellant as Member of Parliament. The 1st Respondent submitted that based on the principle in the case of **Nkhata and Others v The Attorney-General**[8], we as an appellate Court, cannot interfere with the findings of fact as the trial Judge did not misdirect himself. The 1st Respondent contended that ground one lacks merit and should be dismissed.

We have considered the submissions relating to ground one. As the learned trial Judge rightly stated, the allegation to which ground one relates is not provided for under Part VIII of the Act, which provides for electoral offences. The learned trial Judge therefore considered and determined the allegation in light of the duties of the police as set out in paragraph 6 (c) of the Code of Conduct in the Schedule to the Act. Paragraph 6 (c) of the Code of Conduct reads:

> **"6. The Zambia Police Service shall-**
> **(c) refrain from disrupting any campaign, rally or meeting which is legally convened by any political party;"**

The lower Court accepted the 1st Respondent's testimony and held that the police prevented the 1st Respondent and her team from campaigning in two areas within Lusaka Central Constituency in violation of rule 6 (c) of the Code of Conduct and thus violated the principles laid down for the conduct of free and fair elections.

The trial Judge observed that in terms of section 97 (2) (b) of the Act, an election can be declared void where there is non-compliance with the provisions of the Act. He acknowledged that section 97 (2) (b) requires the petitioner to prove that the non-compliance with the provisions of the Act affected the result of the elections. However, the trial Judge proceeded to say:

> **"In my considered view, anything that prevents a candidate from campaigning or communicating with the electorate in a particular area affects the result of the election."**

The learned Judge further said:

> **"Unlike under paragraph (a) of section 97 (2) of the Act, non-compliance with the provisions of the Act under paragraph (b) need not be by the candidate or that candidate's agent. All that is required is evidence of non-compliance by the relevant player, in this case, the Zambia Police. In dealing with this allegation, I have considered subsection (4) of section 97 of the Act and find that it does not apply because the subsection relates to an election officer's act or omission. The allegation in this case relates to the conduct of the Zambia Police."**

Section 97 (2) (b) of the Act which the learned trial Judge relied upon in determining the allegation against the Zambia Police

provides for the nullification of an election where there has been non-compliance with the law in the conduct of elections. The provision reads:

> "97 (2) **The election of a candidate as a Member of Parliament, mayor, council chairperson or councilor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be that -**
>
> (a) ....
>
> (b) **Subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election."** (Emphasis added.)

It is clear to us that section 97 (2) (b) which is set out above, relates to non-compliance with the provisions of the Act in the conduct of elections. It provides for the voiding of an election where it is established that there has been non-compliance with the provisions of the Act in the conduct of the election in issue and that the non-compliance has affected the election result.

The question that arises in view of the provisions of section 97 (2) (b) of the Act is, which institution has the mandate to conduct elections? The answer is found in Article 229 (2) (b) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution as amended)

which vests the power to conduct elections in the Electoral Commission of Zambia. Article 229 (2) (b) provides as follows:

> "(2) **The Electoral Commission shall –**
>
> **(b) conduct elections and referenda;"**

The Constitution does not vest the power to conduct elections in any other institution or person.

Further, the long title to the Electoral Process Act No. 35 of 2016 clearly states that the object of the Act is, inter alia, to provide for the conduct of elections by the Electoral Commission of Zambia and to empower the Commission to make regulations in matters relating to elections. The function of the Commission to conduct elections is further clearly illustrated by section 56 (1) of the Act which provides that:

> "(1) **If it is not possible to conduct a free and fair election at a polling station on a prescribed polling day, the Commission may, at any time before voting at the polling station has commenced, postpone voting at that polling station."** (Emphasis added.)

In the case of **Giles Chomba Yamba Yamba v Kapembwa Simbao and others**[16], we held that:

> **"...the Constitution expressly gives the function to conduct elections to the Electoral Commission of Zambia ... The ECZ must fulfill this function by ensuring that the requirements of the Electoral Process Act are respected and observed in the electoral process. Section 97 (2) (b), therefore, concerns non-compliance to the provisions of the Act by the ECZ, the body charged with the**

conduct of elections under Article 229 (2) (b) of the Constitution, and not the candidates to an election or their agents."

We restate that position in this case.

In order for non-compliance with the law to result in the invalidation of an election under section 97 (2) (b), it must be established that the non-compliance affected the result of the election and must be attributable to the ECZ as the conductor of elections. This is evident from the fact that section 97 (2) (b) of the Act is made subject to section 97 (4) of the Act which reads:

"(4) An election shall not be declared void by reason of <u>any act or omission by an election officer</u> in breach of that officer's official duty <u>in connection with an election</u> if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election." (Emphasis added.)

In the present case, the trial Judge clearly said that the non-compliance with the law was not attributable to any election officer and that section 97 (4) therefore did not apply.

Given the clear provisions of the law which we have cited, the learned trial Judge misinterpreted the law when he held that all that is required for an election to be nullified under section 97 (2) (b) is evidence of non-compliance with the law in the conduct of

elections "by the relevant player, being the Zambia Police, in this case."

The role of the Zambia Police in the electoral process is restricted to enforcing the law and maintaining peace and order during campaign meetings and processions and on polling day. This role is clearly stated in section 4 (6) of the Act and in paragraph 6 (a) of the Code of Conduct. Section 4 (6) of the Act as relevant reads:

> **"4 (6) The Zambia Police Service shall enforce law and order at polling stations..."**

Paragraph 6 (a) of the Code of Conduct reads:

> **"6. The Zambia Police Service shall-**
>
> **(a) enforce law and order at campaign meetings and processions in order to maintain peace and order."**

The learned trial Judge thus misdirected himself when he said the police breached the electoral laws because, as we already stated above, the mandate to conduct elections is exclusively vested in the Electoral Commission of Zambia.

Whether or not there was non-compliance with the electoral law in the conduct of elections and whether or not such non-compliance affected the result of the election, in the present case,

were matters that needed to be proved with cogent evidence by the 1st Respondent and were not matters to be left to the conjecture of the trial Court.

We have examined the 1st Respondent's evidence before the lower Court on the record of appeal and observe that she did not adduce any evidence to prove that the result of the election was affected by the refusal by the police to permit her to carry out door to door campaigns in Northmead and Rhodespark.

We are mindful of the plethora of case authorities which state that an appellate court ought not to interfere with the findings of fact made by a trial court except on very clear grounds. In **Zulu v Avondale Housing Project**[17] it was held that:

> **"An appellate court will not reverse the findings of fact made by a trial Judge unless it is satisfied that the findings in question were either perverse or were made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court, acting correctly, could reasonably make."**

In the present case, the trial Judge's finding that there was non-compliance with the provisions of the Act relating to the conduct of elections by the Zambia police, rendering the election of the Appellant liable to be nullified was not supported by the

evidence on record and was premised on an erroneous interpretation of the provisions of section 97 (2) (b) of the Act.

In the absence of evidence that the result of the election was affected by the Police action against the 1st Respondent, we find that this is a proper case for us to interfere with the trial Judge's findings of fact related to the allegation against the police. We reverse them accordingly. Ground one therefore succeeds.

Grounds two, three, four and seven were argued together. In ground two the Appellant contends that the lower Court was wrong to find in favour of the 1st Respondent regarding the bribery allegations relating to the sinking of the boreholes, the purchase of chitenge materials and the purchase of cement without making adverse findings against the Appellant and her witnesses. In ground three she attacks the lower Court's finding that the bribery allegations affected the outcome of the election. In ground four, the Appellant challenges the lower Court's findings that the alleged bribery allegations were acts of bribery or vote buying contrary to section 81 of the Act. Lastly, in ground seven, the Appellant contends that the trial Judge erred when he took into account the

donation of 100 bags of cement which occurred before the campaign period as an inducement that materially affected the outcome of the elections.

The first issue we shall consider is whether the sinking of the boreholes, the purchase of the chitenges and the purchase of the cement were acts of bribery or vote buying in terms of section 81 of the Act. We shall further consider whether there was any evidence that the alleged acts of bribery were so widespread that they prevented or may have prevented the electorate from voting for their preferred candidate. Section 81 (1) (c) reads:

> **(1) A person shall not, either directly or indirectly, by oneself or with any other person corruptly –**
> **(c) make any gift, loan, offer, promise, procurement or agreement to or for the benefit of any person in order to induce the person to procure or to endeavor to procure the return of any candidate at any election or the vote of any voter at any election.**

The above section prohibits, among others, the giving or procurement of gifts by any person in order to obtain the vote of a voter in an election. In this case, the 1st Respondent alleged that the Appellant procured the sinking of two boreholes in the State Lodge area so that voters in the area could vote for her. The evidence in support of the allegation was adduced by the 1st

Respondent and PW2. The 1st Respondent did not witness the sinking of the borcholes. However, she said PW2 informed her of the sinking and commissioning of the boreholes and further that members of the community told her that they would vote for the Appellant because of the boreholes. She alleged that the Appellant used the boreholes to her advantage in her campaign. The 1st Respondent conceded that making campaign promises is not illegal.

The evidence of PW2, Stephen Mafunga, a UPND official, was that on a date towards the end of June, 2016 he found youths in PF regalia clearing a bush in the State Lodge area. They informed him that a borehole was to be sunk at that site. The first borehole was drilled on 10th July, 2016 while the second one was drilled on 18th July, 2016. PW2 identified two young men in the public gallery in Court as Musonda and Zayelo who were among the PF youths who cleared the bush.

PW2 asserted that after the boreholes were drilled and put in use, he heard the Appellant whilst campaigning in the State Lodge area in July 2016 inform the electorate through a public address system that she had procured the two boreholes for them and that

they should vote for her. PW2 denied that he informed the 1st Respondent about the drilling of the two boreholes in the State Lodge area as alleged by the 1st Respondent. He conceded that he was not aware that the two boreholes were drilled by the Muslim community or that their progamme to sink boreholes was nation-wide. PW2 said that he pointed out the two young men in Court because they were active in campaigning for the Appellant.

The evidence in rebuttal regarding the sinking of the boreholes was given by RW2, RW3 and the Appellant. RW2, Dr. Charles Msiska, the District Medical Officer for Chongwe, testified that following an outbreak of cholera in some areas of Lusaka, including Bauleni, in January 2016, a provincial committee decided to sink boreholes in Bauleni and at State Lodge area. They identified the Appellant to work with them as they had previously worked with her when they constructed a clinic and school in Nachitete area. RW2 said he therefore wrote a letter to the Appellant on 24th March, 2016. He said the boreholes were drilled by a drilling company engaged by the Muslim Welfare Trust on 26th and 29th May, 2016.

He also said the Appellant did not make any monetary contribution to the drilling of the boreholes.

RW3 Mubasshir Mehta's evidence was that he was a Coordinator at the Muslim Social and Welfare Trust which undertakes projects for the provision of clean and safe water and helps health institutions in Zambia. In early May, 2016, RW2 informed him about the need for a borehole to be sunk in the State Lodge area. He visited the area and decided that two boreholes were needed instead of the one that was requested for. He mobilized resources from donors and the first borehole was drilled by the Muslim Society on 28th May, 2016 while the second one was drilled on 29th May, 2016. The sites were cleared by the community. RW3 denied that the boreholes were sunk on 8th and 18th June, 2016. He further said that he did not know the Appellant at the time the boreholes were drilled and that he first met her in September, 2016. He conceded that he would not know if PF youths were involved in clearing the borehole site.

The Appellant testified that the two boreholes were sunk by the Muslim Society under the Muslim Welfare Trust on 28th and

29th May, 2016. She denied that the borcholes were sunk on 10th and 18th July, 2016 as alleged by PW2. She further denied that she commissioned the boreholes or that she took advantage of the sinking of the boreholes in her campaign. She said her campaign promises regarding water were futuristic.

The trial Judge reviewed the evidence and found as a fact that the evidence did not clearly demonstrate the Appellant's role in the drilling of the boreholes and that the Appellant did not donate or finance the drilling of the two boreholes. The trial Judge, however, held that the Appellant was linked to the boreholes by the letter written to her by RW2 asking her to help identify two sites for the boreholes to be sunk in State Lodge area and Bauleni Compound. He stated that the Appellant's friends helped her by drilling the boreholes close to the polling day and she confirmed her personal involvement in the project when she spoke passionately about the need to resolve the water problem in Bauleni on the Race to Manda Hill programme in a quest to endear herself to the voters and to enhance her prospects of being elected and when she wrote about commissioning the boreholes on her facebook page.

The lower Court found that the involvement of the two youths identified by PW2 in the clearing of the sites confirmed that the Appellant helped to identify the sites as requested by RW2 and mobilized the PF youths to clear the sites. The trial Judge found that the drilling of the boreholes was a corrupt act committed by the Appellant's friends with her full knowledge and consent, which act prevented the majority of the voters from electing a candidate of their choice. After citing the case of **Leonard Banda v Dora Siliya,**[18] the lower Court stated that an election will be nullified under section 97 (2) (a) (ii) even though a malpractice is committed by someone else so long as the candidate or his election agent was aware of it and approved of it. The Court held for that reason that the allegation was proved.

In arguing this appeal, the Appellant submitted that since the Court found that the Appellant did not donate or finance the boreholes and that the persons who donated the boreholes to the community were not her election agents, the lower Court was wrong to hold that the Appellant committed a corrupt act. The Appellant further submitted that the drilling of the boreholes was a

philanthropic act which benefited the entire community and that even if it were to be considered a corrupt or illegal act, evidence should have been led regarding the number of voters in the State Lodge area who were swayed from electing their preferred candidate. The Appellant contended that that was not done and therefore the allegation was not proved.

The 1st Respondent on the other hand, submitted that the trial Judge was right to find that the Appellant was aware of and consented to the sinking of the boreholes as evidenced by the letter from RW2. She contended that the sinking of the boreholes was not a philanthropic activity because the Appellant associated herself with the borehole project in order to enhance her chances of being elected. That her comments on the Race to Manda Hill programme and her posting on her face book page attested to the fact that the Appellant campaigned on the back of the boreholes as alleged by PW2.

Regarding whether or not the sinking of the boreholes had a widespread effect, the 1st Respondent invited us to consider the evidence that Bauleni compound where the boreholes were sunk

has the largest number of voters in the whole constituency and that the Appellant used the boreholes to campaign to a larger audience on the ZNBC "Race to Manda Hill" programme and on her face book page with a following of more than 17,000 people.

The 1st Respondent thus argued that the trial Judge was right to hold that the majority of the voters were affected by the sinking of the boreholes because, under section 97 (2) (a) (ii) of the Act, the burden of proof is satisfied by the petitioner merely demonstrating that the majority of voters may have been prevented from electing a candidate of their choice due to the conduct complained of.

The 1st Respondent further contended that under section 97 (3) of the Act, the Court can nullify an election based on a single act of corruption as there is no requirement under that section that the corrupt or illegal act should affect the majority of voters in the constituency for an election to be nullified.

We have considered the above submissions. We note that the allegation in paragraph 8 of the petition was that the Appellant resolved the long standing water problem in the State Lodge area by having two boreholes sunk during the campaign period, that she

commissioned the boreholes and campaigned to the people during the event promising that if they voted for her, she would continue the works she was already doing.

The evidence on record however, proved that the boreholes were drilled by the Muslim Welfare Society and that the Appellant did not procure the drilling of the two boreholes. No evidence was led to prove that the Appellant commissioned the boreholes.

A careful examination of the letter which was written to the Appellant by RW2, Dr. Msiska, which letter is exhibited at pages 131 to 132 of the record of appeal revealed that the sinking of the boreholes arose from a need to improve water and sanitation in the State Lodge and Bauleni areas in the wake of a cholera outbreak in Lusaka Province in February, 2016. This was a nationwide programme according to paragraph 5 of the letter on page 131 of the record of appeal which reads:

> **"Chongwe District has been working in collaboration with the Muslim Welfare Society to install Bore Holes not only in Lusaka Province but in other provinces where there is been need.(sic) The Bore Holes have been installed at Public Institutions like Schools, Clinics, Hospitals and also in the Community."** (Emphasis added).

The reason the Appellant was approached by RW2 regarding the boreholes is clearly explained in the second paragraph of the letter at page 132 of the record, which reads:

> **"We have opted to approach you having worked with you and observed your enthusiasm in creating health awareness and demand for health services in Nachitete which has led into the construction of Nachitete Health Post."**

The boreholes were meant "to improve the well-being of the people" in State Lodge and Bauleni as stated in the last paragraph of the letter at page 132 of the record of appeal. The sinking of the boreholes was therefore intended as a philanthropic activity, which fact did not change by their subsequent drilling during the campaign period.

It is significant to note that the Appellant was not a candidate in any election in March, 2016 when the letter was written to her nor had she been adopted by the PF party as their candidate for Lusaka Central Constituency. This fact was acknowledged by the trial Judge in his judgment at page 70 of the record of appeal when he said:

> **"The fact that she had not yet been officially nominated as a candidate did not diminish her interest as she was hoping to be adopted by her party and officially nominated...."**

The lower Court's findings that the Appellant was personally involved in the drilling of the boreholes and that the boreholes were drilled by her friends are not supported by the evidence on record. The Muslim Welfare Trust were not the Appellant's friends as RW3 clearly said he did not know the Appellant at the time the boreholes were drilled and only met her in September 2016. This evidence was not discredited in cross-examination. Further, there was no evidence that the two PF youths Musonda and Zayelo, who were identified by PW2 in Court and whom he alleged participated in clearing the site for the borehole in State Lodge, were the Appellant's election agents or that they did so with the Appellant's knowledge and consent. There is further no evidence that the Appellant mobilised PF youths to clear the site as stated by the lower Court in his judgment at page 71 of the record. It is settled law that not everyone in a candidate's political party is his election agent as an election agent has to be specifically appointed in terms of the law. Section 2 of the Act defines an election agent as:

> **"a person appointed as an agent of a candidate for the purpose of an election and who is specified in the candidate's nomination paper."**

A candidate is responsible only for illegal or corrupt acts or other misconduct which the candidate commits or which are committed with the candidate's knowledge and consent or approval or that of his election agent. In **Lewanika and Others v Chiluba,**[14] the Supreme Court observed thus:

> **"We are mindful of the provisions of the Electoral Act that a candidate is only answerable to those things which he has done or which are done by his election agent or with his consent. In this regard, we note that not everyone in one's political party is one's political agent since under regulation 67, an election agent has to be specifically so appointed."**

We agree with these observations.

The lower Court accepted the evidence of PW2 that he heard the Appellant ask the voters in State Lodge area to vote for her as she had procured the boreholes for them. PW2 was a partisan witness as he was an official in the UPND party. His evidence therefore required to be corroborated as a matter of law as he was a witness with a possible interest to serve. No corroborating evidence however was adduced by the 1st Respondent as we have not seen any such evidence on the record of appeal. In our view, the evidence of RW2 and RW3 was independent evidence regarding the date of sinking of the boreholes and yet the lower Court rejected the evidence on the ground that they were not eye witnesses to the

sinking of the boreholes. And further that the Appellant did not produce a borehole completion report. We are perplexed to note that the trial Judge accepted the evidence of RW2 and RW3 that the two boreholes were drilled by the Muslim Welfare Society and yet he rejected their testimony regarding the dates when they were drilled.

Having carefully examined the evidence on record, we observe that the drilling of the boreholes by the Muslim society to improve the water and sanitation situation for the benefit of the people of Bauleni and State Lodge area was not a corrupt act as held by the lower Court. The finding that the act of drilling the boreholes in State Lodge area and Bauleni was a corrupt act done by the friends of the Appellant with her knowledge and consent is not supported by the evidence on record. As the trial Judge clearly stated in his judgment at page 69 of the record that the evidence did not clearly demonstrate what role the Appellant played in the drilling of the boreholes, the allegation that she donated the boreholes was not proven to the requisite standard in terms of the requirements of section 97 (2) (a) of the Act. We accordingly reverse the trial Judge's finding that the allegation was proved.

Turning to the allegation of bribery regarding the purchase of chitenge materials, the evidence was given on behalf of the 1st Respondent by PW3 Victoria Chipende a UPND member and an employee of the 1st Respondent. She testified that on a date she could not recall in June or July, 2016 she attended the 07:00 hours Sunday mass at St. Matthias Mulumba Catholic Church in Bauleni Compound. As she left the church at the end of the service, she saw people scrambling for chitenge materials which were meant for fundraising by the church. PW3 alleged that the Appellant had bought about 200 pieces of chitenge which she was distributing to the public and that she heard her assure the crowd, when the chitenge material ran out, that she would buy some more. PW3, however, conceded that she did not see the Appellant buy 200 pieces of chitenge materials and further that she did not see her pay for the chitenge material.

The evidence in rebuttal was adduced by the Appellant and RW4. The Appellant testified that she attended the 09.00 hours service at St. Matthias Mulumba Catholic Church with her entourage on 12th June, 2016 at the invitation of the parish priest

to participate in the unveiling of the chitenge material to be used on 26th June, 2016 in commemoration of the Saint Matthias Mulumba day. The chitenge was unveiled towards the end of the service. After the service, women in her entourage requested her to buy them the chitenge for the celebrations.

She bought twenty pieces of chitenge, distributed twelve to her entourage and remained with eight. She denied that she bought two hundred pieces of chitenge and distributed it to the women at the church after the 07:00 hours mass as alleged by PW3. She further denied assuring the women that she would buy them more chitenge pieces. She stated that it would have been against protocol for her to have engaged the women of the church before she was formally received by her host, the parish priest. She further said the church had only bought three thousand five hundred metres of chitenge material and that only 35 x 2 metre pieces were cut out by the church on that day. The rest were sent out to the sections. She said she got this information from the church chairman.

The Appellant conceded that she distributed some of the chitenge materials to her entourage on 12th June, 2016 during the campaign period.

RW4, Ireen Kasonde, a PF member testified that on 12th June 2016 she attended the 09.00 hours mass at Matthias Mulumba Catholic Church with the Appellant. After the service, the women in the Appellant's entourage requested the Appellant to buy for them the chitenge material which had been launched by the church for the St. Matthias Mulumba celebration. The Appellant bought twenty (20) pieces of the chitenge material and gave some to members of her entourage before she left.

RW4 denied that the Appellant bought two hundred (200) pieces of chitenge material and distributed them to the women in the church premises before mass commenced. She admitted that there was chitenge material on sale in the church grounds when she arrived before the 09:00 hours mass commenced although she did not specify the specific chitenge material on sale.

The trial Judge considered the evidence and held that the purchase of the chitenge by the Appellant within the church

premises was not disputed. That what was disputed was the number of pieces purchased as PW3 alleged that the Appellant purchased about 200 pieces while the Appellant said she bought only 20 pieces at the request of members of her entourage after the 09.00 hours mass.

The trial Court accepted PW3's evidence and dismissed the Appellant and RW4's evidence. The lower Court said RW4's testimony that the chitenge material was being sold before the second service started corroborated PW3's testimony that she found a commotion outside the church after the first service as women jostled for chitenges. The learned trial Judge dismissed the Appellant's assertion that she could not have engaged the women before her host, the parish priest, officially received her, because in the trial Judge's view, there was nothing to stop her from doing so since she was a politician.

The lower Court found as a fact that the number of chitenge materials the Appellant bought was unknown but that the Appellant did buy some chitenge pieces; that she distributed them in full view of the congregants, thereby making it a public donation

and not a philanthropic act. That since this happened in the campaign period, in a densely populated part of the constituency, it was an act of inducement proscribed by the Act. He held that the act was an illegality committed by the Appellant and that it fell within section 97 (2) (a) of the Act.

We have considered the evidence on record on this issue. We note that PW3 was not present when the Appellant allegedly bought the chitenge as she said she came out of the church only to find women scrambling for the chitenge pieces. She admitted that she was not certain that the number of chitenge pieces the Appellant allegedly bought was 200 pieces. As PW3 was not an eye witness to the alleged purchase of chitenge, there was need for the 1st Respondent to have adduced cogent evidence to support the assertion that 200 pieces of chitenge were bought. Further, no independent evidence was adduced from any of the women who allegedly received the chitenge pieces to corroborate the evidence of PW3. The reason stated by the lower Court for choosing to believe the version of events given by PW3 who was not only partisan but also an employee of the 1st Respondent was that there was nothing

to stop the Appellant from engaging the women in the church grounds and purchasing chitenge materials for them, as it were, because she was a politician. That reason was clearly not based on the evidence before the lower Court.

The lower Court therefore took extraneous matters into account in accepting PW3's evidence. Further, since PW3's evidence was not corroborated, the evidence clearly did not meet the high standard required to prove the allegation in terms of section 97 (2) (a) of the Act. We also note that the lower Court found that the Appellant committed an illegal act in terms of section 97 (2) (a) by purchasing 20 pieces of chitenge and distributing 12 pieces to members of her own entourage because it was done in full view of the public. This reasoning was clearly faulty as there is no law against a candidate giving a gift of that nature which was for a specific event to members of her own team. We do not see how the purchase of chitenge material for the Appellant's team could be an inducement to voters in those circumstances as no independent witness testified to that effect. There was also no evidence to support a finding that the purchase of the chitenge materials

influenced or may have influenced the voters from voting for the 1st Respondent. As the Appellant submitted, and we agree with her, if indeed 200 people benefited from the purchase of the chitenge as alleged by RW3, evidence should have been led to show how that number affected the outcome of the election.

In the absence of supporting evidence to that effect, we cannot support the lower Court's finding that the purchase of chitenge for her entourage by the Appellant was an act of inducement falling within the ambit of section 81 (1) (c) of the Act or that it influenced the voters from choosing their preferred candidate so as to warrant nullifying the election. In the circumstances, the findings were at odds with the evidence on record and we accordingly reverse them.

Regarding the cash donation of K6,400.00 for 100 pockets of cement, the 1st Respondent testified that the Appellant made the donation of 100 pockets of cement to the Word of Life Church congregation towards the construction of the church building during the campaign period. No other witness testified on behalf of the 1st Respondent regarding the donation of K6,400.00 cash.

RW1, the Pastor of the Word of Life Church, testified in rebuttal that the cash donation of K6,400 was made by the Appellant on 8th May, 2016 and not during the campaign period as alleged by the 1st Respondent.

The trial Judge found as a fact that the donation was made on 8th May, 2016 which was outside the campaign period and further that the Appellant had not yet been adopted as a candidate at that time. However, he stated that his task was to determine whether illegal practices committed outside the official campaign period can affect the election. The trial Judge held that the Appellant made the donation with elections in mind to induce the congregants to vote for her. That since 8th May, 2016, was just a few days before the dissolution of Parliament when the official campaign period would commence, the act satisfied the requirements of section 97 (2) (a) of the Act.

The Appellant has contended that the lower Court misdirected itself in finding that the act was within section 97 (2) (a) because section 97 (2) (a) of the Act applies to candidates or their election agents. That in this case, the Appellant had not been adopted by

her party nor was she a candidate for any election as defined by section 2 of the Act.

The Appellant submitted with regard to the alleged corrupt act that the petitioner was required to demonstrate that the act complained of prevented or may have prevented voters from voting for their preferred candidate. That in this case, no evidence was adduced regarding the number of congregants who witnessed the donation of K6,400 for the purchase of cement. That the lower Court made no effort to find that the act was widespread due to his reliance on the case of **Michael Mabenga v Sikota Wina and Others**[4] which is no longer good law after the repeal of section 93 (2) of the Electoral Act of 2006.

To start with, we wish to reiterate that an election will be nullified under section 97 (2) (a) of the Act where cogent evidence is provided to show that a candidate or the candidate's election or polling agent committed an electoral offence or that the offence was committed with their knowledge and consent or approval. Further, that the offence prevented the electorate from choosing a candidate of their choice. In this case, the donation of money for cement was

made before the commencement of the campaign period. It therefore could not be an inducement for voters or an electoral offence in terms of section 81 (c) of the Act and was therefore not proved in terms of section 97 (2) (a).

Regarding whether or not the alleged bribery allegations had a widespread effect, we note that the 1st Respondent did not adduce any evidence to prove that that was the case. We find that in the absence of evidence as to the widespread nature of the alleged acts of bribery, all the allegations of bribery were not proven to the required standard in terms of section 97 (2) (a) of the Act. Grounds two, three, four and seven therefore succeed and are upheld.

In grounds five, six and eleven, the Appellant challenges the lower Court's findings that the acts of violence fell within section 97 (2) (b) of the Act so that the election was not conducted in substantial conformity with the Act; that the acts of violence were widespread and affected the outcome of the elections; and that violence by unidentified cadres amounted to non-compliance with the principles for the conduct of elections and warranted nullifying the election. The Appellant submitted that the lower Court was

wrong to consider matters which were not pleaded and cited the case of **Mazoka and others v Mwanawasa and others**[10] wherein the Supreme Court stated that pleadings give fair notice of the case to be met and define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. That once pleadings are closed, the parties are bound by their pleadings and the Court must adhere to them as such.

In support of the allegations of violence, the 1st Respondent said the first incident occurred when she and her team went to the town centre to campaign. They were confronted by aggressive youths clad in PF regalia and were forced to abandon their campaign.

The second attack occurred when they were distributing UPND campaign materials in the town centre. They were attacked and two of the team's motor vehicles were damaged in the incident. A member of her team was nearly stabbed with a screw driver and so the team abandoned their campaign.

The 1st Respondent conceded that she did not know any of the youths who attacked her campaign team and that the Appellant was not present on both occasions.

PW5's testimony was that on the second occasion, he was with the 1st Respondent on a campaign trail in the town centre in a convoy of motor vehicles. They were suddenly confronted by a group of young men clad in PF regalia who came in two mini buses. One youth approached the Land Cruiser and attempted to stab him with a screw driver but missed him. The men smashed the rear windscreen of the Land cruiser with stones. The matter was reported to the police. PW5 conceded that the Appellant was not present when they were attacked.

The Appellant, on the other hand, denied that she or any member of her team was involved in any act of violence. She explained that she was at the Trade Fair in Ndola on 4th July, 2016 when the 1st Respondent's campaign team was allegedly attacked in the town centre.

The learned trial Judge found as a fact that the Appellant and her agents were not responsible for the violence and that she was

out of town on the date of the second attack which was more serious than the first. Nonetheless, the trial Judge held that the allegation fell to be considered under section 97 (2) (b) of the Act, and not section 97 (2) (a) because, in his view, it spoke to the general conduct of the election regarding compliance or non-compliance with specific provisions of the Act.

The trial Judge cited clause 4 (2) (d) of the Code of Conduct which prohibits a member or supporter of a political party or a candidate from disrupting another political party's meeting or rally and stated that the provision of the Code is meant to ensure a free and level playing field for all political parties. The lower Court held that:

> **"... any act by supporters of a political party intended to prevent members of another political party from exercising their right to solicit for votes from the general public, offends against the spirit of section 97 (2) (b) of the Act."**

He reiterated that the candidate against whom the petition is brought need not be involved or have knowledge of such actions by a political party and stated that the subsection is not concerned with who the actual perpetrator is but whether or not the election was conducted in accordance with the principles in the cited

provisions of the Act. He concluded that the allegation had succeeded.

The Appellant has submitted that the lower Court abandoned the allegation on violence in the amended petition and substituted his own allegation when he considered the allegation under section 97 (2) (b) of the Act. The Appellant contended that there was no allegation at trial that the violence amounted to non-compliance with electoral rules and that the lower Court was not entitled to go beyond the matters pleaded by the parties.

The Appellant argued that the principles referred to in section 97 (2) (b) of the Act are those found in section 3 of the Act which dictate how the ECZ is to conduct elections. The Appellant urged us to set aside the issues introduced by the lower Court in relation to the allegation on violence.

The 1st Respondent endorsed the lower Court's approach regarding the allegation of violence and contended that the interpretation given by the lower Court to section 97 (2) (b) was correct in the circumstances. She argued that the learned trial Judge was not precluded from considering the facts before him

against the law contained in section 97 (2) (b) although, as it turned out, the violence was not attributed to the Appellant as alleged in the pleadings.

We have duly considered the above submissions.

In considering grounds five, six and eleven, we note that the 1st Respondent's allegation in paragraph 12 of the amended petition set out on pages 97 to 106 of the record of appeal reads as follows:

> **"12. Your Petitioner also states that on 4th June, 2016 whilst doing door to door campaigns, the Petitioner's campaign team was attacked by the Patriotic Front (PF) cadres at town centre. Further, in the same occurrences of the events the Petitioner's Land cruiser was damaged and one of the Petitioner's party member was stabbed (sic) with a screw driver in the aforementioned attacks."**

The manner in which the above allegation was pleaded does not suggest that there was non-compliance with the provisions of the law in the conduct of elections. As we stated under ground one, section 97 (2) (b) of the Act which the lower Court applied in determining the allegation on violence relates to the conduct of elections by the Electoral Commission of Zambia.

Since the lower Court found that the allegation relating to violence fell to be determined under section 97 (2) (b) of the Act, the question we have to consider is, did the 1st Respondent's evidence

prove to the required standard that there was widespread violence in the Constituency during the campaign period, which violence affected the conduct of elections by the ECZ and ultimately the result of the election to justify the nullification of the election? To answer that question, we have carefully examined the evidence on record on the issue of violence. We note that the 1st Respondent's evidence reveals that there were two incidents of violence which were confined to the town centre. That the violence was quickly brought to an end and did not escalate beyond the town centre because the 1st Respondent and her team immediately abandoned their planned campaign and left the town centre. There is no cogent evidence on record that the two incidents of violence in the town centre had a widespread effect or that they affected the result of the election. Nor did the evidence link the Appellant or her agents to the alleged violence.

As a Court, we repeat our strong disapproval of violence as we have previously done, regardless of who the perpetrator is. In this case, however the 1st Respondent did not prove that the violence was widespread, as we have already said.

We, therefore, reverse the lower Court's finding that the allegation of violence was proved to the requisite standard of convincing clarity in accordance with section 97 (2) (b) of the Act. Grounds five, six and eleven of the appeal therefore succeed.

In ground eight, the Appellant attacks the learned trial Judge's finding that the statements by the Appellant that she was a Zambian born at the University Teaching Hospital and understood the Zambian culture amounted to racial discrimination. The 1st Respondent and PW4 testified in support of the allegation that the Appellant used racist arguments and uttered racist statements against the 1st Respondent.

In the main, the 1st Respondent alleged that the Appellant's remarks on the "Race to Manda Hill" programme on ZNBC television that she was a Zambian born at the University Teaching Hospital (UTH) where her umbilical cord was buried, that she understood the Zambian culture and that the electorate wanted their own person who would understand them were meant to inform the viewers that she (1st Respondent) was not a proper Zambian as her umbilical cord was not buried in Zambia.

PW4 on the other hand, testified that he heard the Appellant say during her campaign in Bauleni that the 1st Respondent was a white person who would not do anything just as the previous Member of Parliament who was white had failed to do anything. He further alleged that the Appellant said she was one of them as she was born at the UTH.

In rebuttal, the Appellant denied that her remarks that she was born at the UTH and that her umbilical cord was at the UTH were racist or discriminatory against the 1st Respondent.

The trial Judge analysed the evidence and stated that the words which were alleged to be discriminatory and racial and attributed to the Appellant on the televised programme, "Race to Manda Hill" were not disputed. That what was disputed was whether or not she made similar remarks during a campaign meeting in Bauleni and whether or not the words had a racial connotation.

The trial Judge stated that the issue to be determined was not what the Appellant intended to convey to the electorate by those words but what an ordinary person who watched the television

programme or heard the utterances would understand the words to mean.

The trial Judge held that the remarks targeted the 1st Respondent and were intended to appeal directly to the electorate against the 1st Respondent who failed the indigenous test as espoused by the Appellant. That the remarks appealed to the voters' sense of indigenousness rather than to the attributes that qualify a candidate for office as Member of Parliament.

The lower Court held that this offended clause 15 (1) (m) of the Code of Conduct and therefore fell within the contemplation of section 97 (2) (a) of the Act for which an election was liable to be voided. The trial Judge stated that in view of his observations, the Appellant was placed in a position where she would have no difficulties in using similar language in her campaigns within the Constituency. He, therefore, accepted PW4's evidence that the Appellant and her agents uttered racially discriminatory remarks during a campaign rally in Bauleni. He added that PW4's testimony was corroborated by the televised broadcast. He therefore found that the allegation was proved.

In considering this ground of appeal, the issue we have to determine is whether the lower Court was right in finding that the Appellant's comments on the television programme were racial and discriminatory against the 1st Respondent. We are alive to the plethora of authorities that guide appellate Courts on the parameters within which findings of fact made by a trial Judge must be dealt with. In **Examination Council of Zambia v. Reliance Technology Limited**[19] which we cited with approval in the case of **Sibongile Mwamba v Kelvin M. Sampa and Electoral Commission of Zambia**[20], the Supreme Court held that an appellate Court will not lightly interfere with findings of fact of the trial Judge who had the benefit of seeing and evaluating the witnesses unless it is shown that the findings of fact were either perverse or were made in the absence of any relevant evidence or were premised on a misapprehension of the facts.

As the lower Court found that the key evidence in support of the allegations was the Appellant's statements during the "Race to Manda Hill" television programme, we took time to view the DVD which was produced by the 1st Respondent before the lower Court

and was availed to us as part of the record of appeal. We note that the Appellant first referred to her birth place in her introductory statements at the beginning of the programme in response to the moderator's invitation to her to introduce herself and state where she was born as other aspiring candidates on the programme had done before her. Her response was that she was born and bred in Lusaka. She added in Chibemba language that her umbilical cord was at UTH. The second time she referred to her birth place was in response to the question, "understanding the demographics of the voters of Lusaka Central Constituency, why should the residents of Lusaka Central Constituency vote for you?" This question was asked by the moderator of the programme to all the five candidates. The Appellant then said, among other things, that she was a Zambian born at the UTH and understood the Zambian culture.

Given the context in which the words were spoken and having heard her full response to the question asked, we do not agree that the words spoken by the Appellant had racial under tones or that they were discriminatory against the 1st Respondent. To borrow the trial Judge's words there was nothing sinister in the words the

Appellant spoke regarding her place of birth on both occasions. Neither do we find that the words were targeted at the 1st Respondent as the order in which the candidates spoke on the television programme was determined by the moderator.

In making a finding in favour of the 1st Respondent in relation to this allegation, the lower Court ought to have determined whether the uttering of the alleged racial and discriminatory remarks by the Appellant amounted to misconduct in terms of section 97 (2) (a) of the Act and if so, whether the remarks were so widespread that they influenced the electorate or may have influenced the electorate in the Constituency from voting for a candidate of their choice.

The lower Court, however, did not make any such connection between section 97 (2) (a) of the Act and clause 15 (1) (m) of the Code of Conduct. Further, since the lower Court said the issue was not what message the Appellant meant to convey by her words, but what she was understood to mean by an ordinary person who watched the programme and heard the utterances, in order for the Court to have got the answer to that question, there was need for

the 1st Respondent to have adduced evidence from independent witnesses that they heard the Appellant's remarks on the programme, that they understood the words to have been directed at the 1st Respondent and further, that they were swayed from voting for the 1st Respondent and voted instead for the Appellant because of her utterances.

Considering that the standard of proof in election petitions is above the balance of probabilities, it was incumbent upon the 1st Respondent to prove her allegations against the Appellant to that high standard. That she did not do. Instead, the lower Court resorted to making assumptions in order to fill out the gaps in the evidence in support of the allegation. The trial Judge stated with regard to RW4's evidence that the Appellant uttered racial remarks at the rally, that the Appellant was prone to do so because of her comments on the television programme. That approach was erroneous as by assuming that the Appellant repeated the alleged racial remarks, at the rally, the lower Court absolved the 1st Respondent of the burden to prove her case against the Appellant to the required standard. Further, PW4 whose evidence the lower

Court chose to believe was a partisan witness whose evidence required corroborating evidence to support it. In taking this position, we rely on the persuasive criminal case of **Boniface Chanda Chola and two others v The People** [21] wherein it was stated that:

> **"The critical consideration is not whether the witnesses did in fact have interests or purposes of their own to serve, but whether they were witnesses who, because of the category into which they fell or because of the particular circumstances of the case, may have had a motive to give false evidence."**

In this case, the lower Court found that the evidence of PW4 was corroborated by the televised broadcast. Having reviewed the evidence on this allegation in total, our view is that the allegation that the Appellant used racial arguments on the ZNBC Race to Manda Hill programme is not supported by the video or any other evidence on record. In our view, the evidence adduced fell far short of the requirements of section 97 (2) (a) of the Act as the 1st Respondent did not prove the commission of an electoral offence by the Appellant or her election agents or with their consent and

approval in relation to the remarks. Further, there was no evidence that the alleged offence had a widespread effect.

We accordingly reverse the lower Court's finding that the Appellant made racial remarks against the 1st Respondent during her campaign as it is not supported by any evidence on record to that effect. Ground eight of the appeal is meritorious and therefore succeeds.

In ground nine, the Appellant impugns the lower Court's finding that by her continued stay in office as Minister of Commerce, Trade and Industry, the Appellant abused Government resources during the campaign period and that the abuse of Government resources materially affected the result of the election. The issue we have to determine under this ground is whether the 1st Respondent proved the allegation to the required standard under section 97 (2) (a) of the Act.

In her evidence in support of the allegation, the 1st Respondent said that during the campaign period, the Appellant was presenting herself to the electorate as a Minister in contravention of the Constitution and thereby creating a perception in the electorate's

mind that she was a Minister. That the Appellant associated her ministerial position to the campaign on her Facebook page which was being constantly updated with the Appellant's current activities and her campaign programmes. She further said the Appellant used Government resources in her campaign. One incident she cited was that on the day of the recording of the Race to Manda Hill programme at the Mass Media Complex, the Appellant used a motor vehicle bearing a GRZ number and flying the Zambian flag as a Cabinet Minister. That she also introduced herself on the programme as the Minister of Commerce, Trade and Industry. The 1st Respondent said the status gave her undue advantage in her campaign.

She conceded that she did not know whether the vehicle the Appellant used during her campaign was offered to her by the Ministry of Works and Supply but said the vehicle flew the Zambian flag. The 1st Respondent insisted that the Appellant was not entitled to use a GRZ vehicle flying the flag as she was not a Minister at that time.

The Appellant denied using Government resources in her campaign and produced a receipt for the purchase of the GRZ motor vehicle she used in her campaign and which she said had been offered to her by the Ministry of Works and Supply. She said she paid the full price for the motor vehicle and was only awaiting change of ownership. The Appellant, however, conceded in cross examination at page 442 of the record of appeal that she used a Government pool vehicle to get to ZNBC for the Race to Manda Hill programme.

The trial Judge considered the evidence and said that it was not disputed that Cabinet Ministers and other Ministers remained in office after the dissolution of Parliament. The trial Judge found as a fact that the Appellant used Government transport and facilities during the campaign period as demonstrated by her use of a Government vehicle to attend to a campaign programme Race to Manda Hill. He held that this was a violation of clause 15 (1) (k) of the Code of Conduct which prohibits the use of Government transportation or facilities for campaign purposes except for the

President and Vice-President. He further held that an election could be rendered void pursuant to this provision.

The trial Judge further held that the Appellant's holding of herself out as Minister of Commerce, Trade and Industry during the campaign period was not only illegal but was also influential to the voters. That she used her status to entice voters to vote for her and therefore disadvantaged other candidates and particularly, the 1st Respondent. He cited the case of **Michael Mabenga v Sikota Wina and 2 Others**[4] wherein the Supreme Court upheld the nullification of the Appellant's election for, among other reasons, use of Government transport during campaigns contrary to regulation 7 (1) (i) of the Electoral Code of Conduct 1996.

We have reviewed the evidence on record and the lower Court's judgment on this aspect. Paragraph 15 (1) (k) of the Code of Conduct provides that:

> **"(1) A person shall not-**
>
> **(k) use Government or parastatal transportation or facilities for campaign purposes, except that this paragraph shall not apply to the President and the Vice-President in connection with their respective offices."**

This provision clearly prohibits the use of Government transport and facilities for campaign purposes. In this case, the 1st Respondent alleged that the Appellant was using a Government motor vehicle throughout her campaign. She, however, cited only one incident when she said the Appellant used a Government motor vehicle with a Zambian flag on the day of the recording of the Race to Manda Hill programme.

The Appellant denied that she used a Government motor vehicle throughout her campaign and said the motor vehicle she used was her personal to holder motor vehicle which she purchased from the Ministry of Works and Supply. As we have already observed, she admitted that she used a Government pool vehicle to get to ZNBC for the Race to Manda Hill television programme.

It is settled law that allegations in election petitions must be proven to a higher standard than a balance of probabilities. In this case, the allegation was that the Appellant used a Government motor vehicle throughout her campaign. However, the 1st Respondent only proved the use of the Government vehicle on the day of the Race to Manda Hill programme.

Bearing in mind that section 97 (2) (a) of the Act requires that both the commission of the illegal practice by the candidate or the candidate's election agent or by someone else with their knowledge and consent or approval and the effect of the illegal practice on the electorate, that is, that it prevented or may have prevented the majority of voters from electing their preferred candidate, be proved, the question which we have to consider is, did the 1st Respondent's evidence (as Petitioner) in the lower Court satisfy these two requirements? In other words, did the 1st Respondent's evidence prove that the use of the Government pool vehicle by the Appellant to get to a campaign programme on ZNBC prevented or may have prevented the majority of voters from electing their preferred candidate to warrant the nullification of the election?

Our examination of the 1st Respondent's evidence on record reveals that apart from alleging that the Appellant used a Government motor vehicle to get to ZNBC for the Race to Manda Hill programme, the 1st Respondent did not adduce any evidence to prove that the prohibited act was widespread and affected the result of the election by preventing the majority of the electorate from

electing their preferred candidate and so rendered the election a nullity. Based on the evidence on record, we find that this allegation was not proven to the required high standard of convincing clarity in terms of section 97 (2) (a) of the Act.

Further, the 1st Respondent did not adduce any evidence to prove that the Appellant used Government resources in her campaign. The allegation was therefore not proved.

The finding by the lower Court that the Appellant used the salary she earned from her position as a Cabinet Minister in her campaign was not supported by any evidence. In the circumstances, the findings of fact to which this ground relates cannot stand. We accordingly reverse them. Ground nine has merit and succeeds.

As the Appellant has succeeded in ten of the eleven grounds she raised, the appeal succeeds. We set aside the lower Court's decision to nullify the election and declare that the Appellant, Margaret Dudu Mwanakatwe, was duly elected as Member of Parliament for Lusaka Central Constituency.

Each party shall bear their own costs of this appeal and before the lower Court.

.....
H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

.....
A.M. Sitali
CONSTITUTIONAL COURT JUDGE

.....
M.S. Mulenga
CONSTITUTIONAL COURT JUDGE

.....
E. Mulembe
CONSTITUTIONAL COURT JUDGE

.....
M. Musaluke
CONSTITUTIONAL COURT JUDGE

231

(3) Subject to any rules of court or tribunal, the powers, practice and procedure of the High Court or a tribunal in respect of the trial of an election petition under this Part shall apply, with the necessary modifications, to the hearing and determination of such applications.

Avoidance of elections

97. (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall be void if, on the trial of an election petition, it is proved to the satisfaction of the High Court or a tribunal, as the case may be, that—

(a) a corrupt practice, illegal practice or other misconduct has been committed in connection with the election—

(i) by a candidate; or

(ii) with the knowledge and consent or approval of a candidate or of that candidate's election agent or polling agent; and

the majority of voters in a constituency, district or ward were or may have been prevented from electing the candidate in that constituency, district or ward whom they preferred;

(b) subject to the provisions of subsection (4), there has been non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court or tribunal that the election was not conducted in accordance with the principles laid down in such provision and that such non-compliance affected the result of the election; or

(c) the candidate was at the time of the election a person not qualified or a person disqualified for election.

(3) Despite the provisions of subsection (2), where, upon the trial of an election petition, the High Court or a tribunal finds that a corrupt practice or illegal practice has been committed by, or with the knowledge and consent or approval of, any agent of the candidate whose election is the subject of such election petition, and the High Court or a tribunal further finds that such candidate has proved that—

(a) a corrupt practice or illegal practice was not committed by the candidate personally or by that candidate's election agent, or with the knowledge and consent or approval of such candidate or that candidate's election agent;

(b) such candidate and that candidate's election agent took all reasonable means to prevent the commission of a corrupt practice or illegal practice at the election; and

(c) in all other respects the election was free from any corrupt practice or illegal practice on the part of the candidate or that candidate's election agent;

the High Court or a tribunal shall not, by reason only of such corrupt practice or illegal practice, declare that election of the candidate void.

(4) An election shall not be declared void by reason of any act or omission by an election officer in breach of that officer's official duty in connection with an election if it appears to the High Court or a tribunal that the election was so conducted as to be substantially in accordance with the provisions of this Act, and that such act or omission did not affect the result of that election.

Presentation of election petition

98. An election petition may be presented to the High Court or a tribunal by one or more of the following persons:

(a) a person who lawfully voted or had a right to vote at the election to which the election petition relates;

(b) a person claiming to have had a right to be nominated as a candidate or elected at the election to which the election petition relates;

(c) a person claiming to have been a candidate at the election to which the election petition relates; and

(d) the AttorneyGeneral.

Relief which may be claimed in election petition

99. Any of the following reliefs may be claimed in an election petition:

(a) a declaration that the election was void; or

(b) a declaration that any candidate was duly elected.

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2026/HP/EP/037

IN THE MATTER OF:	THE PARLIAMENTARY ELECTION PETITION FOR WUSAKILE CONSTITUENCY SITUATE IN THE KITWE DISTRICT OF THE COPPERBELT PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON 13TH AUGUST, 2026
IN THE MATTER OF:	ARTICLES 73 (1) OF THE CONSTITUTION OF ZAMBIA AS READ WITH SECTION 98 (C) OF THE ELECTORAL PROCESS ACT NUMBER 35 OF 2016
IN THE MATTER OF:	SECTION 83 OF THE ELECTORAL PROCESS ACT No. 35 OF 2026
IN THE MATTER OF:	SECTION 97 OF THE ELECTORAL PROCESS ACT No. 35 OF 2016
IN THE MATTER OF:	SECTIONS 98, 99 AND 100 OF THE ELECTORAL PROCESS ACT No. 35 OF 2016;
IN THE MATTER OF:	THE SCHEDULE TO THE ELECTORAL PROCESS ACT No. 35 OF 2016
IN THE MATTER OF:	THE ELECTORAL (CODE OF CONDUCT) REGULATIONS OF 2011 STATUTORY INSTRUMENT 52 OF 2022
IN THE MATTER OF:	THE ELECTORAL COMMISSION ACT No. 25 OF 2026

BETWEEN:

REPUBLIC OF ZAMBIA 07 SEP 2026 PRINCIPAL REGISTRY 6 P.O. BOX 50067, LUSAKA

KATAYI CHIBESA	PETITIONER
AND	
KALOBO PAVYUMA	1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

LIST AND DESCRIPTION OF 1ST RESPONDENT'S DOCUMENTS

ITEM	DESCRITPION	DATE
1.	Campaign Time Table	13/08/2026
2.	List of Polling Agents	- -
3.	Declaration Form	17/08/2026
4.	Complaint Letter	15/06/2026
5.	Announcement to the Results of the Poll GEN 20a Forms for Wusakile Constituency	13/08/2026

Dated .....day of.....2026

Per:

Messrs James & Doris Legal Practitioners
9th Floor Premium House
Independence Avenue
P. O. Box 34302
Lusaka.
Advocates for the 1st Respondent

TO: The Petitioner and his Advocates:

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Plot No. 4880, Elm Road
Woodlands, P.O. Box RW 50896
Lusaka, Zambia.

And To:

The 2nd Respondent
The Electoral Commission of Zambia
Haile Selassie House
P.O. Box 50274
Lusaka, Zambia.