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



2026/HP/EP041

IN THE MATTER OF:	ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA
AND	
IN THE MATTER OF:	SECTION 81, 83, 84, 97, 98 & 100 OF THE ELECTORAL PROCESS ACT, NO. 35 OF 2016
AND	
IN THE MATTER OF:	REGULATION 15 OF THE ELECTORAL CODE OF CONDUCT, 2016
AND	
IN THE MATTER OF:	THE HIGH COURT (ELECTION PETITION) RULES, 2016 SI NO. 31 OF 2026
AND	
IN THE MATTER OF:	THE PARLIAMENTARY ELECTION FOR CHAMA SOUTH CONSTITUENCY DECLARED ON 16TH AUGUST, 2026

BETWEEN

DANIEL PHIRI	PETITIONER
AND	
NKHATA JERIX	1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

2nd RESPONDENT'S ANSWER

The 2nd Respondent responds to the Petitioner's Petition as follows:

(a) Paragraphs 1 and 2 of the Petition are admitted.

(b) Paragraph 3 of the Petition is denied to the extent that Chama South Constituency comprises over 40 Polling Stations. The 2nd Respondent will aver that Chama South consists of 40 Polling Stations.

(c) The contents of Paragraph 4 of the Petition are admitted.

(d) The contents of Paragraph 5 of the Petition are within the peculiar knowledge of the Petitioner save to state that 2nd Respondent did not receive or record any objection, report or complaint concerning the manner in which the 1st Respondent conducted his campaigns leading up to the General Elections.

GROUND ONE
BRIBERY AND VOTE BUYING

1. The contents of paragraphs 1 and 2 under the heading "Bribery and Vote Buying" are within the peculiar knowledge of the Petitioner and shall be put to strict proof of the same. The 2nd Respondent will aver that it did not receive any objection or report regarding the allegations made, whether from the Petitioner, his polling agents, or any other person, of any incident of bribery or vote buying alleged to have occurred within Chama South Constituency.

2. The contents of Paragraphs 3 and 4 under the heading "Bribery and Vote Buying" are denied. The 2nd Respondent avers that it did not receive any objection, report, complaint or communication from the Presiding Officers concerning any alleged incidents in which Polling Agents were removed from various Polling Stations within Chama South Constituency, or any disruption of the voting process arising therefrom.

GROUND TWO
FALSEHOOD STATEMENT

1. The contents of Paragraph 1 under the heading "Falsehood Statements" are within the peculiar knowledge of the Petitioner. The 2nd Respondent avers that it did not receive any report, complaint or formal communication from the Petitioner, his Polling Agents, or any other person concerning any alleged incident involving false statements purportedly made by the 1st Respondent.

GROUND THREE
COLLECTION OF NRC'S FROM VOTERS

I. The contents of Paragraph I under the heading "Collection of NRC's from Voters" are within the peculiar knowledge of the Petitioner and will be put to strict proof.

II. The contents of Paragraph II under the heading "Collection of NRCs from Voters" are denied. The 2nd Respondent avers that it did not receive any report, complaint or formal communication from the Petitioner, his Polling Agents, or any other person concerning the alleged illegal practices and/or misconduct purportedly committed by the 1st Respondent in relation to the collection of National Registration Cards from voters.

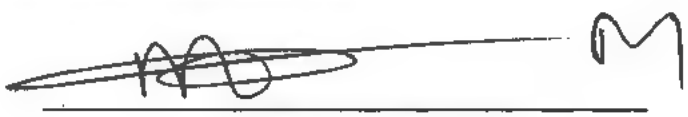
III. The 2nd Respondent further avers that it had no knowledge of, nor did it authorise, sanction or approve, any such alleged conduct by the 1st Respondent or any person acting on his behalf.

IV. The contents of paragraph III under the heading "Collection of NRC's from Voters" are denied. The 2nd Respondent will aver that the alleged acts did not affect the overall outcome of the General elections in Chama South Constituency.

1. Save as is hereinbefore expressly admitted, each and every allegation contained in the Petition is denied as if the same were set out herein and traversed seriatim.

Therefore, the 2nd Respondent prays that this Honourable Court:

1. Dismiss the Petitioner's Petition in its entirety;
2. Alternatively, the Petition is dismissed with Respect to the allegations against the 2nd Respondent;
3. An order that the Petitioner is condemned to costs; and
4. Any other reliefs the Court deems fit.



SIGNED

This Answer was settled by: Jaques & Partners

Messrs. Jaques and Partners Legal Practitioners
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LUSAKA
Advocates for the 2nd Respondent

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

2026/HP/EP/041

IN THE MATTER OF:	ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA
IN THE MATTER OF:	SECTION 81, 83, 84, 97, 98 & 100 OF THE ELECTORAL PROCESS ACT
IN THE MATTER OF:	REGULATION 15 OF THE ELECTORAL CODE OF CONDUCT 2016
IN THE MATTER OF:	THE HIGH COURT ELECTIONS PETITION RULES 2026 S.I. NO. 31 OF 2026
AND	
IN THE MATTER OF:	THE PARLIAMENTARY ELECTION FOR CHAMA SOUTH CONSTITUENCY DECLARED ON 16TH AUGUST 2026

BETWEEN:

DANIEL PHIRI	PETITIONER
AND	
NKHATA JERIX	1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

REPUBLIC OF ZAMBIA HIGH COURT OF ZAMBIA 18 SEP 2026 PRINCIPAL REGISTRY P.O. BOX 50067, LUSAKA

LIST OF AUTHORITIES AND COPIES

NO.	AUTHORITY
1	Kufuka v Ndalemei (Appeal 15 of 2016) [2018] ZMCC 4 (29 January 2018);
2	Michael Mabenga v Sikota Wina and others (SCZ 15 of 2003) [2003] ZMSC 75;
3	Nkandu Luo and Another v Doreen Sefuka Mwamba (CCZ Selected Judgment No. 51 of 2018);
4	Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mungomba, Sebastian Saizi Zulu, Jennifer Mwaba

V Frederick Jacob Titus Chiluba (S.C.Z. JUDGMENT NO. 14 OF 1998);

5 Mazoka and Ors v Mwanawasa and Ors (SCZ EP 1 of 2002) 2005 ZMSC 25 (16 February 2005);

6 Mutelo K. v Kang'ombe and another (2022 ZMCC);

7 The Electoral Process Act No. 35 of 2016;

8 The High Court (Election Petition) Rules, 2026; and

9 The Constitution of Zambia, Chapter 1 of the laws of Zambia.

Dated this ..... day of 2026

Per: Jaques & Partners

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TO: **Nkhata Jerix**
1st Respondent

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)

APPEAL NO. 15/2016
2016/CC/A022

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

AND

IN THE MATTER OF: **SECTION 97 OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016**

AND

IN THE MATTER OF: **THE ELECTORAL CODE OF CONDUCT, 2016**

AND

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

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

BETWEEN:

KUFUKA KUFUKA **APPELLANT**

AND

MUNDIA NDALAMEI **RESPONDENT**

CORAM: **Chibomba, PC, Sitali, Mulenga, Mulonda and Munalula, JJC on 21st June, 2017 and 29th January, 2018**

For the Appellant: **Ms. N. Yalenga and Mr Khosa, Messrs Nganga Yalenga and Associates.**

For the Respondent: **Ms. M. Mushipe, Mesdames Mushipe and Associates, Mr. N. Inambao, Messrs ICN Legal Practitioners**

J U D G M E N T

Mulenga, JC, delivered the Judgment of the court.

Cases cited:

1. **Nabukeerra Hussein Hanifa v Kibule Ronald and another (2011) UGHC 72**
2. **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba (1998) Z.R. 49**
3. **Michael Mabenga v Sikota Wina, Mafo Wallace Mafuyo and George Samulele (2003) Z.R. 110 (SC).**
4. **Reuben Mtolo v Lameck Mangani SCZ Judgment No. 2 of 2013**
5. **Josephat Mlewa v Eric Wightman (1995 – 1997) Z.R. 171 (SC)**
6. **Attorney General v Kakoma (1975) Z.R. 212 (SC)**
7. **Mubika Mubika v Poniso Njeulu SCZ Appeal No. 114/2007**
8. **Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138 (SC)**
9. **Nkhata and Others v The Attorney General (1966) Z.R.124**
10. **Masauso Wilson Zulu v Avondale Housing Project Ltd (1982) Z.R. 172**
11. **Makumbi v Greytown Breweries Limited and Others SCZ Appeal number 32 of 2012**
12. **Brelsford James Gondwe v Catherine Namugala, SCZ Appeal number 129 of 2012**

Legislation cited:

1. **The Electoral Process Act Number 35 of 2016**

Other Materials Cited:

1. **Halsbury's Laws of England, 4th Edition, Volume 15**

This is an appeal by the Appellant against the High Court decision dismissing his election petition challenging the declaration of the Respondent as the duly elected member of Parliament for Sikongo constituency during the 11th August, 2016 general elections.

The Appellant was sponsored by the Patriotic Front (PF) and polled 5,167 votes while the Respondent was sponsored by the United Party for National Development (UPND) and polled 7,740 votes. The Appellant in his election petition alleged that the Respondent and his agents had engaged in acts of intimidation, violence, vote buying and

corruption. It was further alleged that the said illegal practices so affected the result as to warrant the nullification of the election.

At the trial of the election petition, the Appellant testified as PW6 and called fifteen (15) other witnesses in support of his case. The Respondent also testified as RW8 and called fourteen (14) other witnesses. The learned trial Judge considered the adduced evidence and pleadings and noted that the standard of proof required in election petitions was higher than a mere balance of probabilities and that the issues raised were therefore required to be established to a high degree of convincing clarity. After noting that most of the witnesses were partisan, the learned trial Judge cited the Ugandan case of **Nabukeerra Hussein Hanifa v Kibule Ronald and another**[1] wherein it was stated that the court needs to cautiously evaluate the evidence of all parties due to the fact that each party sets out to win an election and therefore, the supporters of one candidate cannot all behave in a saintly manner while those of the other candidate all behave in an unsaintly manner. Hence, the trial Judge stated that the authenticity of the Appellant's evidence required corroboration from neutral and independent sources.

The learned trial Judge identified nine (9) issues or allegations for consideration. These were then evaluated in light of the evidence

and the relevant law following which the learned trial Judge found that all the allegations were not proved to the required standard.

In particular, on the first allegation of distribution of money, salt and bags of mealie meal during the campaign period, the learned trial Judge considered PW1 (the Chairperson of the Social Cash Transfer Committee under the Ministry of Community Development, commonly known as CWAC) and PW2 to be witnesses with a possible interest to serve as they testified that they were bribed and that they reported the incident to other people including CWAC members. The lower Court noted that the people they allegedly informed of the alleged bribes were not called as witnesses. The lower Court observed that doubt was raised as RW14 who was the deputy chairperson of CWAC testified that he was not informed about the bribery incident. The lower Court added that no one who received the salt was called to testify and that the testimony of PW1 and PW2 lacked independent evidence or corroboration. Further, that RW13, the uncle to PW1, testified that he was with PW1 on the material evening of 9th August, 2016 when PW1 was allegedly bribed by the Respondent and that no vehicle went to their village. This evidence was held to support the evidence of the Respondent and his witnesses that he was not in

PW1's village on the material night and therefore did not bribe PW1 and PW2.

The trial court also held that the second allegation was not proved because no evidence was adduced to show that the Respondent and his agents gave gifts during voting day as an inducement to voters.

The third allegation that the Respondent visited a Dorcas rally on or about 4th July, 2016 and donated K1,000.00 and a bag of mealie meal was found not to have been proved. On this aspect, the lower Court considered the evidence of PW4 and PW5 who admitted in cross examination that they did not see the Respondent at the Dorcas rally but that the person who handed over the money to the pastor said it was from Mr. Hakainde Hichilema. The concerned pastor, who was RW1, stated that the K1,000.00 was handed over to him by Mr. Chipman who also informed him that it was from Mr. Hakainde Hichilema. Further, that the church also received 30 bags of mealie meal from the Patriotic Front in August, 2016. The lower Court found that RW1's explanation that the money was from Mr. Hichilema was reasonable and that the donation was a philanthropic activity that was not prohibited during the election campaign period.

The fourth allegation, that headman Nesha of Nesha village went to Wakunja Village around 19th July, 2016 and said he did not want any PF member in the village and ordered them to leave, was found not to have been proved in the absence of evidence to show that the threats were made with the Respondent's knowledge and consent or approval. This was after considering the evidence of the Appellant, PW8, PW9, RW2 and the Respondent. The trial Judge also noted that no one was called to testify that they were threatened or chased or that their fields were confiscated. Further, that PW8 who was the nephew to the headman and who alleged that he was ordered to leave the village for supporting the PF still lived in the village even after the elections. It was added that headman Nesha was not the Respondent's agent.

Similarly, the fifth allegation that headman Sitenge of Sambangula village, as UPND vice chairperson for the area, announced on 25th and 28th July, 2016 that all those supporting the Appellant would be chased from the village and have their fields confiscated, was found not to have been substantiated. This was after considering the evidence of PW11, PW12 and RW3 (headman Sitenge). The trial Court stated that the Appellant failed to call independent witnesses to testify to that effect or to testify that any person received

a pen and was compelled to vote for the UPND. Further, that PW12 who stated that his cattle were chased from the village acknowledged that this occurred in October, 2016 two months after the elections.

The trial Judge further held that the sixth allegation that headman Ndelwa closed the communal tap and declared that supporters of the PF would not be allowed to draw water and would be sent back to their homes in other villages had not been proved. The trial Judge found that the communal tap was closed every evening to protect it from abuse. The trial Judge also accepted the evidence of PW10 and RW12 (headman Ndelwa) that supporters of the PF were not restricted access to the communal tap and that RW12's statement that Inspector Mwangala of Sikongo Police went to investigate the said allegation. The trial Judge thus found that the allegation was not proved.

On the seventh allegation that the Respondent burnt down houses belonging to perceived PF supporters and committed many other atrocities, the lower Court found that no witness testified on the burning of houses and that the evidence of PW16, the Officer in Charge at Sikongo Police Station, was hearsay because the owner of the house that was allegedly burnt was not called to testify nor was anyone called who witnessed the burning. Regarding the issue of the

PF supporters being beaten by UPND supporters, the lower Court held that it was not persuaded that the assault actually occurred in the absence of medical reports and evidence that the two alleged suspects were agents of the Respondent or that they acted with the Respondent's knowledge and consent or approval. Further, that the fact of the entries made in the occurrence book was not evidence that the crime was committed.

The trial Judge also found that witnesses were not called to support the eighth allegation that headman Mbambo confiscated his wife's national registration card to prevent her from voting or that other women were beaten and told not to vote for the Appellant.

The ninth allegation was that on voting day, some polling agents perceived to be for the Appellant had their property damaged and some of it taken away. The learned trial Judge considered the evidence of PW15, PW16, RW6 and RW7 and found that the evidence of PW15 differed from that of PW16, the Officer in Charge of Sikongo Police Station, on the aspect that PW15 also lost K1,100.00. It was further held that there was no evidence to show that the people who broke into PW15's house were agents of the Respondent. The case of **Akashambatwa Mbikusita Lewanika and others v Fredrick Jacob Titus Chiluba**[2] was relied upon for the holding that not everyone in one's

political party was one's agent. The lower Court further held that none of the four incidences had been shown to have been committed by the Respondent's agents. The lower Court added that there was also evidence by RW6 and RW7 that on 29th June, 2016 the Appellant gave K2,000.00 to induna Lwandama for him to share with others.

The learned trial Judge proceeded to state at page J49 of the Judgment lines 25 to 35 that:

> **"After analyzing and evaluating the evidence in its totality, I must deal with the issue of the standard of proof. In an election petition, the standard of proof is higher than the ordinary standard of proof in civil matters so the Court subjects the evidence before it to the required standard. From the foregoing and considering the evidence before this Court where the Petitioner relied on what he was told and failed to substantiate the allegations, considering the inconsistencies and contradictions I am not satisfied that the Petitioner has established or proved the allegations to the required standard."**

The trial Judge further stated that none of the illegal practices or election offences were committed by or with the knowledge, consent or approval of the Respondent or his agents. Thus, the Appellant had failed to prove the allegations to the requisite standard of high degree of convincing clarity. Further, that the actions complained of did not affect the whole or substantial part of the constituency. Hence, the learned trial Judge dismissed the petition with costs to the Respondent.

The Appellant being dissatisfied with the Judgment of the lower Court lodged this appeal. He has raised six grounds of appeal as follows:

(i) **The learned trial Judge erred in law and fact when she failed to reconcile the conflicting statements given by the Respondent and his witnesses concerning his whereabouts on the 9th of August, 2016 and resolve the said conflicting statements in favour of the Appellant.**

(ii) **The learned trial Judge erred in law and fact when she held that the donation of ZMW 1,000.00 by Mr. Hakainde Hichilema to the Dorcas Mothers of the Seventh day Adventists Church when he held a rally in Sikongo was a philanthropic act and was therefore not petitionable.**

(iii) **The learned trial Judge erred in law and fact when she held that the defects in the election complained of were not deep rooted and did not affect the whole constituency for her to nullify the election.**

(iv) **The trial Judge erred in law and fact when she held that recording of an incidence in the occurrence Book did not constitute evidence of the alleged incidence having occurred.**

(v) **The learned trial Judge erred in law and fact when she condemned the Appellant to pay costs in a Constitutional matter despite the long standing custom of the Supreme Court to order that each party bears their own costs.**

(vi) **The learned trial Judge erred in law and fact when she failed to give an analysis of why she believed the witnesses of the Respondent and disbelieved those of the Appellant despite numerous instances of contradictions in the evidence of the Respondent's witnesses.**

The Appellant filed heads of argument in support of the appeal. On ground one, it was argued that the Appellant called witnesses to prove the acts of bribery and corruption by the Respondent. That PW1, PW2, PW3, PW4 and PW5 particularly gave evidence establishing the circumstances when the Respondent and Sitali Sitali at Luombe village offered K150.00 and K50.00 to PW1 and PW2, respectively.

Further, that PW1 and PW2 said that they were then urged to vote for the Respondent and all his other party candidates and they did so.

The case of **Michael Mabenga v Sikota Wina, Mafo Wallace Mafuyo and George Samulele**[3] was cited on the effect of a proved fact of an act of bribery or corruption when it was held *inter alia* that:

> **"Satisfactory proof of any one act of corrupt or illegal practice or misconduct in an election is sufficient to nullify an election."**

It was also argued that the testimonies of the Respondent and RW10 were in direct conflict with each other. The Respondent stated that he was called by RW10 to meet him at Liyeliye Lodge while RW10 said the opposite that he did not make any prior arrangements to meet with the Respondent even though the Respondent went looking for him at the lodge. That this was a direct indication of an attempt to create an alibi for the Respondent who was on this particular night at PW1's house where he engaged in corrupt activities.

Further, that RW11's testimony did not tally with that of the Respondent when he testified that on 8th August, 2016 he was at Lulang'uni where there was no network. It was clearly not possible for RW11 to have communicated with the Respondent through the phone as claimed. This was therefore another attempt to create an alibi for the Respondent which flies in the face of logic. It was submitted that

the above facts inevitably left the trial court with only one logical conclusion that the Respondent on 9th August, 2016 was at the house of PW1 around 23:00 hours but the trial Judge held otherwise and failed to reconcile the conflicting evidence. This warranted that the trial Judge should have resolved the conflicting evidence on the whereabouts of the Respondent in favour of the Appellant in line with well established principles of law. The Appellant urged this Court to overturn the trial Judge's finding.

The case of **Reuben Mtolo v Lameck Mangani**[4] was cited with regard to electoral malpractice and corruption, in which the Supreme Court held that:

> **"Where acts or an act of bribery is established, an election will be nullified, notwithstanding that the bribery has no widespread effect on the electorate... We do not accept the argument that one or two proven acts of corruption or illegal practice attributable to a candidate, to nullify an election, it must be shown that it prevented or may have prevented the majority of voters in a constituency, from electing the candidate of whom they preferred."**

That the Supreme Court further enunciated with regard to acts of bribery or corruption and the effect on the result of an election in the case of **Josephat Mlewa v Eric Wightman**[5] when it held that:

> **"The question of personal knowledge is quite irrelevant and inapplicable under paragraph (a) where it does not matter who the wrong doer is, and the scheme of the law appears designed to protect the electorate and the system itself by providing for nullification whenever there is wrong doing which the Court feels satisfied, perhaps because of the scale or type of wrong doing, probably adversely affected the election ....."**

The Appellant contends that even if the Respondent did not have personal knowledge of each and every particular case of bribery and corruption of the electorate by members of his party, he should have known of such acts by virtue of them being members of the same party and falling under his supervision and thus the election must be nullified on account of such proven acts.

It was added that the record showed that the Respondent gave conflicting evidence with regard to the incidences of corrupt practices and bribery by members or agents of his party. We were urged to follow and apply the principles enunciated in the case of **Attorney General v Kakoma**[6], that:

> **"A 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"**

With respect to ground two, the Appellant based his submissions on the case of **Reuben Mtolo Phiri v Lameck Mangani**[4] as regards what constitutes an act of electoral malpractice as opposed to philanthropic works. It was argued that in the instant case, the presidential candidate for the Respondent's party made a donation of K1,000.00 at a church for the first time when he was in the constituency holding a political rally at a nearby place. That this was done knowing fully well that the Dorcas Mothers gathering was well attended by members

from across the constituency and the donation was made to influence the election, which donation the Respondent benefited from. The Appellant contended that this brought the said donation within the ambit of being petitionable.

Regarding ground three on the holding that the defects were not deep rooted, tbe Appellant submitted that any electoral malpractice or defect in an election is capable of rendering such an election null and void if shown that it had an effect on the outcome of the election.

With respect to ground four challenging the holding that the Occurrence Book did not constitute evidence of the alleged offence, the Appellant submitted that records kept by the police for purposes of recording incidences reported by the public constitute evidence upon which the trial court can and was mandated to rely especially if such evidence was brought by an officer with the proper and necessary knowledge of the incidences reported in the Occurrence Book.

Ground five was on the order to pay costs and the Appellant submitted that matters which touch on a citizen's basic human rights should not be fettered by the fear of being lumped with costs if a litigant tries to pursue his rights by means of a court action. Further,

that a plethora of Supreme Court authorities were instructive with regard to costs in electoral matters.

On ground six relating to analysis of contradictory witness evidence, the Appellant argued that the trial court did not address its mind to factors such as bribery and corruption which influenced the elections as demonstrated.

It was finally submitted that the Appellant had proved the various incidences of electoral corrupt practices, bribery and violence perpetrated by members of the Respondent's UPND party over which the Respondent had control through the various party structures and that the said individuals did so in furtherance of the Respondent's interest and of his party at large. It was the Appellant's prayer that this Court overturns the lower Court's Judgment and nullifies the election of the Respondent as Member of Parliament for Sikongo Constituency with costs to the Appellant.

At the hearing of the appeal, learned counsel for the Appellant, Mr Yalenga augmented the heads of argument by submitting on grounds one and two.

On ground one, he submitted that the trial Judge erred in not considering the evidence of PW3 which corroborated the evidence of

PW1 and PW2 on the aspect of the Respondent being in Lwahumba village on the night of 9th August, 2016. Further, that the trial Judge wrongly relied on the evidence of RW13 who was not even with the Respondent at the material time of the alleged illegal practice. RW13 stated that he was in fact at his kraal and therefore was not with PW1 on the night in issue.

It was advanced that the trial Court misapprehended the facts when it came to a conclusion that PW1 had not informed the members of the Social Cash Transfer Committee (CWAC) that the Respondent had given him money for him to solicit and entice CWAC beneficiaries to vote for the Respondent on the basis of the testimony of RW14 who was not present when PW1 was given the money. Further, that PW1 did not state that he had told the committee that he had been given money by the Respondent. Therefore, the lower Court misapprehended the facts when it disbelieved PW1 on the basis of the evidence of RW14.

Mr. Yalenga added that **Michael Mabenga v Sikota Wina, Mafo Wallace Mafuyo and George Samulele**[3] was still good law under the current Electoral Process Act as section 97(2) (a) is substantially the same as the provision in the repealed Electoral Act of 2006 on the requirement for the act to be widespread. However, that proof of one

act is sufficient to nullify an election so as to safeguard the integrity of the election.

With respect to ground two, counsel submitted that the donation of K1,000.00 made by the UPND presidential aspirant transcended a charitable or philanthropic activity because it was coupled with a request for votes and was therefore a bribe. Counsel maintained that it was impossible to disassociate the Respondent from the gift which was given by the President of his party. When prodded by the Court, Mr. Yalenga stated that the Appellant did not dispute the trial Judge's finding that his allegation on the donation as pleaded in the petition was not proved but that the appellant's contention was regarding the effect of the donation on the Respondent's election.

Mr. Yalenga concluded that this Court should uphold the Appeal and hold that there was satisfactory proof of corrupt practices on the part of the Respondent.

The Respondent also filed heads of argument in opposition. In response to ground one, it was argued that there were no conflicting statements by the Respondent and his witnesses concerning his whereabouts on 9th August, 2016 but that the testimonies of PW1 and PW2 were unsubstantiated as they were adequately rebutted at the trial. The Respondent extensively referred to the record of proceedings

and submitted that he was not in Sikongo on 9th August, 2016. He instead spent a night at Lulang'unyi Primary School with the Council Chairman (Sitali Sitali).

Further, that his testimony and that of RW10 were not in direct conflict. He acknowledged that his testimony was that he called RW10 to meet at Liyeliye Lodge, while RW10 said the opposite, that he did not make prior arrangements to meet with the Respondent although the Respondent went looking for RW10 at the lodge. And that this inconsistency did not change the position that the two were in Kalabo on the material day. It was argued that the record of proceedings is clear that apart from the issue of not making prior arrangement to meet, the two witnesses' account agrees on a number of issues. The overwhelming evidence was that the two actually met at around 22:00 hours at Liyeliye Lodge. And most importantly, the purpose of the Respondent's trip to Mongu was confirmed by RW10 and that at around 23:00 hours he was in fact in Mongu at Kobil Filling Station refuelling. Therefore, that it was practically impossible for the Respondent to have been at PW1's house at 23:00 hours as alleged.

It was further surmised that the Respondent's testimony was also not in direct conflict with that of RW11 that on 8th August, 2016 he was at Lulangu'unyi where there was no network. It was therefore,

not possible for RW11 to have communicated with the Respondent through the phone. The record also showed that the Respondent was in Lulang'unyi on 9th August, 2016 and not 8th August as alleged by the Appellant. Further, RW11 confirmed that he was informed of the Respondent's coming at 21:00 hours and the two met at Kobil Filling Station between 23:00 and 24:00 hours. RW11 also denied that the Respondent was in Lwahumba in Sikongo at 23:00 hours. Therefore, that the issue of being in Lulang'unyi on 8th August, 2016 where there was no network to enable the two to communicate was a misinterpretation of the evidence on record on the part of the Appellant. Accordingly, the lower Court was on *terra firma* when it found the Respondent's alibi to be justifiable.

It was submitted that although the holding in the case of **Michael Mabenga v Sikota Wina and Others**[3] was that satisfactory proof of any one corrupt or illegal practice was sufficient to nullify an election, **Halsbury's Laws of England, 4th Edition, Volume 15** states at paragraph 789 that:

> **"... clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive."**

Therefore, that in the absence of satisfactory proof of any one corrupt or illegal practice or misconduct, the election cannot be nullified.

Further, that when the standard of proof is applied, it is clear that the Appellant did not prove the allegation of corruption and bribery to the required standard of a fairly high degree of convincing clarity.

With regard to ground two, it was submitted that the donation of K1,000.00 to the Seventh Day Adventist Dorcas Mothers by Mr. Hakainde Hichilema was not petitionable as it was a genuine charitable gift to the church and was a mere public philanthropic act and had completely nothing to do with influencing voters as evidenced by the testimonies from the pastor who also confirmed receipt of donations from several people including 80 bags of maize from the Patriotic Front (PF).

Halsbury's Laws of England, 4th Edition Re-issue Volume 15, at paragraph 689, was cited as stating that:

> **"The distribution of genuine charitable gifts to voters has always been allowed. If a gift is charitable, it will not become bribery because of the use made out of the gift, it is not possible any subsequent act to make that which was legal at the time illegal and criminal."**

The case of **Lewanika and Others v Chiluba**[2] was also cited as holding that:

> **"...public philanthropical activity during election is not prohibited."**

It was surmised that ground two lacked merit and should fail.

In response to ground three, it was submitted that the defects in the election, if any, were not deep rooted and did not affect the whole constituency to warrant the nullification of an election. That the case of **Mubika Mubika v Poniso Njeulu**[7] was instructive when it stated that:

> **"The provision for declaring an election of a member of Parliament void is only if whatever activity is complained of, it is proved satisfactorily that as a result of the 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."**

The case of **Josephat Mlewa v Eric Wightman**[5] was also relied on as indicating that:

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

However, that in the case in *casu*, the Appellant's evidence fell far below the requisite standard of proof in an election petition.

As regards ground four, the Respondent argued that recording an incident in the Occurrence Book did not on its own constitute evidence of the alleged incident having occurred. That it only amounted to evidence that an alleged incident could have occurred and thorough investigations were required to actually prove the incident.

In response to ground five, the Respondent argued that costs were at the discretion of the court and that the discretion was exercised fairly as the Respondent was dragged to court on frivolous grounds.

Lastly, with respect to ground six, it was submitted that the learned trial Judge gave an analysis of the witnesses from both parties and tested the authenticity of the evidence especially for the Respondent who brought neutral and independent sources such as the Pastor from the Seventh Day Adventist Church and other congregants who were not inclined to any political party in the strict sense. That this was in line with the Ugandan case of **Nabukeera Hussein Hanifa v Kibule Ronald and another**[1] which stated that:

> **"The evidence of both parties is, in its entirety subjective and cannot be relied upon without testing its authenticity from a neutral and independent source."**

The Respondent also filed submissions expanding on his skeleton arguments. We have however not outlined the submissions as they are on similar lines.

The learned counsel for the Respondent, Ms. Mushipe and Mr. Inambao, augumented the heads of argument and submitted in sum that the lower Court did not misapprehend RW13's evidence. The evidence of RW13, with respect to the Respondent's whereabouts, was that no motor vehicle came to the village on the material night. Reliance was placed on page 500 of the record of appeal which shows that the distance between PW1's house and RW13's house was 8 meters. That the case of **Michael Mabenga v Sikota Wina and Others**[3] did not apply to the appeal at hand because the Appellant had failed to prove the allegations of bribery. It was argued in response to ground two that the donation was philanthropic and not petitionable. Counsel thus prayed that the appeal be dismissed.

In reply, Mr. Yalenga reiterated his earlier submissions. He added that the testimony of RW13 that PW1 was an agent for the PF party and therefore, a witness with an interest to serve, was an afterthought as PW1 was never cross examined on this aspect.

We have carefully considered the grounds of appeal, the Judgment of the lower Court, the record of appeal, heads of argument

filed on behalf of the respective parties as well as the oral submissions by counsel for the parties.

Before we delve into and address the grounds of appeal, we wish to observe from the outset that before arriving at a decision to nullify an election, the trial court must bear in mind the standard of proof required in election petitions. The case of **Michael Mabenga v Sikota Wina and Others**[3] clearly outlines the standard of proof as follows:

> **"proof of an election petition, although a civil matter is higher than balance of probability, but less than beyond all reasonable doubt"**

In the case of **Mazoka and Others v Mwanawasa and Others** [8] it was added that:

> **"As regards the burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity."**

These principles have not changed and we endorse them. This higher standard of proof requires that in determining an election petition, the trial court needs to carefully and diligently assess the evidence presented by the parties at the petition hearing.

For a parliamentary election to be voided, the Appellant, as the petitioner, needed to prove any of the three (3) grounds set out in section 97(2) of the Electoral Process Act No. 35 of 2016 (which we shall refer to as the **Act**). Section 97 (2) of the **Act** provides as follows:

(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.

The Appellant's election petition hinged on the ground in section 97(2)(a) of the **Act** on corrupt or illegal practices and misconduct on the part of the Respondent or his agents or with his knowledge and consent or approval. Part VIII (sections 81 to 95) of the **Act** outlines what constitutes an illegal practice or corrupt practice as well as misconduct.

Having thus stated, we now address the grounds of appeal. As we see it, five out of the six grounds impugn the findings of fact of the trial Court. It will be prudent for us to reiterate and endorse the accepted principles enunciated in **Nkhata and Others v The Attorney General**[9] where the Court of Appeal held as follows:

A trial judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:

(a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

In **Masauso Wilson Zulu v Avondale Housing Project Ltd**[10], the Supreme Court put it in this manner,

"Before this court can reverse findings of fact made by a trial judge, we would have to be 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."

Ground one alleges a failure on the part of the trial Court to reconcile conflicting statements given by the Respondent and his witnesses concerning his whereabouts on 9th August, 2016. This particular evidence of the Respondent and his witnesses was advanced to rebut the evidence given by PW1 and PW2 which was to the effect that the Respondent had gone to PW1's home on the night of 9th August, 2016 and gave him money for purposes of securing votes in the elections. The ground further alleges a conflict between the testimony of the Respondent (RW8) and that of RW11 in relation to the

Respondent's claim that an area known as Lulang'uni lacked mobile network.

Where there are conflicting versions with regard to an issue, there is generally need for the party alleging to call the material witnesses to testify in order to assist him discharge his burden of proof. The burden of proof cannot be shifted to the opposing party to prove the falsity of an allegation. The burden of proof is thus always on the petitioner to prove his case and he cannot succeed merely because the respondent has not put forward a defence or that the defence put forward has failed.

A scrutiny of the subject testimonies reveal that they agree on the material particular that the Respondent went to Kalabo and then Mongu on the night of 9th August, 2016. The record however shows that there were contradictions on a number of aspects surrounding the alibi. In particular, the Respondent stated that he got a message around 1800 hours to go and fuel in Mongu and he left and arrived in Kalabo at 2200 hours where he met RW10 and in Mongu at 2300 hours or midnight where he fueled in the early hours of 10th August. The Respondent stated that RW10 had called him around 2200 hours before meeting him. RW10 denied that he called the Respondent but stated that he met the Respondent between 2100 and 2200 hours

after being informed of his presence by another person. RW11 stated that he was phoned by the Respondent around 2100 hours that he was going to Mongu to fuel after he had informed the Respondent on 8th August of the fuelling program. And that the Respondent arrived between 2300 and 2400 hours. RW9 stated that the Respondent, who had earlier left Sikongo with Sitali Sitali and another person for campaigns, arrived back alone at Sikongo at around 1000 hours. Upon arrival, the Respondent told RW9 that he was going to Mongu but only left at around 1900 hours. Sitali Sitali and the other person returned at 2000 hours and then proceeded to the Respondent's home.

The lower Court in its finding relied on the evidence of RW11, RW13 and RW14 who attested to the Respondent's whereabouts on the particular date. The lower Court also found that PW1 and PW2 were witnesses with a possible interest to serve and as such, their evidence required corroboration but which corroboration was absent. The trial Judge concluded that the allegation was not proved with convincing clarity.

The question however is whether the Appellant had proved to the required standard that the Respondent gave PW1 K200.00 cash and a bag of mealie meal. The trial Judge found that the allegation was not

proved as PW1 and PW2 admitted to being bribed and therefore needed corroboration. The record of appeal shows that the testimony of these two witnesses was corroborated by PW3 who stated that he was the one who showed the Respondent the house of PW1 and identified PW1 to the Respondent. This evidence was not addressed. However, the trial Judge in further discounting the evidence of PW1 and PW2, accepted the evidence of RW13 that he did not hear the sound of any vehicle from his house which was eight (8) meters away from PW1's house. We note, however, that this evidence of RW13 neither supported the Respondent's case nor negated the Appellant's case because he admitted that at the material time in the night he was not at his house but at the kraal outside the village. Therefore, the fact that RW13 did not hear the sound of the vehicle did not discredit the evidence of PW1, PW2 and PW3. In addition, the evidence of PW14 that as vice chairman of CWAC, he was not told about the bribe by PW1 as alleged, could not on its own discredit the evidence of the event having taken place. It instead negated the issue of the bribery having been published to all the CWAC members by PW1 for purposes of securing votes for the Respondent.

This gives basis for us to disturb the trial Judge's finding on this issue in line with the principles set out in **Nkhata and Others v The**

Attorney General[9]. The first ground accordingly partially succeeds on the fact that PW3 corroborated the evidence of PW1 and PW2 on the allegation that the Respondent went to the house of PW1 at which he took a bag of mealie meal and K200.00. We, however, find that the trial Judge was on firm ground in holding that this allegation was not proved to the required standard as the Appellant failed to show that the corrupt or illegal practice affected or may have affected the majority of the electorate in the constituency. There is no evidence of this allegation of bribery being widespread or affecting any other person other than PW1 and PW2. The testimony of RW14 supports this finding.

The Appellant has argued that on the basis of **Josephat Mlewa v Eric Wightman[5]**, the proof of one act of bribery should result in the nullification of the election. This argument is flawed and has no basis in light of the provisions of section 97 (2) (a) of the **Act** which provide that the corrupt or illegal practice or other misconduct upon which an election can be nullified or voided has been restricted to two instances, namely, where the same has been committed by either the candidate or by another person with the candidate's knowledge and consent or approval or that of his election agent or polling agents. The issue of a candidate committing an act or misconduct needs no

elaboration. In terms of another person having committed an act or misconduct, it is no longer enough that someone, even from the candidate's party, committed a corrupt or illegal practice or misconduct, it must be shown that the act in issue was committed with the knowledge and consent or approval of the candidate or his election agent or polling agent.

Once the first aspect of committing a corrupt practice, illegal practice or misconduct by a candidate or another person with the candidate's knowledge and consent or approval or that of his agent is shown with convincing clarity, the further requirement is that it should also be shown that the majority of voters were or may have been prevented from electing a candidate of their choice. It is only when these two aspects are fully satisfied that an allegation can be taken as proved so long as the required standard of proof is met.

We wish to stress that proof of one corrupt or illegal practice or misconduct by the candidate is generally enough to nullify an election only if that one act is also proved to have been so widespread or that it affected or may have affected the majority of the electorate. It is to this extent only, that the case of **Josephat Mlewa v Eric Wightman**[5] is distinguishable from the current provisions of section 97 (2) (a) of the **Act**.

On the whole ground one fails.

The second ground challenges the finding of the lower Court that the donation of K1,000.00 by Mr. Hakainde Hichilema to the Dorcas Mothers of the Seventh Day Adventist Church in Sikongo was a philanthropic act. The Judgment shows that when deciding on this issue, the trial Judge entirely relied on RW1's testimony which she accepted as reasonable over the evidence of the Appellant's witnesses. We note that the trial Judge was faced with two conflicting versions and decided to accept that of the Respondent's witness, RW1, being the pastor who was handed the money. In the case of **Makumbi v Greytown Breweries Limited and Others**[11], the Supreme Court observed that where witnesses advance directly conflicting stories, the trial Court is better placed to make a finding than the appellate Court. Further, in **Brelsford James Gondwe v Catherine Namugala**[12], the Supreme Court refrained from tampering with the finding of the lower Court that the money that an election candidate had advanced to some churches during the campaign period were offerings instead of donations on the grounds that it did not have the opportunity that the trial Court had. We agree with these sound principles. In addition, we hasten to note that even if we were to oblige the Appellant and reverse the findings of fact of the trial Judge on this aspect, it would still fall

short of the requirements of section 97(2)(a) of the **Act** in that it was not proved that the donation was made by the Respondent or with his knowledge and consent or approval and that it also affected the majority of the voters.

The Appellant's allegation was that it was the Respondent who visited the Church or Dorcas Mothers rally and donated the K1,000.00 and a 25kg bag of mealie meal. The Appellant's evidence did little to convincingly prove that it was the Respondent who gave the subject money to the Church. While PW4 said she saw the Respondent give the pastor money, the other witness (PW5) stated that she did not see the Respondent at the time the money was handed over to RW1 (the pastor) who also testified that the money was given to him by a Mr. Chipman. The Respondent's evidence was that he was neither aware nor present when the money was allegedly donated. And at the hearing of the appeal, the Appellant's counsel conceded that the trial Judge's finding that the Appellant did not prove his allegation against the Respondent was not disputed.

However, that the Appellant's contention was that the donation was petitionable because it was donated by the Respondent's party president and the Respondent benefitted from it. The dictates of section 97 (2) (a) of the **Act** as set out above require that the candidate

or his election agent must have been aware of the corrupt or illegal practice and must have approved of it. There is nothing on the record to indicate this position. No evidence was led to show that the Respondent had knowledge and consented to the money being given to the Church. There was equally no evidence to show that Mr. Hakainde Hichilema was the Respondent's election agent or had acted with the Respondent's knowledge and consent or approval so that his conduct could be imputed to the Respondent. The issue therefore of the Respondent benefitting from the donation had no bearing on the election petition brought against him under section 97 (2) (a) of the **Act**. This is because of the deliberate shift from the previous position under the Electoral Act of 2006 of punishing a candidate for acts of third parties be they from his political party or not. That said, this ground equally fails for lack of merit.

Ground three challenged the finding of the lower Court that the defects in the election were not deep rooted in that they did not affect the whole constituency. Section 97 (2) (a) of the **Act** requires that whatever corrupt or illegal practice or misconduct is complained of, it must have prevented or may have prevented the majority of voters from electing their preferred candidate. In **Mubika Mubika v Poniso Njeulu**[7], the Supreme Court put it thus:

"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."

We have perused the evidence which was before the lower Court and find that the lower Court was on firm ground in finding as it did seeing that there is no evidence on record to prove that the alleged defects were widespread to the scale envisaged by the law. This ground fails.

The fourth ground impugned the lower Court's holding that a recording of an allegation in an Occurrence Book did not amount to it being proved. It is trite that when a complaint is lodged with the police by a complainant, it is not taken as an established fact but an allegation which requires investigation and proof. The lower Court stated that the mere fact that there was a record of the allegation in the Occurrence Book did not prove that it happened but that what it proved was that a complaint to that effect was lodged. It was for the Appellant to prove to a high degree of convincing clarity that the incident actually happened and that it was done with the Respondent's knowledge and consent or approval or that of his agents. There is nothing in the evidence on record to suggest this. The Appellant could have proved this by calling the person concerned who

reported the complaint to the police to testify to the incident and the Respondent's involvement. This ground also fails.

The sixth ground of appeal is that the trial Judge failed to state why she believed the witnesses of the Respondent despite their numerous contradictions and disbelieved those of the Appellant. The argument on this ground was general and related to the allegations of bribery and corruption which have been covered under grounds one to three of the appeal. This ground is thus general and the trial Judge's findings regarding the Appellant's and Respondent's witnesses have already been canvassed under the respective grounds above. The trial Judge properly evaluated the evidence of witnesses and where she did not believe a particular witness, the reason was stated. This ground equally fails.

Lastly, with respect to the fifth ground of appeal, the Act has a detailed provision on the issue of costs. Section 109 of the **Act** provides in part as follows:

> **"(1)Subject to the provisions of this section, costs, charges and expenses of, and incidental to, the presentation and trial of an election petition shall be borne in such manner and in such proportions as the High Court or a tribunal may order and in particular, any costs which in the opinion of the High Court or a tribunal have been caused by any vexatious conduct or by any frivolous or vexatious allegations or objections on the part of the petitioner or of the respondent, may be ordered to be paid by the party by whom such costs have been caused.**
>
> **(5) Where, on the trial of an election petition, any person appears to the High Court or a tribunal to have been guilty of any corrupt practice or illegal practice**

relating to the election which is the subject of the election petition, the High Court or a tribunal may, after giving that person an opportunity of making a statement to show cause why the order should not be made, order the whole or a portion of the costs of, or incidental to, the trial of the election petition to be paid by that person to such person or persons as the High Court or a tribunal may determine."

Costs may be ordered against an unsuccessful party or one found to have committed a corrupt or illegal practice or any party to the proceedings and in such proportions as the trial court deems fit. This is a departure from the practice of costs generally following the event. Subsection (1) refers to costs being ordered against a party found to have been vexatious in conduct or found to have advanced frivolous allegations and objections during trial. The trial court may order such a party to pay costs despite the outcome of the petition. Subsections (2) (a) and (b) stipulate that costs may be ordered against the State or a particular erring election officer where a petition succeeds. Under subsection (5), costs can be ordered against any person found guilty of an illegal practice or corrupt practice in respect of the election being petitioned.

From the way the provision is couched, award of costs is still at the discretion of the trial court but we hasten to state that there is need for the trial court to make a finding on the aspect of the parties' conduct when the petition was being tried. We note that the trial Judge in this instance made no finding on this aspect. The mere fact

that one failed to prove his allegations to the required standard in an election petition does not mean that the petition was frivolous and vexatious. There must be an objective finding on this aspect.

In light of what has been stated above, particularly with respect to ground one, this is an appropriate case to order that each party should bear its own costs both of this appeal and of the petition in the High Court. For avoidance of doubt, the award of costs to the Respondent in the court below is hereby set aside.

Apart from the minor success in grounds one and five, this appeal fails and is hereby dismissed.

.....

H. CHIBOMBA
PRESIDENT
CONSTITUTIONAL COURT

.....

A.M. SITALI
CONSTITUTIONAL COURT JUDGE

.....

M.S. MULENGA
CONSTITUTIONAL COURT JUDGE

.....

P. MULONDA
CONSTITUTIONAL COURT JUDGE

.....

M.M. MUNALULA
CONSTITUTIONAL COURT JUDGE

MICHAEL MABENGA v SIKOTA WINA, MAFO WALLACE MAFIYO AND GEORGE SAMULELA

Supreme Court
Sakala, CJ, Chirwa, Chibesakunda, Mambilima and Silomba, JJS
11th February and 24th September, 2003
(SCZ Judgment No. 15 of 2003)

Flynote

Election Law - Election Act - Proof of one corrupt or illegal act sufficient to void election.
Election Law - Election Petition - Standard of proof - Higher than balance of probability, but less than beyond reasonable doubt.

Headnote

This is an election petition brought under Article 72 (2) of the Constitution of Zambia. It arises from a decision of the High Court in an election petition brought in the High Court by the respondents, following an election the High Court declared null and void. The appellant was dissatisfied with the decision of the High Court and hence this appeal.

Held:

1. An election petition is like any other civil claim depends on the pleadings and the burden of proof is on the challenger to that election to prove to a standard higher than on a mere balance of probability.

2. Satisfactory proof of any one corrupt or illegal or misconduct in an election petition is sufficient to nullify any election.

3. The activities of the appellant were so improper that they eroded the electoral process and induced the electorate to vote for a candidate not of their choice.

4. The allegations against the appellant were of a criminal nature.

Cases referred to:

1. *Lewanika and Others v Chiluba*, SCZ 14 of 1998.
2. *Mlewa v Wightman* (1995-97) Z.R. 171

Legislation referred to:

1. Constitution of Zambia, Chapter 1 of the Laws of Zambia . Article 72 (1).
2. Electoral Act, Chapter 13 of the Laws of Zambia .Section 18 (2) (a).
3. Electoral Code of Conduct .Statutory Instrument Numner 179 of 1996. Regulation 7 (1) and (2).
4. Statutory Instrument Number of regulation 51.
5. Financial (Control and Management Act, Chapter 347 of the Laws of Zambia.
6. Evidence Act, Chapter 25 of the Laws of Zambia. Section 15 (1).

Work referred to:

Rules of the Supreme Court (White Book), 1999 Edition. Order 15.

C. L. Mundia of Mundia and Co., R. Mainza of Mainza and Co. and M. Zaloumis of Dove Chambers for the appellants
S. Sikota of Central Chambers for the respondent

Judgment

CHIRWA, JS, delivered judgment of the court: -

This is an election petition to this court brought under Article 72 (2) of the Constitution of Zambia. It arises from a decision of the High Court in an election petition brought at the High Court by the respondents, namely, Sikota Wina (1st Respondent), Mago Wallace Mafiyo (2nd Respondent) and George Samulela (3rd Respondent), challenging the election of the appellant, Michael Mabenga, which election the High Court declared null and void, thereby declaring the Mulobezi Parliamentary Constituency vacant. An election petition is like any other civil claim that depends on the pleadings and the burden of proof is on the challenger to that election to prove, "to a standard higher than on a mere balance of probability. Issues raised are required to be established to a fairly high degree of convincing clarity": See *Lewanika and Others v Chiluba (1).* Before we go into details of this appeal, we wish to put it on record that the Attorney-General applied to be joined to this appeal as a second appellant under Order 15 of the Rules of the Supreme Court, 1999 Edition because of the learned trial judge's remarks in his judgment at J57 that "I would further like to mention that the Electoral Commission and the Attorney -General allowed what happened in Mulobezi Parliamentary Constituency". We declined to allow the application because that remark by the learned trial judge was on obiter dictum, that did not go to the root of the judgment appealed against.

Coming to the present appeal, any appeal against a determination of an election petition lies to this court only on points of law, including the interpretation of the Constitution article 72 (2). As we have said, an election petition is like any other civil claim governed by the pleadings, in this case by the petition and answer and the parties are bound by their pleadings. The election petition as presented contained a number of allegations of corrupt or illegal practices allegedly committed by the appellant.

In order to render the election void, any corrupt practice or illegal practice proved is sufficient if proved to the satisfaction of the court. (see *Mlewa v Wightman* (1). The corrupt

and illegal practices and election offences are contained in Part IV of the Electoral (General) Regulations.

After the trial of the petition, the learned trial judge found that the appellant:

(a) Wrongfully requisitioned for drugs from Medical Stores and he used his agents who are unauthorized drug handlers to collect and distribute the drugs;

(b) The appellant caused the collected drugs to be stored at a house at Sichili Basic School from where he distributed the same to various polling stations up to voting day;

(c) As a result of (a) and (b) above some unauthorized drug handlers were arrested by the Police for the same;

(d) The appellant used a Government facility, namely a house at Sichili Basic School, as his MMD campaign post and paid nothing for this service;

(e) The appellant used Constituency Development Fund totaling K39 million for his campaign; and

(f) The appellant used GRZ transport for his campaign in particular, he collected Indunas from various places to Mwandi for the purposes of holding secret campaign strategic meetings.

There were 17 grounds of appeal, which were supported by detailed written submissions. We will not deal with all these grounds of appeal in the order as presented and we will not deal with all these grounds as we decided in *Mlewa v Wightman (2)*, that satisfactory proof of any one corrupt or illegal or misconduct in an election petition is sufficient to nullify any election. The grounds of appeal may sound many, but they basically revolve on the drugs: - their requisition, collection and distribution; the use of Government transport during the campaign, in particular, collection of Indunas from various places to Mwandi for the purposes of strategizing his campaign; the use of Government facilities at Sichili Basic School and the use of Constituency Development Fund for campaign. In considering this appeal, we will also bear in mind the pleadings as presented in the form of petition and answer.

The allegations on drugs are contained in paragraphs 5.1 to 5.1.5 of the petition. The appellant's answer is in paragraphs 5 to 15, which in sum the appellant admits requisitioning the drugs from the Medical Stores for the Rural Health Centres and Community Health Centres in Mulobezi Constituency, but that this was done in the interest of the public in the Constituency, since there was an outbreak of a mysterious disease; further that he used his transport to transport these drugs as a Minister and his civil responsibility at the Health Centres concerned, had no transport. He denied distributing the drugs at polling stations up to the Election Day using his agents. He further denied that he collected the drugs for the use in his campaign to induce voters to vote for him during the election.

Evidence on record shows the manner in which drugs are normally requisitioned from the Medical Stores. These are normally done by the hospital which in turn distributes them to the Health Centres under it. The respondent adduced evidence to the effect that the

manner in which the drugs were requisitioned by the appellant was abnormal and that there was no mysterious disease in November 2001. The learned trial judge further found that the people handling the drugs were unqualified to handle and transport the drugs and that it was not a mere coincidence that these people were all MMD officials and MMD vehicle was used in distributing them. Looking at the evidence, the learned trial judge found that the drugs were requisitioned by the appellant from Medical Stores for the purposes of using the same to lure voters to vote for him. These findings are the subject of grounds 3-7 in the grounds of appeal and further detailed in the written arguments. In these grounds, it was argued that the findings that it was unreasonable for the appellant to requisition the drugs long after the outbreak of the mysterious disease had been contained, was unsupported by evidence. Further, that, the fact that the drugs were transported by MMD officials, in MMD motor vehicle, does not go to the root of the matter that they had a bearing on election results. It was further argued that the alleged act is not an offence under Regulation 51 of the Electoral (General) Regulations and for it to affect the result of the elections, it must come within Section 18 of the Electoral Act and that there was no evidence on record that the MMD officials were appointed by the appellant as his agents.

In reply, generally on the issue of drugs, it was submitted on behalf of the respondents that there was no doubt that the drugs were requisitioned at the instigation of the appellant and that there was no reason for it as the alleged mysterious disease had been contained in July 2001 and there was no need for the appellant's involvement in the procurement of drugs in November 2001. Further, there was no need to use MMD transport and officials and to keep the same at a house used by the appellant during the campaign period. It was submitted that the only inference that could be made from the facts is that the appellant got involved in order to gain and booster his popularity in the Constituency during the election. Further, that in any event, these were findings of fact against which no appeal lies in an election petition.

In considering this ground of appeal on drugs, we will look at the pleadings and evidence generally and see if the conclusions made by the learned trial judge are unattainable on the evidence on record.

The obtaining of the drugs at the instigation of the appellant from Medical Stores is not denied by the appellant in his answer. It is further not denied that he used some people, not officials in the Ministry of Health, and that he used MMD transport. The appellant states that the people who transported and handled the drugs were qualified to do so having attended some courses to handle the drugs. The reasons given for requisitioning the drugs were that there had been an outbreak of a mysterious disease in Mulobezi Constituency and being community conscious, he took the initiative to requisition the drugs and as the Health Centres had no transport, he took it upon himself to secure transport to ferry the drugs to Mulobezi.

There is evidence on record that the so-called mysterious disease was mysterious when it first broke out and a few people died but medical authorities diagnosed this disease to be pneumonia and they controlled it in July, 2001. The appellant could have been a Member of Parliament, but there is no evidence of what the appellant did to assist to contain this mysterious disease before it was discovered to be pneumonia. If the appellant requisitioned the drugs before the disease was controlled, this he did not support by evidence. Further, accepting that the appellant is a very spirited community conscious person, after getting the report of a mysterious disease from his brother, he never queried the health authorities at Sichili Mission Hospital about it, for if he did, he would have been told that the mysterious

disease was not a mystery at all, but pneumonia and the drug kit would have concentrated on containing this disease. But the appellant, on the strength of the report from his brother, disregarded the procedure obtaining in the Ministry of Health on the procurement of drugs, namely, that the same are ordered by the hospital manning or controlling the satellite health centres.

As if this were not enough, when the drug kits were collected, they were not taken to Sichili Mission Hospital for distribution to the affected areas, but taken to Sichili Basic School and kept under the control of a teacher who had no connection with Ministry of Health. The evidence of PWs 7, 8 and 9 show total disregard of the normal procedure in the ordering and storage of drugs. The evidence of PW 7, the Principal Environmentalist, PW 8 the Clinical Officer PW 16, District Director of Health, PW 9 the Officer-in-Charge, Sichili Police Post, shows that the drugs were ordered without the authority of the hospital and kept in places other than health centres and an attempt was made to regularize the anomaly after elections when the headmaster of Sichili Basic School attempted to send the kits to people who were marginally connected with health institutions. There is evidence of PW 9 and PW 18, that there was a distribution list for the drugs and these were not to health centres only, but to individuals and MMD. The evidence further shows that some of these people marginally connected with health, are trained in sanitation, mosquito control and boreholes, such as RW 27. We shudder that it is the Ministry of Health Policy to give such ill-equipped personnel drugs to administer to people as it was clearly shown in evidence that they did not know the dosage for simple malaria. Also, there is evidence that drugs were handled and recovered from teachers, such as, RW 29, 30 and 31. There is further evidence from PWs 9 and 17, about a failed attempt by the appellant to have the former Republican President donate some drug kits at a rally he addressed drumming support for the appellant, but which the President did not fortunately do.

The evidence adduced by the appellant to justify the movement of the drugs goes completely against the commonest sense and reason and also against his answer to the petition. Taking the totality of the appellant's conduct in the handling of the drug kits, the activities of the appellant go beyond philanthropic activities, we said were not covered in the *Lewanika and Others v Chiluba*. The appellant's activities were so improper that they eroded the electoral process as to amount to "other misconduct" as provided in Section 18 (2) (a) of the Electoral Act, Cap. 13. We are satisfied on the evidence on record that the learned trial judge drew the only reasonable conclusion that the whole scheme of drug procurement and distribution was made to boost his campaign as a Parliamentary candidate in the Mulobezi Constituency in the December 2001 elections. The activities, did unfairly, have an effect on the electorate that they were induced to vote for a candidate not of their choice, so as to make the election result void. We would therefore dismiss grounds 3, 4 and 6 of the grounds of appeal as far as they touch the acquisition and distribution of drug kits in November and December 2001.

Before we leave this ground of appeal, we wish to express our displeasure at the apparent harassment and victimization of PW 9, Sgt. Sinjabu, who according to the evidence, in the course of performance of his duties as officer-in-charge of Sichili Police Post, he was harassed by the authorities that-may-be and immediately put on a "verbal" transfer. Such harassment and victimization of Civil Servants in performance of their duties should be frowned upon by all who wish free and fair elections.

The next finding appealed against is the allegation contained in paragraph 5.5 to 5.5.3 of the petition, in which the respondent alleged that the appellant received K30 million from the Constituency Development Fund. The appellant in his answer to this allegation denied

that he abused the fund on his campaign and that his constituency received K30 million after dissolution of Parliament. The appellant averred that the money was administered by a committee which was entrusted with the responsibility of disbursing the money on behalf of the fund. The learned trial judge disbelieved the evidence that the funds were withdrawn with the consent of the committee for specific projects in that no minutes of such meeting were produced and he did not believe that the money so withdrawn was kept by one Mabula until produced in court, but that the money withdrawn was used by the appellant for his campaign and only organised some other money to look as if the said Mabula was keeping it.

In arguing against this finding in ground 12, it was argued that, having found no direct evidence to prove that the appellant had abused the fund or misused the same for his campaign, the learned trial court erred in finding that this allegation in the petition proved. The main point of criticising the learned trial judge is that there was no direct evidence that the money was withdrawn for the purposes of the campaign by the appellant and that the money was produced in court when the court ordered it to be produced. To have a proper perspective on this allegation, the evidence of Mr. Sipalo, the Bank Manager, PW 6, is pertinent. His evidence is to the effect that the appellant kept on ringing him if the Constituency Development Fund account had been funded and when it was finally funded, the appellant, in the company of Mabula went to the bank and withdrew, on a cheque, the sum of K29,800,000-00 and this withdrawal is confirmed by the bank statement. The withdrawal of the money is confirmed by Mr. Mabula himself. The circumstances under which the appellant and Mr. Mabula met, according to the evidence by the appellant and Mr. Mabula on total analysis, create a circus scene to say the least. The appellant gave conflicting reasons as to why he went to Sesheke. The Chairman of this Development Fund never produced any minutes of the committee authorising the withdrawal of the money. In fact, the committee had been dissolved. Who authorised the withdrawal and for what projects? Further, it is unbelievable that if the funds were withdrawn for a genuine and legitimate purpose was not utilized on those projects, instead Mr. Mabula kept public funds in his village house for months only to produce it in court. Why not return it to the Council Treasurer who would have banked it for safety.

It is not a mere coincidence that Mr. Mabula was the Fund Chairman and at the same time an MMD Constituency Chairman and he is the one who went to cash the cheque at the bank and met the appellant who had been making inquiries at the bank if the Constituency Fund account had been funded. These factors are too much of a coincidence to have no bearing an election. The appellant was no longer a Member of Parliament, Parliament having been dissolved and therefore had no dealing with the Fund. The Constituency Development Fund Committee itself was dissolved. In these circumstances, one can only conclude that there was undue pressure on the poor civil servant to withdraw the money on 3rd December, 2001, with elections coming on 27th December, 2001. This in fact amount to theft of these funds.

The handling of the money was contrary to Financial (Control and Management) Act. The learned trial judge cannot be faulted for arriving at the conclusion that the K29,800,000-00 was withdrawn to finance the appellant's election campaign. The idea of Mabula "keeping" the money up to when he produced it in court was meant to throw a smoke screen around the transaction. Certainly, there was no spirited fight against the learned trial judges conclusion that the Constituency Development Funds were drawn to fund the appellants election campaign. The appeal against this finding is therefore dismissed. We now turn to the finding by the trial judge that the appellant used government transport during this campaign. The allegations in the petition are contained in Paragraphs 5.6 to 5.6.2. The evidence led to support these allegations is that the appellant used GRZ 757BP during the

campaign and also used some other/same motor vehicle to ferry Induna's for secret meetings to boost his election campaign. In his answer, the appellant denies using GRZ 757BP during his campaign but instead used his personal vehicle registration No. AAR 1487, one vehicle belonging to a Mr. Zumla, registration No. AUA 659, one vehicle belonging to a Mr. Lubinda, registration No. AUA 177, and one MMD motor vehicle, registration No. AAX (whose full number the appellant was not able to give in his answer).

He, however, admitted availing a GRZ vehicle to Indunas to enable them to travel to Mwandi, but denied that it was for a secret meeting to tell them to tell their people not to vote for the 1st respondent. To support this allegation, the respondents adduced, in addition to their own evidence through PW 9 and 17, both Police Officers. The evidence of these Police Officers is to the effect that GRZ 757 BP was used by the appellant during the campaign period and that at one stage members of the public got so infuriated that they wanted to damage the vehicle and they had to keep it at the Police Post for safety.

On the other hand, the appellant and his witness testified that GRZ 757 BP, although his official vehicle, was kept in Livingstone except on one occasion that he called it to Mulobezi for use by security personnel the day the former national President visited Mulobezi and that after the Presidential visit, it returned to Livingstone. Further, although it was admitted that Indunas were transported to Mwandi in a GRZ vehicle provided by the appellant, the purpose was not for campaign. These allegations were argued as grounds 13 and 14 and we will treat them together as they are generic. In ground 13, it was submitted that the lower court misdirected itself in law and in fact by holding that the appellant used Government transport and facilities for his campaign and wholly accepted the evidence of PWs 9 and 17, as they were independent, disregarding the evidence of RW26 a Government Transport Officer. It was argued that this transport officer also had no interest in the matter and yet his evidence was disregarded without any reason. This, it was submitted, showed the trial judge assumed that a journey from Mulobezi to Livingstone, could not take 2½ hours. It was also argued that the learned trial judge failed to take into account that when a President travels to rural areas by helicopter, there is need to have sufficient transport and that the vehicle was returned to Livingstone after the Presidential visit to Mulobezi.

On providing transport to the Indunas, it was argued that it was not for the appellant to know what the Indunas discussed and that it was up to the Indunas themselves to decide who to vote for. It was also argued that providing transport to Indunas was not forbidden under the Electoral Regulations.

In reply, it was argued that the learned trial judge correctly found that the appellant used Government transport for his campaign as there was evidence which was not controverted that the vehicle in question was kept at Police Post for safety after some electorates protested against its use for campaign. It was also argued that the appellant's own witness, RW 28, told the court that the trip from Mulobezi to Livingstone could take at least six hours. On transporting Indunas, it was argued that the appellant admitted in his answer to the petition and his attempt to justify this in his evidence was rightly rejected by the trial court.

We have considered these two grounds carefully. A careful study of the evidence by the appellant that the vehicle was called for use by security personnel sounds very hollow. The President was visiting Western Province and it is the duty of the Minister responsible for the province to make logistical arrangements and not for candidates. His own evidence shows that in fact the vehicle was never used by security personnel because, in the first place, it

was never asked for. The evidence of the Police Officers on the ground was that in fact the vehicle was used for campaign and some electorates protected and nearly damaged it in protest, hence it was kept at the Police Post is more plausible and the learned trial judge cannot be faulted for rejecting the appellant's explanation. On the use of the Government transport to ferry the Indunas, the appellant never explained why the Indunas approached him, if they did, for transport. The secret meeting cannot be disbelieved when the appellant's own witnesses, such as RW 13 and RW 19, give a very unbelievable reason that they were collected around 0300 hours only to be told to be non-partisan during the election. Was it necessary to collect Indunas at 0300 hours just to impress upon them not to be partisan? It is clear that the Indunas were collected at his instance, certainly to be partisan. This was a secret meeting organized by the appellant for the purposes of soliciting their and their subjects' support in the election. We cannot also fault the findings of the learned trial judge on these allegations and the use of Government transport for campaign is contrary to Regulation 7 (1) (l) of the Electoral (Conduct) Regulations 1996. These two grounds cannot stand and are dismissed.

On the finding by the trial judge that the appellant used a Government house for his campaign should be looked at the appellant's answer to the allegation as contained in Paragraph 18 of his answer. The appellant admits using the house, but for lodging only and that it was given to him by the Headmaster. From the evidence, the learned trial judge found that the house in question, although authorized by the Headmaster, that authority was given contrary to instruction from the Ministry of Education not to permit the use of Government property for political activities. He further found that the house was not only used for lodging, but it was a meeting place for MMD cadres engaged in the election campaign and the appellant used the house as storage and distribution point of drugs. The learned trial judge further found that the appellant had not paid for the use of the house. These findings are the basis of grounds of appeal 7 and 8.

In ground 7, it was argued that the learned trial judge erred in admitting in evidence on an unauthenticated document purported to have been issued by the Ministry of Education and by so doing the learned judge contravened Section 3 (1) (b) of the Evidence Act, Cap. 43. On ground 8, it was argued that the learned trial judge erred in law and fact in holding that the appellant used the house without paying when PW18 conceded in cross-examination that the agreement between the appellant and school authorities was that the appellant would provide paint and that the appellant did confirm that he complied with the agreement. The finding by the learned trial judge that the appellant did not pay for the use of the house cannot therefore stand. In reply, for the respondents, it was argued that the circular from the Ministry of Education forbidding the use of school property by Political parties, was a public document and it was produced by a person who was interested in implementing it as a School Board Member and it needed not to be produced by the author or any addressees. If the appellant said that the document was a forgery, it was incumbent upon them to prove the forgery. As regards to ground 8, it was submitted that this was against a finding of fact and as such it cannot be a ground in an election appeal as it is against the provisions of article 72 (2) of the Constitution. Further, the evidence of when the agent for the appellant wrote the request letter is doubtful as when he is supposed to have handed in the request, he was supposed also to be with the appellant in Lusaka.

We have considered these two grounds of appeal. The circular from the Ministry of Education is attacked on the basis of authenticity and it was submitted that this was contrary to Section 3 (1) (a) of the Evidence Act. It is addressed to all those manning schools and if the whole Section 3 of the Evidence Act is read in total, it is clear that this document is admissible and the court considered the contents and circumstances of the document as provided for under Section 3 (4) of the Act and we cannot fault him.

On ground 8, we are mindful of Regulation 7 (1) (l) and Regulation 7 (2) of the Electoral (Conduct) Regulations, Statutory Instrument No. 179 of 1996. Regulation 7 (1) (l) of these Regulations prohibits the use of Government transport or facility for campaign purposes. Appellant's answer to the allegations against him is that he had authority from the school authorities. The use of Government transport and facility is prohibited and school authorities cannot authorize that which is prohibited by the law. Further, there is no evidence that the facility was available for hire to all the people contesting election. Furthermore, the evidence by the appellant of having paid for the use of the property is most unsatisfactory. He does not know how much the paint cost, neither does he know who delivered it and when. Taking the totality of the evidence and bearing in mind that all those in position and who are alleged to have granted authority were MMD officials and in fact on the appellant's own evidence, they were his agents. There was clear evidence of use, by the appellant, of Government facility for the purposes of his campaign during the 2001 Parliamentary Elections. We see no merits in these two grounds of appeal and they are dismissed.

On the totality of this appeal, we cannot fault the findings of facts that the appellant requisitioned, collected and distributed drugs from Medical Stores during the election campaign in order to induce voters to vote for him. We cannot also fault the findings of fact that the appellant used Government transport and facilities during the campaign period. On the use of Constituency Development Funds, this cannot be faulted, in fact with evidence before the court, the learned trial judge should have recommended to the Director of Public Prosecutions for possible prosecution in terms of Section 29 of the Electoral Act. The smoke screen schemed by the appellant and his witnesses in the matter does not make any sense for if the money was meant for projects, there ought to have been invoices demanding payment and not keep the money because of a rumour of an election petition touching the same money.

The next question to determine in this appeal is whether our guidelines in the *Lewanika and Others v Chiluba (1),* case have been followed. In that case, we held that proof of an election petition, although a civil matter was higher than balance of probability, but less than beyond all reasonable doubt. We agree with the advocates for the appellant that the learned trial judge throughout advised himself and acted on proof on the balance of probability. This was a misdirection. However, the finding of standard of proof is based on the evidence before the court. As an appellate court, we have to look at the evidence supporting each allegation and see if, properly directing himself, the learned trial judge would have found the allegations proved to a degree higher than on the balance of probability. On our analysis of the evidence supporting the allegations found proved, we are satisfied that even if the learned trial judge properly directed himself on the standard of proof, he ought to have come to the same conclusion that the allegations were proved to the set standard. As the allegations in an election petition are of a criminal nature, this is a proper case for this court to exercise its powers under the provision under Section 15 (1) of the Supreme Court Act and we so hold that the allegations against the conduct of the appellant during the December 2001 Parliamentary Elections have been proved beyond the balance of probability. Grounds 1 and 2 of the appeal are therefore dismissed.

In conclusion, we are satisfied that the respondents proved the allegations of misconduct of the appellant as found by the learned trial judge and that the election of the appellant as a Member of Parliament for the Mulobezi Constituency is void in terms of Section 18 (2) (a) of the Electoral Act, Cap. 13. The appeal is dismissed. Costs are to the respondents both here and in the court below to be agreed, in default, to be taxed.

Appeal dismissed

SELECTED JUDGMENT NO. 51 OF 2018

IN THE CONSTITUTIONAL COURT OF ZAMBIA	Appeal No. 10/2016
AT THE CONSTITUTIONAL REGISTRY	2016/CC/A016
HOLDEN AT LUSAKA	2016/CC/A042

(Constitutional Jurisdiction)

IN THE MATTER OF:	ARTICLE 47(2), 51, 54, 72(2)(c) AND 73(1) OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 VOLUME 1 OF THE LAWS OF ZAMBIA
AND	
IN THE MATTER OF:	SECTION 81, 89, 97(1), 98(c), 99 AND 100(2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	CODE OF CONDUCT RULES 12, 15(a)(h)(k)
AND	
IN THE MATTER OF:	MUNALI CONSTITUENCY ELECTIONS HELD IN ZAMBIA ON THE 11TH AUGUST 2016

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
15 NOV 2018
REGISTRY 2
P O BOX 50067 LUSAKA

BETWEEN:

NKANDU LUO (PROF)	1ST APPELLANT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND APPELLANT
AND	
DOREEN SEFUKE MWAMBA	1ST RESPONDENT
ATTORNEY GENERAL	2ND RESPONDENT

Coram: Sitali, Mulenga, Mulembe, Munalula and Musaluke, JJC

On 20th April, 2018 and 16th November, 2018

For the 1st Appellant:	Mr. B. Mutale, SC, and Ms. M. Mukuka of Messrs. Ellis & Company
	Mr. E. Silwamba, SC, of Messrs. Eric Silwamba, Jalasi and Linyama Legal Practitioners

	Mr. M. Lungu of Messrs. Lungu Simwanza & Company
For the 2nd Appellant:	Mr. R. Mwala and Mr. K. Wishimanga of Messrs. A.M. Wood & Company
For the 1st Respondent:	Dr. H. Mbushi of Messrs. HBM Advocates
	Mr. K. Mweemba of Messrs. Keith Mweemba Advocates
	Mr. G. Phiri of Messrs. PNP Advocates
For the 2nd Respondent:	Ms. T. Nkunika, State Advocate

JUDGMENT

Mulembe, JC, delivered the Judgment of the Court.

Cases referred to:

1. Michael Mabenga v Sikota Wina and others (2003) Z.R. 110
2. Brelsford James Gondwe v Catherine Namugala Appeal No. 175 of 2012
3. Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa and others (2005) Z.R. 138
4. Steven Katuka and Law Association of Zambia v The Attorney General and 64 Others, selected Judgment No. 29 of 2016
5. Akashambatwa Mbikusita Lewanika and Others v Fredrick Jacob Titus Chiluba (1998) Z.R. 79
6. Mubika Mubika v Poniso Njeulu, SCZ Appeal No. 114 of 2007
7. Mulondwe Muzungu v Elliot Kamondo 2010/EP/001
8. Chizonde v The People (1975) Z.R. 85
9. Mubita Mwangala v Inonge Mutukwa Wina, Appeal No. 80 of 2007
10. Nakbukeera Hussein Hanifa v Kibule Ronald and another (2011) UGHC 64
11. Giles Chomba Yamba Yamba v Kapembwa Simbao, Selected Judgment No.6 of 2018
12. Abiud Kawangu v Elijah Muchima, Appeal No. 8 of 2017

13. Vaisamos Koufou v Anthon Greenberg (1982) Z.R. 30
14. Mlewa v Wightman (1995/1997) Z.R. 171
15. August v Electoral Commission and others [1999] ZACC 3
16. Augustine Kapembwa and another v Attorney General (1981) Z.R. 127
17. Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others Petition No. 1 of 2017
18. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172
19. Austin Liato v Sitwala Sitwala, Selected Judgment No. 23 of 2018
20. Saul Zulu v Victoria Kalima (2014) Z.R. 14
21. Chrispin Siingwa v Stanley Kakubo, Appeal No. 7 of 2016
22. Richwell Siamunene v Sialubalo Gift, Selected Judgment No. 58 of 2017
23. Thorp v Holdsworth [1876] 3 Ch D 637
24. British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con. L.R. 1
25. Christopher Lubasi Mundia v Sentor Motors Limited (1982) Z.R. 66
26. London Passenger Transport Board v Moscorp [1942] A.C. 332

Legislation referred to:

1. Electoral Process Act No. 35 of 2016
2. Electoral Process (General) Regulations 2016
3. Constitution of Zambia (Amendment) Act No. 2 of 2016

Other works referred to:

1. Phipson on Evidence, 18th edition
2. Concise Oxford English Dictionary, 12th Edition, Oxford University Press
3. Pocket Oxford Dictionary & Thesaurus, 2nd Edition, Oxford University Press
4. Halsbury's Laws of England, 5th Edition, Volume 38A, LexisNexis
5. Zambian Civil Procedure: Commentary and Cases, Volume 1, Lexis Nexis

This is an appeal against the Judgment of the High Court which nullified the election of the 1st Appellant, Nkandu Luo, who

to view the video clip in the presence of all the parties and give a ruling stating whether or not the video was the same video viewed during the trial. In his ruling, availed to this Court in Supplementary Record of Appeal filed on 29th March, 2018, the learned Judge in the court below confirmed the authenticity of the video. In addition, during this process the video was misplaced within the High Court. The appeal was finally heard on 20th April, 2018.

We, therefore, wish to guide the High Court and the local government election tribunals that where a piece of evidence is tendered and viewed during the trial of an election petition, the same should be properly marked and admitted in evidence and placed in the custody of the court or tribunal. This will avoid unnecessary delays as encountered in this case.

We now turn back to this appeal. The background of this appeal is that the 1st Appellant and the 1st Respondent, Doreen Sefuke Mwamba, stood as candidates for Member of Parliament for Munali Constituency in the 11th August, 2016 general elections. The 1st Appellant contested the seat on a Patriotic Front Party (PF) ticket. The 1st Respondent participated as a

candidate for the United Party for National Development (UPND). There were six other contestants. Five stood on various political parties' tickets while one was independent. The 1st Appellant emerged victorious with 37,935 votes and was declared duly elected Member of Parliament for Munali Constituency. The 1st Respondent came in second having polled 24,628 votes. The six other candidates shared the remaining valid votes cast as follows: Mike Mposha, MMD – 11, 122; Antonio M. Mwanza, FDD – 4,651; Sydney P. Kaweme, Independent – 893; Vincent Chaile, RRP – 831; Mutale Mwila, UNIP – 373; Boston G. Chifita, Rainbow – 294.

Aggrieved by the outcome of the election, the 1st Respondent filed a petition seeking, among other things, a declaration that the 1st Appellant's election as Member of Parliament for Munali Constituency was null and void. In her petition, the 1st Respondent alleged that prior to the election, the 1st Appellant held herself out as Cabinet Minister and used public resources towards her campaign. Further allegations were that on 8th August 2016, the 1st Appellant sponsored violent cadres who attacked the 1st Respondent's campaign bus in Mtendere and

that on 11th August, 2016 a PF councillor, in PF regalia, campaigned in a polling station in full view of the police and the 2nd Appellant's officials. It was also alleged that PF polling agents were allowed to wear PF regalia inside the polling station and that on 11th August, 2016 the 1st Respondent was refused entry to Vera Chiluba School polling station by the 1st Appellant and one Kaizer Zulu, who closed the gate. It was also alleged that the 2nd Appellant refused to provide Form GEN12 to the 1st Respondent's polling agents, resulting in their inability to submit the correct total of the results she obtained at each polling station.

The 1st Respondent claimed that as a consequence of the alleged illegal practices committed by the 1st Appellant and her agents and the failure of the 2nd Appellant to conduct the election fairly, the majority of voters were prevented from electing their preferred candidate.

The learned trial Judge, in his verdict, pointed out that the provisions of the law in section 97(2)(a) of the Electoral Process Act No. 35 of 2016 (henceforth "the Act") were very clear in providing circumstances under which a parliamentary election may be nullified. The trial Judge reminded himself that the

burden of proof rested on the petitioner and that the standard of proof required is that allegations raised must be proved to a fairly high degree of convincing clarity, citing **Michael Mabenga v Sikota Wina and others**[1], **Brelsford James Gondwe v Catherine Namugala**[2] and **Anderson Kambela Mazoka v Levy Patrick Mwanawasa**[3] for authority. In this regard, the learned trial Judge noted that the allegations in the petition were outlined in paragraph 5 under seven sub-heads and proceeded to consider the same seriatim.

In regard to the allegation of the 1st Appellant holding herself out as Cabinet Minister, the court below found that it was not in dispute that during the campaign for the Munali seat, the 1st Appellant was a Cabinet Minister. That this was only stopped by the decision of this Court in **Steven Katuka and Law Association of Zambia v The Attorney General and 63 others**[4]. The court below found that this part of the allegation in paragraph 5(i) of the petition was proved. And on the alleged abuse of public resources, the court below stated that it was not in dispute that Cabinet Ministers were entitled to a Government motor vehicle, public fuel and public driver, but what was in

dispute was that the 1st Appellant used the said public resources in her campaign. Though the trial Judge acknowledged that the 1st Appellant had her personal motor vehicles which she used during her campaign, he stated that he had not seen evidence to show that she truly did not use a Government vehicle as well. The trial Judge was of the view that the lacuna in the 1st Appellant's testimony was that he had not seen any Government guideline to preclude a minister from using Government resources during campaign.

The court below noted that the 1st Appellant was seen being driven in a Government vehicle with a Zambian flag accompanied by a Toyota Noah branded in PF colours and that PW5 saw the 1st Appellant distributing PF campaign materials at a house in Kaunda Square. Although the trial Judge noted that the 1st Respondent's witnesses had difficulties in describing the Government vehicle, he was satisfied that they were describing the same motor vehicle and that the allegation was proved. The court below also found that to the extent that the 1st Appellant held the office of minister illegally, her salary was paid to her

illegally and that she used it to the disadvantage of the 1st Respondent who did not have access to Government funds.

In regard to the allegation that the 1st Appellant sponsored violent cadres who attacked the UPND campaign bus in Mtendere on 8th August, 2016, the learned trial Judge held that he had seen no evidence to show or even to suggest that the 1st Appellant sponsored cadres to attack the UPND campaign bus. However, as the 1st Appellant was not at the scene of the attack, the Court below disagreed with her position that the attackers were not PF cadres and found that the allegation had succeeded.

On the allegation that a PF Councillor was campaigning in a polling station dressed in PF regalia in full view of the police and the 2nd Appellant's officials, the court below found that this allegation was not sufficiently supported by evidence and dismissed it. The court below also found no credible evidence to support the allegation of persons wearing PF regalia inside the polling station at Chainda Catholic Church.

In respect of the allegation that the 1st Respondent was refused entry to Vera Chiluba School Polling Station, the Court below noted that there were two disputes to this allegation. First,

that the 1st Appellant was in the company of one Kaizer Zulu. Secondly, that the 1st Respondent was denied entry. After reviewing the evidence on this aspect, the trial Judge stated that it was immaterial whether or not the 1st Appellant was in the company of Kaizer Zulu. That the material fact was, in the view of the learned trial Judge, a demonstration of double standards where the 1st Appellant was allowed entry into the polling station and the 1st Respondent was denied entry. The court below dismissed the testimony of RW12, the returning officer for Munali Constituency, who testified that it was not possible for the 1st Appellant and Kaizer Zulu to close the gate to the polling station. According to the court below, RW12 was untruthful on account that he purported to testify to events which happened in his absence. Thus, the trial court adjudged that the 1st Respondent was not allowed to monitor the elections in which she was a participant and found that the allegation was proved.

The allegation against the 2nd Appellant was that it refused to provide Form GEN12 to UPND polling agents. That this caused the polling agents not to submit the correct number of votes the 1st Respondent obtained at each polling station. The

court below found that the inadequacy of Form GEN12 affected all participants and found that the failure by the 2nd Appellant to avail the GEN 12 forms did not help to build confidence in the Munali Constituency election. That it was a lapse on the part of the 2nd Appellant and no one could positively ascertain whether or not the votes cast in favour of the 1st Respondent were fully accounted for. Thus, the court below found that the allegation had been proved.

The next allegation was that the 1st Respondent managed to provide her polling agents at Kalikiliki Polling Station with GEN12 forms but the presiding officer was stopped from signing the same by PF cadres. The trial court held that for reasons already given in regard to the allegation of refusal to provide Form GEN12, the allegation succeeded.

The learned trial Judge summed up his findings by stating that the elections in Munali Constituency were not contested on level ground. That the 1st Appellant abused Government resources in her campaigns and that the campaigns in Munali Constituency were marred by violence, which reached a crescendo on 8th August, 2016 and was capable of influencing

abuse of Government resources and that such abuse materially affected the outcome of the polls in Munali Constituency.

Ground Two

The court below erred in law and fact when it annulled the poll in Munali Constituency based on the attack of a UPND bus in Mtendere on 8th August 2016 without evidence linking the appellant or her campaign agent to the said act.

Ground Three

The court below misdirected itself in law and fact when it held that the first respondent was denied entry into Vera Chiluba School Polling Station and such denial materially affected the outcome of the poll in Munali Constituency.

Ground Four

The lower Court erred in law and fact when it held that the non-provision of GEN 12 forms to all the candidates' polling agents materially affected the outcome of the polls.

The 2nd Appellant advanced five grounds of appeal as follows:

Ground One

The learned trial Judge misdirected himself in law and in fact when he nullified the Munali Parliamentary seat on the basis of the alleged illegal and unfair practices committed by the Appellant without establishing that the alleged illegal and unfair practices affected the parliamentary election results, contrary to the law.

Ground Two

The learned trial Judge misdirected himself in law and in fact when he held that the 1st Respondent had proved her allegations as contained in paragraph 5(v) of the Petition, contrary to the evidence on the record.

Ground Three

The learned trial Judge misdirected himself in law and in fact when he found that paragraph 5(vi) of the Petition had been proved without any evidence to support such finding.

Ground Four

The learned trial Judge misdirected himself in law and in fact when he held that the 1st Respondent's allegation as contained in paragraph 5(vii) of the Petition had been proved, contrary to the law and evidence on the record.

Ground Five

The learned trial Judge misdirected himself in law and in fact when he held that the Appellant failed to conduct transparent, free and fair elections contrary to the provisions of the law and evidence on the record.

In the interests of brevity and orderliness, we propose to address some of the 1st Appellant's and 2nd Appellant's grounds of appeal together. In this regard, we first address the 1st Appellant's grounds one and two of the appeal separately. We then proceed to consider the 1st Appellant's ground 3 together with the 2nd Appellant's ground two. Ground four of the 1st Appellant's appeal is considered together with the 2nd Appellant's grounds one, three, four and five.

In support of the appeal, the 1st Appellant filed detailed and lengthy heads of argument on 25th January, 2017. Ground one of the appeal challenges the finding of the court below that the continued stay of the 1st Appellant in office created an irrebutable presumption of abuse of Government resources and that such abuse materially affected the outcome of the election in Munali Constituency. The 1st Appellant began by giving a detailed

outline of the applicable legal principles in election petitions. Calling in aid various case authorities, including **Lewanika v Chiluba,**[5] **Mubika Mubika v Poniso Njeulu**[6] and **Mazoka v Mwanawasa,**[3] the 1st Appellant submitted, *inter alia*, that the burden of proof lies upon the party who substantially asserts the affirmative of the issue and that it must be established, with convincing clarity, that the malpractice complained of was widespread and affected the outcome of the election. It was the 1st Appellant's position that cogent evidence must support the discharge of the burden of proof under section 97(2) of the Act. It was contended that while the learned trial Judge reminded himself on the burden and standard of proof in election petitions, he did not apply the law accordingly.

Further, that even though the trial Judge reminded himself that the petitioner was not allowed to bring in evidence other than evidence connected to and supporting the pleadings, he still relied on extraneous and irrelevant matters to arrive at some findings. That the trial Judge relied on the use of presumptions in finding that the allegations were proved. The 1st Appellant submitted that though the law of evidence in certain instances

allows presumptions, authorities on the burden and standard of proof in election petitions clearly point to the fact that any matter alleged had to be proved to a high standard of convincing clarity.

The 1st Appellant asserted that the finding of the court below that she illegally held herself out as a Cabinet Minister throughout the campaign period was a misapprehension of the holding of this Court in **Steven Katuka**[4] and that the misapprehension informed most parts of the lower court's judgment and tainted its reasoning.

On the allegation that the 1st Appellant used her official car in the campaigns, it was the 1st Appellant's position that the approach the learned trial Judge adopted in resolving the conflicting evidence given by the 1st Appellant on one hand and the 1st Respondent on the other, in which different descriptions of the 1st Appellant's car were given, shows that he did not apply the correct standard of proof. That the trial Judge's finding that he had not seen any evidence to show that the 1st Appellant truly did not use a Government vehicle showed that he placed the burden of proof on the 1st Appellant to lead evidence that she did not use a Government vehicle. The 1st Appellant contended that

the finding was a clear misdirection and that the allegation should be found not to have been proved as the 1st Respondent had not discharged the burden of proof. It was the 1st Appellant's contention that the 1st Respondent merely saw her being driven to inspect a Government project, which did not constitute campaigning. It was contended that there were discrepancies in the evidence as to the make of the vehicle and the witnesses could not recall the vehicle registration number. The 1st Appellant further asserted that PW5 was a partisan witness with an interest to serve, citing **Mulondwe Muzungu v Eliot Kamondo**[7] and **Chizonde v The People**[8] for support. It was submitted that the court below made no adverse finding against the 1st Appellant and, therefore, that there was no basis upon which it could have resolved the dispute in favour of the 1st Respondent.

In regard to the alleged use of Government funds, the 1st Appellant contended that there was no evidence in support led by the 1st Respondent; that the money the 1st Appellant used in the campaigns came from her gratuity and well-wishers and that the finding that she had used her salary for campaigns was perverse as there was no evidence to support such a finding. Further,

that the finding by the court below to the effect that the alleged use of government funds by the 1st Appellant affected the 1st Respondent who had no access to such funding was a misdirection as the act complained of ought to affect the outcome of the election and not a contestant. The 1st Appellant argued that the court below was not entitled to use presumptions or make adverse inferences without specific evidence being led on an allegation.

The 1st Appellant submitted, in the alternative, that even if it was proved to the requisite standard that she used a Government vehicle and funds, the court below was still not entitled to nullify the election on this ground because it was not proved that the use of a Government vehicle and funds affected the outcome of the election. It was contended that in terms of section 97(2)(a) of the Act, evidence must be led to prove that the majority of voters were or may have been prevented from electing their preferred candidate, citing **Mubita Mwangala v Inonge Mutukwa Wina**[9] for support. It was the 1st Appellant's further contention that the court below relied on the PF's use of the slogan *"boma ni boma"* as proof that she used her ministerial

position to intimidate her opponents; but that there were no witnesses called to testify that they were intimated or did not vote for their preferred candidate on account of the slogan.

In ground two, the 1st Appellant challenged the lower court's annulment of the election in Munali Constituency based on the attack of the UPND bus in Mtendere on the 8th August, 2016 without evidence linking the 1st Appellant or her election agent to the said attack. It was submitted that under section 97(2)(a) of the Act, the first test to apply for nullification of an election is proof that either the candidate or her election agent committed the act complained of; that it was a clear departure from section 93(2)(a) of the Electoral Act 2006 which required proof of any malpractice that affected the outcome of the election. The 1st Appellant submitted that the court below found that there was no evidence to show, or even to suggest, that she sponsored cadres to attack the UPND bus but it still proceeded to find that the allegation was proved. It was argued that the finding was not only contradictory but perverse and that it was a misdirection to proceed to examine the matter further after the court had found that the 1st Appellant was not connected to the attack.

Citing **Mazoka v Mwanawasa**[3] and **Mabenga v Wina**[1] to support the point, it was submitted that the finding that the 1st Appellant had not sufficiently shown what measures she took to control her supporters illustrated the lower court's misapprehension of the burden and standard of proof in an election petition. The 1st Appellant argued that the burden to prove that she sponsored the violent cadres lay with the 1st Respondent who had made the allegation; that the 1st Appellant could not be expected to demonstrate measures taken to "cage" supporters as she had no burden of proof to discharge. We were referred to the case of **Brelsford James Gondwe v Catherine Namugala**[2], where the Supreme Court said:

> **"The appellant having failed to prove his case no reasonable court would call upon the respondent to adduce evidence in rebuttal. In any event there was nothing to be rebutted and only courts where injustice is practiced would brave calling the respondent to adduce evidence in rebuttal in these circumstances."**

The 1st Appellant maintained that the finding of the court below fell outside the ambit of the pleading and the law. And citing **Lewanika v Chiluba**[5] it was further submitted that even if the violent cadres were PF members, a candidate was not responsible for the actions of all their party members. Further, that the finding by the court below that the attack was widely

reported by the media thereby spreading fear and leading to a low turnout at a UPND rally on 10th August, 2016 was not supported by evidence.

The combined submissions on ground three of the 1st Appellant's appeal and ground two of the 2nd Appellant's appeal were to the effect that the court below misdirected itself in law and fact when it held that the 1st Respondent's allegation that she was denied entry into Vera Chiluba polling station was proved and that such denial materially affected the outcome of the election.

The 1st Appellant submitted that the objection to the finding of the court below on this aspect was twofold. First, that the court below did not address itself to the pleadings but merely discredited RW12 on the ground that he was untruthful. The 1st Appellant contended that there was no evidence to prove the allegation that the 1st Appellant, acting with one Kaizer Zulu, closed the gate and prevented the 1st Respondent from entering Vera Chiluba polling station to see her polling agents. It was contended that the finding of unfair treatment was irrelevant as it was not pleaded.

Secondly, it was submitted that under section 97(4) of the Act, it has to be demonstrated, through evidence, that the misfeasance by an electoral officer affected the outcome of the election, which the 1st Respondent failed to do. We were referred to pages 60, 61, 62 and 70 of the record of appeal to support the point that the court below failed to consider the 1st Appellant's evidence that she had not been allowed into Vera Chiluba polling station, contrary to the 1st Respondent's claim. We were also referred to page 881 of the record to show that the 1st Appellant never admitted to having been allowed entry into the said polling station and that it was for the 1st Respondent (as petitioner) to prove all allegations to a fairly high degree of convincing clarity.

On its part, the 2nd Appellant submitted that no evidence was adduced at trial to support the allegation that the 1st Appellant and Kaizer Zulu closed the gate and refused the 1st Respondent access to her polling agents. It was further submitted that since in cross-examination the 1st Respondent conceded that the allegation was not true, the matter should have ended there and the allegation dismissed. The 2nd Appellant impugned the finding of the court below that the allegation in the

pleadings had been proved, arguing that the court below misdirected itself as it is trite that evidence must support the pleadings. It was the 2nd Appellant's contention that in arriving at his conclusion, the trial Judge wrongfully accepted and applied the 1st Respondent's testimony to the effect that she was locked out of the polling station by a police officer while the 1st Appellant was allowed to go in. That the court below erred in its finding that there was a demonstration of double standards, thereby resulting in unfairness on the part of the 2nd Appellant's conduct of the elections. It was submitted that at Vera Chiluba polling station, there was an incident where a group of individuals wanted to vote after the close of the poll; that, as testified by RW12, all voters on the queue were instructed to get inside the polling station and the presiding officer closed the gate. That the learned trial Judge's conclusion that RW12 was untruthful had no basis and RW12's testimony ought to have been considered by the court in making its finding.

As indicated earlier, ground four of the 1st Appellant's appeal and grounds one, three, four and five raised in the 2nd Appellant's appeal are related. Submissions on ground four of the

1st Appellant's appeal were to the effect that the court below erred in law and in fact when it held that the non-provision of Form GEN12 to all the candidates' polling agents materially affected the outcome of the polls. The 1st Appellant submitted that the 1st Respondent's allegation was that the 2nd Appellant refused to provide Form GEN12 to UPND polling agents and, as such, the 1st Respondent was unable to ascertain the correct number of votes she received at each polling station. Citing section 49 of the Electoral Process (General) Regulations, it was the 1st Appellant's contention that, in the instant case, failure to countersign Form GEN12 could not be the ground or basis to nullify the election if the court below found that each candidate was affected. That there is a high threshold to be surmounted where misfeasance on the part of electoral officers is alleged pursuant to section 97(2)(b) of the Act.

The 2nd Appellant, in its third ground of the appeal, contended that the learned trial Judge misdirected himself in law and in fact when he found that the allegation that the 2nd Appellant refused to provide Form GEN12 to the 1st Respondent's polling agents was proved and also, in ground four, that the

presiding officer at Kalikiliki polling station was stopped from signing copies of Form GEN12 by PF agents. And in its ground one, the 2nd Appellant contended that the trial Judge misdirected himself in law and in fact when he nullified the election in Munali on the basis of the alleged illegal and unfair practices without establishing that the same affected the election results.

The 2nd Appellant submitted that Form GEN12 refers to the Announcement of the Result of the Poll and is in fact Form GEN20 in the Electoral Process (General) Regulations and is used at a polling station to indicate the total number of votes obtained by a candidate at the polling station. Further, that as the 1st Respondent testified, Form GEN12 is important as it is used to convey information to the totaling centre. And as RW12 testified, the 2nd Appellant provides the document to the presiding officer, who must prepare the document and validate it by signing it and then it is made available to polling agents to countersign. The 2nd Appellant emphasised that it is copies of authenticated documents that are made available to the polling agents.

It was contended that the crux of the matter was whether or not the 2nd Appellant refused to provide Form GEN 12 to the

UPND polling agents. It was the 2nd Appellant's view that the learned trial Judge glossed over the 2nd Appellant's evidence with the result that the full significance of certain aspects of the evidence was not appreciated. It was submitted that the trial Judge ought to have considered the evidence of the 1st Respondent and PW5 cautiously. That the 1st Respondent was a UPND candidate and PW5 was a UPND polling agent and the trial Judge relied on their evidence without caution as to the self-interest of the witnesses. The case of **Nakbukeera Hussein Hanifa v Kibule Ronald and another**[10] was cited for support.

It was the 2nd Appellant's further submission that the trial Judge erred when he accepted and relied on the evidence in collateral matters and that the finding of the court below was based on an unbalanced evaluation of evidence. It was the 2nd Appellant's contention that PW5 was not a credible witness as her testimony contained various untruths on collateral matters and the court below ought not to have believed and accepted her evidence. The 2nd Appellant maintained that it did not refuse to provide Form GEN12 to the 1st Respondent's polling agents as the form was readily available to polling agents who were present at

the polling station after voting, counting and totaling of votes was done.

The 2nd Appellant submitted that, faced with two conflicting versions of events, the court below, in its finding, merely relied on the evidence of the 1st Respondent's witnesses. That had the trial Judge taken into consideration the evidence of RW12, that winning and losing candidates alike left the polling stations before the GEN12 forms were compiled by the 2nd Appellant, he would not have concluded as he did. It was submitted that the non-availability of polling agents at completion of the election process could not possibly be regarded as refusal by the 2nd Appellant to provide copies of Form GEN12.

The 2nd Appellant maintained that the lower court's finding that the 1st Respondent was unable to have the correct total of the results due to failure by the 2nd Appellant to provide Form GEN12 was not supported by evidence. It was submitted that the court below did not take into account the 2nd Appellant's evidence to the effect that there were alternative sources of information that were provided. It was also submitted that RW12 testified that aside from the provision of Form GEN12 to the

polling agents present, the presiding officer announced the results publicly, which gave an opportunity to the parties to hear and record the correct totals. Further, that the "Zero Form", a larger version of Form GEN12 was posted outside the polling station. It was the 2nd Appellant's contention that the 1st Respondent and her agents had numerous sources provided by the 2nd Appellant to obtain the total results received by each candidate at each polling station. The 2nd Appellant maintained, therefore, that there was nothing wrong with the presiding officer refusing to sign a document that was provided or prepared by the 1st Respondent's agents as the agents could not authenticate the results endorsed thereon.

It was the 2nd Appellant's contention that even assuming the allegations of procedural irregularities or non-compliance with the law were true, the acts complained of affected all the candidates. That this was acknowledged by the trial Judge himself when he noted that both winners and the losers did not sign the Form GEN 12. The case of **Mazoka v Mwanawasa**[3] was cited for authority. In addition, the 2nd Appellant relied on its submissions filed in the court below appearing at pages 468 to

469 of the record of appeal and also adopted the 1st Appellant's arguments in so far as they were applicable to the 2nd Appellant's appeal. The 2nd Appellant submitted that the court below erred in law and in fact when it found that the 2nd Appellant failed to conduct transparent, free and fair elections in Munali Constituency and urged us to set aside the lower court's finding.

In oral submissions, Mr. Mutale, SC, submitted that the first three allegations in the petition upon which the election of the 1st Appellant was nullified were founded on the interpretation of section 97(2)(a) of the Act. It was State Counsel's position that the lower court's interpretation was seriously misconceived. Citing our decision in **Giles Chomba Yamba Yamba v Kapembwa Simbao,**[11] Mr. Mutale, SC, argued that the petitioner needed to prove the misconduct with crystal clear evidence, and that the majority of the electorate were prevented from electing their preferred candidate.

Mr. Mutale, SC, contended that the 1st Respondent failed to discharge her obligation to produce cogent evidence that the 1st Appellant did abuse Government resources during her campaign, citing our decision in **Abiud Kawangu v Elijah Muchima**[12] for

support. State Counsel further submitted that the 1st Respondent had failed to adduce evidence that the 1st Appellant or any of her agents were involved in attacking the 1st Respondent's campaign bus or that the incident was widespread in Munali Constituency. He submitted that the incident was isolated and that the video evidence involving the attack on the campaign bus was irrelevant as it only testified to one incidence of violence in Mtendere ward of the Munali Constituency and did not assist the 1st Respondent in confirming that the violence was widespread. Also, that RW10 confirmed at page 948 of the record of appeal that the incident was the only incident of violence that the 2nd Appellant heard of in Mtendere ward.

Turning to the allegation that the 1st Appellant and Kaizer Zulu closed the gate and denied the 1st Respondent entry to Vera Chiluba polling station, it was State Counsel's contention that the lower court's finding was perverse as it was not supported by evidence and that the 1st Respondent confirmed in her testimony that it was incorrect as the 1st Appellant was not responsible for closing the gate and that Kaizer Zulu was not at the polling

station. Mr. Mutale, SC, submitted that the finding of the court below should be set aside for being perverse.

On the allegation of failure to provide GEN12 forms, State Counsel submitted that the same were anchored on section 97(2)(b) of the Act. He contended that the 1st Respondent failed to adduce any evidence confirming that the failure to provide GEN12 forms by the 2nd Appellant affected the results of the entire Munali Constituency. Mr. Mutale SC, added that from a total of 80,727 votes, 37,935 were cast in favour of the 1st Appellant while 42,792 was the total cumulative votes cast in favour of the opposing candidates, showing that the majority voted against the 1st Appellant. That this went against the allegation that any conduct of the 1st Appellant affected the majority from voting for a candidate of their choice.

Mr. Lungu, learned co-counsel for the 1st Appellant, added that the court below misdirected itself on the burden and standard of proof in election petitions, as set out in various case authorities. Referring to page 52 of the record of appeal, Mr. Lungu submitted that the learned trial Judge misdirected himself when he appeared to reverse the burden of proof on the allegation

of use of Government resources, placing the burden of proof on the 1st Appellant to show the existence of guidelines concerning use of Government resources in campaigns. It was submitted that it ought to have been the 1st Respondent (as petitioner) to adduce evidence on the use of Government resources and that the finding of the court below was liable to reversal.

On the allegation of violence, learned counsel Mr. Lungu submitted that a case falls or stands on its pleadings and that the court below found as a fact that there was no evidence that it was the 1st Appellant who sponsored the violent cadres that attacked the UPND campaign bus. That the allegation having not been proved, the court below misdirected itself when it continued to delve into the matter as regards the widespread nature of the violence.

Learned counsel for the 2nd Appellant, Mr. Mwala, relied entirely on the 2nd Appellant's written heads of argument filed on 23rd January, 2017.

In opposing this appeal, the 1st Respondent relied on heads of argument filed on 20th January, 2017. In regard to ground

one, the 1st Respondent submitted that by her own admission, the 1st Appellant bad stated that she was a Government Minister in the Ministry of Gender, holding a constitutional office and, therefore, a public servant. Our attention was drawn to the 1st Respondent's submissions in the court below at pages 377 to 378 of the record of appeal and to our judgment in **Steven Katuka.**[4] It was contended that the candidature of the 1stAppellant in the 11th August, 2016 general election was unlawful as she had failed to comply with the Constitution by failing to vacate her ministerial position before she decided to stand as a candidate in Munali Constituency. That the 1st Appellant could not benefit from a contravention of the law, citing **Valsamos Koufou v Anthon Greenberg**[13] for authority.

And quoting extensively from the case of **Mabenga v Wina**[1] for support, it was the 1st Respondent's contention that the 1st Appellant had admitted to getting an unlawful salary from May to July 2016. Further, that there was abundant evidence on record that the 1st Appellant had used a Government vehicle in her campaigns and occupied a Government house, contrary to regulation 15(1)(k) and (l) of the Electoral Code of Conduct. It

was contended that the learned trial Judge was on firm ground when he found that the 1st Appellant used Government resources and that that affected the 1st Respondent who had no access to such resources.

In regard to ground two, the 1st Respondent began by recounting some of the testimonies on the incident of 8th August, 2016 in Mtendere and discounted the 1st Appellant's assertion that the UPND had engaged in acts of violence. Referring to the testimony of RW4 and the 1st Appellant regarding an alleged act of violence by UPND cadres on 10th August, 2016 at RW4's house and in which the 1st Appellant's vehicle and another vehicle were allegedly damaged, it was the 1st Respondent's contention that the alleged attack by the UPND was a manufactured story. It was submitted that the petition was filed on 26th August, 2016 and the report was made on 27th September, 2016. Further, that the police report at page 190 of the record of appeal made no reference to the 1st Appellant's Toyota Noah vehicle; that in essence no report was made to the police. It was the 1st Respondent's position that the foregoing confirmed the evidence of RW10 at page 948 of the record of appeal that no other

incidence of violence was reported in Munali Constituency apart from the reported incident of 8th August, 2016.

In response to the 1st Appellant's assertion that the findings of the court below at page J53 of the judgment, to the effect that the UPND rally at Mahatma Ghandi grounds failed because of fear of an attack by PF cadres, were not supported by any evidence, it was the 1st Respondent's contention that the 2nd Appellant's own witness, RW10, confirmed that the 2nd Appellant learnt of the 8th August, 2016 incident through the media. It was submitted that many voters in Munali Constituency saw or heard of the violence that occurred on that day and were prevented from electing a candidate of their choice.

On the 1st Appellant's claim that she had no knowledge of the persons who sponsored the violence of 8th August, 2016, the 1st Respondent referred to the case of **Mlewa v Wightman**[14] where it was held that the question of personal knowledge was irrelevant. It was the 1st Respondent's position that the principles of the electoral system and process are well stated in section 3(a), (b), (c) and (d) of the Act, citing the case of **Mulondwe Muzungu v Eliot Kamondo**[7] and the South African case of **August v**

Electoral Commission and others[15] which, according to the 1st Respondent, emphasized the importance of universal adult suffrage and free and fair elections.

On the question of an appellate court interfering with the findings of the trial court, the 1st Respondent drew our attention to the case of **Augustine Kapembwa and another v Attorney General**[16] which outlines when an appellate court can interfere with the findings of the trial court.

Learned counsel for the 1st Respondent, Mr. Phiri, opened his oral submissions by discounting the 1st Appellant's understanding of this Court's holding in **Giles Chomba Yamba Yamba**[11] as it applied to the allegation of abuse of Government resources. Referring to page J75 of that judgment, Mr. Phiri quoted the following excerpt:

> **"It should be borne in mind that that decision came two days before the elections of 11th August, 2016. Its effect, therefore, is post 9th August, 2016, and not before."**

Mr. Phiri argued that understanding the decision hinged on the word "effect"; that the Court was referring to the order directed to the ministers to pay back salaries and that the 1st Respondent failed to see how that could he interpreted to mean

that the stay of the Ministers in office post dissolution of Parliament was legal. That the order to pay back was a result of the illegality that was perpetrated.

Counsel was brief in his response to ground two of the appeal, arguing that though the 1st Appellant was, admittedly, not seen in the video directing the attack on the bus, ground two should fail as the aspect of her election agents had not been specifically addressed. When probed by the Court to show, from the record, evidence linking the 1st Appellant or her election agents to the attack, Mr. Phiri conceded that he had not seen any direct evidence of her sponsorship of violence on the record but maintained that the link could only be seen to the extent that the 1st Appellant benefited from what happened because the incident had an effect on the election.

In opposing ground three, counsel submitted that the court below was clear in stating that the 1st Respondent was denied entry into the polling station and that this was unfair treatment. That as the record showed, this was not rebutted. We were referred to page 61 of the record of appeal where the court below held that there was a demonstration of double standards to the

detriment of the 1st Respondent who by law had a right to access the polling station.

On ground four, Mr. Phiri submitted that the 1st Respondent had evidence of the non-availability of GEN12 forms at 14 polling stations. Counsel argued that the GEN12 form was a primary document for recording results from polling stations in the 2016 elections and that the absence of the form at 14 polling stations would have a material effect on any election. Mr. Phiri referred the Court to a portion of the judgment of the court below at page 65 of the record of appeal where the learned trial Judge lamented the alleged lapses on the part of the 2nd Appellant. That the non-availability of Form GEN12 was a finding of fact that was proved.

In regard to the 1st Appellant's assertion that the trial Judge had shifted the burden of proof on the allegation of abuse of Government resources, Mr. Phiri referred to the following excerpt of the judgment of the court below at page 52 of the record of appeal:

> **"In the contrast, there is evidence from the Petitioner that the 1st Respondent was seen driven in a government motor vehicle with a Zambian flag flying during campaigns."**

Mr. Phiri contended that there was no proposition advanced from the 1st Appellant as to why the finding should be interfered with and we were urged to dismiss the appeal.

In supplementing the arguments, Dr. Mbushi submitted in regard to ground one that evidence from the 1st Respondent's witnesses, such as PW5 who allegedly saw the 1st Appellant in a Government vehicle with a flag, supported the fact of the 1st Appellant's abuse of Government resources. Further, that the 1st Appellant, in her own words, informed the court below that she was living in a Government house and was receiving a salary from which she paid her workers, citing the case of **Mabenga v Wina**[1] for support. Dr. Mbushi contended that the 1st Appellant did use public resources as the evidence to that effect was not challenged. And in regard to the attack on the UPND campaign bus on 8th August, 2016, it was Dr. Mbushi's contention that, as confirmed by RW10, the incident was known throughout the constituency. That violence is illegal no matter the perpetrator and urged this Court to take the issue of violence very seriously.

Learned counsel Mr. Mweemba addressed grounds four, two and one in that order. He opened his submissions by stating

that it was not the position of the law that if it could not be proved that a candidate or their agents was involved in an illegality, the election could not be annulled. Mr. Mweemba argued that Zambia was a democracy and that the interpretation of the law must be looked at in the context of democracy and the fundamental principles that govern it. He contended that the Electoral Process Act could not be read in isolation but should be interpreted in the context of Zambia as a constitutional democracy, citing the Kenyan case of **Raila Amolo Odinga and another v Independent Electoral and Boundaries Commission and 2 others.**[17] Mr. Mweemba argued that one of the fundamental principles of democracy, which also applies to elections, is citizen participation and sovereignty of the people. That people have a right to participate without being intimidated. Counsel also cited government accountability and transparency and the principle of regular, free and fair elections.

Submitting on ground four of the appeal, Mr. Mweemba argued that the law does not provide for quantitative analysis as to whether the election was materially affected or not, hence the use of the word 'may' in section 97 of the Act. Counsel referred

us to Articles 8 and 9 of the Constitution on the national values and principles, that section 97 of the Act should be interpreted in light of the same.

Reiterating his point that there was nothing in the Act that suggested that if a candidate was not linked to a malpractice the election could not be annulled, Mr. Mweemba argued that the 8th August, 2016 attack on the UPND bus in Mtendere was widely known as it was in both the print and electronic media. That the 2nd Appellant was part of the proceedings and if it was found wanting, the election could still be nullified even if the 1st Respondent had not proved that the 1st Appellant or her agents were liable. Counsel contended that the court has the power to nullify an election if the principles of democracy are breached.

In opposing ground one, Mr. Mweemba contended that the Ministers' stay in office was illegal from the time Parliament was dissolved. That as the record showed, the 1st Appellant had conceded to remaining in office after the dissolution of Parliament. Counsel wound up his submissions by urging this Court not to interfere with the judgment of the court below, citing

(1964)

Wilson Masauso Zulu v Avondale Housing Project Limited[18] for authority.

The 1st Appellant filed heads of argument in reply on 23rd February, 2017. In regard to the 1st Respondent's assertion that the 1st Appellant was not qualified to stand as Member of Parliament for Munali Constituency because she was a constitutional office holder, the 1st Appellant cited Article 266 of the Constitution to argue that Ministers and Members of Parliament were excluded from the definition of 'public officer' and 'constitutional office holder'. It was submitted that Article 266 aforesaid puts it beyond doubt that not all persons acting in or holding a public office are public officers for purposes of interpreting the provisions of the Constitution. The 1st Appellant argued that the 1st Respondent's assertion was misconceived and should be dismissed. Further, it was the 1st Appellant's contention that, contrary to the 1st Respondent's assertion, there is nowhere in the record, including the portions relied on by the 1st Respondent, where the 1st Appellant referred to herself as a constitutional officer holder or public servant, thus triggering the provisions of Article 70(2)(b) of the Constitution. That the 1st

Appellant's evidence was simply that she served as Minister of Gender following the dissolution of Parliament, up to the delivery of the judgment of this Court in **Steven Katuka.**[4] It was further contended that the 1st Respondent's proposition on the alleged failure by the 1st Appellant to vacate her ministerial position before deciding to contest the Munali seat was not supported by any authority.

On the 1st Respondent's comparison of the present case and **Mabenga v Wina**[1] on the question of abuse of Government resources in election campaigns, it was the 1st Appellant's contention that the issue was not one of access to public resources but the use of such resources for campaign purposes. That regulation 7(1)(l) and 7(2) relied on in **Mabenga v Wina**[1] was couched in terms similar to regulation 15(1)(k) of the current Electoral Code of Conduct. It was submitted that the 1st Respondent had not addressed the use of Government facilities for campaign purposes and, therefore, no parallel could be made between the present case and **Mabenga v Wina**[1].

In regard to issues arising in ground two, it was the 1st Appellant's contention that it was the court below in its judgment

that found the UPND liable for perpetration of violence. That if the 1st Respondent wished to challenge this finding, she ought to have filed a cross-appeal in accordance with the rules of this Court. As the 1st Respondent had not done so, it was submitted that arguments concerning that finding ought to be dismissed. In the alternative, the 1st Appellant submitted that RW10 did not testify that the UPND did not engage in acts of violence in Munali Constituency. That to the contrary, RW10's evidence was that the 2nd Appellant had reached the conclusion that supporters of the PF and the UNPD had been involved in a violent incident on 8th August, 2016 in Mtendere. Further, that RW10 did not testify that the PF supporters were the perpetrators and UNPD supporters the victims. That the 2nd Appellant admonished both the PF and the UPND.

In regard to the 1st Respondent's argument that RW10's evidence confirmed media reports on the 8th August, 2016 incident, it was the 1st Appellant's position that RW10 did not indicate who received the media report, which media or news outlets and access by the majority of the voters of the said media in Munali constituency. Also, that RW10 did not indicate what

was reported and how and whether any video or photographs of anything relating to the incident were published or televised. The 1st Appellant submitted that it is the duty of a petitioner to adduce evidence to a high degree of convincing clarity that the majority of voters in a constituency were or may have been affected by the misconduct alleged and that, in this case, the 1st Respondent had failed to adduce evidence to that effect.

To augment, State Counsel Mutale contended that the judgment of the court below ought to be set aside. He submitted that the 1st Respondent did not adduce any evidence of abuse of Government resources and urged the Court to discredit the evidence of PW5. And on the 8th August, 2016 attack on the UPND campaign bus, Mr. Mutale, SC., argued that no witness was called to identify the perpetrators of the violence. That even if the perpetrators were identifiable, it would have been pertinent for the court to ascertain whether they were the legitimate election agents of the 1st Appellant as defined by the Act.

State Counsel Mr. Silwamba, supplementing, referred this Court to section 97(2)(a)(ii) of the Act, arguing that the law was clear that to nullify an election the malpractice must be

committed by the candidate or her agents and that the majority must have been prevented from electing a candidate of their choice. Further, that section 97(3) of the Act is clear on the role of an election agent. Our attention was also drawn to the following excerpt of the judgment of the court below at page 63 of the record of appeal:

> **"The allegation concerning lack of or the inadequacy of Form Gen12 did not affect the Petitioner alone. Suffice to state that it affected all the participants in that Parliamentary race."**

Mr. Silwamba, SC, submitted that the 1st Respondent had not cross-appealed that finding of the court below. He submitted that this Court addressed the issue of Form GEN12 in **Giles Chomba Yamba Yamba.**[11]

Mr. Lungu added that the **Steven Katuka**[4] case distinguished between whether the Ministers' stay in office after dissolution of parliament was void or voidable and did not create an irrebuttable presumption on the abuse of Government resources. He contended that the 1st Respondent still had to adduce evidence that Government resources were abused. And on the 8th August, 2016 incident of violence, counsel submitted that nullification on the basis of generalized violence was not

pleaded in the court below and the 1st Respondent was not entitled to go outside the pleadings. And in regard to determining the effect on the majority, Mr. Lungu discounted the 1st Respondent's argument that it was not possible to quantify the claim that the majority of voters were precluded from electing their preferred candidate, citing the case of **Mubika Mubika v Poniso Njeulu**[6] for support.

Mr. Mwala, on behalf of the 2nd Appellant, submitted that the 2nd Appellant called in a witness, RW12, who testified that Form GEN12 was provided at every polling station in excess of 20 copies per election. Mr. Mwala argued that the court below glossed over RW12's evidence and chose to accept the evidence of PW5 who, in his view, was discredited. Drawing our attention to page 65 of the record of appeal, Mr. Mwala submitted that the court below misdirected itself in finding that the failure to countersign a GEN12 form amounted to a failure to provide the document at polling stations, citing section 49(2) of the Electoral Process (General) Regulations and the case of **Mazoka v Mwanawasa**[3] for support.

We are grateful to the parties for the detailed submissions advanced in this appeal. We have carefully considered the grounds of appeal and the written and oral submissions for and against this appeal. We have also given careful consideration to the judgment of the court below and the evidence on record. From the outset, it is clear to us that this appeal attacks the judgment of the court below on aspects of both law and fact. The key question in this appeal is whether the learned Judge in the court below was on firm ground when he found that all the allegations brought against the 1st Appellant and the 2nd Appellant were proved in accordance with the requirements of the current electoral laws based on which he proceeded to nullify the election of the 1st Appellant as Member of Parliament for Munali Constituency in the 11th August, 2016 general elections.

This Judgment comes at a time when this Court has had occasion to pronounce itself on key aspects of the new electoral legal regime as espoused by the Act. That notwithstanding, before we proceed to address the grounds of appeal in the instant case, we find it imperative, and in order to put things in context, to

restate our position on the current state of the law governing the nullification of elections in Zambia.

Section 97(2) of the Act is central to the judicial resolution of electoral disputes. Section 97(2)(a) is couched in the following terms:

> **"97. (2). An 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 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 the 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;"**

As earlier stated, we have, in unequivocal terms, stated our position on the above provisions. 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. Sections 81 to 95 in Part VIII of the Act and also relevant provisions of the Electoral Code of Conduct outline the corrupt or illegal practices or misconduct in the electoral process.

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. Recently in **Austin Liato v Sitwala Sitwala**[19] we said:

> **"...it is not sufficient for a petitioner to prove only 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 prevented or may have prevented the majority of the voters in the constituency, district or ward from electing a candidate of their choice."**

We reaffirm the above position.

> "...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, therefore, that in this case where the petition has been brought under Constitutional provisions and would impact upon the governance of the nation..., no less a standard of proof is required. It follows also that the issues raised are required to be established to a fairly high degree of convincing clarity."

We have also expressed agreement with the sentiments expressed in **Brelsford James Gondwe v Catherine Namugala**[2] that:

> "The burden of establishing any one of 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 ground(s) must be established to the required standard in election petitions namely a fairly high degree of convincing clarity."

It is the foregoing principles and law that will guide this Court in determining the issues raised in this appeal.

Ground one is to the effect that the learned Judge in the court below erred in law and in fact when he held that the continued stay of the 1st Appellant in office as a Cabinet Minister created an irrebuttable presumption of the abuse of Government resources and that such abuse materially affected the outcome of the election in Munali Constituency. The 1st Respondent submitted that the court below was on firm ground when it found

that the 1st Appellant had used Government resources during the campaign and that that adversely affected the 1st Respondent. That by her own admission, the 1st Appellant stated that she was a Minister in the Ministry of Gender and, thus, she had failed to comply with the Constitution when she did not vacate her ministerial position before standing as a candidate in Munali Constituency. Further, that there was abundant evidence on record that the 1st Appellant had used a Government vehicle and that she was occupying a Government house, contrary to regulation 15(1)(k) of the Electoral Code of Conduct.

However, under cross-examination as shown at page 604 of the record of appeal, the 1st Respondent failed to adduce evidence that the 1st Appellant did in fact use her ministerial salary and allowances in the campaign. And as shown at page 633 of the record of appeal, the 1st Respondent could not recall the registration number of the Government vehicle she allegedly saw the 1st Appellant in and could not state the name of the Government driver allegedly used by the 1st Appellant during the campaign.

It was also the 1st Respondent's testimony that the 1st Appellant, as Minister, inspected on-going Government projects in the constituency, although, as shown at page 590 of the record of appeal, the 1st Respondent conceded that she was aware of some of the developmental projects the 1st Appellant initiated since her election as Member of Parliament in 2011. The 1st Respondent also testified that she was denied permission by the police to hold meetings while the 1st Appellant was allowed to freely have public meetings because she was a Minister.

PW5, Wendy Lwendo Michelo, a polling agent, testified that during the campaign she saw the 1st Appellant being driven in a white Government vehicle with a flag on it in Kaunda Square Stage 2 and that a Noah bus in PF colours was following behind. As shown at page 737 of the record of appeal, PW5 described the alleged Government vehicle as "white in colour similar to a Hardbody" but conceded to not having details of the driver. At page 730 of the record of appeal, PW5 stated that the 1st Appellant distributed chitenge materials at a house.

In rebuttal, the 1st Appellant denied using public resources in her campaign. She argued that the 1st Respondent failed to

adduce cogent evidence that the 1st Appellant abused Government resources in the course of her campaign for the Munali parliamentary seat. At page 874 of the record of appeal, the 1st Appellant testified that she knew the regulations and rules and did not remember using Government transport, fuel or driver on any day. It was her testimony that her salary was meagre and she raised K100,000 from well-wishers and also used her gratuity from Parliament in the sum of K88,000 to fund her campaign. The 1st Appellant testified that she had two personal vehicles, a Toyota Noah and a Toyota Regius, lined up for her campaign and did not use her official Government vehicle, a gray Land Rover Discovery.

RW1, Steven Chanda, the 1st Appellant's Campaign Strategist, RW2, Humphrey Tembo, a business man and RW3, Martin Mwanza, in charge of planning, also testified that the 1st Appellant did not use Government transport during the campaign as alleged but that she had designated her two personal vehicles to the campaign. RW4, Watson Mtonga, also testified that the 1st Appellant did not use a Government vehicle or driver during the campaign. RW1 added that there were other personal vehicles

from volunteers used in the 1st Appellant's campaign and that RW2 or himself drove the 1st Appellant during the campaign.

We have carefully considered the submissions on this ground and the evidence on record. From our perspective, the key question that falls for our consideration is whether, on the totality of the evidence on this aspect, the 1st Appellant, in her capacity as Minister, utilized public or Government resources towards her campaign contrary to the provisions of the electoral laws and regulations and that such malpractice affected the majority of the electorate in Munali Constituency as required by section 97(2)(a) of the Act.

Regulation 15(1)(k) of the Electoral Code of Conduct provides as follows:

> **"15(1) A person shall not –**
>
> ...
>
> **(k) use Governmental 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;"**

The provision is clear. Use of Government or public resources by any person in the course of a campaign is proscribed except for the President and the Vice President. The allegation against the 1st Appellant is essentially that she fell

afoul of regulation 15(1)(k) aforesaid in her pursuit of the Munali parliamentary seat.

According to the record, the learned Judge in the court below was of the view that the lacuna in the 1st Appellant's testimony was that he had not seen any guideline to preclude a minister from using Government resources during the campaigns. The specific words of the learned trial Judge at page 52 of the record of appeal were as follows:

> **"The lacuna in her evidence is that I have not seen any government guideline to preclude a Minister from using government resources such as a government motor vehicle during campaigns. Ministers had government resources at their disposal...."**

The 1st Appellant submitted that the court below misdirected itself when it shifted the burden of proof on the allegation that she used a Government vehicle in the campaign; also, that there were discrepancies in the evidence regarding the make of the Government vehicle allegedly used by the 1st Appellant. Further, that the trial Judge did not apply the correct standard of proof in election petitions and relied on presumptions in finding that the allegations were proved. The 1st Appellant further argued that the court below misapprehended the holding

of this Court in **Steven Katuka**[4], which tainted its reasoning and that it failed to distinguish between void and voidable acts.

We note that at page 48 of the record of appeal, the learned trial Judge reminded himself of the applicable principles on the burden and standard of proof in election petitions. His exact words were:

> **"I now remind myself that the burden of proof rests on the Petitioner. In an election petition like the one in casu, the standard of proof required though a civil matter is higher than 'on a balance of probabilities' in order that the allegations raised must be proved to a fairly high degree of convincing clarity."**

We agree with the learned trial Judge on the correct position of Zambian jurisprudence as far as election petitions are concerned. However, we also note that the 1st Appellant argued that in considering the issues in ground one, the learned trial Judge shifted the burden of proof from the 1st Respondent, the petitioner in the court below, to the 1st Appellant, who was the respondent. Mr. Mutale, SC, for the 1st Appellant, drew our attention to this Court's decision in **Abiud Kawangu v Elijah Muchima**[12] where we said at page J19 to J20:

> **"We agree with the Respondent's submission that the burden lay on the Appellant as Petitioner in the court below to prove the allegations made in his petition against the Respondent. This is because the one alleging... carries the burden of proving all the allegations. He must**

> prove the allegations to the required standard with cogent evidence otherwise no judgment will be entered in his favour."

We reaffirm that position here. In particular, we emphasise that the burden resting squarely on the shoulders of the person alleging is to adduce cogent evidence to prove the allegation, without which judgment will not go in his or her favour. In the instant case, the 1st Respondent is the one that brought the allegation against the 1st Appellant that she abused Government resources to propel her campaign for the Munali parliamentary seat. Thus, it was incumbent upon the 1st Respondent to demonstrate, with convincing clarity by way of cogent evidence, the affirmative of the allegation to the effect that the 1st Appellant committed electoral infractions contrary to regulation 15(1)(k) of the Electoral Code of Conduct. We, therefore, find it odd that the trial Judge placed the burden on the 1st Appellant to prove that indeed she did not use or abuse Government or public resources in her bid to secure the Munali parliamentary seat. The learned trial Judge clearly misdirected himself despite having reminded himself of the settled position of the law on who bore the burden of proof. At page 52 of the record of appeal, the trial Judge said:

> "Ministers had government resources at their disposal. It was left solely to the Ministers themselves whether or not to avail themselves of

> those government resources, of which the 1st Respondent denies having used government resources."

Evidence on the record shows, as the trial Judge acknowledged, that the 1st Appellant denied availing herself of Government resources in her campaign. We have not seen any concrete evidence on the record from the 1st Respondent to show, with convincing clarity, that the 1st Appellant, despite her denials, actually abused Government resources as alleged and, as a consequence, committed a breach of the law prohibiting abuse of Government resources in election campaigns.

Our firm view is that the 1st Respondent failed to establish with convincing clarity that the 1st Appellant abused Government resources in her campaign, contrary to regulation 15(1)(k) of the Code of Conduct. Further, there was no evidence adduced by the 1st Respondent to show how the alleged misconduct affected the majority of the electorate. The 1st Respondent's evidence on this allegation clearly failed the test required in section 97(2)(a) of the Act and we, accordingly, reverse the finding of the court below on this aspect.

On the alleged use of a Government vehicle by the 1st Appellant during the campaign, evidence on record shows that

there were discrepancies on the type of Government vehicle the 1st Appellant allegedly used. At page 589 of the record of appeal, the 1st Respondent could not say for certain what kind of Government vehicle she saw the 1st Appellant in but said it was white in colour and "looked like a Prado VX." PW5, under cross-examination at page 737 of the record of appeal, described it as "white in colour similar to a Hardbody." The 1st Appellant herself testified at page 877 of the record that her official vehicle was a gray Land Rover Discovery and her personal-to-holder vehicle was a gold Toyota GX. The learned trial Judge's position, as stated at page 52 of the record of appeal, was as follows:

> **"Truly, the 1st Respondent had her personal motor vehicles, namely, a Toyota Noah and a Toyota Regius which she used during her campaigns but I have not seen evidence to show that she truly did not use a government motor vehicle as well."** (emphasis added)

Clearly, the learned trial Judge accepted the 1st Appellant's evidence and made a finding of fact that she had her personal vehicles which she used in her campaign. What is perplexing to us is that the trial Judge also expected the 1st Appellant to demonstrate that she truly did not use a Government vehicle as well. Again, this was a clear reversal of the burden of proof on this aspect and a misdirection on the part of the trial Judge. We

reiterate our position that the 1st Respondent bore the burden of proof and the onus was on her to prove her allegations with convincing clarity. Given the clear discrepancies in her testimony and that of her key witness PW5, as to the type of Government vehicle allegedly used by the 1st Appellant and that no evidence was adduced on the identity of the alleged Government driver, we find that the 1st Respondent did not discharge that burden. In the absence of clear and convincing evidence on this point, we cannot support the finding of the court below.

Another aspect on this ground is that the 1st Appellant used her salary as Cabinet Minister towards the campaign. The 1st Respondent, at page 604 under cross-examination could not specifically point to what the 1st Appellant used her salary and allowances on during the campaign, insisting only that she knew as a fact that the 1st Appellant continued to get her salary despite being adopted as a candidate for Munali constituency; this, she said, was unfair. In rebuttal, the 1st Appellant's position was that she used her gratuity from Parliament and funds from well-

wishers to finance her campaign; that she used her salary to pay domestic workers and for personal upkeep.

The position of the court below at pages 53 to 54 of the record of appeal was as follows:

> "Indeed that was an admission that the salary which she was paid was spent on her campaigns. She was paid that salary as a Minister, the office which she held illegally. To the extent that she held the office of Minister illegally it follows that even the salaries which accrued to her were paid illegally, she was not entitled to that money. Those salaries were government money which she used to fund her campaigns." (emphasis added)

It is not in dispute that the 1st Appellant held the position of Cabinet Minister during the 2016 election campaign period. However, the flaw in the learned trial Judge's finding is that it was made on a mere assumption that because the 1st Appellant was a Cabinet Minister then she must have used her earnings towards the campaign. As we have noted already, the 1st Respondent in her testimony could not say how the 1st Appellant used her salary, except to maintain that she knew as a fact that the 1st Appellant was receiving her salary. We have also not seen any evidence on record to demonstrate that the alleged malpractice prevented or may have prevented the majority of the electorate from electing their preferred candidate.

Taking into account the evidence before the court below, we find that the requirements of section 97(2)(a) of the Act were not satisfied in regard to the issues raised under this ground. We find that ground one of this appeal has merit. We accordingly reverse the finding of the court below and hold that the 1st Respondent did not prove, with convincing clarity, that the 1st Appellant abused government or public resources in her campaign as alleged.

In ground two, the 1st Appellant contends that the court below erred in law and in fact when it annulled the poll in Munali Constituency based on the attack of a UPND campaign bus in Mtendere on 8th August, 2016 without evidence linking the 1st Appellant or her election agent to the said act of violence. The 1st Respondent's testimony was to the effect that as her campaign entourage approached Mtendere on 8th August, 2016, they saw "a group of PF members" running towards their direction and the other vehicles in her procession scampered in all directions. The male cadres on the bus tried to block the PF supporters but were no match for them and the alleged PF members came onto the bus and attacked the 1st Respondent and threatened to rape her.

The 1st Respondent testified that she lost consciousness; that when she regained consciousness, she found herself in a taxi surrounded by female residents of the area; that the PF cadres regrouped and came towards the taxi and the taxi driver abandoned her at a house about 100 metres from the scene of the bus attack. The 1st Respondent testified that some police officers came on the scene and later she ended up at Levy Mwanawasa Hospital.

PW2, Christopher Hamoonga, testified that on 8th August, 2016, before the UPND campaign bus reached Mtendere main market, a group of people he described as clad in PF regalia run towards the bus armed with stones and machetes. That he jumped off the bus and went to observe the incident from a distance and heard the attackers talking about raping the 1st Respondent and that they removed UPND campaign materials from the bus. In re-examination, as shown at page 666 of the record, PW2 stated that the distance from the scene of the attack to Mtendere East where the 1st Appellant was holding meetings was about three to four kilometres. PW3, Joseph Chilekwa, filmed the attack.

PW6, Kelvin Pilati Hamwete's testimony was that he was at a bus station waiting for a friend when he witnessed PF youths organizing themselves and giving each other t-shirts. He telephoned the UPND Youth Chairperson who advised him to wait at the station. Shortly afterwards PW6 saw what he described as a "small Canter" from which was playing a UPND party song; that when it reached the market, the PF youths chased the vehicle. Then he was informed that the UPND bus had been attacked and that one person had been killed.

In her testimony, the 1st Appellant denied any connection to, or knowledge of the attack on the UPND campaign bus. She asserted that she was in Mtendere East, about five kilometres away, when RW6, Rachel Phiri Nyangu, called her to warn her not to proceed to Mtendere because of the violent incident.

RW1 testified that the 1st Appellant did not sponsor the attack on the UPND campaign bus; that the 1st Appellant was five kilometres away in Mtendere East at the material time. RW2's evidence was that he was with the 1st Appellant in Mtendere East when she received a telephone call on the incident and abandoned her plans to meet marketeers in Mtendere. RW3's

testimony was to the effect that on 8th August, 2016, the 1st Appellant planned meetings in Mtendere and Mtendere East. That the 1st Appellant was in Mtendere East conducting door-to-door meetings when her team received information about the violent incident in Mtendere and the planned meetings were abandoned.

RW4 also testified that on the material day, he was at Mtendere market waiting for the 1st Appellant, who was in Mtendere East conducting door-to-door meetings; that the 1st Appellant was scheduled to meet some women at the market to lobby for their support. RW4 stated that he received a telephone call from RW6 informing him about the incident and that she had communicated to the 1st Appellant and RW1. That the planned meeting at Mtendere market was then abandoned. RW6 testified that on 8th August, 2016 she saw a red double decker bus coming from the direction of Kabulonga. That the bus stopped and three people clad in UPND regalia alighted and started hurling stones at people who were on the road side. She confirmed calling RW1, RW4 and the 1st Appellant, who informed

her that she (the 1st Appellant) was in Mtendere East addressing a small meeting.

As the record of appeal shows at page 922, RW10, Crispin Nasilele Akufuna, Public Relations Manager for the 2nd Appellant, testified that in July 2016, the 2nd Appellant suspended campaigns in Lusaka due to rising levels of intolerance which escalated into violence, including loss of life and damage to property. That the suspension of campaigns was meant to remind political parties of their obligations under the Electoral Code of Conduct. RW10 also testified that the 2nd Appellant strongly condemned the violence in Mtendere in a national address, urging both the PF and the UPND to remind their supporters not to engage in violence.

We have viewed the video evidence and given careful consideration to the submissions and the evidence on record on this ground of appeal. As the learned Judge in the court below rightly observed, it is not in dispute that on the afternoon of 8th August, 2016, violence erupted in Mtendere in which a UPND campaign bus and its occupants came under attack. What is in dispute is whether or not the 1st Appellant perpetrated the violent

act against the 1st Respondent and, as a consequence, violated the electoral laws and regulations.

In order for us to appreciate the real issue in controversy, we find it necessary to restate the allegation as it appeared in paragraph 5(ii) of the petition as shown at page 73 of the record of appeal and which reads as follows:

> **"That on the 8th August 2016 on or about 15:00 hours, she sponsored violent cadres in Mtendere and attacked us and destroyed the party campaign bus."**

The allegation in paragraph 5(ii) of the petition is very specific and unequivocal. In our understanding, the 1st Respondent clearly claimed that the 1st Appellant sponsored the attack on the UPND campaign bus on 8th August, 2016 resulting in its destruction. According to the **Concise Oxford English Dictionary** a sponsor is, *inter alia*, a person taking official responsibility for the actions of another. The **Pocket Oxford Dictionary & Thesaurus** includes the words "backer", "promoter", "supporter" and "contributor" as synonyms of the word "sponsor". In effect, therefore, the allegation of the 1st Respondent was that the 1st Appellant backed, promoted or contributed to the violent attack on the UPND campaign bus.

Regulation 15(1)(a) of the Electoral Code of Conduct states:

> "A person shall not -
>
> (a) cause violence or use any language or engage in any conduct which leads or is likely to lead to violence or intimidation during an election campaign or election;"

Also, section 83(1)(g) of the Act says:

> "A person shall not directly or indirectly, by oneself or through any other person –
>
> ...
>
> (g) unlawfully prevent the holding of any political meeting, march, demonstration or other political event."

The foregoing provisions show that the law proscribes violence, intimidation and similar conduct in the electoral process. The Act in section 83(1)(g) also prohibits the unlawful prevention, by any person, of the stated political activities. As we have already noted, it is not in dispute that the UPND campaign bus was attacked in Mtendere on 8th August, 2016. The key question, as we see it, is whether or not the violent attack on the UPND campaign bus was directly or indirectly perpetrated by the 1st Appellant as alleged by the 1st Respondent in her petition in the court below. At page 54 of the record of appeal, the learned trial Judge stated as follows:

> "There is no dispute that the UPND campaign bus was attacked in Mtendere on 8th August, 2016 at about 15.00 hrs. There are only two disputes. The first dispute is that the attackers of that UPND bus were sponsored by the 1st Respondent. The 1st Respondent vehemently

> denied sponsoring cadres to attack that UPND campaign bus. I have seen no evidence to show or even to suggest that the 1st Respondent sponsored cadres to attack that UPND campaign bus." (emphasis ours)

It is unequivocal from the holding of the learned trial Judge that, though the attack on the UPND campaign bus happened, there was no evidence to link the 1st Appellant, or even to suggest her connection or contribution, to the violent incident. We have also carefully searched the record on this aspect and we have not seen evidence connecting the 1st Appellant to the incident.

As we noted *supra*, the first requirement in section 97(2)(a) of the Act is for the petitioner in an election petition to prove, with convincing clarity, and on the basis of cogent evidence, that the candidate whose election is disputed engaged in a corrupt or illegal practice or other misconduct in connection with the election. In the instant case, the court below found no evidence connecting the 1st Appellant to the attack on the UPND campaign bus. The learned Judge went as far as stating that there was nothing to even suggest that the 1st Appellant conducted herself as alleged by the 1st Respondent. None of the witnesses, including the 1st Respondent herself, proffered evidence directly addressing the allegation as it was framed in the petition. All the

testimony was to the effect that violence had erupted in Mtendere on the afternoon of 8th August, 2016 in which the UPND campaign bus and its occupants were attacked by alleged PF supporters. At page 49 of the record of appeal, the learned trial Judge reminded himself that the petitioner's evidence must support the pleadings which are in the petition. Citing **Saul Zulu v Victoria Kalima,**[20] the trial Judge said:

> **"The Petitioner is not allowed to bring in any evidence other than the evidence which is connected to the pleadings and goes to support those pleadings. Put simply, pleadings in an election petition are allegations by the Petitioner against the Respondent(s). What this means is that the Petitioner cannot go at sea, the Petitioner is restricted only to the evidence which is supportive of the allegations outlined in the petition. If the Petitioner or indeed any witness for the Petitioner adduces evidence which does not support the pleadings then that evidence is irrelevant and inadmissible to the extent of its irrelevancy."**

And referring to the cases of **Michael Mabenga v Sikota Wina,**[1] **Brelsford James Gondwe v Catherine Namugala**[2] and **Anderson Mazoka v Levy Mwanawasa,**[3] the trial Judge categorically said:

> **"What this means is that I must look out only for evidence which supports the pleadings in the petition."**

We have carefully perused the record and, having viewed the video which was availed to us on the violence in Mtendere on 8th August, 2016, we find that there is no evidence supporting the allegation as couched in paragraph 5(ii) of the petition as shown

at page 73 of the record of appeal, that the 1st Appellant sponsored violent cadres to attack the 1st Respondent's campaign bus.

The next question that arises is, if the 1st Appellant was not personally involved, could she still be culpable indirectly? Under section 97(2)(a)(ii) of the Act, an election can be annulled on account of a corrupt or illegal practice or other misconduct committed in connection with the election "with the knowledge and consent or approval of a candidate or of that of a candidate's agent or polling agent." The 1st Appellant testified at pages 879 to 880 of the record of appeal that at the time of the attack on the UPND bus, she was conducting her own activities and did not know of the 1st Respondent's programme on the material day; that she just got a warning call from RW6 about what was happening in Mtendere and was advised not to proceed there for her planned campaign activities.

We have perused the record on this aspect and note that the 1st Respondent did not adduce any evidence to show that the 1st Appellant knew of the attack or that any of her duly appointed election agents were involved or knew or approved of the incident.

That there were violent clashes involving political party cadres and supporters during the 2016 campaign period is indisputable. The testimony of RW10 confirmed that there were rising levels of violence in Lusaka leading to the 2nd Appellant suspending campaigns in July, 2016. Also, that the 2nd Appellant strongly condemned the violence in Mtendere in a national address. At page 922 to 923 of the record of appeal, RW10 said:

> **"The Commission also condemned in very strong terms the violence that occurred specifically in Mtendere through a national address and cited both the ruling PF and the UPND to ensure that they as a party or parties followed provisions of the code of conduct and remind their supporters not to engage in violence."**

We wish to say from the outset that we frown upon and condemn all forms of electoral violence. We are of the firm view that elections must be conducted in a peaceful environment and in strict adherence to the Electoral Code of Conduct.

However, for purposes of the instant case, the key issue that falls for our consideration is whether or not the 1st Appellant, as a candidate, or through her election agents knew or approved of the violent incident of 8th August, 2016 in Mtendere. According to the court below, the 1st Appellant had "not sufficiently shown to the court what measures she took in order to cage her

supporters and/or agents whose violent conduct had then become a notorious fact..."

As already mentioned, the 1st Appellant, whose election was annulled by the court below, was a candidate for the PF party. At page 55 of the record of appeal, the court below said the following:

> **"The second dispute is that the attackers of that UPND campaign bus were PF cadres. The 1st Respondent denied that they were PF cadres. I do not agree with the 1st Respondent. I say so because there is evidence that the 1st Respondent was not at the scene of the attack....The 1st Respondent can, therefore, not know whether those attackers of the UPND campaign bus were PF or not because she was not at the scene of the attack and did not see the attackers for her to positively say they were not PF cadres."**

And at page 67 of the record of appeal, the trial Judge concluded thus:

> **"There is evidence that the campaigns in Munali Constituency Parliamentary elections were marred with violence. This violence reached a crescendo when on 8th August, 2016 the UPND campaign bus was attacked by PF cadres. Apart from saying that she was not at the scene of the attack and that she did not know of the attack, F/Nkandu Luo has not sufficiently shown to the court what measures she took in order to cage her supporters and/or agents whose violent conduct had then become a notorious fact even to the 1st Respondent."** (emphasis ours)

The 1st Appellant contended that the finding by the learned trial Judge was perverse and a misdirection as she could not be expected to demonstrate measures taken to "cage" her supporters

as she had no burden of proof to discharge and that the finding of the court below fell outside the ambit of the pleading and the law.

We agree with the 1st Appellant. From our perspective, it appears that the trial Judge not only reversed the burden of proof on this allegation but apportioned blame onto the 1st Appellant for violent acts that PF supporters or cadres generally could have been engaged in during the campaign. As a consequence, the trial Judge held that the allegation was proved.

The law as provided in section 97(2)(a)(ii) of the Act is very clear. In his evaluation of the evidence before him, and having initially determined that the 1st Appellant was not personally involved, the learned trial Judge should have carefully considered whether, in the totality of the evidence available to him on this aspect, the 1st Appellant, or her duly appointed election agent, was responsible for the attack on the UPND campaign bus within the terms of section 97(2)(a)(ii) of the Act. The trial Judge did not do that. Instead, we note that he held the allegation as proved simply on his finding that there were PF cadres involved and that the 1st Appellant did not show what measures she took to control

her supporters. This was a gross misdirection on the part of the learned trial Judge. Recently in **Crispin Siingwa v Stanley Kakubo,**[21] we cited with approval, as we have done in our earlier decisions, the holding of the Supreme Court in the case of **Lewanika v Chiluba**[5] wherein it said:

> "...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...an election agent has to be specifically so appointed." (emphasis added)

Section 2 of the Act defines "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."**

Also, regulation 55(1) of the Electoral Process (General) Regulations 2016 reads as follows:

> **"A candidate shall name an election agent in the nomination paper and, subject to the other provisions of this regulation, the person named shall be the election agent of the candidate for the purpose of that election."**

As we have stated above, in the holding of the court below as reflected at page 67 of the record of appeal, the trial Judge said the 1st Appellant needed to show "measures she took" to "cage her supporters and/or agents." State Counsel Mutale had submitted that no witness was called to identify the perpetrators of the violence and that even if they were identifiable, it was

pertinent for the court below to ascertain whether they were the legitimate election agents of the 1st Appellant as defined by the Act.

We agree. A careful perusal of the record reveals that the 1st Respondent did not adduce a shred of evidence to support the involvement of the 1st Appellant's duly appointed election agents in the violent act. Neither was it shown in evidence that the 1st Appellant or her election agents knew of the attack on the UPND campaign bus. According to the record, the 1st Appellant only became aware of what had transpired when she was informed by telephone.

That cadres or supporters of the PF were implicated in the attack is not enough to attach responsibility to the 1st Appellant or her duly appointed election agents and to annul the election on the basis of section 97(2)(a)(ii) of the Act. In **Richwell Siamunene v Sialubalo Gift**[22] we said the following:

> **"Mere proof that the UPND supporters were indeed involved in the said acts does not warrant an inference being drawn that the Respondent had directly or indirectly incited the UPND supporters to act as they did. To so hold would amount to speculation and it is not the duty of this Court to make assumptions based on nothing more than party membership and candidacy in an election."**

Our firm view is that, in the circumstances of the instant case, the threshold in section 97(2)(a)(ii) aforesaid was not reached. Considering the gravity of the allegation and taking into account the fact that the occurrence of the attack was not in dispute, the court below should have seriously assessed the evidence before it on this aspect in light of the clear requirements of section 97(2)(a)(ii). The 1st Respondent had brought to our attention the holding in **Mlewa v Wightman**[14] as reflected at page 424 of the record of appeal, to the effect that it does not matter who the wrongdoer is. Our firm position is that that argument is not tenable under the current electoral law as espoused in section 97(2) of the Act and we accordingly discount it.

Learned counsel Mr. Phiri, for the 1st Respondent, had submitted that though there was nothing on the record to show that the 1st Appellant sponsored the attack on the UNPD bus, ground two should still fail as the 1st Appellant benefitted from what happened because the incident had an effect on the election. We disagree. The onus was on the 1st Respondent, to demonstrate with convincing clarity, in terms of the current electoral law, that the 1st Appellant or her election agents were

directly or indirectly connected to the alleged violent act. In this regard, our views in **Richwell Siamunene v Siatubalo Gift**[22] were that:

> **"When section 83 is read with section 97, it is clear that the violence or threat of violence must be perpetrated by the candidate or with the candidate's knowledge and approval or consent or that of his election or polling agent. In order for the candidate to be liable for the illegal practice or misconduct, it must be shown to be that of his official agent; there must be proof to the required standard that he had both knowledge of it and approved or consented to it; or that his election or polling agent had knowledge and consented to or approved of it."**

We reaffirm that position.

We further find as untenable the argument by learned counsel Mr. Mweemba that the election could still be nullified as long as the 2nd Appellant was part of the proceedings even if the 1st Respondent had not proved that the 1st Appellant or her agents were liable for the attack on the campaign bus as alleged in the petition.

We agree with State Counsel Mutale that the 1st Respondent failed to adduce evidence that the 1st Appellant or any of her election agents were involved in attacking the 1st Respondent's campaign bus. Further, there was no evidence that the violence was with the 1st Appellant's knowledge, consent or approval or that of her agents. We also find that the learned trial Judge

veered from the specific allegation as contained in paragraph 5(ii) of the petition to hold that it had been proved, on the basis of which he nullified the election of the 1st Appellant. We accordingly reverse the finding of the court below and hold that, on the totality of the evidence on record, the 1st Respondent failed to prove the allegation and that the court below did not properly address itself to the correct position of the law on the issues surrounding the allegation. Ground two has merit and it succeeds.

Ground three for the 1st Appellant and ground two for the 2nd Appellant challenge the holding of the court below that the 1st Respondent was denied entry into Vera Chiluba School polling station and that the denial materially affected the outcome of the election in Munali Constituency. The 1st Respondent testified that at around 20:20 hours on poll day, she went to Vera Chiluba Polling Station in Mtendere. She stated that the 1st Appellant and one Kaizer Zulu were permitted to enter the polling station while the 1st Respondent and her delegation were denied entry by a police officer despite introducing herself as a candidate, a situation she characterized as unfair.

Under cross-examination, when referred to her allegation under paragraph 5(v) of the petition claiming that the 1st Appellant and Kaizer Zulu closed the gate to the polling station and prevented her and her agent from seeing her polling agents, the 1st Respondent conceded that the allegation was not correct. It was her testimony that the 1st Appellant was not responsible for the gate at Vera Chiluba Polling Station.

The 1st Appellant, in rebuttal, contended that the allegation by the 1st Respondent was not true and that Kaizer Zulu was not part of her campaign team. She stated that she had to beg the police and the 2nd Appellant's officers to allow her to enter the polling station.

RW3 testified that it was not possible to close the gate as alleged by the 1st Respondent as it was guarded by the police. RW12, Emmanuel Makulila, the returning officer for Munali Constituency, also testified that it was not possible for the 1st Appellant and Kaizer Zulu to close the gate. He stated that the law provided that polling opened and closed at 06:00 hours and 18:00 hours respectively. It was his further testimony that at Vera Chiluba polling station, there was a group of people who

wanted to vote after the close of the station; that the presiding officer closed the gate and kept the key himself.

In her submissions, the 1st Appellant particularly took issue with the following excerpt in the lower court's judgment at page 61 of the record of appeal:

> **"The material fact is that there was a demonstration of double standards when one parliamentary candidate, namely, F/Nkandu Luo of the PF was allowed entry into the polling station, yet at almost the same time entry into the same polling station was denied to F/Doreen Sefuke Mwamba of the UPND who was also a parliamentary candidate in the same constituency. This was unfair treatment to the petitioner."**

The 1st Appellant contended that the court below did not address itself to the pleadings but merely discredited the testimony of RW12 on ground that he was untruthful. That the finding of unfair treatment was irrelevant as it was not pleaded.

The 2nd Appellant submitted that as the 1st Respondent had admitted in cross-examination that the 1st Appellant and one Kaizer Zulu did not lock her out of the polling station, the matter should have ended there. That it was trite law that the evidence must support the pleadings and that the court below wrongfully accepted and applied the 1st Respondent's testimony to the effect that she was locked out of the polling station by a police officer

while the 1st Appellant was allowed to go in. It was the 2nd Appellant's contention that the 1st Respondent's allegation that the 1st Appellant and Kaizer Zulu closed the gate was not truthful and that the trial Judge erred when he found that there was a demonstration of double standards, resulting in unfairness on the part of the 2nd Appellant's conduct of the elections.

We have carefully looked at the evidence on the record, the parties' submissions and the holding of the court below on this aspect of the appeal. The key issue, as we see it, is whether the court below was on firm ground to find that the allegation, as framed in paragraph 5(v) of the petition, had been proved.

The 1st Appellant and the 2nd Appellant, in their respective submissions, have argued that the learned trial Judge went outside the pleading in reaching his decision. At page 60 to 61 of the record of appeal, the court below said:

> **"There was no dispute that F/Nkandu Luo who was a Parliamentary Candidate for Munali Constituency went to Vera Chiluba School Polling Station. There are only two (2) disputes. The first dispute is that F/Nkandu Luo was in the company of the said M/Kaizer Zulu. The second dispute is that the Petitioner was denied entry into the polling station. The evidence on this aspect is clear. I have gone through this evidence. I have taken note of the frantic efforts which the Petitioner did in order to be allowed into the polling station. These efforts included self-introduction by the Petitioner that she was an interested party being a Parliamentary Candidate in Munali Constituency. This effort fell on deaf ears. Whether F/Nkandu Luo was in the company of the said M/Kaizer Zulu or not is immaterial. The material fact is that**

> there was a demonstration of double standards when one Parliamentary Candidate, namely, F/Nkandu Luo of the PF was allowed entry into the polling station, yet at almost the same time entry into the same polling station was denied to F/Doreen Sefuke Mwamba of the UPND who was also a Parliamentary Candidate in the same constituency. This was unfair treatment to the Petitioner." (emphasis added)

The learned trial Judge then proceeded to discount the testimony of RW12 on this aspect, saying that RW12 was not there when the alleged incident happened. At page 62 of the record, the trial Judge concluded as follows:

> **"I am satisfied that this allegation in the pleading has been proved."** (emphasis added)

It is significant to note that the allegation in paragraph 5(v) of the petition, as shown at page 73 of the record of appeal, was very specific and succinct. It reads:

> **"(v) That on the 11th August 2016, at Vera Chiluba School polling station Nkandu Luo and Kaizer Zulu closed the gates and refused me and my agent from seeing our polling agents."**

The issue in controversy, as we see it, was that the 1st Appellant and Kaizer Zulu blocked the 1st Respondent and her agent from entering the named polling station and, as a consequence, prevented her from seeing her polling agents. That there was unfair treatment or a demonstration of double standards was not the nature of the allegation. In **Mazoka v Mwanawasa**,[3] the Supreme Court guided as follows:

> "The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matter in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by the pleadings and the court has to take them as such."

And in the old English case of **Thorp v Holdsworth,**[23] Jessel MR outlined the function of pleadings as follows:

> "The whole object of pleadings is to bring the parties to an issue...to prevent the issue being enlarged, which would prevent either party from knowing...what the real point to be discussed and decided was."

In **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd,**[24] Saville L.J. observed that pleadings:

> "...are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing." (emphasis added)

The 2nd Appellant submitted that in arriving at his conclusion, the learned trial Judge wrongfully accepted and applied the 1st Respondent's testimony to the effect that she was locked out of the polling station by a police officer while the 1st Appellant was allowed to go in. In her evidence in chief, the 1st Respondent said at page 567 of the record:

> "My Lord on polling day about 20:20 hours I went to Vera Chiluba Polling Station in Mtendere. The candidate for the PF Professor Nkandu Luo and the special adviser to the President, Kaizer Zulu were permitted to enter the polling station whilst I who was a candidate was not allowed in."

From our perspective, the record shows that the evidence adduced at trial did not address the allegation. The 1st Respondent's evidence was at variance with what she pleaded in the petition on this aspect. She did not call any other witness to testify on this issue.

The question then is, what is the effect of this on the appeal? Though only of persuasive value to this Court, we find the case of **Christopher Lubasi Mundia v Sentor Motors Limited**[25] instructive where it was held that where the pleadings are at variance with the evidence adduced in court, the case fails since the case is completely recast without actual amendment of the claim. In that case, Chirwa J, as he then was, cited the case of **London Passenger Transport Board v Moscrop**[26] where Lord Russell of Killowen said:

> "I have already stated my difficulty in justifying this implication, but, with it as the basis of their order, the Court of Appeal made a declaration that the representation clause was void. This appears to me to have been a complete re-casting of the respondents' alleged cause of action and the matter was unfortunately carried through without amendment of the statement of claim. This should not be so. Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended.' They should be amended in fact." (emphasis added)

We are persuaded. More so because Zambian jurisprudence on election petitions has long required that the petitioner must prove all the allegations with a high degree of convincing clarity, above the balance of probabilities required in ordinary civil matters. There is no evidence on the record that the pleading in paragraph 5(v) of the petition was amended with leave of the court to reflect the issues the 1st Respondent brought up in her testimony. We further note that the 1st Respondent pointed out what she termed a typographical error only under cross-examination. In cross-examination, the exchange between State Counsel Mutale and the 1st Respondent, as shown at pages 605 to 606, was as follows:

> **"Q: ...Yes Mrs. Mwamba, in paragraph 5(v) of the petition this is what you said, 'On 11th of August, 2016 at Vera Chiluba School polling station Nkandu Luo and Kaizer Zulu closed the gate and refused me and my agents from seeing our polling agents." Would you like to correct that?**
>
> **A: Yes, my Lord. Just one word of correction which must have been a typing error which says that she closed the gate, explaining that she is the one who closed the gate. The policeman closed the gate.**
>
> **Q: So it is not correct to say Professor and Kaizer Zulu closed the gate?**
>
> **A: No, it is not right.**
>
> **Q: And that she was not in charge or responsible for that gate?**
>
> **A: My Lord, the issue in this statement is not the gate the issue has become the gate because of the closing because it is mentioned that Professor Nkandu Luo and Kaizer closed the gates. My Lord the issue**

here is the unfairness that even Kaizer Zulu who was not a candidate in Munali....

Q: Mrs. Mwamba, just answer the question I read the paragraph and you have said it is not correct. Professor Luo was not responsible for that gate, do you agree?

A: Yes I agree, my Lord.

Q: Yes that is the position. My Lord, that is all from the 1st Respondent. Much obliged."

We have taken the liberty to reproduce what transpired in the court below for emphasis. We note from the above exchange that in the face of cross-examination, the 1st Respondent revised the nature of her allegation from what was specifically pleaded in the petition to matters that were not pleaded under the guise of a typographical error. She clearly conceded that her allegation was not true; in other words, it was a falsehood. This, in our view, called into question the credibility of the 1st Respondent, an issue the court below should have interrogated.

The 1st Respondent claimed in her testimony that a police officer prevented her access to the polling station. If that were the case, our considered view is that the 1st Respondent should have been specific in her petition. We agree with the 1st Appellant and the 2nd Appellant that the learned trial Judge erred in accepting evidence on matters that were not pleaded. The

learned author of **Zambian Civil Procedure: Commentary and Cases**, volume 1, puts it as follows at page 565:

> **"Pleadings constitute the spine and sprinkle of a suit on which the fate of the case of a plaintiff or defendant depends. Thus the case of a party is articulated in a pleading and no relief based on any ground not set out in the pleadings can be granted by the court. Parties to a suit are bound by the pleadings. It is the case that has been pleaded that has to be proved and consequently, the decision of the court cannot be based on grounds not set out in the pleadings of the parties."**

What the 1st Respondent required to prove in the court below is that the 1st Appellant, acting with one Kaizer Zulu, took charge of the gates at Vera Chiluba Polling Station and prevented the 1st Respondent from entering the polling station to see her polling agents. That is the burden which the 1st Respondent needed to discharge. The 1st Respondent failed the test on this aspect as no evidence was adduced to support the allegation as framed in the petition. The net effect is that the threshold required to be established pursuant to section 97(2)(a) of the Act was not reached. We find that no electoral offence was established against the 1st Appellant or her election agent in relation to the allegation in paragraph 5(v) of the petition.

We do not agree with the court below that "the allegation in the pleading" had been proved. We, accordingly, find merit in

ground three of the 1st Appellant's appeal and ground two of the 2nd Appellant's appeal and they succeed.

Ground four of the 1st Appellant's appeal and grounds one three, four and five of the 2nd Appellant's appeal impugn the finding of the court below that the non-provision of GEN12 forms to all the candidates' polling agents materially affected the outcome of the election in Munali Constituency and that the 2nd Appellant failed to conduct transparent, free and fair elections in Munali Constituency. The 1st Respondent's testimony was to the effect that the 2nd Appellant did not provide adequate amounts of Form GEN12. That she made photocopies of the same which were then distributed to Chainda, Chakunkula, Mtendere and Kalingalinga wards. Also, that polling agents were using note books that they were given to record results. It was also the 1st Respondent's testimony that on 12th August, 2016, she went to Kalikiliki polling station where she discovered that there had been a dispute on figures to be written on the GEN12, though it was later resolved after a recount.

PW5 testified that on 12th August, 2016, at the Community Hall Munali Ward 33 Masasa, PF cadres stormed the polling

station, causing confusion, simply because a demand for Form GEN12 had been made. That a police officer managed to calm the situation and asked the PF cadres to leave the polling station. PW5 further testified that the 2nd Appellant's officials said they did not give GEN12 forms to polling agents, advising that they (polling agents) write in their note books. That on further insistence, the agents were given the Presidential form which they then photocopied at the market and returned the original.

Under cross-examination, PW5 contradicted the testimony of the 1st Respondent in regard to the point at which photocopies of the GEN12 form were given to the UPND polling agents. At page 757 of the record of appeal, PW5 conceded that the 1st Respondent testified that all polling agents were given GEN12 forms. When asked to clarify her earlier position that the polling agents were writing in note books and yet she had admitted that the 1st Respondent had supplied copies of Form GEN12, PW5 failed to reconcile the two contradictory positions.

The 1st Appellant contended that the 1st Respondent failed to adduce any evidence confirming that the failure to provide GEN12 forms by the 2nd Appellant affected the results in the

entire constituency. Also, that the failure to sign or countersign GEN12 forms could not form the basis for nullification if each candidate was affected, citing section 49 of the Electoral Process (General) Regulations.

The gist of the 2nd Appellant's detailed submissions on this aspect of the appeal was that the issue for determination was the alleged refusal by the 2nd Appellant to provide GEN12 forms to the 1st Respondent's polling agents and whether, as a result, the 1st Respondent was not able to have the correct total of results. It was the 2nd Appellant's position that PW5 was not a credible witness as her testimony contained various untruths on collateral matters and the court below ought not to have believed and accepted the evidence of PW5. Citing regulation 49(2) of the Electoral Process (General) Regulations, it was submitted that the court below misdirected itself in finding that the failure to countersign a Form GEN12 amounted to a failure to provide the document to polling stations. That non-availability of polling agents at completion of the election process could not be regarded as refusal by the 2nd Appellant to provide copies of Form GEN12.

RW12 testified that it was not true that the 2nd Appellant refused to provide Form GEN12 to polling agents. That one of his duties as returning officer was to ensure that all documentation was provided to polling stations and that not less than 20 copies each per election of Form GEN12 was given to presiding officers in all the 47 polling stations.

We have carefully considered the submissions and the evidence on record on these grounds of appeal. In our considered view the key issue that falls for our determination is whether the 2nd Appellant fell afoul of section 97(2)(b) of the Act by allegedly abrogating or neglecting its duty to supply adequate numbers of Form GEN12, which dereliction of duty materially affected the election in Munali Constituency. Related to that is the claim that polling agents did not countersign some of the GEN12 forms, affecting the 1st Respondent's ability to know the correct results.

It is trite that in terms of Article 229(2)(b) of the Constitution the 2nd Appellant has the mandate to conduct elections. And as we observed in **Giles Chomba Yamba Yamba v Kapembwa Simbao,**[11] the 2nd Appellant fulfils its functions by

ensuring that the requirements of the Act are respected and observed in the electoral process. A key requirement in the conduct of elections by the 2nd Appellant is the provision of election materials. Pursuant to regulation 4(1)(a) of the Electoral Process (General) Regulations, the 2nd Appellant appoints a returning officer for each constituency, district or ward. According to regulation 29(1)(b) of the Regulations aforesaid, the returning officer shall, as part of the preparations for the taking of a poll in a polling station within the returning officer's constituency, district or ward:

> **"provide each presiding officer with such number of ballot boxes, ballot papers, official seals, official marks, the voters' roll relating to the polling station and such other things as may be necessary for the taking of the poll;"** (emphasis ours)

RW12 was the returning officer for Munali Constituency in the 11th August, 2016 general elections. As we have already noted, in his testimony he confirmed that one of his duties was to ensure that all documentation was provided to the polling stations and that not less than 20 copies each per election of Form GEN12 was given to presiding officers in all the 47 polling stations in Munali Constituency. On the other hand, the 1st

Respondent's contention is that the 2nd Appellant failed to deliver on its duty to supply adequate GEN12 forms.

As we noted in **Giles Chomba Yamba Yamba**,[11] section 97(2)(b) of the Act calls for the annulment of elections in the event that there has been non-compliance with the principles laid down in the Act in as far as the conduct of elections is concerned. Section 97(2)(b) reads:

> **"97. (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- ....;**
>
> **(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)

Thus, a person challenging the election of a candidate on the basis of section 97(2)(b) must demonstrate, with cogent evidence, that there was non-compliance with the provisions of the Act relating to the conduct of an election and that the non-compliance affected the result of the election. We must, however, be quick to point out that not every electoral infraction on the part of the 2nd Appellant's officials attracts the ultimate sanction

of annulment of an election. Section 97(2)(b) is made subject to section 97(4) of the Act, which is in these terms:

> "(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 an act or omission did not affect the result of that election." (emphasis added)

It is clear from the above provision that where there has been substantial compliance with the provisions of the Act, an election cannot be annulled on the basis of section 97(2)(b) of the Act. The learned authors of **Halsbury's Laws of England**, 5th Edition, Volume 38A, also state at paragraph 667 that:

> **"No election is to be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the appropriate elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted substantially in accordance with the law as to elections, and that the act or omission did not affect its result. The function of the Court in exercising this jurisdiction is not assisted by consideration of the standard of proof but, having regard to the consequences of declaring an election void, there must be a preponderance of evidence supporting any conclusion that the result was affected."**

In the instant case, the learned trial Judge held as follows at page 65 of the record of appeal:

> "There are some Form Gen12 which are partially signed. This confirms the allegation by the Petitioner that there were no Form Gen12 at polling stations. The failure by the Electoral Commission of Zambia to avail Form Gen12 did not help to build confidence in the electoral process in Munali constituency Parliamentary elections. There was a total absence of transparency and it is the Electoral Commission of Zambia who are responsible for the failure to build confidence in the

> electoral process ...as well as the total absence of transparency. This was a lapse on the part of the Electoral Commission of Zambia and the result is that no one can positively ascertain whether or not the votes cast in favour of the Petitioner were fully accounted for. In this regard, the Electoral Commission of Zambia has let down the people of Munali constituency and the Petitioner was personally affected." (emphasis ours)

Earlier at page 63 of the record, the trial Judge had found as follows:

> "The allegation concerning the lack of or the inadequacy of Form Gen12 did not affect the Petitioner alone. Suffice to state that it affected all the participants in that Parliamentary race."

We find it contradictory on the part of the learned trial Judge that he initially determined that the problem of Form GEN12 affected all participants in the poll only to isolate the 1st Respondent as having been personally affected and ultimately finding that the allegation had been proved. It is worth noting that in his holding *supra*, the trial Judge noted that some GEN12 forms were partially signed and that that confirmed the allegation by the 1st Respondent that there were no Form Gen12 at polling stations. We are perplexed because at page 63 of the record of appeal, the learned trial Judge made this clear statement:

> "I have seen Form Gen12 for each polling station in Munali Constituency."

From our perspective, the foregoing unequivocal statement was a clear finding of fact by the court below and confirmation that Form GEN12 was available at all the polling stations in Munali Constituency contrary to the 1st Respondent's assertion. We do not agree that a finding that some GEN12 forms were partially countersigned equates to non-availability of the document at polling stations. Further, the record of appeal shows at pages 215 to 262 that the 2nd Appellant produced in evidence all the GEN12 forms for the 47 polling stations in Munali Constituency, a fact confirmed by the court below as indicated above.

The record of appeal shows that the learned trial Judge addressed the allegation relating to Form GEN12 at pages 62 to 65. We have carefully looked at this portion of the judgment of the court below. Our considered view is that the learned trial Judge did not properly evaluate the evidence on this aspect as against the 1st Respondent's allegation that the 2nd Appellant failed to supply adequate amounts of the Form GEN12. For instance, we note that the trial Judge never made any reference to the testimony of RW12 who had testified that he issued not

less than 20 copies of Form GEN12 per election to the presiding officers at all the 47 polling stations and that the evidence was before court. A careful perusal of the record shows that this aspect of RW12's testimony was not challenged in cross-examination.

We hold that the issues surrounding the 1st Respondent's allegation that there were inadequate supplies of Form GEN12 in Munali Constituency should have been carefully considered and measured against the threshold in section 97(2)(b) of the Act as read with section 97(4). We have not seen any evidence on record proving with convincing clarity the allegation made by the 1st Respondent that the 2nd Appellant abrogated its duty pursuant to section 97(2)(b) aforesaid. We, accordingly, reverse the finding of the court below on the ground that it is one which, on a careful assessment and evaluation of the evidence before it, the court below would not have reached.

We now turn to the connected aspect of signing and countersigning Form GEN12. We note that after confirming that he had seen all GEN12 forms for all the 47 polling stations, the learned trial Judge observed that GEN12 forms for 14 polling

stations were "not signed at the back". Further, after naming the 14 polling stations, the trial Judge said at page 64 to 65 of the record of appeal:

> "In the wake of the demands by the Petitioner and her agents to comply with the provisions of Form Gen12, I have seen no reason why Form Gen12 for all the above fourteen (14) polling stations were not signed by polling agents....Interesting to note is that it is not only the losers who did not sign Form Gen12 in those polling stations but the winners as well."

We have had occasion to address the issue of signing and countersigning of Form GEN12 in recent decisions. The provisions of the law on the signing and countersigning of the election results are well stated. Paragraph 5(2) of the Electoral Code of Conduct reads:

> "An election agent or polling agent shall counter sign the election results duly announced or declared by a presiding officer or returning officer, as the case may be, except that failure to countersign the election results by such election agent or polling agent shall not render the results invalid." (emphasis added)

Also, regulation 49(2) of the Electoral Process (General) Regulations, to which we were referred by the 2nd Appellant, provides:

> "The presiding officer shall announce how the votes have been cast for each candidate in Form GEN20 set out in the Schedule, and how many have been rejected in the polling station and may require if present, election agents or monitors to countersign the results, except that failure to countersign the election results does not render the results invalid." (emphasis added)

In addressing the importance of Form GEN12 in the electoral process, the learned trial Judge had this to say at page 63 of the record of appeal:

> "This issue...is an important matter in the conduct of elections and in the spirit of promoting transparency and building confidence in the electoral system. It is important because Form Gen12 is a document for the Electoral Commission of Zambia which is used in an election at polling stations to record election results both in figures and in words. The design of Form Gen12 shows that polling agents should append their names in full and signature at the back of that Form Gen12. Even if the use of Form Gen12 is not couched in mandatory terms, when a dispute of this magnitude arises, compliance as to the way it is supposed to be filled in becomes a necessity." (emphasis added)

We agree with the learned trial Judge that Form GEN12 plays an important role in our electoral process and that its proper use enhances transparency and confidence in the electoral system. In **Giles Chomba Yamba Yamba,**[11] we said the following when addressing the question of Form GEN12 at page J70:

> "We venture to say the ideal situation of course is that all the people required to sign for the election results should sign to enhance transparency in the electoral process."

And in **Lewanika v Chiluba**[5] the Supreme Court put it thus:

> "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."

We endorse those views. Considering that elections provide a means for the governed to express their will as to who is to govern them, those managing the electoral process must, as far as possible, work on and eliminate any flaws in the process.

The record shows that out of the 47 polling stations in Munali Constituency, GEN12 forms for 14 of those were not signed by any polling agent. According to the court below, this amounted to a total absence of transparency and a lapse on the part of the 2nd Appellant as, in the lower court's view, no one could positively ascertain whether or not the votes cast in favour of the 1st Respondent were fully accounted for.

The problem we see with the position taken by the court below is that, despite finding that both the losing and winning sides in Munali Constituency did not countersign the Form GEN12 in the named polling stations, the court below isolated the 1st Respondent as the candidate whose votes cast in her favour could not be positively accounted for. Our considered view is that this was an unbalanced approach to the issue by the court below. In our view, the non-signing of Form GEN12 for the 14 polling stations affected all the participating candidates. In

our recent decisions, we have cited with approval the case of **Mazoka v Mwanawasa,**[3] where the Supreme Court said:

> **"We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of the election materials and insufficient supply of Presidential ballot papers in the complaining constituencies which led to the delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st Respondent."**

We remain persuaded by that position.

Most importantly, however, the law, as we have cited it above, clearly stipulates that failure to countersign the election results by election or polling agents does not render the results invalid. The court below found as a fact that all GEN12 forms for all the polling stations in Munali were exhibited in evidence before it. In that regard, we are of the view that, as far as this aspect is concerned, the 2nd Appellant conducted the election in Munali Constituency in substantial conformity with the requirements of the law and it should not have been a basis for nullifying the election. Further, we have not seen, from the record, cogent evidence to show how the non-signing of GEN12 forms for the named polling stations affected the overall result in the 2016 Munali parliamentary election. It is our firm view that the election in Munali Constituency was conducted substantially

in accordance with the provisions of the Act. We find ground four of the 1st Appellant's appeal and grounds one, three, four and five of the 2nd Appellant's appeal meritorious and they succeed.

All the 1st Appellant's grounds of appeal and the 2nd Appellant's grounds of appeal have succeeded and, therefore, the entire appeal succeeds. Accordingly, we set aside the decision of the court below to nullify the election and declare that the 1st Appellant, Nkandu Luo, was duly elected as Member of Parliament for Munali Constituency.

We order that each party bear their own costs of this appeal and in the court below.

.....

A. M. Sitali
Constitutional Court Judge

.....

M. S. Mulenga
Constitutional Court Judge

.....

E. Mulembe
Constitutional Court Judge

.....

M. M. Munalula
Constitutional Court Judge

.....

M. Musaluke
Constitutional Court Judge

IN THE SUPREME COURT OF ZAMBIA

SCZ/EP/3 & 4 OF 1996

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 41(2) of THE CONSTITUTION OF ZAMBIA.

IN THE MATTER OF THE PRESIDENTIAL ELECTION HELD IN ZAMBIA ON THE 18TH OF NOVEMBER, 1996

B E T W E E N

AKASHAMBATWA MBIKUSITA LEWANIKA	1ST PETITIONER
AND	
EVARISTOR HICUUNGA KAMBAILA	2ND PETITIONER
AND	
DEAN NAMULYA MUNG'OMBA	3RD PETITIONER
AND	
SEBASTIAN SAIZI ZULU	4TH PETITIONER
AND	
JENNIFER MWABA PHIRI	5TH PETITIONER
AND	
FREDERICK JACOB TITUS CHILUBA	1ST RESPONDENT

Coram: Ngulube C.J., Bweupe D.C.J., Sakala, Chirwa and Lewanika JJS.

23rd June and 23rd July, 1997

For the Petitioners: Mr. M. Chona SC, Mahachi Chambers.
Mr. E.J. Shamwana SC, of Shamwana & Company.
Mr. D. Lisulo SC, of Lisulo & Company.
Professor M.P. Mvunga, of Mvunga Associates.
Mrs. N.B. Mutti, of Lukoma Chambers.
Mr. E. Lungu of A.S. Andrew Masiye & Co.
Mr. W, Kabimba.
Mrs. M. Zaloumis, of Mvunga Associates.
Mr. S. Sitwala , of Light House Chambers.

For the 1st Respondent: Mr. V. Malambo and E. Silwamba of Malambo Silwamba & Company.

R U L I N G

Sakala JS delivered his Ruling.

This is an application, on behalf of the petitioners, by way of a Notice of Motion, made pursuant to Order 112(2) of the Supreme Court Rules, 1993 Edition of the White Book, seeking for an order or such other directions that the respondent do submit or be caused to submit to a test, being blood or such other tissue test to establish whether or not one, Luka Chabala Kafupi, is the biological father of the respondent. The application is supported by an affidavit sworn by one, Jennipher Mwaba Phiri, the 5th petitioner, on behalf of all the other petitioners. Paragraphs 5,6,7, 8 and 11 of that affidavit read as follows:-

"5. That I am informed by one Luka Kafupi Chabala that he is the biological father of the Respondent herein Titus Mpundu also known as Frederick Jacob Titus Chiluba and not Frederick Titus Jacob Chiluba.

6. That I have seen both the said Luka Kafupi Chabala and the Respondent and have noted the great similarity in physical and facial structure coupled with mannerisms and expressions.

7. That the claim by one Luka Kafupi Chabala to be the father of the Respondent could be true.

8. That there exists a medical test which is called DNA fingerprinting which can conclusively determine whether or not the claims by Luka Kafupi Chabala are true.

11. That the said LUKA KAFUPI CHABALA is ready and willing to submit himself to a medical test to determine the paternity of the respondent."

There was no affidavit in opposition.

Leading the arguments and the submissions on behalf of the petitioners, Mr. Lisulo, the State Counsel, informed the court that the application was for the issue of a directive involving the taking of blood samples from the respondent and Mr. Luka Chabala Kafupi, who had for a long period of time, consistently claimed to be the legal father, the natural father, or the biological father or

the procreator of the respondent. Mr. Lisulo pointed out that Mr. Luka Chabala Kafupi had repeated his claim with gusto and confidence before court to the extent of agreeing to have his blood tested for purposes of proving conclusively and scientifically that he procreated the respondent. Mr. Lisulo further pointed out that the first petitioner had demanded in his evidence that the respondent and Luka Chabala Kafupi have their blood tested. Counsel explained that before the court is a notice of motion pursuant to Order 112(2) of the White Book and an affidavit in support. He further explained that the court will observe that the petitioners have made serious allegations against the respondent centering on his paternity and place of birth and which allegations have been pleaded in the petition. Counsel pointed out that substantial viva voce evidence had been raised in relation to the respondent's paternity and place of birth and that there have been several versions regarding the respondent's place of birth and two versions regarding his paternity. Counsel also pointed out that Mr. Luka Chabala Kafupi's evidence on the issue of paternity had been persistent and that there is also evidence that the respondent's father was Jimmy Zharare Nkonde who came from Mozambique. According to counsel, from all this evidence the court should find ways and means of ascertaining and determining the whole truth about the respondent's place of birth and paternity, contending that the contradictions must be narrowed down to zero point and that this could come about by an analysis of blood or genetic finger printing, submitting that this was the only way the petitioners' counsel could help the court to come to the whole truth on the issues of paternity and place of birth. Mr. Lisulo's further contention was that the respondent is said to have been born in several places yet, even the Son of God was only born in one place.

Counsel explained that the application was made in terms of the provisions of Section 20(1) of the Family Law Reform Act of 1969 of the United Kingdom which provides for the taking of blood samples in any civil proceedings relating

to paternity. Counsel submitted that the taking of blood samples from the respondent for the purposes of a DNA test was a golden opportunity to establish the truth. He pointed out that under Section 20(1) of the Act, the court was only required to give a directive and not to consider whether or not that person would consent to the directive.

On the applicable law, counsel explained that section 10 of the High Court Act, Cap 27 empowers this court to apply the English law on the issues of paternity in the absence of our own law. Mr. Lisulo submitted that this was the authority he was depending on in adopting the English law. Counsel also cited Sections 12 and 13 of Cap 27 and drew the Court's attention to Section 2 of Cap 11, The English Law (Extent of Application) Act. He also referred the court to Phipson, 14th Edition, paragraphs 15-21 at pages 337to 340 inclusive and to Practice Direction (1975) 1 ALL ER 233 (b) and (c). Counsel submitted that he would like the matter to be scientifically proved and cited the cases of S V S and W V Official Solicitor (1970) 3 ALL ER 107 at pages 109 and 110 paragraph (h) as per Lord Reid in support of his submissions.

Counsel further contended that the Affiliation and Maintenance Orders Act, Cap 64, did not apply to the case before court as it applied to children defined as persons under the age of 18 years and related to Affiliation and Maintenance orders. Counsel argued that the question of the respondent's paternity and place of birth was key and fundamental and goes to the very root of the petition in that it would ascertain whether the respondent was duly qualified, constitutionally or otherwise to contest the 1996 November elections and finally elected President. He urged the court to grant the direction sought.

On joinder of Luka Chabala Kafupi as a party to the petition Counsel pointed out that Order 112/4 provides for a joinder of parties. Mr. Lisulo concluded his arguments by pointing out that while the petitioners could not request the respondent to prove their case they had to lay all their cards on

the table so that it was not later argued that they did not apply for blood samples.

Augumenting Mr. Lisulo's submissions, Prof. Mvunga observed that the application was unprecedented in the legal history of this country and that he felt duty bound to assist the court arriving at a conclusion fair in law. Prof. Mvunga further observed that this was not an ordinary paternity case, contending that it was a constitutional paternity case whose constitutional requirements arise out of the provisions of article 34 (3) (a) and (b) of the Constitution. Prof. Mvunga contended that there are broader interests conceived by article 34 transcending beyond the interest of the respondent. He submitted that the petitioners' desire and the desire of those they represent and the Zambian nation at large, was that the court should come to a conclusion on the paternity of the respondent.

Prof. Mvunga explained that before 1964 the Common law appeared to be at variance with statutory law in that the Common law took the position that the court had no inherent power to order blood samples as it would lead to violation of human rights but that now the Common law is compromised in the interest of truth. He drew the attention of the court to the case of W V W(4) (1964) P. 67, contending that the holding was most instructive in that it established the criteria in cases of this nature as being the discovery of the truth. Prof. Mvunga pointed out that this position is restated in Phipson, 14th Edition at page 337. Counsel submitted that advances of modern science had made discovery easier and that constitutional requirements impose a duty on this court to resolve the issue of paternity in order to settle the question of who contests the office of President. Prof. Mvunga contended that there has been so much uncertainity surrounding the respondent's paternity even on the evidence adduced so far. He pointed out that it had emerged by now that the petitioners had approached the paternity issue from two points of view namely, Chabala Kafupi's point of view that he is the father of the respondent and Jimmy Zharari Nkonde's view that he was the father of the respondent.

The Prof. explained that the reason for this approach was that the petitioners had been attempting to show that regardless of whether Nkonde or Chabala is the respondent's father, the respondent did not qualify for candidature of President because none of the two claimants was a Zambian. The Prof. further explained that this approach was necessitated by the respondent's stance on the issue, submitting that if the direction is given then the issue of paternity will be resolved once and for all and this will be in search of truth. Prof. Mvunga pointed out that the 1969 Family Law Reform Act clearly sets out that a grant of a direction pursuant to section 20(1) is not conditional to the requirement for consent and that the court is therefore not required to take into account the question of whether consent will be given or not, submitting that independent of consent, the court can direct, the emphasis not being on refusal. Counsel however submitted that from refusal to consent certain inferences could be drawn. He referred the court to the case of R V Smith (1985) 81 Crim App. 286 and submitted that refusal should lay a basis for an adverse finding against a party refusing to consent.

Prof. Mvunga concluded his submissions by pointing out that the seriousness of the petition and its national character in terms of the constitutional requirements impose a duty on the court to exercise its discretion in terms of section 20(1) in the affirmative because the petitioners and the nation at large are entitled to know the paternity of the rspondent and that it is up to the respondent to submit or not to submit and that if he refused to submit to a blood test then the usual inferences should follow. Prof. Mvunga contended that in the exercise of its discretion the court should not concern itself with the issue of convenience but with the discovery of the truth by conclusive evidence. He explained that a request for a blood test had been made but there was no response from the respondent.

On behalf of the respondent, Mr. Silwamba prayed that the application be dismissed as being grossly misconceived. He drew the attention of the court to the fact that although the application is brought in terms of Order 112(2) of the White Book, the heading, in so far as it related to

an application for a committal order for contempt made interesting reading and not supported by arguments but that since the respondent was magnanimous, he was turning a blind eye to that. Counsel submitted that the law under which the application was made namely, the Family Law Reform Act of 1969 of the United Kingdom was inapplicable to Zambia. For this submission Mr. Silwamba relied on the provisions of Chapter 10, the British Acts Extension Act, Chapter 11, The English Law (Extent of application) Act and Chapter 2, The Interpretation and General Provisions Acts and pointed out that all these acts do not make the Family Law Reform Act of 1969 applicable to Zambia. While conceding that in terms of Section 8 of the Supreme Court Act, Cap 25, this court was competent to look at the laws and procedure prevailing in England, and that in terms of article 41 of the constitution, this court is sitting as a court of first instance, exercising original jurisdiction, and that in terms of section 9 of the High Court Act Cap 27, this court can resort, in certain instances, to the practice and procedure of the High Court of Justice in England, counsel pointed out that in terms of section 10 of Cap 27, the Court can only resort to the English Law and procedures when there is a default in our own laws and procedures as observed in the case of **Siwingwa V Phiri (1979) ZR 145** although reversed in the case of **Kabwe Transport Limited V Press Transport (1975) Limited ZR 43.** Mr. Silwamba submitted that there is no default in our laws for the purposes of the present case as regards the applicable law, procedure and practice. Further on the point of law counsel drew our attention to the Affiliation and Maintenance Orders Act No. 19 of 1994 but quickly conceded that he took the point that the Act relates to affiliation and maintenance. Counsel also referred the court to the Legitimacy Act, the Adoption Act Cap 54, and the Trust Restriction Act Cap 63 but again conceded that there is no mention of blood samples in all these Zambian Acts, but that that in itself, did not amount to default in our laws.

In the alternative Mr. Silwamba submitted that in the event the court decided to depart from Kabwe Transport Company case and hold that there was default in our law and practice and procedure and that the Family Law Reform Act of 1969 applied to Zambia, he understood section 20(1) of that Act to govern only parties to an action contending that in the present case Mr. Chabala Kafupi is the petitioners' witness number 3 and clearly not a party although Order 112(4) provided for joinder of parties. Counsel contended that Luka Chabala Kafupi can not be joined as a party in these proceedings submitting that the Electoral Act provides as to who can be a party to proceedings brought in terms of article 41. Counsel advised that a separate process should be commenced by Mr. Luka Chabala Kafupi in order to claim for his child and whether he could succeed in his own action was a different issue. Mr. Silwamba also argued that section 21 of the Family Law Reform Act, 1969 is couched in mandatory terms and urged the court to follow the decisions in S V S, W V Official Solicitor (1970) 3 ALL ER 107 at page 111 and refuse to grant the application as consent is a condition precedent to issuing a direction and submitted that a direction without consent was incompetent. Counsel further cited Halsbury Laws of England Vol. I, 4th edition at paragraph 686, where the learned Authors discuss Section 21(1) of the Family Law Reform Act of 1969.

Reacting to Mr. Silwamba's arguments and submissions Mr. Lisulo explained that there was an error in the heading of the notice of motion where it makes reference to a committal order and asked the court to delete that particular portion of the heading. Mr. Lisulo contended that the application was in law properly founded since the aim was to prove the paternity of the respondent and that proof would solve the issue of whether or not the respondent was qualified to seek election to the office of President. Counsel submitted that an application for a direction does not mean ipso facto that the respondent will be dragged before a blood tester but that the application is the first step.Mr. Lisulo observed that Cap 10 of the Laws of Zambia had been misinterpreted, submitting that section 2 of that Act is not exhaustive and that the other laws

referred to by Mr. Silwamba were irrelevant and that Mr. Chabala Kafupi could be joined as a party to this application for a direction although not a party to the petition itself. Mr. Lisulo agreed with Mr. Silwamba that the respondent could not be forced to have his blood samples taken but pointed out that if consent was refused it would thereafter be for the court to draw its own inference contending that the petitioners' position was that consent is a condition subsequent to a direction and not a precondition to a direction. According to counsel if the application is not granted, the court will subsequently find it difficult to resolve the question of paternity. He urged the court to dismiss the objection by counsel as well as the arguments as irrelevant in the interest of justice and fair play.

In re-enforcing the reply by Mr. Lisulo, Prof. Mvunga contended that the petition and the paternity are inseperable issues, submitting that paternity arises from constitutional requirements and that having so arisen it has been presented to this court as a petition and therefore the issue of paternity must be resolved by way of a petition.

On English Law as applied to Zambia, Prof. Mvunga pointed out that if all the constitutional aids that guide the court are thrown away then the court will be left in a vacuum. The court will then have to look at the constitution under article 41 and it will note that there are no detailed procedures to guide it. The next law the court could look at would be the Electoral Act and the court would also note that there are no procedures governing the presidential election petition and that neither does the amended Electoral Act provide any guidelines on paternity. Prof. Mvunga submitted that in the light of the lacuna the court has to adopt one alternative and that is Cap 11 which enjoins the court to apply Common Law and Equity. According to the Prof. this should be the starting point. He also submitted that if there are inadequancies in our law, the court must advance the Common Law submitting that in the situation of a vacuum and there being default in procedures, the court has an inherent jurisdiction to devise procedures to enable it arrive at the truth. He contended that there are

convincing reasons for adopting the suggested approach as the petition involved a constitutional issue. He pointed out that if the court assumed inherent jurisdiction it will then be free to apply any aid including the English Statutes. According to the Prof. while the court is an arbiter it can not be viewed as a passive arbiter, it had to be a little more active in bringing any aids to determine issues contending that if this petition had been commenced by a returning officer as provided by article 41, the question of burden of proof would never be an issue as the issue would be to determine the matters that would arise for determination under article 41. Prof. Mvunga concluded his reply by referring the court to the book of Allot's New cases on African Law pages 9 to 28.

I have very anxiously addressed my mind to the application and to the detailed submissions by the three learned and experienced senior counsel. I am profoundly indebted to them all. In dealing with this application I Propose to confine myself to the issue of paternity and not with the respondent's place of birth although raised in Mr. Lisulo's arguments. I take note that the submissions by all the advocates cite the same law and rely on the same decided cases. The only point of difference is the interpretation of the law and the authorities cited. Indeed this application is, in the legal history of this country, unprecedented both in terms of the law, the practice and the procedure as well as in terms of fact. It raises very fundamental Constitutional issues never before litigated upon in our courts of law.

The specific constitutional provisions leading to the application are contained in Articles 34(3)(a) and (b) and 41(2) dealing with questions relating to qualifications to be a candidate for election as President and election of a President / Article 34(3)(b), introducing respectively a qualification of both parents of a Presidential Candidate to be Zambians by birth or descent, is a new introduction in the Constitution; equally is Article 41(2) conferring original jurisdiction on the Supreme Court to determine questions relating to elections of a President.

It is common cause that both the Constitution and the Electoral Act have not provided guidelines on the law, the practice and procedure applicable when questions relating

to the elections of a President arise for determination. It is also common cause and agreed that the Supreme Court, in the exercise of its original jurisdiction, is entitled to adopt and follow the law, the practice and procedure of original jurisdiction as exercised by the High Court of Zambia.

The first issue for determination therefore, as raised by this application relates to the relevant applicable law, practice and procedure. At the expense of repeating myself but for the sake of emphasis, I find it necessary, at this juncture, to recite some of the submissions in so far as they relate to the applicable law, practice and procedure. The case for the petitioners as pleaded in so far as it is relevant to this application, centres on the identity of the respondent and that of his parents. According to the petitioners they desire evidence of biological tests to ascertain the true parentage of the respondent which is one of the Constitutional requirements for a person to qualify to hold office of President.

Briefly the petitioner's submissions are that Mr. Luka Chabala Kafupi, has consistently claimed to be the respondent's father and has agreed in court to have his blood tested for purposes of proving conclusively and scientifically that he procreated the respondent. That before the court are two versions regarding the respondent's paternity and that the issue can only be narrowed down to zero by a blood test or genetic finger printing. That the petitioners have approached the paternity issue from two angles to show that regardless of who is the father of the respondent, the respondent did not qualify for candidature of President because none of the two claimants is or was a Zambian. According to the petitioners the applicable law to this application is that of the United Kingdom in the absence of our own specific statutes on the subject.

The case for the respondent as pleaded and argued on the other hand, is that his identity and that of his parents is not the subject of contradictory public records and that the onus is on Luka Chabala Kafupi to establish the alleged paternity. According to the respondent the United Kingdom law is inapplicable to the facts of this application.

This application, as already observed, is a consequence of a petition based on article 41(2) of the Constitution. The Notice of Motion is pursuant to Order 112 (2) of the Whitebook, 1993 edition and made in terms of Section 20 (1) of the Family Law Reform Act of 1969 of the United Kingdom which provides for the taking of blood samples in any civil proceedings relating to paternity. Mr. Lisulo contended and submitted that he relied on the English Law, Practice and Procedure on the strength and authority of Section 10 of the High Court Act, Chapter 27 of the laws of Zambia in the absence of our own laws, practice and procedure on paternity issues. Mr. Lisulo also contended that Mr. Kafupi can properly be joined as a party to this application though not a party to the petition itself.

Prof. Mvunga submitted that the Constitution and the Electoral Act have no detailed guidelines on practice and procedure to be applied in determining constitutional paternity once raised in connection with the elections of a President. The Prof. urged the court that in the light of a lacuna and a vacuum in our laws, on a question of paternity, the court had only one alternative namely; to adopt the provisions of section 10 of Cap 27 of our laws and apply the English law.

Counteracting these submissions of the petitioners Mr. Silwamba, on behalf of the respondent, prayed the court to dismiss the application for being grossly misconceived and that the Family Law Reform Act, 1969 of the United Kingdom was inapplicable in Zambia. Mr. Silwamba, however, conceded that this court whether exercising original or appellate jurisdiction was competent, in terms of section 8 of the Supreme Court Act, Cap 25 and in terms of Section 9 of the High Court Act, Cap 27, to resort, in certain instances, to the law, practice and procedure exercised by the High Court of Justice and Court of Appeal in England.

But Mr. Silwamba quickly submitted that in terms of Section 10 of Cap 27, this court can only resort to the English Law when there is default in our own laws contending that the present application has not established any default in our law.

In the alternative Mr. Silwamba submitted that in the event we did not agree with him and held that the English law was applicable to this application his understanding of Section 20(1) was that it is **subject** to the consent of the parties and that it is only applicable to parties to an action, contending that in the present application Mr. Luka Chabala Kafupi is not a party but a witness for the petitioners in the petition although Order 112(4) provided for joinder of parties.

The submissions relating to the law applicable to this application have, in my view, been very well taken by all the three learned counsel. I found them very persuasive indeed. But on a careful consideration of the facts as disclosed in this application and the issues raised for determination, I am satisfied that the Affiliation and Maintenance Orders ACt, the Adoption Act, the Trust Restriction Act and the Legitimacy Act are notrelevant laws in resolving the issue of Constitutional paternity by the taking of blood samples. The petitioners appear categoric that there is default in our law on this issue. Counsel for the respondent showed some hestation to accept the existence of default in our law on the issue of taking blood samples.

For my part to ascertain the law applicable to this application, the first relevant starting provision of law is section 10 of the High Court Act, Chapter 27. This section reads:

"10. The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

The last words of the section are significant and instructive. These are:

"....and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

These words were discussed in the case of Bowmaker Finance Ltd V Buck (1967) ZR 79 where Evans J observed as follows:-

"Our High Court Rules are not intended to be a complete code governing the practice and procedure in this court: were they so intended, the words (in the said section 10) "and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice" would be otiose."

As it will be observed later the words are not otiose. In the case of Siwingwa Vs Phiri (1979) ZR 145a case referred to us by Mr. Silwamba, Moodley J., after setting out the whole of section 10 of Cap 27, had this to say at page 149:-

"There is no ambiquity in the above section. Thus in the absence of statutory or judicial authority in Zambia in matters relating to practice and procedure then the High Court in Zambia will exercise jurisdiction in those matters in substantial conformity with the law and practice for the time being in force in England. The operative words are "in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice." It should be added that s.9(1) of the High Court Act , Cap. 50, empowers the High Court to possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England."

For different reasons the Supreme Court only disapproved the conclusion of the Siwingwa case in the Kabwe Transport Company case also referred to us by Mr. Silwamba. But the Supreme Court had the opportunity in the Kabwe Transport case to explain section 10 of Cap27 in more detail and stated as follows at page 46:.

"The case of Siwingwa V Phiri (4), which was decided in this country by a High Court Judge resulted in a ruling that the the Civil Evidence Act 1968 applied in this country by virtue of section 10 of the High Court Act, which provides that the practice and procedure at present prevailing in the courts of England and Wales shall apply in this country. Mr. Jearey argued that the provision can be called in aid in default of any legislation in Zambia. There is in fact in Zambia an Evidence Act, Cap 170, in which there is no provision for the calling of evidence in criminal proceedings to assist a decision in civil proceedings. This court has been asked to decide whether the provisions of section 10 of the High Court Act enables courts in this country to decide that there is an absence of legislation when, in this specific instance, there is a definite act dealing with evidence. We have no hesitation in finding that, where there is a specific act dealing with a matter of law, such as evidence, in this country, there is no default of legislation as envisaged by section 1o of the High Court Act."

The emphasis is on the words "..where there is a specific act ...in this country ...there is no default." In my view this court acknowledged in the converse in the Kabwe case that where there is no specific act in this country there is then a default in our laws. From our own statutes, it appears to me that the arguments in favour of applying the English Law, when there is no specific act dealing with a matter of law in this country are very persuasive. But before making my finding and before leaving the point of the applicable law, I wish to observe that in addition to section 10 on practice and procedure there is also section 9 of Cap 27 confering jurisdiction on the High Court and specifically providing that the High Court "....shall, within the limits ....possess and exercise all jurisdiction power and authorities vested in the High Court of Justice in England."

It should also be observed that this application raises issues of paternity, parentage and family. In general, Learned Authors like Rayden and Jackson on Divorce, treat all these issues as family matters under Matrimonial Causes and Matters. In this connection it will be noted also that the whole text of the Family Law Reform Act is discussed with commentaries in the sixteenth edition of Rayden and Jackson on Divorce. Also to be noted is that Section

11, Cap 27 providing for Probate and Divorce Jurisdiction on the High Court is couched in the following terms:

"11. The jurisdiction of the Court in divorce and matrimonial causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England."

I have deliberately examined the numerous acts and all the laws referred to us on practice and procedure. Having also listened and considered all the learned arguments and submissions, I am satisfied that there is no specific provision in our laws or in our practice and procedure relating to taking of blood samples for determining the issue of paternity or parentage. In the circumstances, I hold that the English Law is the applicable law to this application in default of our own law on the subject of paternity.

The second question for consideration is whether the facts of the application warrant the issuance of a direction. The application before this court sitting as a court of first instance in a Presidential election petition is for an order or such directions that the respondent do submit or be caused to submit to a test being blood or such other tissue test to establish, whether or not, one Luka Chabala Kafupi, is the biological father of the respondent. The scenario in this application, as I see it, is that the petitioners have produced a witness claiming to be the father of the respondent but whom they say is not Zambian by birth or descent. These claims have been denied by the respondent in his answer. The question that emerges from the scenario is this: Why do the petitioners want a blood test? Their contention is that a blood test will conclusively , by scientific evidence, establish one way or the other that the witness they produced is or is not the respondent's father, thereby resolving some of the issues prayed for in the petition.

Having found that the Zambian laws are silent on the practice, and procedure and in the absence of any statutory or judicial authority in Zambia in matters relating to practice and procedure in an application for taking of blood samples, and this court, sitting as a court of first instance, to exercise the jurisdiction on matters of taking blood samples in substantial conformity with the law and practice for the time being in force in England, I now proceed to apply the English law to this application.

The Practice and Procedure for the time being in force in England is Order 112 of the 1995 edition of the White Book headed "Applications for use of Blood Tests in determining Paternity". The law for the time being in force in England is the Family Law Reform Act, 1969. Among the objects of the Act as set out in the preamble is "...to make provision for the use of blood tests for the purposes of determining the paternity of any person in Civil proceedings..." After indeed very anxious moments, I am satisfied and have come to the conclusion that the application both in terms of law and practice is well founded and properly before this court and I so hold.

Mr. Lisulo argued that the petitioners have made serious allegations against the respondent centering on his paternity and that substantial viva voce evidence has been adduced in support of the allegations. Mr. Lisulo contended that the only way to establish the truth about the respondent's paternity is by a blood test. According to Prof. Mvunga this is a constitutional paternity case raising issues that transcend beyond the respondent's interests. In dealing with this appplication I have been mindful not to stray into the merits of the issues raised by the petition itself.

Section 20(1) of the Family Law Reform Act, 1969, that confers power on the court to require use of blood tests reads as follows:-

"20(1) In any civil proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for taking, within a period to be specified in the direction, of blood samples from that person, the mother of that person and any party alleged to be the father of that person or from any, or any two, of those persons."

As already observed the practice and procedure of making the application and the taking of blood samples is set out in Order 112. It was common ground that the court has judicial discretion to give or not to give the direction. All the learned counsel drew our attention to a number of decided cases that have settled the principles on which a court should act in determining whether or not to direct use of blood tests. The general principle seems to be that in considering whether to order the taking of blood samples the court is entitled to take into account the probable outcome of the proceedings in which the issue arises. Balcombe L. J in Re F(a minor) blood tests Parental rights, (1993) 3 ALL ER 596 stressed the point at page 600 as follows:

"As is apparent from the provisions of s. 20(1) of the Family Law Reform Act 1969, the power to direct the use of blood tests to determine parentage only arises in civil proceedings in which the paternity of any person falls to be determined. If the probable outcome of those proceedings will be the same whoever may be the natural father of E, then there can be no point in exposing E to the possible disadvantages of a blood test."

It is the case of the petitioners as pleaded and as so far testified that this court must determine, among other issues, the respondent's paternity.

In the case of S V McC and M (1970) 1 ALL ER 1162 Lord Denning M R stressed the role of blood test in the Administration of Justice. At page 1165 he stated thus:

"In my opinion, when a court is asked to decide whether a child is legitimate or not, it should have before it the best evidence which is available. It should decide on all the evidence, and not on half of it. There is at hand in these days expert scientific evidence-by means of a blood test-which can in most cases resolve the issue conclusively. In the absence of strong reason to the contrary, a blood test should be made available. The interests of justice so require."

It is the petitioner's case that the interest of justice in the petition requires the taking of a blood test. And Lord MacDermott in S V S, W V Official Solicitor (1970) 3 All ER 107 at page 118 made the point as follows:-

"...the application for a blood test was a proper step to procure the best evidence....."

I am alive to the fact that a blood test has frequently arisen as an issue in family proceedings involving the paternity of an infant, a minor or a child in which the interest of a child and that of justice have always been the subject for consideration. I am also alive to the fact that until 1st March, 1972, the date of coming into force of the provisions for use of blood tests in determining paternity in the Family Law Reform Act 1969, there was no statutory power enabling a court to order the use of blood tests to assist in the determination of paternity. On the other hand it had been established by decided English cases that a Judge of the High Court could order blood tests in certain circumstances. See Halsbury's Laws of England Volume I, 4th Edition para 685 under the heading: Powers of Court to require use of blood tests" and the cases under note 2.

The major submission in favour of a blood test in the instant case was that the petition does not raise an ordinary paternity case but a constitutional paternity issue in that it is a constitutional requirement that among other qualifications, a person shall be qualified to be a candidate for election as President if (a) He is a Zambian citizen and

(b) Both his parents are Zambians by birth or descent.

According to Prof. Mvunga, these requirements transcend beyond the interests of the respondent to compel this court to judicially exercise its discretion by making a direction with a view to discovering the truth of the respondent's paternity by conclusive evidence.

After a very critical analysis of the facts in support of the application, I am satisfied that the petitioners have made out a case for this court to consider the exercise of its discretion of whether to grant or not to grant the application for the order sought in terms of section 20(1) of the Family Law Reform Act of 1969. But before considering the exercise of that discretion I must first deal with the issue of consent.

The third and final issue for determination in this application centres on section 21(1) of the Act dealing with consent for taking of blood samples.

Section 21(1) reads as follows:-

"21-(1) Subject to the provisions of subsections (3) and (4) of this section, a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent."

Subsections (3) and (4) are not relevant here.

The gist of Mr. Silwamba's alternative submission is that Section 20(1) of the Family Law Reform Act is applicable only to parties to an action and that a direction pursuant to section 20(1) is incompetent without a consent given under section 21(1) of the Act since consent is a condition precedent to a direction. On the other hand, counsel for the petitioners contended that consent is a condition subsequent to a direction under section 20(1).

While I agree with Mr. Silwamba that section 20(1) applies only to parties to an action I also take note that under Order 112(4) of the White Book, this court has a discretion and is competent to direct that a person, from whom blood samples have to be taken and is not a party to the application, be made a party to the application. On the other hand I do respectfully disagree with Mr. Silwamba that a direction pursuant to section 20(1) is dependent on consent under section 21(1). I am fortified on this conclusion by the very wording of the two sections. Section 20(1) giving power to court to require use of blood tests in part reads as follows:-

"In any civil proceedings in which paternity of any person falls to be determined ...the court may give a direction for the use of blood test....."

Section 21(1) in part states as follows:-

"....a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent."

My understanding of these two sections is that consent is only necessary for purposes of giving effect to a direction. This means you can not seek for a person's consent before you **obtain** a court's direction. In my view this makes good sense on account of the fact that the court has a discretion to give or not to give a direction. This conclusion is fortified further by the provisions of section 23(1) which state:

"23-(1) Where a court gives a direction under section 20 of this Act and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances."

It follows from the wording of this section that a direction under section 20 comes first followed by consent which in my view is a step to giving effect to a direction, failure of which may enable a court to draw any such inferences. My understanding of the law is that once a direction has been issued, a party is at liberty to refuse to consent. In the event of refusal to consent to a direction for a blood test, the court is also at large to draw any inference whether favourable or adverse depending on the circumstances of the case.

In the case of B V B and E (B intervening) (1969) 3 ALL ER 1106 the court directed a blood test to determine the paternity of a child. One of the parties refused to consent to a blood test. The court of appeal held that in the circumstances of that case the refusal to submit to a blood test was reasonable. This buttresses my finding that a direction under section 20(1) is not dependent on consent.

From the decided English authorities it would appear to me that whether or not a court will exercise its discretion to give a direction largely depends on three factors. These are:

The issues to be determined,
The circumstances of the case and
The purpose of the application for a blood test.

Before this court is a petition in which the petitioners have, among other prayers, raised the following issues for determination:

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

2. That it may be determined and declared that the 1st 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."

The circumstances leading to the petition as pleaded are that on 18th November, 1996 a Presidential Election was conducted and the respondent was declared as elected and subsequently sworn in office as President. That among the qualifications for one to stand as a candidate for election as President is that he must be a Zambian and both his parents must be Zambians by birth or descent. The case for the petitioners, as pleaded and testified to so far, is that there is doubt whether the respondent met the constitutional requirements as to his identity and paternity which issues must be resolved by this court.

The purpose of this application for a blood test, as I have understood it, is to obtain the best evidence on the issue of the respondent's paternity. The application, in my view, has met all the three factors to enable this court to judicially exercise its discretion under section 20(1) of the Family Law Reform Act, 1969.

(g) that the paternity of the respondent has risen for determination in the Petition requiring the taking of blood samples for blood tests to procure the best evidence.

(h) that whether or not a court will exercise its discretion to give a direction depends on the circumstances of the case, the issues to be determined in the case and the purpose for the blood test.

(i) that the Petitioners herein have established grounds in support of the application to enable this court to judicially exercise its discretion in their favour.

For the reasons and the conclusions I have set out in this ruling, I would, in the exercise of my discretion, give a direction for use of blood tests and taking of blood samples. Accordingly I grant the application as prayed.

For the avoidance of any doubt, I direct that Luka Chabala Kafupi, Petitioners' witness No. 3 be made a party to this application, only for the purpose of blood tests and taking of blood samples. I also direct that the blood samples be taken from the respondent and Luka Chabala Kafupi and that blood tests be carried out within twenty-one days from today's date.

Dated this 23rd Day of July 1997 at Lusaka in Open Court.

E.L. Sakala,
SUPREME COURT JUDGE.

ANDERSON KAMBELA MAZOKA — 1ST PETITIONER
LT GENERAL CHRISTON SIFAPI TEMBO — 2ND PETITIONER
GODFREY KENNETH MIYANDA — 3RD PETITIONER

v

LEVY PATRICK MWANAWASA — 1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT
THE ATTORNEY GENERAL — 3RD RESPONDENT

SUPREME COURT
SAKALA, C.J., LEWANIKA, D.C.J., CHIRWA, CHIBESAKUNDA, MAMBILIMA, CHITENGI AND SILOMBA JJS
On various dates between 22nd July, 2002, 30th November, 2004 and 16th February, 2005.
SCZ/EP/01/02/03//2002

Constitutional law-Jurisdiction-Constitution confers the Supreme Court with jurisdiction to decide whether a person has been validly elected.

Constitutional-law Electoral Act-the Electoral Act which voids an election of a candidate to the National Assembly does not apply to a Presidential Election Petition.

Constitutional law-Candidacy-a person becomes a candidate and therefore qualified to stand for the Presidential elections well before nomination day.

Constitutional law-Vacancy in office of President-Article 38 of the Constitution catering for vacancy in the office of the President is sufficient.

Civil Procedure-Presidential and Parliamentary Election Petitions ought not and must not follow the course of existing clogged system.

Civil Procedure-Standard of proof-Standard of proof required to prove a Presidential Election petition is higher than balance of probability and must be proved to a convincing degree of clarity.

Civil procedure-Function of pleadings-to give fair notice of the case to be met and to define issues to be ajudicated upon.

Prof. M.P. Mvunga, S.C., of Messrs Mvunga Associates
Mr. S. Sikota, of Central Chambers
Mr. J. Mwiimbu, of Messrs Jack Mwiimbu and Company for the 1st Petitioner

Mr. C.K. Banda, S.C., of Messrs Chifumu Banda and Associates
Mr. E. Mwansa, of Messrs Ernest Mwansa and Associates for the 2nd Petitioner.

Dr. J.B. Sakala, S.C., of Messrs J.B. Sakala and Company
Mr. S.M. Malama, of Jacques and Partners
Mr. M.M. Mundashi, of Mulenga Mundashi and Company, for the 1st Respondent.

Hon. George Kunda, S.C., Attorney-General
Mr. J. Jalasi, Principal State Advocate
Mr. D. Sichinga, Acting Chief State Advocate for the 2nd and 3rd respondents.

Held:

1. Elections be it Presidential or Parliamentary by their nature of demanding a quick resolution, ought not and must not follow the course of the existing clogged court system which has very slow wheels of resolution because of the strict requirements of adherence to rules of pleadings, practice, and procedure. Matters pertaining to elections must be determined very expeditiously, lest they be rendered an academic exercise at the end.

2. It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by the legislature, that recourse can be had to the other principles of interpretation.

3. Article 41(2) of the Constitution confers the Supreme Court Jurisdiction to decide whether a person has been validly elected as President.

4. Section 18 of the Electoral Act, which voids an election of a candidate to the National Assembly does not apply to Presidential Election Petitions.

5. Under Article 41(2) of the Constitution, the election of a President can be challenged on any question, either of law relating to the election of a President or the validity of the

election itself. Thus, any question relating to the legitimacy of a Presidential election including corruption, bribery, and non-compliance with the relevant law can be considered under Article 41 (2) of the Constitution.

6. In trying the question alleged, the Supreme Court is at large to examine the conduct of the Presidential election itself or indeed the compliance to the provisions of the applicable law. Should the court be satisfied, on any proven facts, that a candidate was not validly elected or indeed that the relevant laws were not complied with, so as to negate the legitimacy of the election, it will void such an election.

7. It is not within the sprit of the Constitution that when the incumbent President's election has been nullified there should be interregnum, with no one to take care of the affairs of the state thereby leading to chaos. Article 38 of the Constitution relating to vacancy in the office of the President is sufficient.

8. A person becomes a candidate for purposes of participating in Presidential election from the day that he or she accepts the nomination or sponsorship of a political party.

9. The standard of proof must depend on the allegations pleaded. Given the national character of the exercise where all the votes in the country form a single electoral college, the proven defects must be such that the majority of the voters are prevented from electing the candidate whom they preferred; or that the election is so flawed that the defects seriously affect the result which can no longer reasonably be said to represent the true free choice and free will of the majority of the voters.

10. As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.

11. The function of pleadings, is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.

12. In a case where any matter not pleaded is let in evidence, and

not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of unpleaded issues.

13. The courts however do not condone in any way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case, the court will always exclude any matter not pleaded, more so where an objection has been raised.

14. There were flaws, incompetence and derelictions of duty on the part of the Electoral commission of Zambia. However, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st respondent.

15. On the evidence presented, there is no basis upon which to find that the election was rigged and that it was not free and fair. The elections while not being totally perfect, were substantially in conformity with the law and practice.

16. According to the findings, 30 allegations out of the 36 were not proved. The few partially proved allegations were not indicative that the majority of the voters were prevented from electing the candidate whom they preferred, or that the election was so flawed that the dereliction of duty seriously affected the result which could no longer reasonably be said to reflect the true choice and free will of the majority of the voters.

Cases referred to:

(1) *Northman v Barnet Council [1978] 1 ALL ER 1243.*
(2) *Pyx Granile Company Limited v Ministry of Housing and Local Government [1960] A.C. 260.*
(3) *Lewanika and Others v Chiluba (1998) Z.R. 79*
(4) *Miyanda v Handahu (1993-1994) Z.R. 187*
(5) *Miyanda v Attorney General (1985) Z.R. 185*
(6) *Banda v The People (1986) Z.R. 105*
(7) *Re The Nomination Paper of A.C. Ngoma and the Federal Electoral Act (1958) NLR 974,*
(8) *The Controverted Election for the Electoral District of Two Mountains*

[1912] 47 C.S.C. 183

(9) *Sahu v Singh and Another [1985] LRC 31*

(10) *The Attorney-General and Another v Lewanika and Others (1993 - 1994) Z.R. 164.*

(11) *Mwamba and Another v The Attorney-General of Zambia [1993] 3 LRC 166*

(12) *Sussex Peerage Case [1843-1845] (65RR) 11*

(13) *Seaford Court Estates Limited v Asher [1949] 2KB 481.*

(14) *Shimonde and Another v Meridien BIAO Bank (Z) Limited (1999) Z.R. 47*

(15) *Mlewa v Wghtman. (1995 - 1997) Z.R. 171*

(16) *Bater v Bater, (No. 2) [1950] 2 ALL ER 458*

(17) *Zulu v Avondale Housing Project Ltd. (1982) Z.R. 172*

(18) *Mwelwa v The People (1975) Z.R. 166.*

(19) *Mohamed v The Attorney General (1982) Z.R. 49*

(20) *Mundia v Sentor Motor Limited (1982) ZR 66*

(21) *London Passenger Transport Board v Moscrop [1942] SC 332*

(21) *Zambia Electricity Supplies Corporation Limited v Red-Line Limited (1990-1992) Z.R. 170*

(22) *Jere v DVR/SGT Shamayuwa and Another (1978) Z.R. 204*

(23) *Re Robinson Settlement, Grant v Hobbs [1978] 1Ch.D.728*

(24) *Kearny Company Limited v Agip Zambia Ltd, Asphalt and Tamar (1985) Z.R. 7*

(25) *Bank of Zambia v Anderson and Another (1993-1994) Z.R. 47*

(26) *Attorney General v Mubiana Appeal Number 38 of 1993 (unreported).*

Legislation referred to:

Constitution of Zambia, Cap.1: Articles: 34,35, 38 (1) (2) (3), 41 (1) (2), 75 (2)

Electoral Act, Cap. 13: Sections: 2, 8, 9 (1), 17, 18 (2), 20, 27 (1)

Electoral (Amendment) Act, No. 23 of 1996: Section 9 (3)

Interpretation and General Provisions Act, Cap.2, Section 10, 20 (3) 20 (4)

Electoral (Presidential Elections) Statutory Instrument Number 109 0f 1991 Regulations: Reg. 17.

Supreme Court rules, Cap. 25: Rule 72A

Election Petition Rules, Cap. 13: Rule 4 (1)

Electoral (General) Regulations Statutory Instrument Number 108 0f 1991 Reg. 3, 22 and 23

Electoral (Conduct) Regulations of 1996: 7 (I) (*l*)

General Editor's note:

This is an abridged version of the judgment in this matter. It only covers pages 1 to 63 and 310 to 316 of the judgment.

SAKALA C. J.: delivered the Judgement of the Court.

The trial and the determination of this Consolidated Presidential Election Petition of 2002 has seemingly taken a long period to complete and justifiably so, the delay caused a lot of anxiety in the nation and others. Yet, the number of the actual days, when the court sat and heard witnesses, arguments and submissions in support of various interlocutory applications, does not reflect the long duration the Petition has taken. The Court sat for 89 days in all to hear evidence, arguments and submissions. The Petition commenced in January 2002 and Judgement is being delivered today three years and one month from the dates the separate petition were filed.

The circumstances, some of which were procedural, leading to the protracted trial, were, in most instances, unavoidable and beyond the control of the court. In fact, the court was all along desirous to complete the matter as quickly as possible. To put the record straight, it is necessary to allude to some of the circumstances leading to this protracted trial. There are three petitioners and three respondents in this petition. While the 3rd petitioner appeared in person, the other two petitioners were represented. On the part of the 1st and the 2nd petitioners, there were initially seven counsel of record. There were also seven counsel on the part of the Judgements. The 1st petitioner filed his original petition on 15th January 2002, while the 2nd petitioner filed his original petition on 16th January 2002. The 3rd petitioner, who represented himself, filed his original Petition on 17th January, 2002, and subsequently; he filed an Amended Petition on 17th March, 2002. The filing of these petitions was followed by various interlocutory applications and rulings before single Judges of this court. These are on record. The respondents, too, initially filed separate Answers to each of the separate petitions. The 1st respondent filed his Answer to the 1st and the 2nd petitioners' petitions on 14th May, 2002, while the 1st respondent's Answer to the 3rd petitioners' Petition was filed on 18th July, 2002. The 2nd and the 3rd respondents filed a joint Answer to the 1st and the 2nd petitioners' petitions on 4th June, 2002.

After close of pleadings, the matter was set down for hearing for 22nd July, 2002. On that day, interlocutory matters, which are also on record, were raised. The hearing of witnesses could not start on that day.

The matter was adjourned to 23rd July, 2002. After, again, disposing of some interlocutory matters on that day, the hearing of evidence could not proceed. The matter was adjourned to 16th September 2002. On the same 23rd July, it transpired that the earlier Order for Directions issued by the Court, in relation to pleadings, had not been fully complied with. Consequently, a fresh Order for Directions had to be issued. This fresh order was in the following terms; that the petitioners file their Amended Consolidated Petition by 31st July 2002; that the Amended Consolidated Answer be filed by 12th August 2002; that the Reply, if any, be filed by 22nd August, 2002; that Discovery and Inspection be completed by 2nd September, 2002; that the Bundle of Documents and Pleadings be filed by 9th September 2002; and that the hearing of the Amended Consolidated Petition be commenced on 16th September, 2002. In the course of hearing the Petition, it transpired that this fresh order was also not fully complied with in that discovery and inspection seemed not to have been done. As a result of this failure to fully comply with the order of discovery and inspection, fresh documents continued to surface in the midst of hearing a witness resulting in further arguments and rulings. All in all, the exchange of pleadings took about nine months.

The hearing of evidence from witnesses commenced on 16th September 2002. The 3rd Petitioner closed his case on 6th October, 2003, while the 1st and the 2nd Petitioners closed their case on 10th October, 2003, after all the petitioners had called a total of 76 witnesses. Although it took 57 days to hear evidence, arguments and submissions on behalf of the three petitioners, there were in between the hearings 20 long adjournments for a variety of reasons. Some of the reasons were difficulties encountered by the parties in securing the attendance of witnesses, counsel seeking instructions from their respective clients and also the Courts' work schedule. There was also the problem of securing suitable hearing dates convenient to all the parties as well as the Court. The hearing of the evidence on behalf of the respondents commenced on 10th November, 2003. They closed their case on 6th October, 2004; after hearing evidence from 80 witnesses.

The hearing of the respondents' case took 32 days with 11 long adjournments in between the hearings. After the close of the respondents' case, the court invited written submissions from the parties. The petitioners were to file their written submissions by 29th October, 2004. But the 1st and the 2nd petitioners filed their written

submissions on 4th November, 2004. The 3rd petitioner filed his written submissions on 19th November 2004, instead of 29th October, 2004, as directed by the court. The respondents were directed to file their responses to the petitioners' written submissions by 21st November, 2004. Instead, the 1st respondent filed his written submissions on 25th November, 2004, while the 2nd and the 3rd respondents filed their written submissions on 26th November, 2004. Thus, again the dates directed by the court were not followed thereby contributing to the long period the petition has taken.

As a consequence of not following the directed dates, the petitioners, who had been directed to file their written replies, if any, by 26th November, 2004, to enable the court to sit on 30th November 2004, for oral submissions, were unable to file their replies by 26th November 2004. The court, however, sat on 30th November, 2004. But the petitioners insisted on their right to file written replies. The court granted them the application to file their replies by 7th December, 2004. On the same 30th November, 2004, the court reserved judgment to a date after the written replies by the petitioners had been filed and the date for delivery of judgment was to be communicated to the parties. This is the history of this consolidated petition leading to this unprecedented long period it has taken.

We have deliberately delved into this detailed history of this petition in order to bring out two points. The first point is that the events leading to the long period it has taken to complete this matter were unavoidable and in the interest of justice. The second point is that elections, be it Presidential or Parliamentary, by their nature of demanding a quick resolution, ought not and must not follow the course of the existing clogged court system which has very slow wheels of resolution because of the strict requirement of adherence to rules of pleadings, practice and procedure. Matters pertaining to elections, must be determined very expeditiously lest they be rendered an academic exercise at the end. During the hearing of this petition, on a number of occasions, the court passionately appealed to the parties to expedite the bringing of witnesses to court. The Court also expressed its serious concerns at the slow pace the petition had been proceeding. At one stage, the court was even told by counsel that "it can take as long as it takes". Indeed, the long history of the trial of this petition cannot be said that it was the court's intention that it goes on *ad infinitum*, as suggested in some quarters. Issues of bereavements, which were some of the issues leading to long adjournments, were matters beyond anyone's

control. The long period it has taken the court to conclude this matter is very much regretted.

It has taken two months and eight days to render this judgment after the petitioners filed their replies. This was on account of the complexity of the case, and the novel constitutional issue based on the special jurisdiction of this court given to it by the Constitution. The court had to examine the issue of jurisdiction carefully as it was raised and argued for the first time. We shall deal with the issue of jurisdiction and other related matters later in this judgment. It was also necessary for the court to do a thorough research in the matter. Apart from that, the court had to study the evidence of all the 156 witnesses contained in 11 box files of typed transcripts of evidence. The typed evidence alone runs into 7,180 pages. The court had also to study over 500 pages of written submissions by the parties and study the authorities referred to it. We are indebted to counsel on both sides and the 3rd Petitioner for the detailed learned written submissions. In addition to all that has been said, in the course of hearing the petition, the court had to contend itself with the schedule of other cases in Lusaka, Kabwe and Ndola.

Having explained the long journey the petition has taken, we now turn to deal first with the preliminary issues of jurisdiction and/or remedies, as raised in the written arguments and submissions on behalf of the 2nd and the 3rd respondents. The 3rd petitioner also raised an issue of conflict of interest on the part of the learned Attorney-General, suggesting that he had no *locus standi* in this matter. Before we deal with the preliminary issues, we must allude to the provisions of the Constitution under which the petition was brought. The petition was made pursuant to Article 41 (2) of the Constitution of Zambia. This Article reads:

"(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 first and most cardinal preliminary issue, is the one raised by the respondents with regard to the jurisdiction of this Court to hear and determine this petition.

But when arguing the point, it was argued together with the issue of remedies. The respondents consider the issue of jurisdiction to be very critical in that they first raised it through a Notice of Motion filed in this Court on 13th November, 2002, pursuant to Order 14A, as read with Order 33, rules 3 and 7, of the Rules of the Supreme Court, 1999 Edition. In our ruling of 19th November, 2002, we said that this Petition could not be properly determined through the Motion which was before us because the issues raised in the Notice of Motion went to the very root of the petition. Consequently, we declined to entertain the motion and advised the parties to raise the issue in their submissions at the conclusion of the hearing of the petition. It would appear that the petitioners anticipated that the respondents would again raise the issue of jurisdiction in their submissions and consequently, the petitioners made submissions on the issue of jurisdiction to the extent that the respondents were relegated to the position of replying.

The 1st and the 2nd petitioners referred us to Article 41(1)(2) of the Constitution and submitted that these provisions are not ambiguous in terms of content and construction pertaining to the determination and alidity of the election of the President in Zambia. They argued that the role of the Court in a Presidential election Petition is to resolve disputes between different parties of the society, so that society does not degenerate into anarchy, otherwise parties to Presidential elections would have, as their only recourse, to take their grievances to the streets. They submitted that this Court has the jurisdiction to determine the matter on merits. It is the 1st and the 2nd petitioners' further submission that the Supreme Court of Zambia is endowed with the final authority to determine and interpret the laws of the land. One of the authorities to which they referred us is the case of *Northman v Barnet Council*[1], at page 1246 in which Lord Denning stated, *inter alia,*

"The literal method is now completely out of date. It has been replaced by the approach, which Lord Diplock described as purposive approach.....
In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: "There is nothing we can do about it." Whenever the strict interpretation of the statute gives rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind."

This decision was confirmed by the House of Lords in [1979] 1 ALL ER Page 142.

The 3rd petitioner also submitted extensively on the issue of jurisdiction of this court to determine these petitions and cited to us several authorities in support of his submissions. He stated that there is a presumption against the ouster of the jurisdiction of courts. According to the 3rd petitioner, it would be contrary to public policy to oust the jurisdiction of the full bench of this court in view of Article 41(2) of the Constitution whose purpose and effect is to grant special and/or exclusive jurisdiction to the court to hear and determine Presidential election petitions. For this submission, the 3rd petitioner referred us to various authorities, one of which was Lord Simonds' statement in the case of *Pyx Granile Co. Limited v Ministry of Housing and Local Government*[2], where he said, when considering whether a statute had excluded the right of a subject to have recourse to courts of law, that: -

> *"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."*

The 3rd petitioner submitted further that under Article 41(2) of the Constitution, this court has at the end of the hearing, to determine whether the 1st respondent or any other person was duly elected as President of Zambia. He also stated that as a participant in the last Presidential elections, he was claiming his rights as guaranteed in the Constitution of Zambia and that those rights be enforced or applied to him (sic) According to the 3rd petitioner, these constitutional rights cannot be abridged by law or waived by any official. Finally, the 3rd petitioner submitted that it would be a judicial scandal of the century if, after three years of hearing the petition, the court, in frustration, failed to give a remedy after finding the 1st respondent guilty.

On behalf of the 1st respondent, it was submitted that there was no law under which this election may be nullified. We were referred to our earlier decision in the case of *Lewanika and Others v Chiluba*[3], in which we stated, inter alia, that: -

> *"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 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 as set out in Section 18 of Cap 13 which reads....."

Counsel also referred us to Article 41 of the Constitution, which empowers this Court to determine whether any person has been validly elected as President and/or whether any provision of the Constitution or any law relating to the election of the President has been complied with.

In short, Counsel for the 1st respondent concedes that this Court has power to hear and determine a Presidential Election Petition. However, Counsel argued that under Article 38 of the Constitution, a vacancy in the office of the President can only occur when:-

(a) a sitting President dies; or
(b) resigns; or
(c) is impeached; or
(d) is incapacitated; or
(e) the National Assembly is dissolved.

In view of this, counsel submitted that there is a yawning *lacuna* as to what happens when the court nullifies the election of a President in that the law does not provide for the occurrence of a vacancy and a remedy as a result of such nullification. In this regard, it was argued that Section 18 of the Electoral Act cannot be relied upon because on a proper construction of Section 18 of the Electoral Act, which falls under Part VI and which avoids the election of a candidate to the National Assembly, does not apply to a Presidential candidate. It was further argued that while by virtue of Regulation 17, Electoral (Presidential Elections) Regulations, Part IV of the Electoral (General) Regulations, which creates electoral offences under which an election may be nullified, apply to Presidential elections, this Regulation does not and cannot amend the principal Act because it is a subsidiary legislation. It was the 1st respondent's position that Section 18 of the Act, therefore, does not apply to a Presidential election. In the view of the 1st respondent, this court cannot fill in the *lacunae* created by Article 41 of the Constitution by reading into the Electoral Act matters which have not been provided for. It was argued that the intention of the legislature was very clear, which is that Part VI of the Electoral Act was not intended to cover Presidential elections. It was submitted that if this was the case, the legislature would have said so in Act 23 of 1996, which amended Part III dealing with Presidential elections.

To buttress this submission, the 1st respondent referred us to our decision in the case of *Miyanda v Handahu*[4] where we said:-

> *"It is not what the legislature meant to say or what their supposed intentions were with which the court should be concerned; the court's duty is to find out the expressed intention of the legislature. When the language 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, justice or political exigency, motive of the framers and the like.....*

On the prayers in the petition, the 1st respondent submitted that the orders being sought by the petitioners are in the nature of declarations. It was argued that while it is conceded that this court can grant a declaration, the question the 1st respondent poses is: in view of the Constitutional *lacuna*, how far can any such declaration made by the court be effective, useful and beneficial to the country and the people of Zambia? Relying on the case of *Miyanda v Attorney General*,[5] the 1st respondent submitted that a declaration, being a discretionary remedy, can only be made on proper principles and considerations and will not be made when it will serve no useful purpose. It is the 1st respondent's position that should the court make the orders, it has to accept that it will be involved in the enforcement of the said orders and give direction as to what will happen after nullification of the Presidential election. Consequently, the 1st respondent invited this court to hold that in view of the *lacunae* in the law, the success of this Petition will be of an academic value only.

Submitting on behalf of the 2nd and the 3rd respondents, the learned Attorney-General stated that the issue of jurisdiction was fundamental. He echoed the submissions on behalf of the 1st respondent that the Constitutional provisions are deficient and have a serious *lacunae*. He pointed out that the law does not prescribe any grounds upon which the election of a President may be annulled. According to him, the office of President cannot become vacant as a result of an election petition. He also referred us to Article 41(2) of the Constitution and submitted that this provision is vague in that it does not stipulate what particular provision of the Constitution or any law should be contravened so as to lead to the nullification of a Presidential election and the grounds upon which the Supreme Court should rely to determine whether a President has been validly elected.

The learned Attorney-General also referred us to the case of *Lewanika and Others v Chiluba (3)*, and submitted that in this case, the propriety of resorting to Section 18 of the Electoral Act, in resolving issues raised in election Petitions originated under Article 41(2) of the Constitution, was not raised and not fully argued. He was of the view that had these arguments in relation to Section 18 been raised, this court could have decided otherwise on the use of this Section in Presidential election petitions. He urged us to depart from the approach that we adopted in the *Lewanika and Others v Chiluba case (3)*, by not relying on the grounds prescribed in Section 18 of the Electoral Act. The learned Attorney- General urged us to overrule this decision, arguing that there are sufficient reasons for us to do so. For this submission, he referred us to the case of *Banda v The People*[6], in which this Court held, *inter alia*, that in order to have certainty in the law, the Supreme Court should stand by its past decisions even if these are erroneous unless there is a sufficiently strong reason requiring that such decisions should be overruled. He went on to state that the Court relied on Section 18 of the Electoral Act because the Constitution and the Electoral Act do not provide specific grounds for nullifying a Presidential election.

On the submissions by the petitioners that this court can seal gaps and *lacunae* in the law and grant the remedies sought, should the strict interpretation of the statutes lead to an absurd and/or unjust situation; the learned Attorney-General submitted that the authorities relied on by the petitioners do not apply to the interpretation of electoral statutes. According to the learned Attorney-General, decided cases are to the effect that electoral legislation should be construed strictly and that courts should not rewrite or read new provisions into such legislation. He referred us to the case of Re *The nomination paper of A.C. Ngoma and the Federal Electoral Act,*[7] where the Court quoted from the Canadian Case of, *The Controverted Election for the Electoral District of Two Mountains,*[8] in which Davies J stated that:-

> *"In construing the Section of such an important Public Act as the one under consideration, I think that while we should be careful, on the one hand, not to allow merely technical or formal objects to prevail so as to defeat the manifest purpose and intention of the Act, on the other, we should not attempt to re-write the Act or to strain the clear, precise language of its Sections so as to render them innocuous."*

The learned Attorney-General also extensively quoted from the Indian case of *Sahu v Singh and Another*[9], in which Chandrachud, C.J. threw out a challenge to the election of the President on the ground that

he was not a suitable candidate. The enabling legislation, in that case, did prescribe the grounds upon which the election of a candidate could be declared void and suitability was not one of such grounds. The Court was of the view that the ballot box was to be the sole judge of the suitability of the candidate.

The learned Attorney-General further submitted that while Section 18 of the Act only covered Parliamentary election petitions, Sections 8 and 9 of the Electoral Act governed Presidential election petitions. According to the learned Attorney General, Section 9 of the Act is as vague as Article 41(2) of the Constitution in that it does not prescribe grounds for nullifying a Presidential election. He went on to state that in view of this, this Court should revisit it's decision in the *Lewanika and Others v Chiluba* (3) case to the extent that the Court sought guidance from Section 18 of the Electoral Act.

In his further submissions, the learned Attorney-General stated that neither the Constitution nor the Electoral Act prescribe remedies which may be granted to a petitioner in a Presidential election petition. The statutes merely empower the court to determine whether;

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

(b) any person has been validly elected as President under Article 34.

The learned Attorney-General pointed out that under this law, the starting point is the Constitution itself. He went on to state that the only provision of the Constitution relating to the election of the President is Article 34. This article prescribes among others, the qualification of candidates in a Presidential election; when a Presidential election would be held; and how the Presidential poll would be conducted.

He stated that the court also has to consider other laws apart from the Constitution and consider whether they have been complied with. According to the learned Attorney-General, these other laws are Part III of the Electoral Act, and the Electoral (General) Regulations as extended by the Electoral (Presidential elections) Regulations.

He submitted that these provisions are in contrast to Section 20 of the Electoral Act, which clearly prescribes the remedies that may be granted in a Parliamentary election petition. The learned Attorney-

General submitted that if it was proved, at the end of this petition, that there was non-compliance with the laws, there is no provision either in the Constitution or the Electoral Act, under which this court would grant the remedies sought. He stated that the Constitution does not provide for a vacancy in the office of President arising from nullification of a Presidential election. According to the learned Attorney-General, it was not the intention of the legislature that an incumbent President should vacate office pursuant to an election petition. He found support for this submission in Articles 35 and 38 of the Constitution, which prescribe instances when the office of the President can become constitutionally vacant.

The learned Attorney-General also raised the issue of the limitation period under Section 27(1) of the Electoral Act which provides that Parliamentary election petitions should be determined within 180 days of the presentation of the petition to the High Court. He stated that there is no similar provision applicable to a presidential petition. The learned Attorney-General submitted that should this Court hold that provisions relating to Parliamentary election petitions should be applied in determining Presidential election petitions, then Section 27(1) of the Electoral Act should also apply. To support his submission, the learned Attorney-General relied on the case of *Re The Nomination Paper of, A.C. Ngoma and the Federal Act (7)*, which according to him, expounded the principle that Courts must ensure that the provisions of Electoral Acts are properly complied with. He submitted that the idea behind prescribing the period of 180 days was to cure the mischief of delaying Petitions for long periods until they become an academic exercise. He submitted further that this period is mandatory and should be complied with. He stated that since the petition in this case went well beyond the 180 days period, we should dismiss it for want of prosecution. According to the learned Attorney-General, there was inordinate delay in prosecuting the action and that passing judgment now would be catastrophic and disruptive to the nation. He also stated that such nullification would bring into question, the agreements and appointments made by the 1st respondent. He submitted that the correct status of the matter is that it is illegally before the court, having exceeded the prescribed period by two and half years.

In reply, the 1st and the 2nd petitioners made an extensive joint submission, the sum and substance of which is that the respondents raised the issue of jurisdiction too late in the day. They pointed out that by the time the respondents raised the issue of jurisdiction, the pleadings

had been closed and some witnesses had even given evidence. Further, the 1st and the 2nd petitioners said that a preliminary issue should be raised at the first available opportunity before pleadings from the side raising the preliminary issue. In short, the 1st and the 2nd petitioners are saying that the respondents cannot raise the issue of jurisdiction after submitting to the jurisdiction of the court. Citing Article 41(2) of the Constitution, the 1st and the 2nd petitioners submitted that this court has the jurisdiction to determine a Presidential election petition. Quoting the definition of the word "determination" from Blacks Law Dictionary 6th Edition and the Concise Oxford Thesaurus compiled by Betty Patrick 1995, the 1st and the 2nd petitioners submitted that the word determination in Article 41(2) of the Constitution means *decision, conclusion, judgment, verdict, opinion, decree, solution, result, arbitration, settlement, diagnosis or prognosis.* It was argued that to determine a case is to *decide, resolve, conclude, end, terminate or finish an argument.* The 1st and the 2nd petitioners say the court must therefore *determine* this petition.

It was emphasized that the jurisdiction of the Supreme Court to hear a Presidential election petition is not only provided for by Article 41(2) of the Constitution, but also by Section 9(3) of Act Number 23 of 1996 which provides that:-

> *"Any question by any person which may arise as to whether any provision of the Constitution or any law relating to nomination or election of President has been complied with shall be referred by the Returning Officer or by such person to the full bench of the Supreme Court within 14 days of the person elected as President being sworn-in in accordance with Clause 9 of Article 34 of the Constitution."*

The 1st and the 2nd petitioners then drew the court's attention to the fact that in the 1996 Presidential election petition, the Supreme Court conclusively determined the petition regarding the validity of the election of Frederick Jacob Titus Chiluba. In this case, the 1st and the 2nd petitioners argued, the Supreme Court has jurisdiction to determine the validity of the election of the 1st respondent.

On the argument that there is a *lacuna* in the law in that the Constitution does not prescribe the grounds upon which the election of a President may be annulled, the submission on behalf of the 1st and the 2nd petitioners is that the Supreme Court had, in the 1996 Presidential election petition against Frederick Jacob Titus Chiluba, already ruled that Section 18 of the Electoral Act applies. It was argued that the holding by the Supreme Court in case of *Lewanika and Others v Chiluba (3)*, that

Section 18 of the Electoral Act also applied to Presidential Election Petitions was consistent with the preamble to the Electoral Act which says that the provisions relate, *inter alia*, to the election to the office of the President. It was argued further that by virtue of Regulation 17 of the Electoral (Presidential Elections) Regulations, Part IV of the Electoral (General) Regulations, apply with necessary modifications to the election of a President. Further, it was submitted that by Statutory Instrument Number 17 of 2002, the Supreme Court Rules were amended so as to introduce Rule 72A which states that:

"The provisions of the Election Petition Rules under the Electoral Act shall apply with necessary modifications to Presidential Petitions."

It was also argued that since the Election Petition Rules which apply to Parliamentary election petitions also apply to Presidential election petitions, it follows that Rule 4(1) of the Election Petition Rules also applies to the Presidential Election Petitions. Rule 4(1) provides that:

"The petitioner shall state the right of the petitioner to petition under Section 18 of the Act."

It was then argued that it was for this reason that in the Frederick Jacob Titus Chiluba Presidential Petition, the Supreme Court said:-

"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 (1985 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 at 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....."

According to the 1st and the 2nd petitioners, the issue of applicability of the Electoral Act and the Regulations made thereunder has, therefore, been long settled by this court after due attention and consideration.

It was further submitted that the argument by the respondents that the interpretation of Regulation 17 and Section 18 of the Electoral Act and Articles 34 and 41 of the Constitution that a Presidential election, cannot be annulled, does not fall within the terms of the phrase in Article 41(7), that:

"Any question which may arise as to whether -

(a) any provision of this Constitution or any law relating to the election

of a President has been complied with or

(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."

5. It was argued that the interpretation the respondents put on the rules and the Constitutional provisions does not accord with the natural and ordinary meaning of the words in the phrase quoted above; nor with the clear purpose of Articles 34 and 41 of the Constitution. It was argued further that the interpretation does not comply with the guarantees that 10. statutes and the Constitution shall be interpreted in a manner which will give life to the intention of Parliament provided by the Supreme Court in the case of the *Attorney-General and Another v Lewanika and Others*[10]. It was the submission of the 1st and the 2nd petitioners that the respondents have cited no authority to support the interpretation they seek to place on 15. Articles 34 and 41 of the Constitution and Regulation 17 and Section 18 of the Electoral Act.

On the argument on lapse of 180 days within which to complete the hearing and determination of the petition, it was submitted that this court ruled on that issue in 1996 when it said that the provision in the law 20. that election Petitions must be completed within 180 days should not be interpreted as an endorsement that an election petition begun in good time must be stopped and thrown out because the nature of the case takes it beyond the 180 days limit. It was argued that in fact, numerous election petitions take more than 180 days and the court should take judicial 25. notice of that fact.

On the submissions that the nullification of the election would bring into question the agreements and appointments made by the 1st respondent, it was submitted, on behalf of the 1st and the 2nd petitioners, that on the authority of *Noris case*, which was adopted by this Court in 30. *Mwamba and Another v The Attorney-General of Zambia*,[11] the agreements and appointments made by the 1st respondent will remain valid notwithstanding that his election has been nullified. As to the possibility of chaos, it was submitted that like in the Ukraine, nullification of the election of the 1st respondent will not be catastrophic but will lead to 35. peace. On a rather personal note, it was also argued that the 1st and the 3rd respondents should not talk about *lacunae* in the law now because the 1st respondent was once a Solicitor-General and at one time leader of the House and the 3rd respondent is the learned Attorney-General. They stated that the 1st respondent and the learned Attorney-General should

therefore, have seen those *lacunae* and made the necessary amendments to the law. It was submitted that if there are *lacunae* in the law, then the learned Attorney-General is taking advantage of his own default or inefficiency.

And by pleading the *lacunae*, the learned Attorney-General is failing to protect the rights of the aggrieved parties in the election process.

On the argument by the 2nd and the 3rd respondents that the election of the 1st respondent cannot be invalidated by a mere violation of Election Regulations, it was submitted that in Zambia, violation of Electoral Regulations can lead to the nullification of a Presidential election. On the case of *Sahu (9)*, relied on by the 2nd and the 3rd respondents, it was submitted that, that case is irrelevant as the issue at hand is not one of suitability of the 1st respondent but the validity of his election.

On what would happen in the event of the election of the President being annulled, it was submitted that by virtue of Sub Article 2 of Article 38 of the Constitution, the Vice President or in his absence a member of the Cabinet elected by the Cabinet shall perform the functions of the President in accordance with Article 34 until a new President assumes office. According to the 1st and the 2nd petitioners, the word "whenever" in Sub Article 2 of Article 38 is contrasted with Sub Article (1) of Article 38 which talks about specific incidents. Therefore, it was argued, Sub Article (2) of Article 38 will apply regardless of the manner the President vacates office and covers all unforeseen circumstances. It was argued that these unforeseen circumstances include nullification of the President's election under Article 41 of the Constitution. Relying on Section 10 of the Interpretation and General Provisions Act, it was argued and submitted that Sub Articles (1) and (2) of Article 38 should be taken notice of separately in that Sub Article (1) provides for the time within which an election should be held when a vacancy occurs, whereas Sub Article (2) provides that whoever shall act as President will continue until the next elections are held. Further, it was argued that these Sub Articles are distinct and provide for different scenarios.

In his reply to the respondents' submissions, the 3rd petitioner repeated his earlier submissions on jurisdiction. He pointed out that by virtue of the *Lewanika case* (3), the application of Section 18 of the

Electoral Act to a Presidential Election Petition is the correct legal position. He said that any uncertainty has been resolved by the promulgation of Statutory Instruments. He pointed out that Regulation 17 of the Electoral (Presidential Elections) Regulations makes Part IV of the Electoral (General) Regulations applicable with necessary modifications to an election of a President as they apply to and in respect of elections of members of the National Assembly. On the application of the other Electoral Regulations to Presidential elections, the 3rd petitioner echoed the submissions of the 1st and the 2nd petitioners. Further, the 3rd petitioner echoed the submissions by the 1st and the 2nd petitioners on what should happen after nullification of the Presidential election.

The 3rd petitioner submitted extensively on the issue of 180 days limitation and cited several authorities, but the import of the 3rd petitioner's submissions is that the issue of limitation has been raised late and that in any case there is already a precedent by this court where an Election petition has taken more than 180 days to dispose of. The 3rd petitioner also submitted on conflict of interest in so far as the learned Attorney-General's appearance in these proceedings is concerned. However, we do not think that these submissions go to the issue of jurisdiction raised by the respondents. Therefore, we do not intend to go into the submissions related to conflict of interest. We are, however, satisfied that there is no conflict of interest in the present petition.

We have given our anxious consideration to the submissions by the parties on the issue of jurisdiction. It is common cause that the only provision under which a Presidential election petition can come before the Supreme Court is Article 41 of the Constitution. As we understand the submissions and the arguments, the critical issue being canvassed by the respondents is that while this Court has the power to hear and determine any question which may arise as to whether a person has been validly elected as President or indeed, whether the provisions of the Constitution or any other law relating to the election of a President has been complied with, this Court has no jurisdiction to grant the remedies which the petitioners are seeking in this petition.

Article 41(2) of the Constitution provides as follows:

> *"41.(1) .....*
>
> *(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 question is; what mandate has this provision given to this court? It is trite law that the primary rule of interpretation is that words should be given their ordinary grammatical and natural meaning. It is only if there is ambiguity in the natural meaning of the words and the intention of the legislature cannot be ascertained from the words used by the legislature that recourse can be had to the other principles of interpretation. Tindal C.J. in the old English case of *Sussex Peerage,*[12] lends credence to this view when he said that: -

"If words of a statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense."

Indeed, as Lord Denning observed in the case of *Seafood Court Estates Limited v Asher*[13]: -

"A Judge must not alter that of which it (a statute) is woven, but he can and should iron out the creases."

Looking at the words used in Article 41(2) of the Constitution, it is clear to us that this court has been clothed with the mandate to determine whether any person has been validly elected as President and/or whether any provisions of the Constitution or any law relating to the election of a President has been complied with.

The Concise Oxford Dictionary, 9th Edition, at Page 368 defines *"determine"* to mean: -

(a) find out or establish precisely;
(b) decide or settle;
(c) be a decisive factor in regard to;
(d) make or cause a person to make a decision;
(e) bring or come to an end; and
(f) fix or define the position of.

We have no doubt in our minds that the meaning of the word *"determine"*, in the context it is used in Article 41(2) calls upon this court to find out or establish precisely or decide whether a person was validly elected as President of Zambia and/or whether the applicable laws were followed. Clearly, therefore, Article 41(2) of the Constitution confers this court with the jurisdiction to decide whether a person has been validly

elected as President. As such, the submissions by the petitioners that this court has jurisdiction to hear and determine this Petition are well grounded. Indeed, even Counsel for the 1st respondent conceded that this Court has jurisdiction to hear and determine the election of a President. Their only quarrel was that there is no legal provision under which we can nullify the election of a President. In trying to show that this court has no power to annul the Election of the President and grant the remedies sought, the respondents took us through the provisions of the Electoral Act and the relevant Regulations made thereunder and the Constitution, arguing that there is no express provision stipulating the grounds upon which an election of the President may be nullified and specifying the remedies to be granted in the event of such nullification. It has been argued by the respondents, that while by virtue of Regulation 17 of the Electoral (Presidential Elections), Regulations, Part IV of the electoral (General) Regulations applies to Presidential elections Petitions, Section 18 of the Electoral Act, which voids an election of a candidate to the National Assembly on the grounds stipulated therein, does not apply to Presidential election petitions. The respondents pointed out that there has been no amendment to the Electoral Act for Section 18 to apply to Presidential election petitions. It has been argued that Regulation 17 cannot therefore purport to amend Section 18 as the petitioners have argued.

We agree with these submissions because Regulation 17 specifically refers to Part IV of the Electoral (General) Regulations. We agree that subsidiary legislation cannot amend provisions of the principal legislation: *Shimonde and Another and Liners v Meridien BIAO Bank (Z)*[a9]. In the event, all the submissions by the petitioners to that effect are not tenable.

Part IV of the Electoral (General) Regulations provides for corrupt and illegal practices and election offences, which in fact are offences for which a candidate may be liable. It is clear to us that the intention of Regulation 17 of the Electoral (Presidential Elections) Regulations was to apply the corrupt, illegal practices and other election offences to a Presidential candidate.

Section 18 of the Electoral Act, however, empowers the High Court to void the election of a candidate as a Member of the National Assembly on the grounds stipulated therein. Our understanding of this provision is that anyone who intends to impugn the election of a candidate to the National Assembly must invoke the jurisdiction of the

High Court under Section 18(1) of the Electoral Act and the election of such candidate shall only be declared void on proof of any of the grounds specified in Sub Section 2.

However, under Article 41(2) of the Constitution, the election of a President can be challenged on any question, either of law relating to the election of a President or the validity of the election itself. In trying the question alleged, this Court is at large to look at the conduct of the Presidential election itself or indeed the compliance of the provisions of the applicable law. Should the Court be satisfied, on any proven facts, that a candidate was not validly elected or indeed that the relevant laws were not complied with, so as to negate the legitimacy of the election, it will void such an election.

In our view, Section 18 of the Electoral Act does not directly apply to Presidential election petitions. To argue otherwise would be to limit the wide Provisions of Article 41(2) of the Constitution under which this court is at large to consider any grounds in resolving questions referred to it. Any question relating to the legitimacy of a Presidential election, including corruption, bribery, non-compliance with the relevant law etc. can be considered under Article 41(2) of the Constitution. Our use of the word "borrow" in relation to Section 18 of the Electoral Act, in the *Lewanika and Others v Chiluba judgment*(3), should be understood in this context. The issue of jurisdiction was not raised and fully argued in that case. Had the issue been fully argued in the *Chiluba case*, we would, no doubt, have given the full meaning and extent of Article 41(2) of the Constitution. In any event, the arguments by the respondents if taken to their logical conclusion suggest that a Presidential election cannot be challenged at all and that Article 41(2) of the Constitution is of no consequence. This, in our view, could not have been the intention of the framers of our Constitution.

The respondents also submitted that in the event that we hold that Section 18 of the Electoral Act applies to Presidential election petitions, we should also hold that Section 27(1) of the Electoral Act, which prescribes the time limit of 180 days within which to determine an election petition, should also apply to a Presidential election petition. We have found that Section 18 of the Electoral Act does not directly apply to Presidential election petitions. We have found no law, which suggests that Section 27(1) of the Electoral Act applies to Presidential election petitions. Though for different reasons, we uphold the petitioners' submissions that the 180 days limitation does not apply.

On the other hand, even if Section 27(1) would be applicable, strict adherence to it, would lead to a number of illogicalities and absurdities in both Parliamentary and Presidential elections, in that regardless of any reason, a petition which exceeds 180 days must cease or collapse in midstream without any determination. This, in our view, would be most unsatisfactory. Perhaps, this explains why the Section is silent on what should happen when a petition has exceeded 180 days. We take note that in practice most Parliamentary election petitions and even the last Presidential election petition exceeded 180 days.

Another argument advanced by the respondents is that the law does not provide for a vacancy in the office of the President consequent upon nullification of the election of the holder of the office of President. We do not find much force in these arguments because in view of what we have said, the corollary to the finding by the court that the holder of the office of President was not validly elected, or that his election cannot be upheld by reason of non-compliance with the laws relating to the election of a President, is that there will be a vacancy in the office of the President. In short, we find Article 41(2) of the Constitution to be comprehensive and to have envisaged a vacancy in the office of the President in the event that his election is nullified. As to how such a vacancy will be filled, it goes without saying that it will be through an election since there are no any other constitutional means for any one to ascend to the office of the President. In such an event, the court will have to order a fresh Presidential poll to be conducted in a specified time. The provisions of the Constitution in Article 38(1) are that a vacancy created in terms of that Sub Article shall be filled within 90 days. And we do not see the court departing from the spirit of this Article in the event that a fresh Presidential poll is ordered.

There have been arguments and submissions from the parties as to the constitutional arrangement in the event that the election of a sitting President is nullified. Without going into the details of the arguments and submissions, we find Sub Articles (2) and (3) of Article 38 of the Constitution to be sufficient. It is our opinion that these provisions stand alone and independent of Sub Article (1) of Article 38 of the Constitution, as argued by the Petitioners. We have reached this conclusion because Sub Article (2) of Article 38 does not refer to a vacancy which may be created pursuant to Sub Article (1) of Article 38 of the Constitution. Sub Article (2) of Article 38 starts with the words: *"Whenever the office of the President becomes vacant ....."*. The

Concise Oxford Dictionary, 9th Edition, on Page 1595, gives the natural meaning of the word.

"whenever" as *"at whatever time; on whatever occasion etc."*

In the event, we hold that Sub Article (2) of Article 38 of the Constitution applies to a vacancy in the office of President, however caused.

The arguments by the respondents that Sub Article (2) of Article 38 of the Constitution will only operate when there is a vacancy created by Sub Article (1) of Article 38 is, therefore, untenable because it fails to take into account the election of a President, which has been declared invalid under Article 41(2) of the Constitution. The arguments by the respondents if taken to their logical conclusion would lead to an absurd situation. If, for example a Presidential candidate would have been found to have cheated on age or citizenship thereby contravening Article 34 of the Constitution, it cannot be validly argued that such a situation would not create a vacancy in the office of the President. Article 38 of the Constitution should not be interpreted in isolation but in light of all the other relevant provisions in the Constitution, one of which is Article 34. It is not within the spirit of the Constitution, as the arguments by the respondents suggest, that when the incumbent President's election has been nullified there should be an *interregnum,* with no one to take care of the affairs of the state, thereby leading to the chaos the respondents fear. In conclusion, we hold, on the preliminary issue of jurisdiction, that this court has the jurisdiction to hear and determine this petition and if proven, grant the remedies sought.

Another related preliminary issue raised by the 2nd and the 3rd respondents, in their joint written submission, was for us to determine when one becomes a candidate in a Presidential election. Their contention is that a person becomes a Presidential candidate only upon nomination as per the definition of candidate in Section 2 of the Electoral Act. Section 2 reads as follows:-

"Candidate means any person nominated as a candidate for an election."

The 2nd and the 3rd respondents further contended that in terms of Section 2, a candidate is a person who goes through the prescribed process of nomination for an election and has filed nomination papers to qualify as a candidate. The 2nd and the 3rd respondents also contended

that in relation to Section 18(2) of the Electoral Act, which, inter alia, deals with electoral offences and mal-practices, for which an election may be annulled, can only apply to a Presidential candidate after he or she has lodged his or her nomination papers. In consequence thereof, it was the view of the two respondents that all Presidential candidates were only answerable for illegal and corrupt practices committed after they lodged their nominations on the 1st December, 2001 and not otherwise. The two respondents have also drawn our attention to the definition of candidate in Statutory Instrument No. 108 of 1991, dealing with Electoral (General) Regulations and Statutory Instrument No. 109 of 1991, which deals with Electoral (Presidential Elections) Regulations and which, in their view, have expanded the definition of the term candidate. The Electoral (General) Regulations (S.I. No. 108 of 1991) define candidate as follows:-

"Candidate means a person who, in relation to an election, has lodged or intends to lodge his nomination papers."

And the *Electoral (Presidential Elections) Regulations (S.I. No. 109 of 1991)* define *a candidate* as follows:-

(a) in relation to any period before the close of the period appointed under regulation 3 for receiving nomination in an election, any person intending to stand for election in such election; and

(b) in relation to any period after the close of the period under regulation 3 for receiving nominations in an election, any person validly nominated as a candidate in such election.

It was contended by the 2nd and the 3rd respondents that these two definitions of candidate in the regulations are at variance with the definition in Section 2 of the Electoral Act in that the regulations purport to include persons who intend to stand for elections. The two respondents contended that the added meaning given to the term candidate in the two Regulations is contrary to Section 20(2) of the Interpretation and General Provisions Act, Chapter 2, of our Laws, which provides that:-

"Terms and expressions used in Statutory Instruments shall have the same meaning as in the written law under which the Statutory Instrument was made."

The two respondents also referred us to our decision in the case of *Shimonde and Freight and Another v- Meridien BIAO Bank (Z) Limited (14),*

in which we subordinated a Statutory Instrument to the enabling Act in the following words:-

"In choosing to apply a rate of interest upon a judgment debt based on the current bank rates at the time, the learned Commissioner relied on Statutory Instrument No. 174 of 1990, which amended the rate of interest specified at the time in the High Court Rules. However, that statutory instrument in fact flew in the teeth of the Judgments Act, which prevailed over the subordinate legislation and which decreed 6% of the rate of interest on a money judgment. The decisions of this court, such as Bank of Zambia v Anderson, *and Another* and Mubiana, *made it very clear that the provisions of an Act of Parliament could not be ignored or over-ridden by a mere statutory instrument. See Section 20(4) of the Interpretation and General Provisions Act, chapter 2. The Judgments Act has since been amended and it accords with what the statutory instrument had proposed. However, the fact still is that at the time of the judgment herein, it was not lawful to award more than 6%."*

On the basis of the Interpretation and General Provisions Act and our reasoning in the Shimonde case (14), the 2nd and the 3rd respondents submitted that the definition of candidate should be restricted to those persons who have actually filed nomination papers; that only when candidates are nominated in terms of the Electoral Act are they answerable for their conduct as candidates.

The other issue that was canvassed in the written submissions, and which has a bearing on the meaning given to candidate was in respect of the nomination process as provided for in the Electoral (Presidential Elections) Regulations under Statutory Instrument No. 109 of 1991. The respondents quoted Regulation 5 in full, but what is of relevance to their subsequent argument is Regulation 5(2)(a) which provides as follows: -

"5(2)A nomination paper shall-

(a) state the political party of which the candidate is a member or by which he is sponsored and the symbol that the candidate proposes to use."

In terms of the foregoing Regulation, the 2nd and the 3rd respondents contended that political parties merely sponsor candidates; that a person does not become a candidate at the time that he or she is selected or elected by a political party; but that he or she becomes a candidate after going through the nomination process. Consequently, the position of the two respondents, which forms the gist of their submissions, is that the evidence led by the petitioners relating to the

events, which occurred before the filing of the nomination papers, is irrelevant and should, therefore, be excluded. We note that the 1st and the 2nd petitioners did not, in their reply, address the issue as to when one becomes a candidate. On the other hand, the 3rd petitioner, although not directly replying on this issue, condemned the learned Attorney-General for not playing his role of defending the public interest for which purpose he was joined to the proceedings or indeed for which he holds office. According to the 3rd petitioner, the learned Attorney-General exhibited a conflict of interest between his office and his personal relationship with the 1st respondent by raising the issue of when one becomes a candidate.

We have considered the submission of the 2nd and the 3rd respondents with regard to the question of candidate in a Presidential election. The question we have been asked to answer is: when does a person become a candidate in a Presidential election? Since we are dealing with a Presidential election petition, we find that the genesis of a candidate, his or her nomination and qualification to run for the office of President must be in Article 34(3) of the Constitution. The relevant part of this Article provides: -

"34(3) A person shall be qualified to be a candidate for election as President if: -

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

Section 9(1) of the Electoral Act, which falls under PART III dealing with Presidential elections, makes provision, inter alia, for the filing of nomination papers in the following terms:-

"9(1) A candidate for election as President shall, on such day, at such time and at such place as may be determined by the Commission, deliver to the Returning Officer-

(a) the candidate's nomination paper;"

Regulation 5(2) of the Electoral (Presidential Elections) Regulations provides, *inter alia*, as follows: -

"5(2) A nomination paper shall:-

(a) state the political party of which the candidate is a member or by which he is sponsored and the symbol that the candidate proposes to use."

Further, we note that the term candidate is defined in the Electoral (Presidential Elections) Regulations as: -

"(a) in relation to any period before the close of the period appointed under Regulation 3 for receiving nomination in an election, any

person intending to stand for election in such election; and

(b) in relation to any period after the close of the period under regulation 3 for receiving nominations in an election, any person validly nominated as a candidate in such election."

Having considered the provisions in Article 34(3) of the Constitution, Section 9(1) of the Electoral Act and Regulation 5(2) of the Electoral (Presidential elections) Regulations, we find that a person becomes a candidate, for purposes of participating in a Presidential election, from the day that he or she accepts the nomination or sponsorship of a political party. We are, therefore, satisfied that in terms of the constitutional provisions, the Electoral Act and the Regulations made thereunder, a person becomes a candidate and, therefore, qualified to stand in the Presidential elections well before nomination day. This is so because in Zambia now, political parties nominate and announce the names of their candidates for Presidential elections well before the Electoral Commission of Zambia (ECZ) fixes a date for nomination. This practice enables prospective Presidential candidates to campaign well before the nomination day. If we were to accept the submissions by the 2nd and the 3rd respondents that a person becomes a Presidential candidate on nomination day, we would have the absurd situation of a prospective Presidential candidate engaging in corrupt and illegal practices prior to nomination only to stop on nomination day. Clearly, that is not the spirit or intent of the Constitution, the Electoral Act and the Regulations made thereunder. From the foregoing discussion on candidate, we are satisfied, on the evidence of Michael Chilufya Sata, (PW3) and Vernon Johnson Mwaanga, (PW4), that the 1st respondent, Levy Patrick Mwanawasa, was nominated and accepted nomination by the Movement for Multi- Party Democracy (herein referred to as MMD), as Presidential *candidate* on 24th August, 2001. We find that, that was the date the 1st respondent became a Presidential *candidate* for the purpose of the Presidential elections held in Zambia between 27th and 31st December, 2001. We have also considered the point raised by the 3rd petitioner, that the learned Attorney-General, as counsel representing the 2nd and the 3rd respondents, has abandoned his role of defending the public interest by raising the issue of candidate which is for the benefit of the 1st respondent, thereby creating a conflict of interest. We do not agree with him that the issue raised by the learned Attorney-General is not of public interest.

Related to the question of when one becomes a Presidential candidate, the respondents, in answer to the evidence adduced by the petitioners that the MMD and the Parliamentary and Local Government candidates were agents for the 1st respondent, submitted that the notion flies in the teeth of the Electoral (General) Regulations, particularly Regulation 67. Referring to the *Lewanika and Others v Chiluba* case (3), where we held that not all one's political party members can be agents and that agents must be appointed as provided for in Regulation 67 of the Electoral (General) Regulations, it was argued that the 1st respondent can only be responsible for the agents he appointed himself and since there is no evidence that he appointed any agents, the policy of MMD that Parliamentary and Local Government candidates were agents for the 1st respondent was an internal MMD arrangement, which could not be accepted as legally binding on the 1st respondent.

In reply to these submissions, the 1st and the 2nd petitioners, in their joint submission, countered, relying extensively on Halsbury's Laws of England, Volume 15, 4th Edition, particularly from paragraphs 376 377, 698, 701 and 703, that according to MMD tradition, all Parliamentary candidates were election agents for the Presidential candidate and that this had not been rebutted by the 1st respondent and that in fact even the respondents' witnesses confirmed this tradition. Following this, it was submitted that, all canvassers were agents for the 1st respondent. Further, it was submitted that having been sponsored by a political party, the party was a political association and as such the political association was an agent for the 1st respondent.

Although the petitioners made references to pages 376 377 and 655 and 701 and 703, their submissions are on canvassers, political associations, candidate being an agent himself and candidates' wife being an agent. These are discussed in other paragraphs such as 619 at page 481; paragraph 621 at page 482. We take it that the paragraphs quoted by the two petitioners were quoted in error, but they meant to discuss canvassers and political associations as agents. They submitted that there was sufficient evidence that the MMD's policy was that the Parliamentary and Local Government candidates were agents for the 1st respondent and that the evidence did not suggest that every member of MMD was agent for the 1st respondent. For this submission, they relied on the evidence of Sata, (PW3), Mwaanga, (PW4), Kalumba, (PW48), Machungwa, (PW51) and Sakeni, (RW53). They submitted that according to Halsbury's Laws of England Vol.15, 4th Edition, at page 377, where it is acknowledged that where a candidate adopts either

individually or collectively, the work that is done by a political association in such a manner as to benefit by its agency regarding the election, the candidate is bound by the actions of such an association. The 3rd petitioner also submitted that it was MMD's policy that all Parliamentary and Local Government candidates were election agents for the Presidential candidate. The 1st respondent must therefore be responsible for all that MMD and its Parliamentary and Local Government candidates did for him. He further referred us to the Halsbury's Laws of England, Vol. 15, 4th Edition, on election agents.

We have considered the submissions by the parties on this issue. It is true in the *Lewanika Others v Chiluba* case (3), we did say that not everyone in one's political party can be an election agent. Further, that an agent had to be appointed under Regulation 67 of Electoral (General) Regulations. Reference to Regulation 67 in the Chiluba case(3) was per incuriam, because Regulation 12 (1) of the Electoral (Presidential Elections) Regulations excludes the application to Presidential Election of Part V of the Electoral (General) Regulations. Part V deals with the appointment of election agents. Under our electoral laws, a Presidential candidate was and is not obliged to appoint election agents. It follows, therefore, that whether one was an election agent of a Presidential candidate is a matter of evidence.

Another argument, raised by the 2nd and 3rd respondents in their written submissions that fall under the category of preliminary issues, relates to the standard and the burden of proof. The two respondents, citing this courts' judgment in *Lewanika and others v Chiluba*[3], pointed out that this court had ruled that the standard of proof required to prove a Presidential election Petition is the same as that required in the Parliamentary election Petitions; that the standard of proof is higher than a mere balance of probability; and that averments in a petition have to be proved to a convincing degree of clarity. It was contended, on behalf of the respondents, that to the proposition enunciated in the *Lewanika and others v Chiluba case(3)*, we must add that since a Presidential election involves all the 150 constituencies; the petitioners must prove electoral malpractices and violations of Electoral laws in at least a majority of the constituencies.

It was pointed out that the petitioners had cited a number of cases relating to Parliamentary election petitions, including the case of *Mlewa v Wightman*[15], for the proposition that once one of the grounds in Section 18 (2) of the Electoral Act is proved to the satisfaction of the court, then

the election would be nullified. It was submitted, on behalf of the 2nd and the 3rd respondents, that different considerations should apply in proving a Presidential election petition. It was contended that we cannot use the same yardstick used in a single constituency election to a 150 constituency election. It was also contended that the petitioners must show that the entire election process was affected and that the majority of voters were prevented or denied the chance to vote for a candidate of their choice.

It was further pointed out to us that in determining this petition, the court is dealing with the security and even the life of the nation, the future of the nation and therefore different considerations to those applicable to Parliamentary elections should be applied. It was submitted, citing Lord Denning, L.J. in *Bater v Bater, (No 2)*[16] that within a set standard of proof, there may be degrees of probability within that standard. It was further submitted that even in this petition, a higher standard within the standard applicable to Parliamentary election petitions should be applied, particularly that serious allegations bordering on criminality are alleged. It was also contended that on the whole, a Presidential election petition cannot be nullified if the petitioners prove only isolated instances of irregularities or wrongdoing. It was submitted that they must prove large scale, deep rooted and comprehensive widespread malpractices, defects and flaws in the electoral process and further that the majority of voters were prevented from voting for a candidate whom they preferred. It was contended that it is not enough to prove that the elections were not perfect. For these arguments and submissions, counsel, on behalf of the two respondents, also relied on this court's decision in the case of *Lewanika and others v Chiluba (3)*.

On the burden of proof, the gist of the arguments and the submissions is that it is trite law that he who alleges must prove; that the petitioners are obliged to call evidence and prove the case to the required standard; and that it is not for the respondents to call witnesses to prove their innocence. It was pointed out that these submissions were made in the light of some comments on behalf of the petitioners about the respondents' alleged failure to call witnesses. It was submitted that there was no need for the respondents to call witnesses because the petitioners' witnesses had failed to adduce cogent evidence. The respondents cited the case of *Zulu v Avondale Housing Project Ltd*,[17] in support of their arguments on the burden of proof.

We have examined the submissions and replies on behalf of the 1st and the 2nd Petitioners, we note that they did not directly advance arguments on standard and burden of proof. The 3rd petitioner, in his main submissions, did not also directly submit on standard and burden of proof. He, however, indirectly made submissions in reply to the 2nd and the 3rd respondents' submissions on standard and burden of proof when he concluded his reply by saying: that the 1st respondent had completely failed to provide a defence and that he, the 3rd petitioner, had discharged the evidential burden of proof. For this submission, he cited the case of *Mwelwa v The People,*[18] where Baron, DCJ, observed that the defence must be given at some time or other; the court will not consider it simply in the form of a speculative argument from the bar.

We have very carefully considered the arguments and submissions on standard and burden of proof. In their Consolidated Petition, the petitioners pleaded general and specific allegations relating to the elections and the electoral process. We shall be alluding to these allegations when we analyse the evidence.

In the case of *Lewanika and others v Chiluba* (3), this court said on 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, 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 raised are required to be established to a fairly high degree of convincing clarity."*

On behalf of the 2nd and the 3rd respondents, we have been urged that we must add to what we said in the *Chiluba case*(3), that since a Presidential election petition involves all the150 Constituencies, the petitioners must prove electoral malpractices and violations of electoral laws in at least a majority of the constituencies. It was submitted that different considerations should apply in proving a Presidential election petition and that we cannot use the yardstick used in a single constituency election to a 150 Constituency election.

These arguments are indeed plausible, but beg the question. In our considered opinion, what the respondents are contending here is purely a matter of semantics. We totally agree with the position taken by Lord *Denning in Bater v Bater*[16], where, at page 459, he said:

"The difference of opinion which has been invoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases, the charge must be proved beyond reasonable doubt but there may be degrees of proof within that standard. Many great Judges have said that in proportion as the crime is enormous so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil Court when considering a charge of fraud will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal Court even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

We accept that the issue of standard of proof may turn out to be more a matter of words than anything else. There can be no absolute standard of proof.

The degree must depend on the subject matter. In the case under consideration, the standard of proof must depend on the allegations pleaded. What we said in the *Chiluba case (3)*, when concluding our judgment is on all fours with Lord Denning's remarks in *Bater case*. This is what we said in the *Chiluba case(3)*:

"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 the 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 witness who spoke of aborted democracy."

In this passage, we said everything that the respondents are now asking us to do. We find nothing to add to what we said. The standard of proof we shall adopt in this case is that enunciated in the *Chiluba case (3).*

On burden of proof, we said in *Zulu v Avondale Housing Project:*[17]

> *"There is one observation I wish to make before leaving this subject. Mr. Phiri's general approach has been to allege that the respondent had not adduced evidence in support of the allegations in the dismissal letter. I have found that the respondent did in fact adduce such evidence. In the process however I have also pointed out the deficiencies in the appellant's own evidence. It appears that the appellant is of the view that the burden of proof lay upon the respondents and it is on this that I would like to say a word. I think that it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case when he makes any allegation, it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent's case."*

Earlier in 1982, in *Mohamed v the Attorney General,*[19] this court said on burden of proof:

> *"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a Plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence."*

We held in that case that a plaintiff cannot automatically succeed whenever a defence failed; he must prove his case. It follows that for the petitioners to succeed in the present petition, it is not enough to say that the respondents have completely failed to provide a defence or to call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and the electoral flaws were such that the majority of 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 voters. This is the bottom line we alluded to in the *Chiluba case (3)*.

The last issue raised by the 2nd and the 3rd respondents that falls in the category of preliminary issues is one on pleadings. On behalf of the 2nd and the 3rd respondents, it was pointed out that an examination of the petitioners' pleadings and the evidence adduced in respect thereof reveals that the petitioners either departed from their pleadings in presenting their case or failed to adduce evidence on some of the averments in the consolidated petition; that in some cases the petitioners presented a completely new case from what they pleaded; and that in other cases not a single witness was called to substantiate some of the allegations in the petition. As examples where no evidence was led, the respondents cited the pleadings on *"ghost polling stations"*, destruction or exchange of polling boxes, stuffing of pre-marked ballot papers, Special Branch distributing ballot papers throughout the country, and soldiers shown to have voted, but who were actually out of the country.

It was submitted, on behalf of the respondents, that no evidence was led from many of the Polling Stations mentioned in the Consolidated Petition. It was argued that this court, in the case of *Lewanika and others v Chiluba (3)*, had commented on some of the averments included in a petition but on which no evidence was led. It was submitted that such averments only served the purpose of sensationalizing the Petition, as there was no justification of including such a serious allegation and not call evidence at the end of the day.

On behalf of the respondents, it was further pointed out that in some cases, the petitioners introduced new allegations, which were not pleaded, thereby introducing a new case. This, it was submitted, was done on the basis of some general pleas made in the petition. The examples given were those of the evidence led in respect of the constituencies in Ndola, such as Ndola Central, Bwana Mkubwa and Chifubu. Also cited as examples were some polling stations in Luapula Province, such as Ndoba and Kasanse. In all these, it was submitted, evidence was led on such allegations without even amending the pleadings so as to accommodate the fresh evidence adduced. We were urged not to allow the evidence adduced and to exclude it even at this late stage because the evidence is not supported by the pleadings. The cases of *Mundia v Sentor Motors Limited*[20], and of *London Passenger Transport Board v Moscrop*[21], were cited in support of these submissions.

On behalf of the respondents, we were also urged to follow the reasoning in the two cases and dismiss some of the allegations in the petition on the ground that the petition as drawn is not supported by the evidence. We were further asked to disregard evidence adduced outside the four corners of the petition. On behalf of the 2nd and the 3rd respondents, the learned Attorney-General in his submissions, also invited the court to disregard the argument of the 3rd petitioner that the court was obliged to receive evidence from all constituencies, whether or not specifically pleaded. It was contended that this was a court of law and was guided by rules and that pleadings are very critical, particularly, in allegations of this nature so as to avoid surprises. It was submitted that issues to do with registration of voters as raised by the 3rd petitioner, should not be considered by this court and that in any event, there was no evidence led by the petitioners on the registration of voters.

In reply to the arguments and submissions on behalf of the 2nd and the 3rd respondents, counsel for the 1st and the 2nd petitioners confined their submissions to the question of adequacy of pleadings on motor vehicles only. It was pointed out that the respondents had tried to exclude the overwhelming evidence on use of government motor vehicles by claiming that the same was not pleaded. It was submitted that under the Election Petition Rules adopted by Statutory Instrument No. 17 of 2002, amending the Supreme Court Rules, a petition should only state the holding and the result of the election and should briefly state the facts and the grounds relied on to sustain the prayer, but no evidence should be stated in a petition. However, the court may order such particulars as may be necessary to prevent surprises and unnecessary expense and to ensure a fair and effectual trial.

It was submitted on behalf of the petitioners that in Paragraph 5.VI, the petitioners had pleaded that the respondents were utilizing government facilities and resources and that in Paragraph 4 the petitioners had sufficiently pleaded flagrant violation or non-compliance with the provisions of the Electoral Laws and Regulations made thereunder. It was pointed out that the words *"corrupt"* and *"illegal practices"* encompass the corrupt and illegal use of government vehicles or resources to purchase government vehicles. Detailed arguments and Submissions were advanced on behalf of the 1st and the 2nd petitioners centred on Paragraphs 4(i) and 5. VI of the petition. It was submitted that the pleading in the petition relating to use of government resources as read with the pleading that there were flagrant violations

and non - compliance of Electoral Regulations was sufficient, such that the 1st respondent, in defence, called witnesses from the Road Traffic Commission, Zambia Revenue Authourity and the Government Controller of Transport to testify on the motor vehicles. In addition, a supplementary bundle of documents containing white books of motor vehicles in issue was filed in the court by the respondents and the respondents went as far as making an attempt to show, through documents generated at the Zambia Revenue Authority, that the vehicles in question had duty paid in respect thereof. It was submitted that the respondents were alive to the fact that at all times they had to answer the question of use of government motor vehicles. It was contended that for this reason the respondents cross-examined the petitioners' witnesses on the issue of motor vehicles.

It was argued, on behalf of the 1st and the 2nd petitioners, that when the evidence of the motor vehicles was called, the respondents did not object or state that they were taken by surprise; that when the respondents objected to the subpoena to the Road Traffic Commissioner, they did not base their objection on the grounds that the issue was not pleaded, but instead stated that the documents were government records which related to the security wings. It was submitted that the issue of pleading the vehicles was a desperate last-ditch attempt to exclude the damning evidence which was central and relevant to the petition. It was also argued, on behalf of the 1st and the 2nd petitioners, that in the unlikely event that the court found in the respondents' favour on the issue of pleadings, the respondents are estopped by their conduct from stating that they had been taken by surprise on the issue of motor vehicles. It was submitted that the respondents waived their right to object to the evidence once they cross-examined the witnesses at length and even brought witnesses in an attempt to rebut the evidence of the petitioners on the ground of pleadings.

The petitioners further argued that the purpose of the electoral petition Rules is to ensure a fair and effectual trial. They pointed out that there was no doubt that everyone in the nation knew that part of the petition is about the illegal use of government motor vehicles although the question of the motor vehicles had occupied a lot of time at the trial. In concluding the reply on behalf of the 1st and the 2nd petitioners, it was pointed out that if the court found that the matters were not pleaded, the Zambian cases are to the effect that where there is a failure to object to evidence of unpleaded issues and evidence is led, the court is not precluded from considering that evidence. For this submission, the case

of *Zambia Electricity Supply Coroporation Limited v Red-Line Limited*[22], was cited as an authority. It was also submitted that since so much time has been spent on the issue of motor vehicles and so many documents had been prepared and produced by both sides, it would not be fair to ignore the authority of *Zambia Electricity Supply Coroporation Limited*(22). The 3rd petitioner did not make a direct reply on the submissions on pleadings.

We have carefully considered the arguments and the submissions on the issue of pleadings. We have also examined the Amended Consolidated Petition. The gist of the respondents' submissions on the issue of pleadings is that the petitioners departed from their pleadings in presenting their case and in some cases the petitioners presented a completely new case from what they pleaded. In arguing the issue of pleadings, the respondents also submitted on the petitioners' failure to adduce evidence on some of the averments in the petition or to call witnesses to substantiate some of the allegations in the petition. In dealing with the issue of pleadings, we do not intend to consider the submissions on failure to adduce evidence or to call witnesses. The failure to adduce evidence or to call witnesses will be dealt with later when we review the evidence adduced in the petition.

We also do not wish to allude to the examples cited by the respondents where no evidence was led or where evidence was led. These are also matters to be dealt with when reviewing the evidence. The function of pleadings was aptly stated by Chirwa J (as he then was) in the case of *Mundia v Sentor Motors Ltd*,[23] a case cited by the respondents, when at page 69, he said:

> *"The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by their pleadings and the court has to take them as such."*

In the case of *Jere v DVR/SGT Shamayuwa and Another* (21), this court stressed the point on pleadings when it pointed out that *"It is one of the cardinal rules of pleadings for the party to tell his opponent what he is coming to court to prove and to avoid taking his opponent by surprise. If he does not do that, the court will deal with it in one of the two ways. It may say that it is not open to him, that he has not previously raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it and protect the other*

party by letting the case stand down." Thus, in a case where a defence and or, in our view, any matter not pleaded is let in evidence and not objected to by the other side, the court is not and should not feel precluded from considering it.

This is the position emphasized in the case of the *re Robinson Settlement, Grant v Hobbs*[24] when the Court said:

> *"The rule is not one that excludes from the consideration of the Court, the relevant subject matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just."*

In the present petition, the respondents argued on pleadings that the petitioners departed from their pleadings in presenting their case and in some cases presented a completely new case. The petitioners on the other hand advanced detailed arguments based on adequacy of pleadings on motor vehicles. These arguments, in our view missed the point. However, the gist of the petitioners' arguments was that the respondents did not object to the evidence being led and above all they cross-examined the witnesses on all the unpleaded matters.

In our considered opinion, the respondents having not objected to the evidence immediately it was adduced, this Court is not precluded from considering that evidence. At the end of the day, the issue will depend on the weight the Court will attach to the evidence which was let in on unpleaded issues. At this late stage, we cannot therefore exclude the evidence adduced and allowed without objection. This, however, does not mean that we condone in any way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case, the court will always exclude matters not pleaded more so where an objection has been raised. Having set out the history of the petition and having disposed of the various preliminary issues, we now turn to the petition as pleaded.

By their Consolidated petition, the petitioners have advanced several allegations and averments. These allegations are both general and specific. On account of the manner the Petition was presented and argued, we propose to deal with both the general and specific allegations as contained in the Consolidated petition. Paragraph 4 of the Consolidated Petition sets out the general allegations. The paragraph states:

"And your Petitioners say:-

(i) that the election was fraught with general and notorious bribery and corrupt and illegal practices and misconduct by reason of which the majority of the voters were or may have been prevented from electing a candidate of their choice and were therefore disenfranchised.

(ii) that the election and the whole electoral process was not conducted in accordance with the letter and spirit generally of the Constitution of the Republic of Zambia and particularly of Article 34 of the Constitution of Zambia and the Electoral Act, but instead was characterized with flagrant violation or non-compliance with the provision of these laws and regulations made thereunder thereby affecting the results and denying your petitioner a free and fair election, which conduct is not reasonably justifiable in a democratic society.

(iii) that the election result was pre-determined or pre-arranged by Levy Patrick Mwanawasa and/or his agents in Levy Patrick Mwanawasa's favour and therefore was contrary to the spirit of upholding the value of democracy, transparency, accountability and good governance and hence was a sham and was null and void.

(iv) that the Electoral Commission of Zambia was negligent and failed to supervise or superintend the Election in accordance with the electoral Act and its Regulations, thereby facilitating the illegal and fraudulent conduct of several of its officers such as the opening or allowing of ballot boxes in the absence of interested parties and deliberately transporting ballot boxes without seals and unaccompanied by agents of parties."

Before we deal with the specific allegations set out in Paragraph 5 of the Petition, we can here interpose some observations on Paragraph 4. The manner Paragraph 4 was drafted is a classic example of the haphazard approach to pleadings. The petitioners simply set out general statements or allegations without any specifics. Thus, in their final submissions, they never addressed the paragraph apart from reproducing it. As we have already said, pleadings serve a specific function in a civil case. They set out a formal statement of a cause of action. They give a fair notice of a case to be met and to define the issues on which the court will have to adjudicate. Paragraph 4 (iii) as pleaded is most unsatisfactory. The petitioners are challenging an election result of a nationwide constituency. In our view, it is not enough to allege that the election result was pre-determined or pre-arranged by the 1st respondent

and or his agents without defining or stating the fact and not the evidence of how the election result was pre-determined or pre-arranged. As it will be seen later, no evidence was led or adduced on this Paragraph 4 (iii). This particular sub-paragraph (iii) of Paragraph 4 falls away. Sub-paragraphs (i), (ii) and (iv) of Paragraph 4 will be alluded to when considering the evidence of the specific allegations in Paragraph 5. The petitioners have advanced a number of prayers based on these general and specific allegations and averments as outlined in Paragraph 5. We shall refer to these prayers later in the judgment.

The respondents, in their Consolidated Answer, admitted and denied some of the allegations. They admitted that the Consolidated Petition was presented under Article 41 (2) of the Constitution, but denied that the 1st respondent was not validly elected. They admitted that the Consolidated Petition related to the Presidential election conducted on 27th December through out to 31st December 2001; that the petitioners were persons rightly entitled to vote in the elections and had the right to be nominated as candidates and stood as candidates in the elections. They denied all the general allegations in paragraph 4 of the Consolidated Petition. The respondents have joined issue with the petitioners in their Answer.

In the alternative, the respondents pleaded that an election of the President can only be impugned on the basis of Articles 41(2) and 34(3) of the Constitution of Zambia, as read with Part III of the Electoral Act, Cap. 13 of the Laws of Zambia; and that the allegations contained in the Consolidated Petition did not constitute grounds on which an election of the President can be challenged. We have already dealt with this alternative pleading, when we discussed preliminary issues. From our discussion on the issue of jurisdiction, we are satisfied that an election of the President can be impugned on the basis of Articles 41 (2) and 34 (3) of the Constitution. We are also satisfied that the allegations contained in the Consolidated Petition did constitute grounds on which an election of the President can be challenged.

We now turn to the thirty-six specific allegations which the petitioners have pleaded in paragraph 5 of the Consolidated Petition.

General Editors note: This marks the end of pages 1 to 63 of the judgment and the beginning of pages 310-316, being the last part of the judgment.

CONCLUSION

Having considered the evidence and made findings, we must now

conclude our judgment. We take note that in reviewing the evidence, there were some witnesses whose evidence was not considered in great detail or specifically. This is because we considered such evidence to be unhelpful to the issues before us and made no useful contribution to the case. For instance, a number of tapes and newspapers were produced. We did not specifically allude to them, although mentioned, because the point they covered had been adequately dealt with by reference to the evidence of other witnesses. We should also mention that from the evidence of the petitioners, they had a number of grievances which largely and clearly established some shortcomings in the management of the elections. There is also no doubt that on some issues, the parties found it appropriate to vent their feelings in court. Indeed, serious concerns were raised about the ECZ's capacity to manage the Tripartite Elections, and concerns about the use of the public media and the limited access to it by the opposition. There were also complaints concerning misuse of public or government facilities and resources. In our judgment, we have found that some of the allegations have been partially proved, while some have been found not to have been proved as they were not supported by the evidence on record. In some allegations, no iota of evidence was ever adduced. Thus, out of 36 allegations pleaded, 6 were partly supported by evidence and found partially proved. The remaining 30 were found not proved or not supported by any evidence on record. We accept that given the fact that the majority of the voters voted for the opposition as shown by the final result, and also taking into account the shortcomings in the management of the whole election exercise, there was on the whole, reasonable cause for petitioning the election. Some of the allegations and issues were certainly well taken, but some could not have been pursued had the petitioners been possessed of the full facts, while in others had the petitioners accepted the explanation given by the officials concerned.

The petitioners asked for six specific prayers in their Consolidated Petition. The first prayer was for an order for a scrutiny, verification and recount of the Presidential ballot papers. As regards scrutiny, no evidence was adduced to justify an order for scrutiny. The petitioners never adduced evidence relating to the results of verification, which as a matter of law is carried out in all the constituencies by the Returning Officers. We only heard evidence of verification from two constituencies, Livingstone and Kantanshi in Mufulira. Bearing in mind the nature of the Presidential constituency, which is nation wide, verification results from two constituencies cannot in our view, justify a scrutiny of the whole country.

On recount, we dealt with this matter when considering the allegation in Paragraph 5. XXXVI. We find no justification to order a recount. For the foregoing reasons, we decline to grant the prayer for scrutiny, verification and recount. Arising from our conclusion on the first prayer it follows that prayer number three, which is to the effect that after verification, scrutiny and recount, the rightfully elected President should be declared as the rightful and legal winner of the election, falls away.

The other prayers by the petitioners were that:-

"4. *that it may be determined and declared that the Electoral Commission willfully neglected its statutory duty to superintend the election process thereby allowing a fraudulent exercise favouring the 1st respondent.*"

"5. *that it may be determined and declared that the electoral process was not free and fair and that the election was rigged and therefore null and void.*"

We propose to deal with these prayers together. We accept that there were flaws, incompetency and dereliction of duty on the part of the Electoral Commission of Zambia. This is exemplified by the late delivery of election materials and insufficient supply of Presidential ballot papers in the complaining constituencies which led to delays and extension of the gazetted voting period. However, in our view, any negative impact arising out of these flaws affected all candidates equally and did not amount to a fraudulent exercise favouring the 1st respondent. On the evidence which was presented to us, we have no basis upon which we can find that the election was rigged and that it was not free and fair.

The other prayer by the petitioners was that: "2. *that it may be determined and declared that the 1st respondent was not duly elected as President of the Republic of Zambia.*"

According to our findings, 30 allegations out of the 36 pleaded have been found not proved. We have, however, found that 6 allegations have been partially proved. These are:

(a) **Paragraph 5. VI**
Except for the finding that 48 motor vehicles listed in the subpoena to the Road Traffic Commission and appearing

registered in Exhibit P25, under the name 'OP' as government vehicles, and the finding that some of the posters used in the 1st respondent's campaign were paid for using public funds, the whole allegation in Paragraph 5. VI relating to utilizing Government facilities and resources was not found to have been proved.

(b) **Paragraph 5. VII**

We found that only one District Administrator, RW35, Mr. Dennison Chisunka used government facilities and time to campaign for the 1st respondent.

(c) **Paragraphs 5. IX and 5. X**

We found that the allegations in these paragraphs were partly proved in that a pre-paid debate for Presidential candidates which was to be aired on ZNBC television on the eve of the tripartite elections was deliberately and wrongfully cancelled.

(d) **Paragraph 5. VIII**

We found that the allegation that the Presidential results communicated to ECZ were not consistent with the count at the polling station was proved in respect of Dambwa Site and Service polling station 37A in Livingstone Constituency.

(e) **Paragraph 5. XXX1 (b).**

We found that it was proved that MMD sold cheap mealie meal in Kantanshi constituency, during the campaign period which amounted to vote buying as an inducement to secure a vote in it's favour. Apart from the above findings, we have also found that there were flaws in the electoral process and dereliction of duty on the part of the Electoral Commission of Zambia. But as we said in the *Chiluba case (3)*:-

> *"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 the 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 present 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 being totally perfect as found and discussed, were substantially in conformity with the law and practice. The few partially proved allegations are not indicative that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the dereliction of duty seriously affected the result which could no longer reasonably be said to reflect the true free choice and free will of the majority of the voters. We, therefore, determine and declare that the 1st respondent, Levy Patrick Mwanawasa, was duly and validly elected as President of the Republic of Zambia.

Finally, on the prayers, there is the question of imposition of security for costs as a condition precedent to the hearing of a petition. According to the petitioners in their prayers, this is a denial of access to the Courts and is contrary to the spirit of the Constitution and other laws, especially in political cases. Security for costs is a matter of law and cannot be challenged in a Presidential election petition. We, therefore, decline to grant the prayer on costs.

For the reasons we have given in our judgment, this petition is unsuccessful and is dismissed. As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the 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

IN THE CONSTITUTIONAL COURT OF ZAMBIA 2021/CCZ/A0033

HOLDEN AT LUSAKA

(APPELLATE JURISDICTION)

IN THE MATTER OF:	ARTICLE 73(1) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016.
IN THE MATTER OF:	SECTIONS 97 (2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.
IN THE MATTER OF:	SECTIONS 98(c), 99(a), 100(2) (a), 106 (1) (b), 108 (1) & (4) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	THE PARLIAMENTARY ELECTION FOR KAMFINSA CONSTITUENCY OF THE DISTRICT OF KITWE HELD ON 12TH DAY OF AUGUST, 2021.

BETWEEN:

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
29 JUL 2022
REGISTRY 5
P O BOX 50067, LUSAKA

SUBETA MUTELO K. APPELLANT

AND

KANG'OMBE CHRISTOPHER 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

CORAM: Sitali, Mulenga, Mulonda, Chisunka and Mulongoti, JJC

On 17th May, 2022 and 29th July, 2022

For the Appellant:	*Mr. K. Chali of G.M. Legal Practitioners*
For the 1st Respondent:	*Mr. N. Simwanza, Mr. Y.S Simukonda and Mr. M. Mahenda of Noel Simwanza Legal Practitioners*
For the 2nd Respondent:	*Mr. B.M. Musenga, Ms. T.K. Phiri and Mr. M. Bwalya-In house Counsel-ECZ*

JUDGMENT

Mulongoti, JC, *delivered the Judgment of the Court*

Cases referred to:

1. *Margaret Mwanakatwe v Charlotte Scott and another CCZ Judgment No. 50 of 2018.*
2. *Brelsford James Gondwe v Catherine Namugala SCZ Appeal No. 129 of 2012.*
3. *Anderson Kambela Mazoka and others v L.P. Mwanawasa and The Attorney General, (2005) Z.R. 138.*
4. *Akashambatwa Mbikusita Lewanika and others v F.T.J. Chiluba (1998) Z.R. 79.*
5. *Mohamed v The Attorney General (1982) Z.R. 49 (SC)*
6. *Nkhata & others v The Attorney General (1966) Z.R. 124.*
7. *Zulu v Avondale Housing Project Limited (1982) Z.R. 172.*
8. *Abuid Kawanga v Elijah Muchima CCZ Appeal No. 8 of 2017.*
9. *Austin Milambo v Jamba Machila CCZ Appeal No. 6 of 2016*
10. *Jonathan Kapaipi v Newton Samakayi CCZ Appeal No. 13 of 2017.*
11. *Stephen Masumba v Elliot Kamondo CCZ Selected Judgment No. 53 of 2017.*
12. *Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General CCZ Selected Judgment No. 51 of 2018.*
13. *Kabwe Taulo Chewe v Patrick Mucheleka and George K. Mwamba CCZ/2021/0023*
14. *Mubika Mubika v Poniso Njeulu SCZ Appeal No.114 of 2007*
15. *Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014.*
16. *Austin Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018.*
17. *Richwell Siamunene v Sialubalo Gift CCZ Selected Judgment No. 58 of 2017*
18. *Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia CCZ Appeal No. 2021/CCZ/A0012 (unreported)*
19. *Sithole v State Lotteries Board (1975) Z.R. 140, 151*

Legislation referred to:

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Electoral Process Act No. 35 of 2016*
3. *The Electoral Code of Conduct (Schedule) Act No. 35 of 2016*

Other works:

1. ***The International Foundation for Electoral Systems Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (2011, P86-87).***

[1.0] Introduction

[1.1] This appeal is against the decision of the High Court which dismissed the election petition of Subeta Mutelo K. (referred to herein as the appellant). The appellant sought nullification of the election of Kang'ombe Christopher (referred to herein as the 1st respondent) as Member of Parliament (MP) for Kamfinsa Constituency in Kitwe.

[1.2] In dismissing the petition, the High Court found that there were no statistics before it to prove that the alleged electoral malpractices committed by the 1st respondent, prevented the majority of the registered voters from electing their preferred candidate.

[2.0] Background facts

[2.1] On 12th August, 2021, the Electoral Commission of Zambia, the 2nd respondent herein, conducted general elections countrywide.

[2.2] The appellant and 1st respondent were among candidates vying for election as MP for Kamfinsa Constituency. The appellant was the

candidate for the United Party for National Development (UPND) while the 1st respondent was the candidate for the Patriotic Front (PF) party.

[2.3] At the close of the polls, the 2nd respondent declared the 1st respondent as the duly elected MP for Kamfinsa Constituency.

[2.4] Aggrieved by this outcome, the appellant petitioned the High Court alleging that the 1st respondent had committed electoral malpractices. The electoral malpractices relevant to this appeal were stated in the Petition appearing at pages 158 to 165 of the record of appeal verbatim as follows:

> ***5. In the referred to elections, the 1st respondent was NOT DULY ELECTED owing to the fact that the 1st respondent by himself, servants, agents and other persons on his behalf are guilty of general illegal and corrupt electoral offences and campaign malpractice which, inter alia, include-***
>
> ***5.2 On 31st July, 2021 the 1st respondent used the Wesley Nyirenda Secondary School grounds, a government owned facility and held a campaign rally in contravention of the Electoral Act and Covid-19 Electoral Code of Conduct.***
>
> ***5.3 On 10th August, 2021 the 1st respondent held a rally in Mulenga compound in the Constituency contravening the Covid 19 rules and guidelines and Electoral Code of Conduct.***
>
> ***5.4 On 29th May, 2021 the 1st respondent organized and held a meeting at Ndeke Secondary School Hall, a government owned facility in contravention of the Electoral Act.***

8. *The 1st respondent by himself, servants, agents and other persons on his behalf breached the Electoral Process Act, the Covid 19 guidelines, caused voter intimidation, his campaign was characterized by severe malpractice and committed numerous electoral offences prior to and during the election, which include inter alia:*

8.1 *The petitioner reiterates that on 3rd June, 2021 the 2nd respondent through its Chief Electoral Officer suspended all campaign rallies and meetings.*

8.2 *On 11th August, 2021 at around 06:00 hours, the 1st respondent went to Kamfinsa Prison (the Prison), was allowed entry therein by the Prison officials and thereat held a campaign meeting where he introduced himself and said he was sent by the Republican President to tell the inmates that they should vote for him and the Republican President and let them know their problems.*

8.3 *The 1st respondent further asked if the beef that he had brought on 10th August, 2021 was enough. Upon being told it was not enough he arranged for more beef for the prisoners.*

8.4 *Further, the 1st respondent offered and gave the prison warders K20,000.00 for purposes of sharing the same to the prisoners of which it was shared among some of the prisoners and in addition some warders received K200 each.*

8.6 *A Mr. Chisanga Siame the Deputy Officer in Charge was going round the prison cell and telling inmates that they had to vote for the 1st respondent and all PF candidates.*

8.8 *On 2nd and 11th August, 2021 prison warders were given a bag of mealie meal each.*

8.10 *On the 8th July, 2021 the 1st respondent organized and conducted a door-to-door distribution of mealie meal in the Kamfinsa prison camp which was being carried on a Zambia Army truck.*

8.11 *On 2nd July, 2021 the 1st respondent together with the Kitwe District Education Board Secretary (DEBS), organised and held a campaign meeting with teachers of Kamfinsa Secondary School (the teachers) in the school hall, where he distributed mealie meal and K120.00 (One*

hundred and twenty Kwacha) each to all the teachers and people present.

8.12 The DEBS in fact enticed and told the teachers that they needed to vote for the 1st respondent and President Lungu and that they had no choice but to vote for the 1st respondent and President Lungu because the serial numbers of the ballot papers they would vote on would be known and a teacher who voted for UPND or the Petitioner would be retired in national interest.

9 The 2nd respondent by its agent, servants, workers and other persons on its behalf breached the Electoral Act, Electoral Code as well as committed proscribed electoral offences in the capture and entry of valid votes cast in numerous Polling Stations that consequently influenced the outcome of the election in the 1st respondent's favor and to the detriment of the Petitioner. (sic)

[2.5] Going by these allegations the appellant sought the following:

(i) That it be determined and declared that the said Kang'ombe Christopher was not duly returned or elected as Member of Parliament for Kamfinsa Constituency.

(ii) That it be determined and declared that both the 1st respondent's election and return were null and void. (sic)

(iii) That it be declared and ordered that the said Kang'ombe Christopher's seat is vacant.

(iv) That it be directed and ordered that costs of this Petition be borne by the respondents.

[2.6] The 1st and 2nd respondents filed their respective Answers denying the appellant's allegations. The 1st respondent averred that it was in fact the appellant who committed electoral malpractices. The 2nd respondent averred that its agents, servants, workers and

employees did not breach the Electoral Act and the Electoral Code and they did not commit any proscribed electoral offences.

[2.7] At trial the appellant called 17 witnesses. The 1st respondent called 6 witnesses while the 2nd respondent did not adduce any oral evidence.

[3.0] ***Decision of the High Court***

[3.1] After analysing the evidence adduced before it, which included videos, audios and pictures filed by both the appellant and 1st respondent, the trial court dismissed the appellant's case and declined to grant the prayers sought.

[3.2] In dismissing all the allegations the trial court found that the appellant failed to prove that money was paid to the people who attended the 1st respondent's campaign rallies held at Ndeke and Wesley Nyirenda Secondary Schools. Additionally, that the appellant's witnesses who testified that the 1st respondent bribed inmates and prison warders with money contradicted themselves as to the amounts given to the inmates and the warders respectively. The allegations were dismissed on that premise. Furthermore, that the appellant failed to prove that the three cows

which were delivered to Kamfinsa Correctional Facility (KCF) on 9th August, 2021 in the prison's truck were donated by the 1st respondent and meant to feed the inmates. The trial judge reasoned it could not make a finding of fact that the cows were supplied by the 1st respondent based on the evidence of the inmates only because their evidence had been discredited.

[3.3] The allegation that the 1st respondent held a rally in Mulenga Compound was also dismissed. The Court found that it could not be proved from the picture availed to it that the 1st respondent held a rally on the 10th of August, 2021 during the ban or suspension of physical campaigns.

[3.4] The trial court further found that the 1st respondent was not at the rally held at Kamfinsa Secondary School, as no video evidence was adduced by the appellant to prove it, as she did with the rallies held at Ndeke and Wesley Nyirenda Schools.

[3.5] The trial court concluded that all the appellant was able to prove to the requisite standard was that the 1st respondent held campaign rallies in government facilities at Ndeke Secondary School in Ndeke ward and at Wesley Nyirenda Secondary School in Bupe ward contrary to section 15(1) (k) of the Electoral Code of Conduct.

[3.6] Ultimately, the trial court dismissed the Petition on the premise that the appellant failed to prove that the majority of the registered voters in Kamfinsa Constituency were prevented from voting for their preferred candidate because of the campaign rallies as the appellant did not produce any statistics of registered voters who attended the rallies.

[3.7] Accordingly, that since no statistics were placed before it, the appellant had not discharged the burden of proving that the majority were affected with a high degree of convincing clarity.

[4.0] <u>The Appeal</u>

[4.1] Dissatisfied with the Judgment of the trial court the appellant appealed to this Court raising seven grounds of appeal couched thus:

1. ***At pages "J84, J86 and J100 lines 1 to 7", and at page "J118 lines 14 to 17" the Court below found as a fact that contrary to the Electoral Process Act, the 1st respondent held illegal Campaign rallies at Ndeke Secondary school and at Kamfinsa Correctional Facility, thus erred both in law and fact when she held that in view of the evidence before her, notwithstanding the Petitioner having proved the said allegations of electoral malpractice to the required high degree of convincing clarity, the said acts did not affect the outcome of the election and prevent the majority of voters from voting for their preferred candidate, and, that money was not given thereat as an inducement for votes.***

2. *At "J116" lines 3 to 7, the lower Court having found that the evidence of PW5, PW6 and PW7 of receiving mealie meal at the instance of the 1st respondent at Kamfinsa Prison Camp to solicit for votes was corroborated, the lower Court erred both in law and fact when it held that the petitioner has failed to prove the allegations of the 1st respondent giving out the said mealie meal by himself or with his knowledge to a high degree of convincing clarity.*
3. *The lower Court erred in both law and fact when it held that the allegation of the 1st respondent holding an illegal campaign rally in Mulenga Compound was not proved to the required standard and that it did not affect the outcome of the election despite finding as a matter of fact at page "J88 lines 22 to 24 leading to lines 1 to 6" that the 1st respondent held an illegal campaign rally in Mulenga Compound after the adoption process and during the campaign period contrary to the Electoral Process Act.*
4. *The lower Court erred both in law and fact when it was held that the allegation of the 1st respondent holding an illegal campaign rally at Kamfinsa Secondary School was not proved and it did not influence the outcome of the election and prevented the majority of voters from voting for their preferred candidate despite finding as matter of fact at page "J97" that the Kitwe District Education Board Secretary (DEBS) was at the said rally and that the Evidence of PW9, PW10, PW13 and RW3 placing the 1st respondent at the said illegal rally to solicit for votes was corroborated, and at page "J99 line 5 to 12" that the words of the DEBS at the said rally was an inducement and a threat.*
5. *The lower Court erred both in law and fact when it was held at page "J127 lines 9 and 10" that the petitioner failed to prove the allegations against the 2nd respondent to a high degree of convincing clarity notwithstanding the provided evidence of missing Gen 20 forms and the Record of Proceedings.*
6. *The lower Court erred both in law and fact when it was held at "J137 lines 16 to 25" that the petitioner had a burden to prove the statistics*

of the registered voters and to prove that the voters had change of heart due to the illegal conduct of the 1st respondent.

7. *Having found as a fact that the petitioner had proved the allegations in the petition, the Court below fail into error in law and in fact when she held that the illegalities were not widespread in the constituency and the proved facts were not shown to sufficiently conclude that the voters were prevented from voting for their preferred candidate contrary to the evidence on record placing illegalities in all four wards of Kamfinsa Constituency.*

[5.0] **The Arguments**

[5.1] The appellant filed Heads of Argument in support of the appeal which Mr. K. Chali, counsel for the appellant, relied upon at the hearing of the appeal. Grounds one, two, three, four and seven were argued together.

[5.2] Counsel submitted that the arguments were premised on Article 73 (1) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and section 97 (2) (a) of the EPA. That a reading of section 97 (2) (a) of the EPA reveals that the key elements to be established before an election is nullified are that the candidate personally committed a corrupt or illegal practice or misconduct, or the same were committed by another person with the candidate's knowledge, consent or approval or with the knowledge, consent or approval of that candidate's election or polling agent. And, that the petitioner

must prove that as a result of the corrupt or illegal practice or misconduct, the majority of the electorate were or may have been prevented from electing their preferred candidate. The case of **Margaret Mwanakatwe v Charlotte Scott and another**[1] was cited in support of this argument.

[5.3] Regarding the standard of proof, it is argued that in election cases it is higher than the balance of probabilities for ordinary civil matters. Reliance was placed on the cases of **Brelsford James Gondwe v Catherine Namugala**[2]; **Anderson Kambela Mazoka and others v L.P. Mwanawasa and the Attorney General**[3]; and **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4]. After quoting sections 81(1) (a) and 83 (1) (c) (iv) of the EPA on prohibited acts during election campaigns, counsel wondered how the trial court having found at paragraph 32.6, of the Judgment that PW16's testimony was plausible when he stated that he had received K20 from the 1st respondent, went on to contradict itself when it concluded that there was no evidence of money being paid out to people at Ndeke Secondary School rally.

[5.4] Learned counsel further impugned the trial court's finding, that the testimony of PW17 was credible when he testified that money was given at Wesley Nyirenda school, yet it discredited this evidence on

the basis that PW17 walked away and thus, did not know if it was the 1st respondent who gave out the money. Counsel argued that the trial court erred in this regard as a proper evaluation of the evidence should have been that money was given out at Wesley Nyirenda Secondary School.

[5.5] In relation to the allegation of the campaign rallies held at KCF as well as money and beef being given to the inmates, counsel argued that the trial court erred in holding at paragraph 32.58 of the Judgment that there were contradictions in the witnesses' evidence on where the money came from. It was counsel's view that the trial court contradicted itself as it had made a finding on paragraph 32.54 page 121 of the record of appeal that the evidence of PW2, PW3 and PW4 was corroborated with regards to the 1st respondent holding rallies, giving out meat and money to the inmates at KCF.

[5.6] Counsel further questioned the trial court's reasoning when it stated at paragraph 32.63 of the Judgment that it was at pains to accept statements of the inmates at KCF that they had never eaten meat provided by the prison. On the contrary, counsel maintained that the trial court did not properly evaluate the evidence of PW2 found at paragraph 7 on page 50 of the record of appeal where he stated

that part of their grievance was that the prison did not provide them with meat and that is what led the 1st respondent to promise them beef. That what the trial court assumed was a rehearsed and hollow testimony by PW2 that meat was never provided, was actually a fact and was sufficiently corroborated by PW3 and PW4.

[5.7] Furthermore, that there was video footage which showed the cows being delivered at KCF and the trial court's finding at paragraph 32.63 of the Judgment, that because the cows were delivered by the prison truck it is not the 1st respondent who provided them, was a misdirection in law and fact.

[5.8] With regard to the allegation that money was given to the prison officers at KCF, it is the appellant's contention that there was evidence through the testimony of PW5 at paragraph 10 on page 53 of the record of appeal, that the 1st respondent addressed the prison officers and stated that he would leave them something. After addressing them the 1st respondent went into the Office of Mr. Siame the Deputy Officer In Charge (DOIC) at KCF. After that Mr. Siame called the accountant who then distributed the money. Mr. Siame received a K200. According to counsel this evidence was corroborated by PW7 and PW8. Thus, the discrepancies between

the prison officers as to how much was left by the 1st respondent is normal and that it should not discredit the evidence that the 1st respondent paid the prison officers so that they could vote for him.

[5.9] Learned counsel canvassed further that the trial court, having found that the evidence of PW5, PW6 and PW7 who are prison officers, was corroborated on each one of them having received a bag of mealie-meal, erred when it held that the said mealie-meal could not have come from the 1st respondent. That a careful examination of the testimony of PW5 and that of PW6 shows that the bags of mealie-meal were delivered by Mr. Siame who stated that they were from the PF.

[5.10] It was contended that the trial court erred in not addressing her mind to the fact that Mr. Siame, being in a position of power as DOIC at KCF unduly influenced the prisoners to vote for the 1st respondent, a fact the Court acknowledged at paragraph 32.58 of the Judgment.

[5.11] With respect to the allegation that the 1st respondent held an illegal rally at Mulenga Compound, counsel argued that the trial court, having found at paragraph 32.19 of the Judgment that there was clear proof that the 1st respondent held an illegal rally in the said

compound, erred in holding that it had not been proved to the required standard of proof as the image produced to prove this assertion was not dated. It is submitted that the trial court misdirected itself in not considering the fact that the said picture of the rally was taken prior to 3rd June, 2021 before the ban of rallies by the 2nd respondent. The 1st respondent testified that the picture was taken prior to his adoption, an assertion which the trial court itself found improbable. Thus, the fact that the 1st respondent tried to paint that the picture was taken earlier, before the suspension of rallies, and the fact that he admitted being at Mulenga Compound on the material date, points to the fact that the said picture was taken during the suspension of rallies and the Court should have found as such.

[5.12] Regarding the rally held at Kamfinsa Secondary School, counsel contends that the trial court erred when it held that the said rally was neither held at the instance of the 1st respondent, nor was the 1st respondent in attendance. Counsel submitted that the presence of the 1st respondent at this rally was confirmed by the testimonies of PW9, PW10 and PW13 and that this fact was also noted by the trial court on paragraph 32.36 of the Judgment. And that their

testimony was confirmed by the 1st respondent's own witness' testimony, RW3, who stated at page 107 of the record of appeal that he saw the 1st respondent at Kamfinsa Secondary School. However, being a witness with an interest to serve RW3 stated that he saw the 1st respondent inspecting a classroom block.

[5.13] Still at Kamfinsa Secondary School, counsel submitted that the 1st respondent together with the DEBS and the Kitwe District Commissioner (DC) gave money as inducement for votes. The trial court therefore erred in holding that there was no evidence of the 1st respondent giving money on the basis of the inconsistencies and discrepancies in the testimonies of PW10 and PW13 as to the total amount of money given and what amount was attributable to the 1st respondent, the DEBS and the DC.

[5.14] In light of the above arguments, counsel maintained that the trial court not only should have found that the 1st respondent held illegal rallies at Ndeke Secondary School, Wesley Nyirenda Secondary School, KCF, Mulenga Compound and Kamfinsa Secondary School, but it should have made a finding that the said rallies affected the outcome of the election as opposed to the holding that the rallies were not widespread. Learned counsel amplified that the

1st respondent held rallies in three (3) out of the four (4) Wards that are in Kamfinsa Constituency and therefore, the malpractice was widespread as to influence the majority of voters in the constituency.

[5.15] On ground five, counsel submitted that the trial court, having found that the appellant had proved that the Gen 20 Forms had clerical errors, being overwritten or were illegible, should have addressed its mind to the fact that these discrepancies left room for the results to be manipulated.

[5.16] On ground six, counsel argued that the trial court erred when it held on paragraph 34.8 of the Judgment that the appellant should have adduced evidence in the form of statistics of registered voters in the areas where the 1st respondent perpetuated the malpractice, details of the number of polling stations affected or where people who attended the rallies came from. According to counsel the law as provided by Article 73 (1) of the Constitution of Zambia (Amendment) Act, section 97 (2) (a) of the Electoral Process Act and as held in **Margaret Mwanakatwe v Charlotte Scott and another,**[1] does not envisage this standard of proof.

[5.17] In concluding his arguments, counsel submitted that a proper analysis of the facts from the documents on the record of appeal and the appellant's arguments would show that the trial court erred in both law and fact when it held that the appellant had not proved the allegations to the required standard of proof of a fairly high degree of convincing clarity. The cases of **Mohamed v The Attorney General**[5]; **Nkhata and others v The Attorney General**;[6] and **Zulu v Avondale Housing Project Limited**,[7] were referred to, to highlight circumstances when an appellate court can interfere with findings of fact made by a trial court. We were urged to allow the appeal on the basis of these authorities and the appellant's arguments.

[5.18] The 1st respondent filed his Heads of Argument which his counsel Mr. Simwanza augmented at the hearing. It is the 1st respondent's submission that this Court should render the appellant's appeal unsuccessful on all grounds based on the fact that the appellant failed to prove her allegations to the requisite standard as established in the Supreme Court election case of **Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, Electoral Commission of Zambia and The Attorney General**[3] that *"As regards the burden of proof, the evidence adduced must*

establish the issues raised to a fairly high degree of convincing clarity", and restated by this Court in **Abuid Kawangu v Elijah Muchima.**[8]

[5.19] Citing the cases of **Austin Milambo v Jamba Machila**[9] and **Jonathan Kapaipi v Newton Samakai**[10] it is argued that an election can only be nullified where it is proved that the electoral malpractice was committed by the candidate himself/herself, or by another person with the candidate's knowledge and consent or approval or by the candidate's election or polling agent.

[5.20] Citing the cases of **Stephen Masumba v Elliot Kamondo;**[11] **Jonathan Kapaipi v Newton Samakayi;**[10] and **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General,**[12] it was the appellant's further submission that for an election to be nullified, it has to be proved that the electoral malpractice was so widespread that the majority of the voters were, or may have been influenced by it and prevented from electing a candidate of their choice.

[5.21] The gravamen of the 1st respondent's arguments on ground one is that the learned trial court was on firm ground when it found that the appellant only managed to prove to the required standard that campaign rallies took place at Ndeke Secondary School. There was

no cogent evidence to support PW16 that he was given K20 at Ndeke Secondary School. We were urged to dismiss this aspect of the appeal as it was wrongly challenging sound findings of fact contrary to our recent decision in the case of **Taulo Chewe v Patrick Mucheleka & George K. Mwamba.**[13]

[5.22] With regards to KCF, counsel submitted that the trial court considered the allegations of money and mealie-meal being given to the inmates and prison officers as inducement, as well as cattle being delivered to the prison at pages J103 to J118 of the Judgment. That the trial court considered the inconsistencies and discrepancies in the testimonies of PW2, PW3 and PW4 with regards to who or where the money came from and at what point the money was given, and consequently declined to make any findings of fact that the 1st respondent gave money to the inmates for campaign purposes. According to the 1st respondent, the only allegation that was proved was that of the rally being held, but the appellant failed to prove that the said rally prevented the majority of the electorate from voting for their preferred candidate.

[5.23] As regards ground two which assails the finding that there was no evidence attributing mealie-meal distribution at KCF to the 1st

respondent, counsel submitted that PW5, PW6 and PW7 who testified to mealie-meal being received at KCF, did not testify to the same being distributed by the 1st respondent himself nor with his knowledge or consent, in line with our decision in **Austin Milambo v Jamba Machila.**[9] Counsel submitted that this ground challenged the trial court's finding of fact but no evidence had been presented to fault the same. Reliance was placed on cases of **Zulu v Avondale Housing Project Limited**[7] and **Kabwe Taulo Chewe v Patrick Mucheleka & George K. Mwamba.**[13]

[5.24] On ground three, it is argued that the evidence which was produced in support of the allegation that the 1st respondent held a rally at Mulenga Compound was a photo. The trial court found that the appellant had not proved with convincing clarity that the picture/photo relied on depicted the 1st respondent holding a rally on 10th August, 2021 in Mulenga Compound, as the said picture did not have anything on it to confirm the date or indeed the venue of the said rally. It is argued that in the absence of such key evidence and authentication, the trial court was on firm ground in holding that the picture did not meet the required threshold of proof to a fairly high degree of convincing clarity.

[5.25] On ground four of the appeal relating to the holding of an illegal rally at Kamfinsa Secondary School, the respondent called in aid the case of **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General**[12] on the need to prove that the electoral malpractice was conducted personally by the person whose election is challenged or through his/her election or polling agent. Counsel submitted that the trial court held at page 111 of the record of appeal that the appellant did not provide any picture or video evidence to support the allegation that the 1st respondent held a rally at Kamfinsa Secondary School on 2nd August, 2021.

[5.26] It was the further submission of counsel that the trial court went on to find that there was no evidence that the giving or gifting of any inducement was attributable to the 1st respondent. That the green military truck which delivered the mealie meal could not be assumed to belong to the 1st respondent. In addition, that the trial court found at page 113 line 17 that the words of the DEBS although held to be an inducement, there was nothing before it to suggest that the words were made with the knowledge of the 1st respondent. The trial court was therefore on firm ground to hold that all

allegations at Kamfinsa Secondary School were not proved as having been at the instance of the 1st respondent.

[5.27] On ground five which assails the trial court's finding that the allegations against the 2nd respondent had not been proved, counsel contended that the trial court was on firm ground in holding that the act of PW11 being chased out of the polling station did not influence the outcome of the election in favour of the 1st respondent, to the detriment of the appellant as another agent of the appellant remained inside the polling station and observed the proceedings. Learned counsel amplified that it is not for the courts to delve into the ambit of assumptions nor is it the trial court's duty to prove a petitioner's case as suggested by the appellant in paragraph 47 of her Heads of Argument that the trial court should have addressed the discrepancies in the Gen 20 Forms.

[5.28] On ground six which impugns the trial court's finding that the petitioner had the burden to provide statistics of registered voters and to prove how the alleged illegal acts influenced the electorate, counsel argued that the petitioner bears the burden of proof and in election petitions it is higher than the standard in ordinary civil proceedings. Additionally, that the petitioner has to show how the

electoral misconduct influenced the electorate. The trial court at paragraph 34.15 of the Judgment, in addressing this fact, referenced the case of **Mubika Mubika v Poniso Njeulu**[14] where the Supreme Court stated that in proving the widespread of an electoral misconduct, statistics of registered voters should be given. That the trial court was therefore on firm ground in holding the way it did.

[5.29] Ground seven which contends generally that the trial court erred in holding that the illegalities were not widespread and that the proved facts were not shown to sufficiently conclude that the majority of the voters were prevented from voting for their preferred candidate, was argued on the premise that the trial court did not find that the petitioner had proved the allegations in the petition. That the only allegations proved were those relating to the rallies being held at Ndeke Secondary School, Wesley Nyirenda School and KCF and the rest of the allegations failed for lack of evidence supporting them to the required standard.

[5.30] Counsel maintained that the appellant failed to afford the trial court an opportunity to discern the majority principle when she did not adduce evidence of the statistics for the ward. As such, the appellant failed to discharge the burden of proof to the required

standard and urged us to dismiss the appeal and grounds raised for lack of merit.

[5.31] The 2nd respondent filed its Heads of Argument which Mr. Musenga relied upon at the hearing. It is submitted that the standard of proof in election petitions is to a high degree of convincing clarity as held in the cases of **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4] and **Saul Zulu v Victoria Kalima.**[15] Citing the case of **Nkandu Luo v Doreen Sefuke Mwamba and another**[12] where this Court interpreted the import of section 97 (2) of the Electoral Process Act, counsel submitted that the petitioner must prove that the electoral malpractice was committed by the candidate whose election has been challenged, or by their election or polling agent. Furthermore, that it must be proved that the said malpractice was widespread and influenced the election outcome. That the burden of proof lies on the petitioner as held in the case of **Abuid Kawangu v Elijah Muchima**[8] and restated in **Austin Liato v Sitwala Sitwala.**[16]

[5.32] Learned counsel amplified that a candidate can only be held liable for their own misconduct or that of an appointed agent as held in **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4] and that in accordance with the holding of **Richwell Siamunene v Sialubalo Gift,**[17]

a general allegation that the supporters of a particular party were implicated in a misconduct is not enough to attach responsibility to the respondent.

[5.33] On the basis of the authorities above, the 2nd respondent concluded that the trial court was on firm ground when it held that the appellant had the burden to prove the statistics of the registered voters and to prove that the voters had a change of heart due to the illegal conduct by the 1st respondent. Since there were no statistics that were availed to the trial court the appellant did not discharge the burden. In support of this argument, the cases of **Anderson Kambela Mazoka and others v L. P. Mwanawasa**[3] and **Mubika Mubika v Poniso Njeulu**[14] were relied upon.

[5.34] On ground five, the 2nd respondent argued that the trial court was on firm ground to hold that there were no witnesses called to support the host of allegations in paragraph 9 of the Petition regarding the Gen 20 forms. Our decision in the case of **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia**[18] was relied upon to the effect that cogent evidence must be produced to prove that the election was not conducted in substantial conformity with the provisions of the EPA.

[6.0] **Decision on Appeal**

[6.1] We shall consider grounds one to four, six and seven simultaneously as they are interlinked. Ground five relates to the 2nd respondent and will be dealt with separately. As we see it, the cardinal issue this appeal raises is whether the appellant proved her case to the requisite standard of proof of a fairly high degree of convincing clarity that the majority of voters in Kamfinsa Constituency were prevented from electing a candidate of their choice due to the campaign rallies held during the ban at Ndeke and Wesley Nyirenda Secondary Schools and KCF. Key to the issue is the question whether the 1st respondent committed electoral malpractices during those rallies.

[6.2] We note that the grounds impugn findings of fact made by the trial court in dismissing the Petition.

[6.3] It is settled law that a trial court sitting alone without a jury can only be reversed on findings of fact when the conditions set out in the case of **Nkhata and others v The Attorney General**[6] are satisfied and demonstrated to the appellate Court as follows:

(a) by reason of some non-direction of mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanuor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer

[6.4] We have echoed similar sentiments in several of our decisions including recently in **Kabwe Taulo Chewe v Patrick Mucheleka and George K. Mwamba**[13] where we elucidated that we can only disturb findings of fact made by the trial court if they are perverse and not supported by the evidence.

[6.5] In making the findings of fact the trial court in *casu* was guided by a plethora of our decisions which included the cases of **Stephen Masumba v Elliot Kamondo,**[11] **Mubika Mubika v Poniso Njeulu,**[14] **Jonathan Kapaipi v Newton Samakayi**[10] and **Austin Liato v Sitwala Sitwala**[16] wherein we pronounced that it is not sufficient for a

petitioner to prove only 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 prevented or may have prevented the majority of the voters in the constituency from electing a candidate of their choice.

[6.6] In order to properly consider grounds one to four, six and seven, we take the liberty to disaggregate the categories of the allegations levelled against the 1st respondent and the findings by the trial judge as highlighted by the appellant in the said grounds of appeal which also question the standard of proof employed by the trial court in dismissing the Petition:

Campaign rally at Ndeke Secondary School:

[6.7] The allegation was that on 29th May, 2021 the 1st respondent held a campaign rally at the said school in the hall and gave out money to the people in attendance contrary to sections 81 (1) and 83 (1) (c) of the EPA. The trial judge after viewing the video and taking into account the oral evidence found that the video depicted events at Ndeke Secondary School and was supported by the oral evidence. Thus, the Court made a finding of fact that the appellant

had proved that the 1st respondent held a campaign rally at the school and not a PF meeting as he averred. The trial court, however, found that no money was paid to the people at that meeting. We note the appellant's arguments on this issue that the video evidence showed the appellant addressing a fully packed school hall at Ndeke School such that some people were observing the proceedings from the door and windows. That this was corroborated by PW16 who testified that the 1st respondent was lobbying for votes and gave out K20 notes to the attendees of the rally.

[6.8] In addition, it is argued that the trial court found that PW16's testimony was plausible and that he had nothing to gain from stating that he received K20, yet it ultimately found that no money was paid out and dismissed the allegation. That this is inconsistent with the available evidence as a proper evaluation should have been that money was given to the people at the rally.

[6.9] We note that the finding made by the trial court about PW16's evidence being plausible is at paragraph 32.6 lines 11 to 13 of the judgment. What the judge found to be plausible is *"on the fact of how he found out about this meeting, through a moving vehicle with*

a Public Address system and which informed people of the meeting at the school.."

[6.10] The rest of PW16's evidence was discounted. The trial judge noted the fact that PW16 said he received K20 at the said meeting. She nonetheless, observed that although PW16 had nothing to gain in conjuring up his evidence that he received K20, it was questionable why the appellant was unable to obtain the video clip to prove that the 1st respondent gave out money at the said meeting. The judge further observed that PW16 appeared hesitant and unsure when questioned about the money and admitted that he had not placed any evidence in support of the allegation. Clearly, the argument that the trial court found PW16's evidence to be plausible is misconstrued and erroneous as noted above.

[6.11] We cannot fault the approach taken by the trial judge in dismissing the allegation that money was given out at Ndeke School. We must add further that the evidence of PW16 needed corroboration for it to meet the requisite standard of proof of a fairly high degree of convincing clarity. This could have been corroborated by the video evidence of which the trial court only found to depict that a campaign rally was held but she was not convinced that money was

paid out. We therefore cannot interfere with the finding that money was not paid out as it is supported by the evidence. The trial court had the opportunity to observe the witness PW16, as being hesitant and unsafe which as an appellate Court we do not have. Based on this observation and all the evidence before it, it properly concluded that the appellant failed to prove that money was paid out at the rally at Ndeke School.

Campaign Rally at Wesley Nyirenda Secondary School Grounds:

[6.12] The appellant alleged that the 1st respondent held a rally at the said school grounds on the 31st of July 2021 contrary to the EPA and the Covid 19 guidelines by which physical campaign rallies were suspended on 3rd June, 2021. The trial court found as a fact that the rally was held but that no money was given out.

[6.13] The trial court examined the evidence of PW17, Gift Sheli, who testified that he rushed to Wesley Nyirenda School after he heard noise and a woman told him that the 1st respondent was giving out money at the said school grounds. That PW17 said when he got nearer to the school, he saw the 1st respondent who addressed the crowd and asked for their votes. The 1st respondent then asked them to form lines of women, youths and men and after which he

proceeded to give them money. However, the youths squabbled among themselves as they differed on how to share the money at which point PW17 left.

[6.14] The trial court observed that PW17 appeared to have no motive to come to Court and tell lies on a matter whose outcome would have no effect on his life. Nonetheless, the trial court opined that there was no proof of money having been paid and PW17 did not receive any. It concluded that the allegation of the 1st respondent having held a rally at Wesley Nyirenda School was proved but not the allegation of him giving money to the people at the said meeting.

[6.15] The appellant has taken issue with this finding and contends that the trial court misdirected itself when it disbelieved PW17 based on the fact that he voluntarily left when people were being bribed with money yet found him to have been a credible witness who appeared to have no motive to lie.

[6.16] Learned counsel contends that the finding is erroneous as it assumes that everyone is willing to be bribed in exchange of votes. Again, as we have stated above in relation to PW16 and the rally at Ndeke Secondary School, PW17's evidence needed to be supported and corroborated by independent evidence or witness

for it to have satisfied the burden of proof of a high degree of convincing clarity. However, there was no such evidence, hence, the finding that there was no proof of money being paid out at Wesley Nyirenda. We cannot interfere with this finding as it was supported by the oral evidence including video evidence. Our understanding of the inference made by the trial court on PW17 is not what the appellant insinuates that it assumes everyone is willing to be bribed in exchange of votes. The essence of the finding by the trial court is that the appellant failed to prove that money was paid out and her witness (PW17) did not receive any money. After a review of the evidence on record, our view is that indeed the appellant did not prove that the 1st respondent paid out money to people at the rally held at Wesley Nyirenda School grounds.

[6.17] We shall deal with the issue whether or not the rally was illegal later in this Judgment.

Rallies at KCF

[6.18] Several allegations were levelled against the 1st respondent regarding the campaign rallies and meetings at KCF as follows:

(a) gifting inmates with money and cows/beef in exchange of votes:

[6.19] The appellant alleged that the 1st respondent held rallies at KCF on the 8th, 9th, 10th and 11th of August 2021 at which *inter alia* money was paid to the inmates. The trial court found as a fact that the 1st respondent held campaign rallies at KCF. However, it discounted the evidence of the three inmates (PW2, PW3 and PW4) who testified that the 1st respondent gave the inmates K150 each to campaign and vote for him due to discrepancies and inconsistencies as to the amount given and where it was given from.

[6.20] Counsel for the appellant contends that the trial court erred in its holding as it contradicted its finding of fact on paragraph 32.54 of the Judgment, that the evidence of the three inmates (PW2, PW3 and PW4) was sufficiently corroborated regarding the 1st respondent's malpractices within KCF. The inmates alleged inter alia that the 1st respondent paid them K150 each as inducement for votes and for them to campaign for him. It was counsel's contention that there was consistent evidence that inmates were given K150 each at the chapel and that the money came from the 1st respondent. That the trial court misdirected itself in holding that there was no money given to the inmates by the 1st respondent

based on what she considered contradictions when she had in fact held that the witnesses' testimonies in relation to the same was corroborated.

[6.21] Learned counsel for the 1st respondent argued that the trial court was on firm ground for dismissing the allegation that money was paid to the inmates as the appellant failed to prove the same.

[6.22] Before we can state whether we support the finding on the allegation of giving money to the inmates, we will chronicle the trial court's analysis of the evidence that was before it. The evidence of paying inmates was adduced by three inmates (PW2, PW3 and PW4). According to PW2, on 8th August, the 1st respondent met the 'captains' including himself inside the office and asked them to inform all the other inmates to vote for him. Then he left with the 'chairmen' and when they returned, they found them seated inside the chapel. Names were called out and each one received K150 out of the K20,000 which the chairmen brought after meeting the 1st respondent. PW3 testified that when the 1st respondent visited the facility on 9th August, 2021, all the captains were invited to the chapel. Then the top chairman, Mr. Siame the DOIC and the 1st respondent went to the reception. Later, the chairman and the

DOIC returned with money and each one was given K150 after their names were called. PW4 testified that the 1st respondent visited KCF on 9th August, 2021. The rest of his testimony is similar to that of PW3. The trial judge concluded that the appellant failed to prove that money was given to the inmates by the 1st respondent because the videos of the rallies at KCF which she viewed did not reveal this fact. Thus, the inmates' evidence was not supported by independent evidence to attain the required proof of a fairly high degree of convincing clarity.

[6.23] At paragraph 32.54, of the Judgment, the trial court found that the evidence of PW2, PW3 and PW4 (the inmates), was substantially corroborated in respect of the events of the 8th to 11th August, 2021 regarding the allegations that the 1st respondent visited KCF on the said dates and held rallies, donated cows/beef and also paid the inmates.

[6.24] At paragraph 32.57 at page 122 lines 8 to 10, the trial court stated that the evidence of PW2, PW3 and PW4 supported the appellant's allegation that the 1st respondent used Mr. Siame to canvass and campaign for him within the facility. At paragraph 32.58, the trial court further made a finding that the evidence of PW2, PW3 and

PW4 was inconsistent and had several discrepancies concerning the dates and where the 1st respondent produced the money inside or outside the chapel. Moreover that whilst PW4 stated that there was confusion inside the cells on the issue of sharing the money, the trial court noted that PW2 and PW3 did not mention such confusion.

[6.25] In addition, that there was no evidence of how and where the K20,000 allegedly given to inmates to share came from and whether it was from whilst they met inside or outside the chapel or from Mr. Siame's office or how many 'captains' attended the meeting. The trial court questioned whether PW2's denial that politics were ever discussed amongst the inmates was realistic at a time when in the history of our country inmates were allowed to vote. The trial court discredited PW4's testimony that he was forced to vote for PF and was beaten, on the basis that there was no proof. The Court also considered the testimony of PW6 which was to the effect that he heard noise from all the 46 cells and that he was told by the captains that they (the captains) were campaigning for the 1st respondent. The Court concluded thus:

> ***...This heap of contradictory evidence does not lead me to making any findings of fact on the allegation of the 1st respondent having given money to the inmates for the purpose of voting or campaigning for him. I therefore find that this allegation of the 1st Respondent having given money to the inmates is not proved.***

[6.26] The issue which needed to be proved to a fairly high degree of convincing clarity was that the 1st respondent bribed the captains with K150 each to vote for him and to ask the other inmates to do so as well. The judge noted that the three witnesses corroborated each other in this respect but this is at variance with her finding that their evidence was full of inconsistencies and discrepancies and there was no video to support the same. PW5 a prisoner warder testified that he learnt from other officers that the 1st respondent left K20,000 for the special inmates to share. He said the video of the meeting was available though not before court.

[6.27] We are of the firm view that although the three inmates corroborated each other that they were paid K150 each, PW3 and PW4 said the 1st respondent met them on 9th August, 2021 and they did not state the exact amount allegedly left by the 1st respondent. PW2 and PW5 said K20,000 but they differed on the dates. PW2 said it was on 8th August, 2021 and PW5 said 11th August, 2021.

PW5 a prisoner warder testified about the inmates being paid based on what he was told, so his evidence in this regard is hearsay and inadmissible. We therefore uphold the finding that there was no independent evidence or something more to support the witnesses whose testimonies had discrepancies; to prove the allegation that money was paid to the inmates.

(b) *1st respondent's supply of beef/cows to inmates to vote for him:*

[6.28] The evidence on this allegation came from the same three inmates who also alleged that the 1st respondent paid them to vote and campaign for him. The trial judge dismissed this allegation due to discrepancies in the witnesses' testimonies. She found that despite the videos showing cows being delivered in the prison truck on 9th August 2021, the appellant failed to prove that it was the 1st respondent who had delivered them. She also discounted the testimony by PW2 that the prisoners never ate meat unless their relatives brought it for them.

[6.29] The appellant contends that the trial court erred when it stated on paragraph 32.63 of the Judgment that it was at pains to accept that the inmates had never eaten meat provided to them by the prison services other than when it was brought by relatives. It was

contended that the trial court erred by not properly evaluating the evidence of PW2 on paragraph 7 page 50, of the record of appeal, where he stated that part of the prisoners' grievance was that the prison did not provide them with meat and that that led to the 1st respondent promising to bring them beef.

[6.30] It was further contended that the trial court erred when it surmised that it would be naïve to hold the evidence as true, that the cows that were delivered to the correctional facility were at the instance of the 1st respondent only because the 1st respondent had said he would bring cows/beef. Counsel contended that the trial court misdirected itself by not properly considering the evidence as the sequence of events regarding the cows and the evidence on record which all point to the fact that the beef was supplied by the 1st respondent.

[6.31] The trial court's analysis of the issue to do with beef being supplied to KCF is set out in paragraphs 32.61 to 32.64 on pages 126 to 129 of the record of appeal. In lines 22 to 24 on page 126, the trial court considered the testimony of PW2 which was to the effect that the 1st respondent promised to provide meat in an address at KCF held on 8th August, 2021 and that they in fact ate meat on 10th August,

2021. The trial court also noted the testimony of PW3 who narrated that at the rally on 11th August, 2021, the 1st respondent asked if they had eaten meat to which they said they had and that it was not enough and the 1st respondent said he would provide some more.

[6.32] Furthermore, that PW4 confirmed having eaten meat and that PW5 a prison warder, testified that he had seen three slaughtered cows in the Prison Services Truck on 10th August, 2021 at 07:40 hours near the stores facility. After analyzing the video clips, which analysis is in paragraph 32.62 on page 127, the trial court made a finding on page 128, lines 1 to 3, that slaughtered cows were delivered to the facility on 9th August, 2021 at 22:35 hours in a white prison services truck registration number PS32287. The trial court went on to pose a question to itself, as follows: *"if, by the time the 1st respondent, met the inmates on the 8th August, 2021 and promised to provide meat, and on the 10th August, 2021 at 07:40 hours, slaughtered cows were delivered at the Correctional Facility, it can be said that the allegation had been proved to the required standard; that the cows had been delivered at the instance of, and with the consent and knowledge of the 1st respondent?"* In

addressing this question, the trial court stated as follows in lines 8 to 14 of page 129:

> ***... I cannot make such a finding as the allegation has not been supported to the level required. Any finding of beef having been supplied by the 1st Respondent, based on the evidence of the inmates alone, whose evidence has been discredited for reasons stated, would be a serious travesty, and would be speculative and conjecture on the part of the Court. I therefore find that this allegation has not been proved.***

[6.33] We have considered the competing arguments on this issue. The evidence revealed that the 1st respondent visited KCF on 8th August and 9th August, 2021 and asked the inmates if they ate beef and that he would supply the same. In the night of the 9th August, 2021, three slaughtered cows were delivered, a fact determined by the trial court at paragraph 32.62 of the Judgment. PW5 a prisoner warder said early in the morning of 10th August, 2021, he saw the slaughtered animals near the stores facility. Then on 10th August, 2021 the inmates ate beef. And on 11th August, 2021 the 1st respondent asked them if the beef was enough to which they said no and he promised to bring more. We are of the considered view that the sequence of events would lead to the inescapable inference that the beef which was supplied to the KCF on the 9th of August, 2021 was at the instance of the 1st respondent as the dates

referred to by the witnesses when the 1st respondent promised to supply beef and when the cows were delivered is supported by the video evidence.

[6.34] We are persuaded in making the inference that the 1st respondent supplied the cows by the Supreme Court decision in the case of **Mohamed v Attorney General** supra, which holds that:

> ***While it is accepted that the appellate court should not lightly reverse the findings made by a trial court, there is a world of difference between findings of primary facts and findings based on drawing of conclusions or inferences from undisputed primary facts. In the latter event, the appellate court is in a good position to draw the inferences or conclusions as the trial court.***

[6.35] We are equally persuaded by **Sithole v State Lotteries Board**[19] that the appellate Court is in as good a position as the trial court to draw inferences or substitute its own opinion for any opinion the trial court might have expressed.

[6.36] The trial court found that the 1st respondent visited KCF from the 8th to the 11th of August, 2021 and that the witnesses corroborated each other regarding this allegation. To require of the appellant to have produced a video of the 1st respondent actually delivering the cows, is tantamount to pushing the burden to proof beyond reasonable doubt, which is not the standard in election matters. The

trial court's finding on this matter is accordingly reversed. Be that as it may, there is still a further hurdle for the appellant to overcome that of proof that the majority of the voters were actually or might have been prevented from electing a candidate of their choice as a result of the 1st respondent supplying cows to feed the inmates. We shall revert to this issue later.

(c) *supplying prison officers/warders with bags of mealie meal and gifting them with money for votes*:

[6.37] Three prison warders (PW5, PW6 and PW7) testified that that they each received a 25kg bag of mealie meal on 8th August, 2021.That the mealie meal was delivered to all the officers' homes by the DOIC Mr. Siame. Upon inquiry they were informed that it was from the PF party. PW6 admitted that even he received a bag of mealie meal despite him being perceived as a UPND sympathizer by his superiors.

[6.38] Regarding the gifting of money to the prison officers, PW5 and PW8 testified that on 11th August 2021, they attended a meeting at the reception open area at KCF. The meeting was addressed by the 1st respondent. In concluding his address he informed the officers/warders that he had left something for them. Then the 1st

respondent and the DOIC left for the office. According to PW5 he stood near the office and saw the 1st respondent give K27,000 to Mr. Siame. When the 1st respondent left, Mr. Siame called PW8 the accountant and instructed her to pay each prison officer K200. PW8 retreated to her office from where she paid the officers as instructed, in his (PW5's) presence. PW8 confirmed this line of testimony except she said she was given K23,700 by Mr. Siame and she paid the 119 officers in the presence of the intelligence officer, a Mr. Bwembya Stanley, who was not called as a witness. According to PW8 Mr. Siame called her to his office immediately after the 1st respondent left and that some of the officers did not go back to work after the 1st respondent's address. They (including herself) waited for about 20 minutes while the 1st respondent and Mr. Siame were in the office. PW7 confirmed that he was called to PW8's office on the date in question and paid K200.

[6.39] Learned counsel for the appellant contended that the trial court erred when it held in paragraph 32.61 at page 126, of the record of appeal that there was no proof of that based on the discrepancies between the prison officers as to the total amount given. Yet,

according to counsel all the prison officers testified to having received K200 each from the 1st respondent.

[6.40] The trial court's reasoning on this issue was that Mr. Siame, from whom the money was said to have come, was not the agent of the 1st respondent and further that because of the many discrepancies in the dates and the amount given, the allegation had not been proved. We note that PW5's testimony that he saw the 1st respondent give the money to Mr. Siame was not corroborated by any other witness or evidence for it to attain proof of a fairly high degree of convincing clarity. Furthermore, his claim that he witnessed PW8 pay the officers was at variance with PW8's own testimony as she stated that it was Stanley Bwembya who witnessed to this fact. Furthermore, whereas PW5 said the money given was K27,000. PW8 who is the accountant and who received the money said it was K23,700. Clearly, therefore there were discrepancies in the evidence on this issue as noted by the trial court.

[6.41] Thus, we are of the considered view that although all the three witnesses were categorical that they each received K200, only PW5 testified that he saw the 1st respondent give money to Mr.

Siame which evidence was uncorroborated. PW8 said the money came from Mr. Siame. PW7 only confirmed being paid K200 by PW8. Additionally, a video of the 1st respondent addressing the officers on 11th August 2021 was produced but it had no audio. We therefore cannot fault the trial court for dismissing this allegation as it was not proved to the requisite standard that the 1st respondent donated the money which was used to pay the prison officers K200 each.

[6.42] With regard to the allegation that the 1st respondent gave a bag of mealie meal to each of the prison warders, the trial court accepted the testimonies of the three witnesses who testified that 25kg bags of mealie meal were delivered to their homes on 8th August, 2021. Upon inquiry they were told the mealie meal came from the PF party. The trial court further noted that the witnesses corroborated each other and appeared to have no motive or interest in the matter other than to offer testimony on the issue of mealie meal.

[6.43] The trial court reasoned that the fact that witnesses were informed that the mealie meal was supplied by the government of the day cannot be placed on the shoulders of the 1st respondent. It

concluded therefore that the 1st respondent did not give mealie meal to the prison warders as alleged.

[6.44] The appellant argues that the trial court did not properly evaluate the evidence as the three witnesses (PW5, PW6 and PW7) who are prison officers corroborated each other that they each received a bag of mealie meal. And that the bags of mealie meal were delivered by Mr. Siame who stated that it came from the PF. According to the appellant a careful examination of the evidence shows that Mr. Siame was heavily involved in the activities at the prison.

[6.45] We are of the firm opinion that the trial court properly evaluated the evidence. She accepted that bags of mealie meal were distributed to the prison warders and officers and they were told that the mealie meal was from the PF. It is settled law that a candidate must personally be involved in the illegal or corrupt practice or other misconduct or his election or polling agent must be involved with the candidate's knowledge and consent or approval for the election to be voided. Mr. Siame the DOIC was not a polling or election agent of the 1st respondent, for the latter to be liable for his actions. The appellant needed to adduce cogent evidence to prove this fact.

Furthermore, a candidate cannot be blamed for the activities of the party just because he is a member of the party. ***Richwell Siamunene v Sialubalo Gift***[17] refers.

[6.46] We therefore cannot disturb the finding that the allegation that the 1st respondent distributed mealie meal to prison warders was not proved as the finding was supported by the evidence on record.

Campaign rally at Mulenga Compound:

[6.47] About the allegation that the 1st respondent held a campaign rally at Mulenga Compound during the ban, the appellant argued that the trial court erred to find that it was not proved to the required threshold because the picture on which this allegation was premised, was not dated. Counsel contended that the trial court should have discounted the 1st respondent's assertion that the picture was taken prior to his adoption and found as a result, that the said picture was taken during the period when there was a suspension on campaign rallies.

[6.48] We note that at paragraph 32.19 of the Judgment, the trial court opined that the averment by the 1st respondent that the picture was an image from pre-adoption meeting was inconceivable.

Nonetheless it reasoned that as there was no corroborative evidence to confirm the date of the picture, it did not support the allegation of a rally being held at Mulenga Compound during the ban to the threshold required.

[6.49] We opine that the finding was supported by the evidence. It is settled that it is incumbent upon the Petitioner to prove the allegations in the petition to a fairly high degree of convincing clarity. In our view even if we were to agree with the appellant's counsel that the image was taken during the period when campaign rallies were banned, the issue was not proved to the requisite standard as to warrant nullification of the results as we shall discuss later in this judgment.

Rally at Kamfinsa Secondary School:

[6.50] The evidence regarding the campaign meeting at Kamfinsa Secondary School in Kamfinsa ward was that on 2nd August, 2021, the 1st respondent together with the DEBS met with teachers wives at the school where money and mealie meal was distributed and the people were urged to vote for the then Republican President Edgar Chagwa Lungu.

[6.51] After analysing the evidence of the Petitioner's witnesses and RW3, the trial court found that the 1st respondent was not present at the meeting although he had placed himself at the school. The Court reasoned that although the evidence of RW3, Joseph Katongo, was corroborated by the evidence of Moono Bwantu (PW9), Mirriam Chama (PW10) and Prudence Teswa Chola (PW13) on the directives and inducements made at the meeting, coupled with the violence, there was no evidence that the 1st respondent attended the meeting. Furthermore, that PW10 seemed hesitant, nervous and uncomfortable and was not convincing in her evidence. PW13 was also not convincing especially in light of the discrepancies in the amount of money alleged to have been given at the meeting.

[6.52] In addition, the trial Judge observed that RW6 was very casual in her approach and demeanor, her evidence seemed rehearsed and she displayed no serious understanding of why she was in Court, fidgeted with her mask when she appeared uncomfortable with the questions and could not really answer with conviction or clarity why she was even there or what purpose she served.

[6.53] The trial court also noted that after listening to the audio evidence, she heard the DEBS say words to the effect that the electorate should support the debt swap and asked if they should forget the person who gave them relief.

[6.54] The trial court found that these words uttered by the DEBS were both an inducement and a threat. The trial Judge concluded therefore that the words attributed to the DEBS, the gifting of mealie meal or money were not done with the consent, knowledge or approval of the 1st respondent and or that of his agent. She observed at paragraph 32.34 of the Judgment that the appellant had been able to place several videos and pictures in support of her various allegations save for the meeting at Kamfinsa School.

[6.55] The trial court's finding at page 113, lines 13 to 23 of the record of appeal, was as follows:

> ***I ask myself the critical question, in this Petition, as to whether the words attributed to the DEBS on the material day, and the gifting of mealie meal and or money, can be placed directly on the shoulders of the 1st Respondent, more so, that I have found that he was not present at the said meeting. There has not been any evidence presented to the Court, to the required threshold, to satisfy the Court that the words, actions and gifting alleged to have been done at the said meeting, was with the consent and or specific knowledge and***

approval of the 1st Respondent, and or with the consent of his agent. I therefore find that this allegation has not been proved to the required standard.

The allegation was accordingly dismissed.

[6.56] We note the appellant and the 1st respondent's arguments at paragraphs 5.1 and 5.2 respectively, in relation to the allegations that the 1st respondent donated K3000 and bags of mealie meal to the people who attended his campaign rally at Kamfinsa Secondary School.

[6.57] The gravamen of the trial court's decision is that although the 1st respondent placed himself at the scene, there was no evidence to prove that he was at the meeting where the DEBS uttered words which were both an inducement and a threat.

[6.58] The trial court observed that both parties' witnesses were unimpressive and problematic. It observed that RW3 who supported the 1st respondent's claim that he was at the Kamfinsa Secondary School to inspect a classroom block, was a witness with an interest to serve whilst RW6 was casual in her approach and demeanor in Court and her evidence appeared rehearsed.

[6.59] The trial court was equally not impressed with the appellant's witnesses as stated above. It is settled that an appellate Court will not lightly interfere with findings of a trial court based on demeanor as that Court had the opportunity of hearing and seeing the witnesses and is entitled to decide whom to believe. It was thus incumbent upon the appellant to prove to a fairly high degree of convincing clarity that the 1st respondent attended the meeting at Kamfinsa School and gave K3,000 to the attendees as alleged.

[6.60] Therefore, although the 1st respondent placed himself at the school, the appellant bore the burden to adduce cogent evidence that he was at the meeting in the school hall and addressed the people and gave money as alleged. All the appellant proved via audio evidence was that the DEBS addressed the people who gathered in the school hall as found by the trial court and this therefore corroborated the oral evidence of the witnesses. No audio or video evidence was produced to prove that the 1st respondent addressed the people and gave them money as alleged. We cannot fault the trial court for dismissing this allegation as it was not proved.

Were the rallies illegal? Were the majority affected?

[6.61] We hasten to state that the appellant's main argument in this appeal is that having found as a fact that the 1st respondent held illegal rallies at Ndeke and Wesley Nyirenda Secondary Schools and at KCF, the trial court should have made a finding that the said illegal rallies affected the outcome of the elections as the 1st respondent held rallies in three out of the four wards in Kamfinsa constituency. Therefore, the malpractice was widespread as to influence the majority of voters in the Constituency. Moreover, that the trial court erred when she held that the appellant had a burden to prove the statistics of the registered voters and to additionally prove that the voters had a change of heart due to the illegal conduct of the 1st respondent.

[6.62] Our perusal of the judgment does not reveal any finding by the trial court that the 1st respondent held illegal campaign rallies but that he held campaign rallies in government buildings contrary to the Electoral Code of Conduct. We note the appellant's insistence that the rallies were illegal because they were held during the ban which was effected by the 2nd respondent on 3rd June 2021, via the covid 19 guidelines. Furthermore, that the 1st respondent contravened

section 11(d) of the Electoral Code of Conduct and Article 229 of the Constitution, when he held the said rallies as the 2nd respondent is empowered by Article 229 of the Constitution to issue the said guidelines in its conduct of elections.

[6.63] We must state from the onset that these arguments are flawed and meritless. The appellant failed to prove how the appellant contravened the Constitution while section 11(d) of the Code simply empowers the 2nd respondent to impose any administrative measures on any person, candidate or political party for any breach of its Code. The EPA is clear in its provisions as to the grounds upon which an election can be nullified.

[6.64] Moreover, in finding that the appellant had not proved that the 1st respondent's conduct of holding rallies was so widespread, that it prevented or may have prevented the majority of voters from voting for the candidate of their choice, the trial court placed reliance on our decision in the case of **Margaret Mwanakatwe v Charlotte Scott and another.**[1]

[6.65] In concluding that the appellant did not provide statistics to prove that the majority of the electorates in the constituency were prevented from electing a candidate of their choice, the trial court

also relied on the Supreme Court decision in the case of **Mubika Mubika v Poniso Njeulu,**[14] that:

> ***The evidence therefore, does not indicate widespread vilification of the respondent, neither does it indicate that the majority of the registered voters were influenced by the respondent. In this type of allegation, statistics of registered voters who attended rallies should have been given to assist the trial court on the extent of influence in the Constituency.***

[6.66] We are alive to the fact that the burden of proof for election petitions is set by statute being the EPA as provided in section 97(2)(a) 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;***

[6.67] We have had occasion to pronounce ourselves on the import of section 97(2)(a) in a plethora of cases including **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General**,[12] where we illuminated 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 agent, 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...***

Furthermore, that:

> ***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 a candidate of their choice.***

[6.68] It is clear that the appellant apart from proving that the 1st respondent held rallies in government buildings contrary to section 15(1)(k) of the EPA as determined by the trial court, also needed to prove that the electoral malpractice or misconduct was so widespread that it prevented or may have prevented the majority of the electorate from electing a candidate of their choice.

[6.69] We reiterate that it is a legal requirement under section 97 (2) (a) of the EPA that apart from proving electoral malpractice; cogent evidence that the alleged electoral malpractice was so widespread that the majority of the voters were or might have been prevented from electing a candidate of their choice, must be presented before the trial court for an election to be voided. The appellant in *casu* failed to do so during trial. Not a single number or estimate of how many people attended the rallies held in the government buildings was given to demonstrate that the majority of voters in Kamfinsa Constituency were or might have been prevented from electing a candidate of their choice. It is also unknown as to how many inmates ate the beef supplied by the 1st respondent and, in line with the case of **Mubika Mubika v Poniso Njeulu,**[14] how many of those were actually registered voters.

[6.70] We are alive to the argument by the appellant that the 1st respondent held rallies in three out of the four wards, therefore the rallies were widespread. However, the appellant did not adduce any evidence concerning this assertion. For obvious reasons, we cannot take this argument for a fact.

[6.71] The trial court cannot be faulted for finding that the appellant failed to prove her case to the requisite standard set by section 97(2) (a) of the EPA. The trial court used the correct standard of proof as provided in the EPA and pronounced by this court in several of our decisions.

[6.72] In light of all the preceding paragraphs grounds one to four, six and seven have no merit except to the extent stated on ground one on supplying cows and ground seven that it was proved that campaigns were held in government buildings only.

[6.73] We now move to consider ground five which impugns the trial court's finding that the appellant failed to prove the allegations against the 2nd respondent to the requisite standard. It is argued that the available evidence was that the Gen 20 Forms were illegible and had clerical errors. And, that there were several irregularities and discrepancies in the Gen 20 forms which put the authenticity of the results in question.

[6.74] The 2nd respondent contends that the trial court made a finding of fact that the clerical errors by way of overwritten or illegible documents and being given the original as opposed to copies of the Gen 20 forms; did not cause any detriment or loss to the appellant.

Our decision in the case of **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia**[18] was relied upon wherein we observed thus:

> ***Evidence on record shows that there were anomalies as regards 29 votes that were allocated in favour of a 5th candidate who was not a candidate for the ward in question. This anomaly was indeed an omission by the election officer in breach of his official duty in connection with the election. Evidence on record also shows that this anomaly was addressed and corrected once it was brough to the attention of the election officer, so that the name of the 5th candidate did not appear on the 2nd respondent's official Declaration of the Result of the Poll-Councilor Form on page 77 of the Record of Appeal. Apart from this anomaly there is no other cogent evidence that the election was not conducted substantially in conformity with the provisions of the EPA.***

[6.75] And also in **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General**,[12] wherein we elucidated:

> ***That where there has been substantial compliance with the provisions of the Electoral Process Act an election cannot be annulled on the basis of section 97 (2) (b) of the Act.***

[6.76] The 2nd respondent canvassed that the appellant did not call any witnesses to support the host of allegations on the Gen 20 Forms or tender any tangible evidence in the lower court to prove that the

election was so flawed and not conducted in substantial conformity with the law or that the clerical errors by the electoral officers did affect the election results.

[6.77] We note the arguments by both parties on this score. We are of the firm view as aforestated that the appellant had the burden to prove the allegation to the requisite standard against the 2nd respondent.

[6.78] The trial court took note of the appellant's witnesses' testimonies on the issue of Gen 20 Forms. She observed that PW11 Joseph Muyutu was the polling agent for the UPND at Cecina Stream 3 Polling Station in Bupe Ward and PW12 George Malupande was the polling agent at Kafue Bridge Secondary School Stream 1 in Kafue Ward. Therefore, their evidence only related to the two polling stations.

[6.79] The Judge found that when PW11 was removed from the polling station for about 45 minutes, another polling agent from the UPND party remained in the room and did observe whatever may have happened. The trial court opined that PW11's evidence was therefore based on apprehension of what may have or could have hypothetically happened as opposed to what actually happened at the polling station.

[6.80] With regard to George Malupande (PW12), who testified that he and other polling agents were sent out of the polling station at Kafue ward and allowed back after the intervention of the Petitioner and the Town Clerk, the trial court noted that PW12 conceded under cross-examination, that he made no report to the 2nd respondent. PW12 was shown the Gen 20 Form and he confirmed that he appended his signature to signify his agreement with the results attained at that polling station. The trial Judge further noted that PW12 admitted that he was present from 06:00 hours in the morning till 09:00 hours the following day when counting ended and he confirmed that UPND won at that particular polling station. Accordingly, his evidence was equally found to be speculative as no cogent evidence was adduced to support the allegations of electoral malpractice at the polling station.

[6.81] The trial court also analysed the appellant's evidence in relation to the Kamfinsa Correctional 01 polling station. The appellant testified that the total number of votes cast was 783 of which 41 were rejected giving a total of 778 votes. When referred to the 2nd respondent's bundle of documents, she agreed that her results and those of the 1st respondent were 299 and 406 respectively. The trial

court noted that the appellant conceded that the mistake in the total initially stated to be 783 was corrected to 778. The appellant also admitted that she did not know that the EPA empowers the 2nd respondent to correct clerical mistakes within 7 days. Based on the evidence adduced by PW11, PW12 and the appellant, the trial court came to the conclusion that the allegations against the 2nd respondent had not been proved to the required standard.

[6.82] As noted by the trial court, the appellant only called PW11 and PW12 who testified about what transpired at Bupe and Kafue Wards respectively. No witnesses were called to testify to the other allegations against the 2nd respondent. It was incumbent upon the appellant to adduce evidence to prove that the results were manipulated, which she failed to do even by her own testimony.

[6.83] It is not sufficient to make averments in a Petition and fail to adduce evidence to support the same.

[6.84] We cannot interfere with the finding of fact as it was based on the evidence presented by the parties to the trial court. Ground five also fails.

[6.85] The net result is that the appeal is devoid of merit and is accordingly dismissed. Consequently, we uphold the judgment of the trial court that the 1st respondent was duly elected as Member of Parliament for Kamfinsa Constituency.

[6.86] Each party to bear own costs.

A.M. SITALI
CONSTITUTIONAL COURT JUDGE

M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

P. MULONDA
CONSTITUTIONAL COURT JUDGE

M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE

IN THE CONSTITUTIONAL COURT OF ZAMBIA 2021/CCZ/A0033

HOLDEN AT LUSAKA

(APPELLATE JURISDICTION)

IN THE MATTER OF:	ARTICLE 73(1) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016.
IN THE MATTER OF:	SECTIONS 97 (2) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016.
IN THE MATTER OF:	SECTIONS 98(c), 99(a), 100(2) (a), 106 (1) (b), 108 (1) & (4) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016
IN THE MATTER OF:	THE PARLIAMENTARY ELECTION FOR KAMFINSA CONSTITUENCY OF THE DISTRICT OF KITWE HELD ON 12TH DAY OF AUGUST, 2021.

BETWEEN:

SUBETA MUTELO K. APPELLANT

AND

KANG'OMBE CHRISTOPHER 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
29 JUL 2022
REGISTRY 5
P O BOX 50067, LUSAKA

CORAM: Sitali, Mulenga, Mulonda, Chisunka and Mulongoti, JJC

On 17th May, 2022 and 29th July, 2022

For the Appellant:	*Mr. K. Chali of G.M. Legal Practitioners*
For the 1st Respondent:	*Mr. N. Simwanza, Mr. Y.S Simukonda and Mr. M. Mahenda of Noel Simwanza Legal Practitioners*
For the 2nd Respondent:	*Mr. B.M. Musenga, Ms. T.K. Phiri and Mr. M. Bwalya-In house Counsel-ECZ*

JUDGMENT

Mulongoti, JC, *delivered the Judgment of the Court*

Cases referred to:

1. *Margaret Mwanakatwe v Charlotte Scott and another CCZ Judgment No. 50 of 2018.*
2. *Brelsford James Gondwe v Catherine Namugala SCZ Appeal No. 129 of 2012.*
3. *Anderson Kambela Mazoka and others v L.P. Mwanawasa and The Attorney General, (2005) Z.R. 138.*
4. *Akashambatwa Mbikusita Lewanika and others v F.T.J. Chiluba (1998) Z.R. 79.*
5. *Mohamed v The Attorney General (1982) Z.R. 49 (SC)*
6. *Nkhata & others v The Attorney General (1966) Z.R. 124.*
7. *Zulu v Avondale Housing Project Limited (1982) Z.R. 172.*
8. *Abuid Kawanga v Elijah Muchima CCZ Appeal No. 8 of 2017.*
9. *Austin Milambo v Jamba Machila CCZ Appeal No. 6 of 2016*
10. *Jonathan Kapaipi v Newton Samakayi CCZ Appeal No. 13 of 2017.*
11. *Stephen Masumba v Elliot Kamondo CCZ Selected Judgment No. 53 of 2017.*
12. *Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General CCZ Selected Judgment No. 51 of 2018.*
13. *Kabwe Taulo Chewe v Patrick Mucheleka and George K. Mwamba CCZ/2021/0023*
14. *Mubika Mubika v Poniso Njeulu SCZ Appeal No.114 of 2007*
15. *Saul Zulu v Victoria Kalima SCZ Judgment No. 2 of 2014.*
16. *Austin Liato v Sitwala Sitwala CCZ Selected Judgment No. 23 of 2018.*
17. *Richwell Siamunene v Sialubalo Gift CCZ Selected Judgment No. 58 of 2017*
18. *Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia CCZ Appeal No. 2021/CCZ/A0012 (unreported)*
19. *Sithole v State Lotteries Board (1975) Z.R. 140, 151*

Legislation referred to:

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Electoral Process Act No. 35 of 2016*
3. *The Electoral Code of Conduct (Schedule) Act No. 35 of 2016*

Other works:

1. ***The International Foundation for Electoral Systems Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections (2011, P86-87).***

[1.0] Introduction

[1.1] This appeal is against the decision of the High Court which dismissed the election petition of Subeta Mutelo K. (referred to herein as the appellant). The appellant sought nullification of the election of Kang'ombe Christopher (referred to herein as the 1st respondent) as Member of Parliament (MP) for Kamfinsa Constituency in Kitwe.

[1.2] In dismissing the petition, the High Court found that there were no statistics before it to prove that the alleged electoral malpractices committed by the 1st respondent, prevented the majority of the registered voters from electing their preferred candidate.

[2.0] Background facts

[2.1] On 12th August, 2021, the Electoral Commission of Zambia, the 2nd respondent herein, conducted general elections countrywide.

[2.2] The appellant and 1st respondent were among candidates vying for election as MP for Kamfinsa Constituency. The appellant was the

candidate for the United Party for National Development (UPND) while the 1st respondent was the candidate for the Patriotic Front (PF) party.

[2.3] At the close of the polls, the 2nd respondent declared the 1st respondent as the duly elected MP for Kamfinsa Constituency.

[2.4] Aggrieved by this outcome, the appellant petitioned the High Court alleging that the 1st respondent had committed electoral malpractices. The electoral malpractices relevant to this appeal were stated in the Petition appearing at pages 158 to 165 of the record of appeal verbatim as follows:

> ***5. In the referred to elections, the 1st respondent was NOT DULY ELECTED owing to the fact that the 1st respondent by himself, servants, agents and other persons on his behalf are guilty of general illegal and corrupt electoral offences and campaign malpractice which, inter alia, include-***
>
> ***5.2 On 31st July, 2021 the 1st respondent used the Wesley Nyirenda Secondary School grounds, a government owned facility and held a campaign rally in contravention of the Electoral Act and Covid-19 Electoral Code of Conduct.***
>
> ***5.3 On 10th August, 2021 the 1st respondent held a rally in Mulenga compound in the Constituency contravening the Covid 19 rules and guidelines and Electoral Code of Conduct.***
>
> ***5.4 On 29th May, 2021 the 1st respondent organized and held a meeting at Ndeke Secondary School Hall, a government owned facility in contravention of the Electoral Act.***

8. *The 1st respondent by himself, servants, agents and other persons on his behalf breached the Electoral Process Act, the Covid 19 guidelines, caused voter intimidation, his campaign was characterized by severe malpractice and committed numerous electoral offences prior to and during the election, which include inter alia:*

8.1 *The petitioner reiterates that on 3rd June, 2021 the 2nd respondent through its Chief Electoral Officer suspended all campaign rallies and meetings.*

8.2 *On 11th August, 2021 at around 06:00 hours, the 1st respondent went to Kamfinsa Prison (the Prison), was allowed entry therein by the Prison officials and thereat held a campaign meeting where he introduced himself and said he was sent by the Republican President to tell the inmates that they should vote for him and the Republican President and let them know their problems.*

8.3 *The 1st respondent further asked if the beef that he had brought on 10th August, 2021 was enough. Upon being told it was not enough he arranged for more beef for the prisoners.*

8.4 *Further, the 1st respondent offered and gave the prison warders K20,000.00 for purposes of sharing the same to the prisoners of which it was shared among some of the prisoners and in addition some warders received K200 each.*

8.6 *A Mr. Chisanga Siame the Deputy Officer in Charge was going round the prison cell and telling inmates that they had to vote for the 1st respondent and all PF candidates.*

8.8 *On 2nd and 11th August, 2021 prison warders were given a bag of mealie meal each.*

8.10 *On the 8th July, 2021 the 1st respondent organized and conducted a door-to-door distribution of mealie meal in the Kamfinsa prison camp which was being carried on a Zambia Army truck.*

8.11 *On 2nd July, 2021 the 1st respondent together with the Kitwe District Education Board Secretary (DEBS), organised and held a campaign meeting with teachers of Kamfinsa Secondary School (the teachers) in the school hall, where he distributed mealie meal and K120.00 (One*

hundred and twenty Kwacha) each to all the teachers and people present.

8.12 The DEBS in fact enticed and told the teachers that they needed to vote for the 1st respondent and President Lungu and that they had no choice but to vote for the 1st respondent and President Lungu because the serial numbers of the ballot papers they would vote on would be known and a teacher who voted for UPND or the Petitioner would be retired in national interest.

9 The 2nd respondent by its agent, servants, workers and other persons on its behalf breached the Electoral Act, Electoral Code as well as committed proscribed electoral offences in the capture and entry of valid votes cast in numerous Polling Stations that consequently influenced the outcome of the election in the 1st respondent's favor and to the detriment of the Petitioner. (sic)

[2.5] Going by these allegations the appellant sought the following:

(i) That it be determined and declared that the said Kang'ombe Christopher was not duly returned or elected as Member of Parliament for Kamfinsa Constituency.

(ii) That it be determined and declared that both the 1st respondent's election and return were null and void. (sic)

(iii) That it be declared and ordered that the said Kang'ombe Christopher's seat is vacant.

(iv) That it be directed and ordered that costs of this Petition be borne by the respondents.

[2.6] The 1st and 2nd respondents filed their respective Answers denying the appellant's allegations. The 1st respondent averred that it was in fact the appellant who committed electoral malpractices. The 2nd respondent averred that its agents, servants, workers and

employees did not breach the Electoral Act and the Electoral Code and they did not commit any proscribed electoral offences.

[2.7] At trial the appellant called 17 witnesses. The 1st respondent called 6 witnesses while the 2nd respondent did not adduce any oral evidence.

[3.0] ***Decision of the High Court***

[3.1] After analysing the evidence adduced before it, which included videos, audios and pictures filed by both the appellant and 1st respondent, the trial court dismissed the appellant's case and declined to grant the prayers sought.

[3.2] In dismissing all the allegations the trial court found that the appellant failed to prove that money was paid to the people who attended the 1st respondent's campaign rallies held at Ndeke and Wesley Nyirenda Secondary Schools. Additionally, that the appellant's witnesses who testified that the 1st respondent bribed inmates and prison warders with money contradicted themselves as to the amounts given to the inmates and the warders respectively. The allegations were dismissed on that premise. Furthermore, that the appellant failed to prove that the three cows

which were delivered to Kamfinsa Correctional Facility (KCF) on 9th August, 2021 in the prison's truck were donated by the 1st respondent and meant to feed the inmates. The trial judge reasoned it could not make a finding of fact that the cows were supplied by the 1st respondent based on the evidence of the inmates only because their evidence had been discredited.

[3.3] The allegation that the 1st respondent held a rally in Mulenga Compound was also dismissed. The Court found that it could not be proved from the picture availed to it that the 1st respondent held a rally on the 10th of August, 2021 during the ban or suspension of physical campaigns.

[3.4] The trial court further found that the 1st respondent was not at the rally held at Kamfinsa Secondary School, as no video evidence was adduced by the appellant to prove it, as she did with the rallies held at Ndeke and Wesley Nyirenda Schools.

[3.5] The trial court concluded that all the appellant was able to prove to the requisite standard was that the 1st respondent held campaign rallies in government facilities at Ndeke Secondary School in Ndeke ward and at Wesley Nyirenda Secondary School in Bupe ward contrary to section 15(1) (k) of the Electoral Code of Conduct.

[3.6] Ultimately, the trial court dismissed the Petition on the premise that the appellant failed to prove that the majority of the registered voters in Kamfinsa Constituency were prevented from voting for their preferred candidate because of the campaign rallies as the appellant did not produce any statistics of registered voters who attended the rallies.

[3.7] Accordingly, that since no statistics were placed before it, the appellant had not discharged the burden of proving that the majority were affected with a high degree of convincing clarity.

[4.0] <u>The Appeal</u>

[4.1] Dissatisfied with the Judgment of the trial court the appellant appealed to this Court raising seven grounds of appeal couched thus:

1. ***At pages "J84, J86 and J100 lines 1 to 7", and at page "J118 lines 14 to 17" the Court below found as a fact that contrary to the Electoral Process Act, the 1st respondent held illegal Campaign rallies at Ndeke Secondary school and at Kamfinsa Correctional Facility, thus erred both in law and fact when she held that in view of the evidence before her, notwithstanding the Petitioner having proved the said allegations of electoral malpractice to the required high degree of convincing clarity, the said acts did not affect the outcome of the election and prevent the majority of voters from voting for their preferred candidate, and, that money was not given thereat as an inducement for votes.***

2. *At "J116" lines 3 to 7, the lower Court having found that the evidence of PW5, PW6 and PW7 of receiving mealie meal at the instance of the 1st respondent at Kamfinsa Prison Camp to solicit for votes was corroborated, the lower Court erred both in law and fact when it held that the petitioner has failed to prove the allegations of the 1st respondent giving out the said mealie meal by himself or with his knowledge to a high degree of convincing clarity.*
3. *The lower Court erred in both law and fact when it held that the allegation of the 1st respondent holding an illegal campaign rally in Mulenga Compound was not proved to the required standard and that it did not affect the outcome of the election despite finding as a matter of fact at page "J88 lines 22 to 24 leading to lines 1 to 6" that the 1st respondent held an illegal campaign rally in Mulenga Compound after the adoption process and during the campaign period contrary to the Electoral Process Act.*
4. *The lower Court erred both in law and fact when it was held that the allegation of the 1st respondent holding an illegal campaign rally at Kamfinsa Secondary School was not proved and it did not influence the outcome of the election and prevented the majority of voters from voting for their preferred candidate despite finding as matter of fact at page "J97" that the Kitwe District Education Board Secretary (DEBS) was at the said rally and that the Evidence of PW9, PW10, PW13 and RW3 placing the 1st respondent at the said illegal rally to solicit for votes was corroborated, and at page "J99 line 5 to 12" that the words of the DEBS at the said rally was an inducement and a threat.*
5. *The lower Court erred both in law and fact when it was held at page "J127 lines 9 and 10" that the petitioner failed to prove the allegations against the 2nd respondent to a high degree of convincing clarity notwithstanding the provided evidence of missing Gen 20 forms and the Record of Proceedings.*
6. *The lower Court erred both in law and fact when it was held at "J137 lines 16 to 25" that the petitioner had a burden to prove the statistics*

of the registered voters and to prove that the voters had change of heart due to the illegal conduct of the 1st respondent.

7. *Having found as a fact that the petitioner had proved the allegations in the petition, the Court below fail into error in law and in fact when she held that the illegalities were not widespread in the constituency and the proved facts were not shown to sufficiently conclude that the voters were prevented from voting for their preferred candidate contrary to the evidence on record placing illegalities in all four wards of Kamfinsa Constituency.*

[5.0] The Arguments

[5.1] The appellant filed Heads of Argument in support of the appeal which Mr. K. Chali, counsel for the appellant, relied upon at the hearing of the appeal. Grounds one, two, three, four and seven were argued together.

[5.2] Counsel submitted that the arguments were premised on Article 73 (1) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and section 97 (2) (a) of the EPA. That a reading of section 97 (2) (a) of the EPA reveals that the key elements to be established before an election is nullified are that the candidate personally committed a corrupt or illegal practice or misconduct, or the same were committed by another person with the candidate's knowledge, consent or approval or with the knowledge, consent or approval of that candidate's election or polling agent. And, that the petitioner

must prove that as a result of the corrupt or illegal practice or misconduct, the majority of the electorate were or may have been prevented from electing their preferred candidate. The case of **Margaret Mwanakatwe v Charlotte Scott and another**[1] was cited in support of this argument.

[5.3] Regarding the standard of proof, it is argued that in election cases it is higher than the balance of probabilities for ordinary civil matters. Reliance was placed on the cases of **Brelsford James Gondwe v Catherine Namugala**[2]; **Anderson Kambela Mazoka and others v L.P. Mwanawasa and the Attorney General**[3]; and **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4]. After quoting sections 81(1) (a) and 83 (1) (c) (iv) of the EPA on prohibited acts during election campaigns, counsel wondered how the trial court having found at paragraph 32.6, of the Judgment that PW16's testimony was plausible when he stated that he had received K20 from the 1st respondent, went on to contradict itself when it concluded that there was no evidence of money being paid out to people at Ndeke Secondary School rally.

[5.4] Learned counsel further impugned the trial court's finding, that the testimony of PW17 was credible when he testified that money was given at Wesley Nyirenda school, yet it discredited this evidence on

the basis that PW17 walked away and thus, did not know if it was the 1st respondent who gave out the money. Counsel argued that the trial court erred in this regard as a proper evaluation of the evidence should have been that money was given out at Wesley Nyirenda Secondary School.

[5.5] In relation to the allegation of the campaign rallies held at KCF as well as money and beef being given to the inmates, counsel argued that the trial court erred in holding at paragraph 32.58 of the Judgment that there were contradictions in the witnesses' evidence on where the money came from. It was counsel's view that the trial court contradicted itself as it had made a finding on paragraph 32.54 page 121 of the record of appeal that the evidence of PW2, PW3 and PW4 was corroborated with regards to the 1st respondent holding rallies, giving out meat and money to the inmates at KCF.

[5.6] Counsel further questioned the trial court's reasoning when it stated at paragraph 32.63 of the Judgment that it was at pains to accept statements of the inmates at KCF that they had never eaten meat provided by the prison. On the contrary, counsel maintained that the trial court did not properly evaluate the evidence of PW2 found at paragraph 7 on page 50 of the record of appeal where he stated

that part of their grievance was that the prison did not provide them with meat and that is what led the 1st respondent to promise them beef. That what the trial court assumed was a rehearsed and hollow testimony by PW2 that meat was never provided, was actually a fact and was sufficiently corroborated by PW3 and PW4.

[5.7] Furthermore, that there was video footage which showed the cows being delivered at KCF and the trial court's finding at paragraph 32.63 of the Judgment, that because the cows were delivered by the prison truck it is not the 1st respondent who provided them, was a misdirection in law and fact.

[5.8] With regard to the allegation that money was given to the prison officers at KCF, it is the appellant's contention that there was evidence through the testimony of PW5 at paragraph 10 on page 53 of the record of appeal, that the 1st respondent addressed the prison officers and stated that he would leave them something. After addressing them the 1st respondent went into the Office of Mr. Siame the Deputy Officer In Charge (DOIC) at KCF. After that Mr. Siame called the accountant who then distributed the money. Mr. Siame received a K200. According to counsel this evidence was corroborated by PW7 and PW8. Thus, the discrepancies between

the prison officers as to how much was left by the 1st respondent is normal and that it should not discredit the evidence that the 1st respondent paid the prison officers so that they could vote for him.

[5.9] Learned counsel canvassed further that the trial court, having found that the evidence of PW5, PW6 and PW7 who are prison officers, was corroborated on each one of them having received a bag of mealie-meal, erred when it held that the said mealie-meal could not have come from the 1st respondent. That a careful examination of the testimony of PW5 and that of PW6 shows that the bags of mealie-meal were delivered by Mr. Siame who stated that they were from the PF.

[5.10] It was contended that the trial court erred in not addressing her mind to the fact that Mr. Siame, being in a position of power as DOIC at KCF unduly influenced the prisoners to vote for the 1st respondent, a fact the Court acknowledged at paragraph 32.58 of the Judgment.

[5.11] With respect to the allegation that the 1st respondent held an illegal rally at Mulenga Compound, counsel argued that the trial court, having found at paragraph 32.19 of the Judgment that there was clear proof that the 1st respondent held an illegal rally in the said

compound, erred in holding that it had not been proved to the required standard of proof as the image produced to prove this assertion was not dated. It is submitted that the trial court misdirected itself in not considering the fact that the said picture of the rally was taken prior to 3rd June, 2021 before the ban of rallies by the 2nd respondent. The 1st respondent testified that the picture was taken prior to his adoption, an assertion which the trial court itself found improbable. Thus, the fact that the 1st respondent tried to paint that the picture was taken earlier, before the suspension of rallies, and the fact that he admitted being at Mulenga Compound on the material date, points to the fact that the said picture was taken during the suspension of rallies and the Court should have found as such.

[5.12] Regarding the rally held at Kamfinsa Secondary School, counsel contends that the trial court erred when it held that the said rally was neither held at the instance of the 1st respondent, nor was the 1st respondent in attendance. Counsel submitted that the presence of the 1st respondent at this rally was confirmed by the testimonies of PW9, PW10 and PW13 and that this fact was also noted by the trial court on paragraph 32.36 of the Judgment. And that their

testimony was confirmed by the 1st respondent's own witness' testimony, RW3, who stated at page 107 of the record of appeal that he saw the 1st respondent at Kamfinsa Secondary School. However, being a witness with an interest to serve RW3 stated that he saw the 1st respondent inspecting a classroom block.

[5.13] Still at Kamfinsa Secondary School, counsel submitted that the 1st respondent together with the DEBS and the Kitwe District Commissioner (DC) gave money as inducement for votes. The trial court therefore erred in holding that there was no evidence of the 1st respondent giving money on the basis of the inconsistencies and discrepancies in the testimonies of PW10 and PW13 as to the total amount of money given and what amount was attributable to the 1st respondent, the DEBS and the DC.

[5.14] In light of the above arguments, counsel maintained that the trial court not only should have found that the 1st respondent held illegal rallies at Ndeke Secondary School, Wesley Nyirenda Secondary School, KCF, Mulenga Compound and Kamfinsa Secondary School, but it should have made a finding that the said rallies affected the outcome of the election as opposed to the holding that the rallies were not widespread. Learned counsel amplified that the

1st respondent held rallies in three (3) out of the four (4) Wards that are in Kamfinsa Constituency and therefore, the malpractice was widespread as to influence the majority of voters in the constituency.

[5.15] On ground five, counsel submitted that the trial court, having found that the appellant had proved that the Gen 20 Forms had clerical errors, being overwritten or were illegible, should have addressed its mind to the fact that these discrepancies left room for the results to be manipulated.

[5.16] On ground six, counsel argued that the trial court erred when it held on paragraph 34.8 of the Judgment that the appellant should have adduced evidence in the form of statistics of registered voters in the areas where the 1st respondent perpetuated the malpractice, details of the number of polling stations affected or where people who attended the rallies came from. According to counsel the law as provided by Article 73 (1) of the Constitution of Zambia (Amendment) Act, section 97 (2) (a) of the Electoral Process Act and as held in **Margaret Mwanakatwe v Charlotte Scott and another,**[1] does not envisage this standard of proof.

[5.17] In concluding his arguments, counsel submitted that a proper analysis of the facts from the documents on the record of appeal and the appellant's arguments would show that the trial court erred in both law and fact when it held that the appellant had not proved the allegations to the required standard of proof of a fairly high degree of convincing clarity. The cases of **Mohamed v The Attorney General**[5]; **Nkhata and others v The Attorney General**;[6] and **Zulu v Avondale Housing Project Limited**,[7] were referred to, to highlight circumstances when an appellate court can interfere with findings of fact made by a trial court. We were urged to allow the appeal on the basis of these authorities and the appellant's arguments.

[5.18] The 1st respondent filed his Heads of Argument which his counsel Mr. Simwanza augmented at the hearing. It is the 1st respondent's submission that this Court should render the appellant's appeal unsuccessful on all grounds based on the fact that the appellant failed to prove her allegations to the requisite standard as established in the Supreme Court election case of **Anderson Kambela Mazoka, Lt. General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v Levy Patrick Mwanawasa, Electoral Commission of Zambia and The Attorney General**[3] that *"As regards the burden of proof, the evidence adduced must*

establish the issues raised to a fairly high degree of convincing clarity", and restated by this Court in **Abuid Kawangu v Elijah Muchima**.[8]

[5.19] Citing the cases of **Austin Milambo v Jamba Machila**[9] and **Jonathan Kapaipi v Newton Samakai**[10] it is argued that an election can only be nullified where it is proved that the electoral malpractice was committed by the candidate himself/herself, or by another person with the candidate's knowledge and consent or approval or by the candidate's election or polling agent.

[5.20] Citing the cases of **Stephen Masumba v Elliot Kamondo;**[11] **Jonathan Kapaipi v Newton Samakayi;**[10] and **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General,**[12] it was the appellant's further submission that for an election to be nullified, it has to be proved that the electoral malpractice was so widespread that the majority of the voters were, or may have been influenced by it and prevented from electing a candidate of their choice.

[5.21] The gravamen of the 1st respondent's arguments on ground one is that the learned trial court was on firm ground when it found that the appellant only managed to prove to the required standard that campaign rallies took place at Ndeke Secondary School. There was

no cogent evidence to support PW16 that he was given K20 at Ndeke Secondary School. We were urged to dismiss this aspect of the appeal as it was wrongly challenging sound findings of fact contrary to our recent decision in the case of **Taulo Chewe v Patrick Mucheleka & George K. Mwamba.**[13]

[5.22] With regards to KCF, counsel submitted that the trial court considered the allegations of money and mealie-meal being given to the inmates and prison officers as inducement, as well as cattle being delivered to the prison at pages J103 to J118 of the Judgment. That the trial court considered the inconsistencies and discrepancies in the testimonies of PW2, PW3 and PW4 with regards to who or where the money came from and at what point the money was given, and consequently declined to make any findings of fact that the 1st respondent gave money to the inmates for campaign purposes. According to the 1st respondent, the only allegation that was proved was that of the rally being held, but the appellant failed to prove that the said rally prevented the majority of the electorate from voting for their preferred candidate.

[5.23] As regards ground two which assails the finding that there was no evidence attributing mealie-meal distribution at KCF to the 1st

respondent, counsel submitted that PW5, PW6 and PW7 who testified to mealie-meal being received at KCF, did not testify to the same being distributed by the 1st respondent himself nor with his knowledge or consent, in line with our decision in **Austin Milambo v Jamba Machila.**[9] Counsel submitted that this ground challenged the trial court's finding of fact but no evidence had been presented to fault the same. Reliance was placed on cases of **Zulu v Avondale Housing Project Limited**[7] and **Kabwe Taulo Chewe v Patrick Mucheleka & George K. Mwamba.**[13]

[5.24] On ground three, it is argued that the evidence which was produced in support of the allegation that the 1st respondent held a rally at Mulenga Compound was a photo. The trial court found that the appellant had not proved with convincing clarity that the picture/photo relied on depicted the 1st respondent holding a rally on 10th August, 2021 in Mulenga Compound, as the said picture did not have anything on it to confirm the date or indeed the venue of the said rally. It is argued that in the absence of such key evidence and authentication, the trial court was on firm ground in holding that the picture did not meet the required threshold of proof to a fairly high degree of convincing clarity.

[5.25] On ground four of the appeal relating to the holding of an illegal rally at Kamfinsa Secondary School, the respondent called in aid the case of **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General**[12] on the need to prove that the electoral malpractice was conducted personally by the person whose election is challenged or through his/her election or polling agent. Counsel submitted that the trial court held at page 111 of the record of appeal that the appellant did not provide any picture or video evidence to support the allegation that the 1st respondent held a rally at Kamfinsa Secondary School on 2nd August, 2021.

[5.26] It was the further submission of counsel that the trial court went on to find that there was no evidence that the giving or gifting of any inducement was attributable to the 1st respondent. That the green military truck which delivered the mealie meal could not be assumed to belong to the 1st respondent. In addition, that the trial court found at page 113 line 17 that the words of the DEBS although held to be an inducement, there was nothing before it to suggest that the words were made with the knowledge of the 1st respondent. The trial court was therefore on firm ground to hold that all

allegations at Kamfinsa Secondary School were not proved as having been at the instance of the 1st respondent.

[5.27] On ground five which assails the trial court's finding that the allegations against the 2nd respondent had not been proved, counsel contended that the trial court was on firm ground in holding that the act of PW11 being chased out of the polling station did not influence the outcome of the election in favour of the 1st respondent, to the detriment of the appellant as another agent of the appellant remained inside the polling station and observed the proceedings. Learned counsel amplified that it is not for the courts to delve into the ambit of assumptions nor is it the trial court's duty to prove a petitioner's case as suggested by the appellant in paragraph 47 of her Heads of Argument that the trial court should have addressed the discrepancies in the Gen 20 Forms.

[5.28] On ground six which impugns the trial court's finding that the petitioner had the burden to provide statistics of registered voters and to prove how the alleged illegal acts influenced the electorate, counsel argued that the petitioner bears the burden of proof and in election petitions it is higher than the standard in ordinary civil proceedings. Additionally, that the petitioner has to show how the

electoral misconduct influenced the electorate. The trial court at paragraph 34.15 of the Judgment, in addressing this fact, referenced the case of **Mubika Mubika v Poniso Njculu**[14] where the Supreme Court stated that in proving the widespread of an electoral misconduct, statistics of registered voters should be given. That the trial court was therefore on firm ground in holding the way it did.

[5.29] Ground seven which contends generally that the trial court erred in holding that the illegalities were not widespread and that the proved facts were not shown to sufficiently conclude that the majority of the voters were prevented from voting for their preferred candidate, was argued on the premise that the trial court did not find that the petitioner had proved the allegations in the petition. That the only allegations proved were those relating to the rallies being held at Ndeke Secondary School, Wesley Nyirenda School and KCF and the rest of the allegations failed for lack of evidence supporting them to the required standard.

[5.30] Counsel maintained that the appellant failed to afford the trial court an opportunity to discern the majority principle when she did not adduce evidence of the statistics for the ward. As such, the appellant failed to discharge the burden of proof to the required

standard and urged us to dismiss the appeal and grounds raised for lack of merit.

[5.31] The 2nd respondent filed its Heads of Argument which Mr. Musenga relied upon at the hearing. It is submitted that the standard of proof in election petitions is to a high degree of convincing clarity as held in the cases of **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4] and **Saul Zulu v Victoria Kalima.**[15] Citing the case of **Nkandu Luo v Doreen Sefuke Mwamba and another**[12] where this Court interpreted the import of section 97 (2) of the Electoral Process Act, counsel submitted that the petitioner must prove that the electoral malpractice was committed by the candidate whose election has been challenged, or by their election or polling agent. Furthermore, that it must be proved that the said malpractice was widespread and influenced the election outcome. That the burden of proof lies on the petitioner as held in the case of **Abuid Kawangu v Elijah Muchima**[8] and restated in **Austin Liato v Sitwala Sitwala.**[16]

[5.32] Learned counsel amplified that a candidate can only be held liable for their own misconduct or that of an appointed agent as held in **Akashambatwa Mbikusita and others v F.T.J Chiluba**[4] and that in accordance with the holding of **Richwell Siamunene v Sialubalo Gift,**[17]

a general allegation that the supporters of a particular party were implicated in a misconduct is not enough to attach responsibility to the respondent.

[5.33] On the basis of the authorities above, the 2nd respondent concluded that the trial court was on firm ground when it held that the appellant had the burden to prove the statistics of the registered voters and to prove that the voters had a change of heart due to the illegal conduct by the 1st respondent. Since there were no statistics that were availed to the trial court the appellant did not discharge the burden. In support of this argument, the cases of **Anderson Kambela Mazoka and others v L. P. Mwanawasa**[3] and **Mubika Mubika v Poniso Njeulu**[14] were relied upon.

[5.34] On ground five, the 2nd respondent argued that the trial court was on firm ground to hold that there were no witnesses called to support the host of allegations in paragraph 9 of the Petition regarding the Gen 20 forms. Our decision in the case of **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia**[18] was relied upon to the effect that cogent evidence must be produced to prove that the election was not conducted in substantial conformity with the provisions of the EPA.

[6.0] **Decision on Appeal**

[6.1] We shall consider grounds one to four, six and seven simultaneously as they are interlinked. Ground five relates to the 2nd respondent and will be dealt with separately. As we see it, the cardinal issue this appeal raises is whether the appellant proved her case to the requisite standard of proof of a fairly high degree of convincing clarity that the majority of voters in Kamfinsa Constituency were prevented from electing a candidate of their choice due to the campaign rallies held during the ban at Ndeke and Wesley Nyirenda Secondary Schools and KCF. Key to the issue is the question whether the 1st respondent committed electoral malpractices during those rallies.

[6.2] We note that the grounds impugn findings of fact made by the trial court in dismissing the Petition.

[6.3] It is settled law that a trial court sitting alone without a jury can only be reversed on findings of fact when the conditions set out in the case of **Nkhata and others v The Attorney General**[6] are satisfied and demonstrated to the appellate Court as follows:

(a) by reason of some non-direction of mis-direction or otherwise the judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanuor, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer

[6.4] We have echoed similar sentiments in several of our decisions including recently in **Kabwe Taulo Chewe v Patrick Mucheleka and George K. Mwamba**[13] where we elucidated that we can only disturb findings of fact made by the trial court if they are perverse and not supported by the evidence.

[6.5] In making the findings of fact the trial court in *casu* was guided by a plethora of our decisions which included the cases of **Stephen Masumba v Elliot Kamondo,**[11] **Mubika Mubika v Poniso Njeulu,**[14] **Jonathan Kapaipi v Newton Samakayi**[10] and **Austin Liato v Sitwala Sitwala**[16] wherein we pronounced that it is not sufficient for a

petitioner to prove only 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 prevented or may have prevented the majority of the voters in the constituency from electing a candidate of their choice.

[6.6] In order to properly consider grounds one to four, six and seven, we take the liberty to disaggregate the categories of the allegations levelled against the 1st respondent and the findings by the trial judge as highlighted by the appellant in the said grounds of appeal which also question the standard of proof employed by the trial court in dismissing the Petition:

Campaign rally at Ndeke Secondary School:

[6.7] The allegation was that on 29th May, 2021 the 1st respondent held a campaign rally at the said school in the hall and gave out money to the people in attendance contrary to sections 81 (1) and 83 (1) (c) of the EPA. The trial judge after viewing the video and taking into account the oral evidence found that the video depicted events at Ndeke Secondary School and was supported by the oral evidence. Thus, the Court made a finding of fact that the appellant

had proved that the 1st respondent held a campaign rally at the school and not a PF meeting as he averred. The trial court, however, found that no money was paid to the people at that meeting. We note the appellant's arguments on this issue that the video evidence showed the appellant addressing a fully packed school hall at Ndeke School such that some people were observing the proceedings from the door and windows. That this was corroborated by PW16 who testified that the 1st respondent was lobbying for votes and gave out K20 notes to the attendees of the rally.

[6.8] In addition, it is argued that the trial court found that PW16's testimony was plausible and that he had nothing to gain from stating that he received K20, yet it ultimately found that no money was paid out and dismissed the allegation. That this is inconsistent with the available evidence as a proper evaluation should have been that money was given to the people at the rally.

[6.9] We note that the finding made by the trial court about PW16's evidence being plausible is at paragraph 32.6 lines 11 to 13 of the judgment. What the judge found to be plausible is *"on the fact of how he found out about this meeting, through a moving vehicle with*

a Public Address system and which informed people of the meeting at the school.."

[6.10] The rest of PW16's evidence was discounted. The trial judge noted the fact that PW16 said he received K20 at the said meeting. She nonetheless, observed that although PW16 had nothing to gain in conjuring up his evidence that he received K20, it was questionable why the appellant was unable to obtain the video clip to prove that the 1st respondent gave out money at the said meeting. The judge further observed that PW16 appeared hesitant and unsure when questioned about the money and admitted that he had not placed any evidence in support of the allegation. Clearly, the argument that the trial court found PW16's evidence to be plausible is misconstrued and erroneous as noted above.

[6.11] We cannot fault the approach taken by the trial judge in dismissing the allegation that money was given out at Ndeke School. We must add further that the evidence of PW16 needed corroboration for it to meet the requisite standard of proof of a fairly high degree of convincing clarity. This could have been corroborated by the video evidence of which the trial court only found to depict that a campaign rally was held but she was not convinced that money was

paid out. We therefore cannot interfere with the finding that money was not paid out as it is supported by the evidence. The trial court had the opportunity to observe the witness PW16, as being hesitant and unsafe which as an appellate Court we do not have. Based on this observation and all the evidence before it, it properly concluded that the appellant failed to prove that money was paid out at the rally at Ndeke School.

Campaign Rally at Wesley Nyirenda Secondary School Grounds:

[6.12] The appellant alleged that the 1st respondent held a rally at the said school grounds on the 31st of July 2021 contrary to the EPA and the Covid 19 guidelines by which physical campaign rallies were suspended on 3rd June, 2021. The trial court found as a fact that the rally was held but that no money was given out.

[6.13] The trial court examined the evidence of PW17, Gift Sheli, who testified that he rushed to Wesley Nyirenda School after he heard noise and a woman told him that the 1st respondent was giving out money at the said school grounds. That PW17 said when he got nearer to the school, he saw the 1st respondent who addressed the crowd and asked for their votes. The 1st respondent then asked them to form lines of women, youths and men and after which he

proceeded to give them money. However, the youths squabbled among themselves as they differed on how to share the money at which point PW17 left.

[6.14] The trial court observed that PW17 appeared to have no motive to come to Court and tell lies on a matter whose outcome would have no effect on his life. Nonetheless, the trial court opined that there was no proof of money having been paid and PW17 did not receive any. It concluded that the allegation of the 1st respondent having held a rally at Wesley Nyirenda School was proved but not the allegation of him giving money to the people at the said meeting.

[6.15] The appellant has taken issue with this finding and contends that the trial court misdirected itself when it disbelieved PW17 based on the fact that he voluntarily left when people were being bribed with money yet found him to have been a credible witness who appeared to have no motive to lie.

[6.16] Learned counsel contends that the finding is erroneous as it assumes that everyone is willing to be bribed in exchange of votes. Again, as we have stated above in relation to PW16 and the rally at Ndeke Secondary School, PW17's evidence needed to be supported and corroborated by independent evidence or witness

for it to have satisfied the burden of proof of a high degree of convincing clarity. However, there was no such evidence, hence, the finding that there was no proof of money being paid out at Wesley Nyirenda. We cannot interfere with this finding as it was supported by the oral evidence including video evidence. Our understanding of the inference made by the trial court on PW17 is not what the appellant insinuates that it assumes everyone is willing to be bribed in exchange of votes. The essence of the finding by the trial court is that the appellant failed to prove that money was paid out and her witness (PW17) did not receive any money. After a review of the evidence on record, our view is that indeed the appellant did not prove that the 1st respondent paid out money to people at the rally held at Wesley Nyirenda School grounds.

[6.17] We shall deal with the issue whether or not the rally was illegal later in this Judgment.

Rallies at KCF

[6.18] Several allegations were levelled against the 1st respondent regarding the campaign rallies and meetings at KCF as follows:

(a) gifting inmates with money and cows/beef in exchange of votes:

[6.19] The appellant alleged that the 1st respondent held rallies at KCF on the 8th, 9th, 10th and 11th of August 2021 at which *inter alia* money was paid to the inmates. The trial court found as a fact that the 1st respondent held campaign rallies at KCF. However, it discounted the evidence of the three inmates (PW2, PW3 and PW4) who testified that the 1st respondent gave the inmates K150 each to campaign and vote for him due to discrepancies and inconsistencies as to the amount given and where it was given from.

[6.20] Counsel for the appellant contends that the trial court erred in its holding as it contradicted its finding of fact on paragraph 32.54 of the Judgment, that the evidence of the three inmates (PW2, PW3 and PW4) was sufficiently corroborated regarding the 1st respondent's malpractices within KCF. The inmates alleged inter alia that the 1st respondent paid them K150 each as inducement for votes and for them to campaign for him. It was counsel's contention that there was consistent evidence that inmates were given K150 each at the chapel and that the money came from the 1st respondent. That the trial court misdirected itself in holding that there was no money given to the inmates by the 1st respondent

based on what she considered contradictions when she had in fact held that the witnesses' testimonies in relation to the same was corroborated.

[6.21] Learned counsel for the 1st respondent argued that the trial court was on firm ground for dismissing the allegation that money was paid to the inmates as the appellant failed to prove the same.

[6.22] Before we can state whether we support the finding on the allegation of giving money to the inmates, we will chronicle the trial court's analysis of the evidence that was before it. The evidence of paying inmates was adduced by three inmates (PW2, PW3 and PW4). According to PW2, on 8th August, the 1st respondent met the 'captains' including himself inside the office and asked them to inform all the other inmates to vote for him. Then he left with the 'chairmen' and when they returned, they found them seated inside the chapel. Names were called out and each one received K150 out of the K20,000 which the chairmen brought after meeting the 1st respondent. PW3 testified that when the 1st respondent visited the facility on 9th August, 2021, all the captains were invited to the chapel. Then the top chairman, Mr. Siame the DOIC and the 1st respondent went to the reception. Later, the chairman and the

DOIC returned with money and each one was given K150 after their names were called. PW4 testified that the 1st respondent visited KCF on 9th August, 2021. The rest of his testimony is similar to that of PW3. The trial judge concluded that the appellant failed to prove that money was given to the inmates by the 1st respondent because the videos of the rallies at KCF which she viewed did not reveal this fact. Thus, the inmates' evidence was not supported by independent evidence to attain the required proof of a fairly high degree of convincing clarity.

[6.23] At paragraph 32.54, of the Judgment, the trial court found that the evidence of PW2, PW3 and PW4 (the inmates), was substantially corroborated in respect of the events of the 8th to 11th August, 2021 regarding the allegations that the 1st respondent visited KCF on the said dates and held rallies, donated cows/beef and also paid the inmates.

[6.24] At paragraph 32.57 at page 122 lines 8 to 10, the trial court stated that the evidence of PW2, PW3 and PW4 supported the appellant's allegation that the 1st respondent used Mr. Siame to canvass and campaign for him within the facility. At paragraph 32.58, the trial court further made a finding that the evidence of PW2, PW3 and

PW4 was inconsistent and had several discrepancies concerning the dates and where the 1st respondent produced the money inside or outside the chapel. Moreover that whilst PW4 stated that there was confusion inside the cells on the issue of sharing the money, the trial court noted that PW2 and PW3 did not mention such confusion.

[6.25] In addition, that there was no evidence of how and where the K20,000 allegedly given to inmates to share came from and whether it was from whilst they met inside or outside the chapel or from Mr. Siame's office or how many 'captains' attended the meeting. The trial court questioned whether PW2's denial that politics were ever discussed amongst the inmates was realistic at a time when in the history of our country inmates were allowed to vote. The trial court discredited PW4's testimony that he was forced to vote for PF and was beaten, on the basis that there was no proof. The Court also considered the testimony of PW6 which was to the effect that he heard noise from all the 46 cells and that he was told by the captains that they (the captains) were campaigning for the 1st respondent. The Court concluded thus:

> ***...This heap of contradictory evidence does not lead me to making any findings of fact on the allegation of the 1st respondent having given money to the inmates for the purpose of voting or campaigning for him. I therefore find that this allegation of the 1st Respondent having given money to the inmates is not proved.***

[6.26] The issue which needed to be proved to a fairly high degree of convincing clarity was that the 1st respondent bribed the captains with K150 each to vote for him and to ask the other inmates to do so as well. The judge noted that the three witnesses corroborated each other in this respect but this is at variance with her finding that their evidence was full of inconsistencies and discrepancies and there was no video to support the same. PW5 a prisoner warder testified that he learnt from other officers that the 1st respondent left K20,000 for the special inmates to share. He said the video of the meeting was available though not before court.

[6.27] We are of the firm view that although the three inmates corroborated each other that they were paid K150 each, PW3 and PW4 said the 1st respondent met them on 9th August, 2021 and they did not state the exact amount allegedly left by the 1st respondent. PW2 and PW5 said K20,000 but they differed on the dates. PW2 said it was on 8th August, 2021 and PW5 said 11th August, 2021.

PW5 a prisoner warder testified about the inmates being paid based on what he was told, so his evidence in this regard is hearsay and inadmissible. We therefore uphold the finding that there was no independent evidence or something more to support the witnesses whose testimonies had discrepancies; to prove the allegation that money was paid to the inmates.

(b) *1st respondent's supply of beef/cows to inmates to vote for him*:

[6.28] The evidence on this allegation came from the same three inmates who also alleged that the 1st respondent paid them to vote and campaign for him. The trial judge dismissed this allegation due to discrepancies in the witnesses' testimonies. She found that despite the videos showing cows being delivered in the prison truck on 9th August 2021, the appellant failed to prove that it was the 1st respondent who had delivered them. She also discounted the testimony by PW2 that the prisoners never ate meat unless their relatives brought it for them.

[6.29] The appellant contends that the trial court erred when it stated on paragraph 32.63 of the Judgment that it was at pains to accept that the inmates had never eaten meat provided to them by the prison services other than when it was brought by relatives. It was

contended that the trial court erred by not properly evaluating the evidence of PW2 on paragraph 7 page 50, of the record of appeal, where he stated that part of the prisoners' grievance was that the prison did not provide them with meat and that that led to the 1st respondent promising to bring them beef.

[6.30] It was further contended that the trial court erred when it surmised that it would be naïve to hold the evidence as true, that the cows that were delivered to the correctional facility were at the instance of the 1st respondent only because the 1st respondent had said he would bring cows/beef. Counsel contended that the trial court misdirected itself by not properly considering the evidence as the sequence of events regarding the cows and the evidence on record which all point to the fact that the beef was supplied by the 1st respondent.

[6.31] The trial court's analysis of the issue to do with beef being supplied to KCF is set out in paragraphs 32.61 to 32.64 on pages 126 to 129 of the record of appeal. In lines 22 to 24 on page 126, the trial court considered the testimony of PW2 which was to the effect that the 1st respondent promised to provide meat in an address at KCF held on 8th August, 2021 and that they in fact ate meat on 10th August,

2021. The trial court also noted the testimony of PW3 who narrated that at the rally on 11th August, 2021, the 1st respondent asked if they had eaten meat to which they said they had and that it was not enough and the 1st respondent said he would provide some more.

[6.32] Furthermore, that PW4 confirmed having eaten meat and that PW5 a prison warder, testified that he had seen three slaughtered cows in the Prison Services Truck on 10th August, 2021 at 07:40 hours near the stores facility. After analyzing the video clips, which analysis is in paragraph 32.62 on page 127, the trial court made a finding on page 128, lines 1 to 3, that slaughtered cows were delivered to the facility on 9th August, 2021 at 22:35 hours in a white prison services truck registration number PS32287. The trial court went on to pose a question to itself, as follows: *"if, by the time the 1st respondent, met the inmates on the 8th August, 2021 and promised to provide meat, and on the 10th August, 2021 at 07:40 hours, slaughtered cows were delivered at the Correctional Facility, it can be said that the allegation had been proved to the required standard; that the cows had been delivered at the instance of, and with the consent and knowledge of the 1st respondent?"* In

addressing this question, the trial court stated as follows in lines 8 to 14 of page 129:

> ***... I cannot make such a finding as the allegation has not been supported to the level required. Any finding of beef having been supplied by the 1st Respondent, based on the evidence of the inmates alone, whose evidence has been discredited for reasons stated, would be a serious travesty, and would be speculative and conjecture on the part of the Court. I therefore find that this allegation has not been proved.***

[6.33] We have considered the competing arguments on this issue. The evidence revealed that the 1st respondent visited KCF on 8th August and 9th August, 2021 and asked the inmates if they ate beef and that he would supply the same. In the night of the 9th August, 2021, three slaughtered cows were delivered, a fact determined by the trial court at paragraph 32.62 of the Judgment. PW5 a prisoner warder said early in the morning of 10th August, 2021, he saw the slaughtered animals near the stores facility. Then on 10th August, 2021 the inmates ate beef. And on 11th August, 2021 the 1st respondent asked them if the beef was enough to which they said no and he promised to bring more. We are of the considered view that the sequence of events would lead to the inescapable inference that the beef which was supplied to the KCF on the 9th of August, 2021 was at the instance of the 1st respondent as the dates

referred to by the witnesses when the 1st respondent promised to supply beef and when the cows were delivered is supported by the video evidence.

[6.34] We are persuaded in making the inference that the 1st respondent supplied the cows by the Supreme Court decision in the case of **Mohamed v Attorney General** supra, which holds that:

> ***While it is accepted that the appellate court should not lightly reverse the findings made by a trial court, there is a world of difference between findings of primary facts and findings based on drawing of conclusions or inferences from undisputed primary facts. In the latter event, the appellate court is in a good position to draw the inferences or conclusions as the trial court.***

[6.35] We are equally persuaded by **Sithole v State Lotteries Board**[19] that the appellate Court is in as good a position as the trial court to draw inferences or substitute its own opinion for any opinion the trial court might have expressed.

[6.36] The trial court found that the 1st respondent visited KCF from the 8th to the 11th of August, 2021 and that the witnesses corroborated each other regarding this allegation. To require of the appellant to have produced a video of the 1st respondent actually delivering the cows, is tantamount to pushing the burden to proof beyond reasonable doubt, which is not the standard in election matters. The

trial court's finding on this matter is accordingly reversed. Be that as it may, there is still a further hurdle for the appellant to overcome that of proof that the majority of the voters were actually or might have been prevented from electing a candidate of their choice as a result of the 1st respondent supplying cows to feed the inmates. We shall revert to this issue later.

(c) *supplying prison officers/warders with bags of mealie meal and gifting them with money for votes*:

[6.37] Three prison warders (PW5, PW6 and PW7) testified that that they each received a 25kg bag of mealie meal on 8th August, 2021.That the mealie meal was delivered to all the officers' homes by the DOIC Mr. Siame. Upon inquiry they were informed that it was from the PF party. PW6 admitted that even he received a bag of mealie meal despite him being perceived as a UPND sympathizer by his superiors.

[6.38] Regarding the gifting of money to the prison officers, PW5 and PW8 testified that on 11th August 2021, they attended a meeting at the reception open area at KCF. The meeting was addressed by the 1st respondent. In concluding his address he informed the officers/warders that he had left something for them. Then the 1st

respondent and the DOIC left for the office. According to PW5 he stood near the office and saw the 1st respondent give K27,000 to Mr. Siame. When the 1st respondent left, Mr. Siame called PW8 the accountant and instructed her to pay each prison officer K200. PW8 retreated to her office from where she paid the officers as instructed, in his (PW5's) presence. PW8 confirmed this line of testimony except she said she was given K23,700 by Mr. Siame and she paid the 119 officers in the presence of the intelligence officer, a Mr. Bwembya Stanley, who was not called as a witness. According to PW8 Mr. Siame called her to his office immediately after the 1st respondent left and that some of the officers did not go back to work after the 1st respondent's address. They (including herself) waited for about 20 minutes while the 1st respondent and Mr. Siame were in the office. PW7 confirmed that he was called to PW8's office on the date in question and paid K200.

[6.39] Learned counsel for the appellant contended that the trial court erred when it held in paragraph 32.61 at page 126, of the record of appeal that there was no proof of that based on the discrepancies between the prison officers as to the total amount given. Yet,

according to counsel all the prison officers testified to having received K200 each from the 1st respondent.

[6.40] The trial court's reasoning on this issue was that Mr. Siame, from whom the money was said to have come, was not the agent of the 1st respondent and further that because of the many discrepancies in the dates and the amount given, the allegation had not been proved. We note that PW5's testimony that he saw the 1st respondent give the money to Mr. Siame was not corroborated by any other witness or evidence for it to attain proof of a fairly high degree of convincing clarity. Furthermore, his claim that he witnessed PW8 pay the officers was at variance with PW8's own testimony as she stated that it was Stanley Bwembya who witnessed to this fact. Furthermore, whereas PW5 said the money given was K27,000. PW8 who is the accountant and who received the money said it was K23,700. Clearly, therefore there were discrepancies in the evidence on this issue as noted by the trial court.

[6.41] Thus, we are of the considered view that although all the three witnesses were categorical that they each received K200, only PW5 testified that he saw the 1st respondent give money to Mr.

Siame which evidence was uncorroborated. PW8 said the money came from Mr. Siame. PW7 only confirmed being paid K200 by PW8. Additionally, a video of the 1st respondent addressing the officers on 11th August 2021 was produced but it had no audio. We therefore cannot fault the trial court for dismissing this allegation as it was not proved to the requisite standard that the 1st respondent donated the money which was used to pay the prison officers K200 each.

[6.42] With regard to the allegation that the 1st respondent gave a bag of mealie meal to each of the prison warders, the trial court accepted the testimonies of the three witnesses who testified that 25kg bags of mealie meal were delivered to their homes on 8th August, 2021. Upon inquiry they were told the mealie meal came from the PF party. The trial court further noted that the witnesses corroborated each other and appeared to have no motive or interest in the matter other than to offer testimony on the issue of mealie meal.

[6.43] The trial court reasoned that the fact that witnesses were informed that the mealie meal was supplied by the government of the day cannot be placed on the shoulders of the 1st respondent. It

concluded therefore that the 1st respondent did not give mealie meal to the prison warders as alleged.

[6.44] The appellant argues that the trial court did not properly evaluate the evidence as the three witnesses (PW5, PW6 and PW7) who are prison officers corroborated each other that they each received a bag of mealie meal. And that the bags of mealie meal were delivered by Mr. Siame who stated that it came from the PF. According to the appellant a careful examination of the evidence shows that Mr. Siame was heavily involved in the activities at the prison.

[6.45] We are of the firm opinion that the trial court properly evaluated the evidence. She accepted that bags of mealie meal were distributed to the prison warders and officers and they were told that the mealie meal was from the PF. It is settled law that a candidate must personally be involved in the illegal or corrupt practice or other misconduct or his election or polling agent must be involved with the candidate's knowledge and consent or approval for the election to be voided. Mr. Siame the DOIC was not a polling or election agent of the 1st respondent, for the latter to be liable for his actions. The appellant needed to adduce cogent evidence to prove this fact.

Furthermore, a candidate cannot be blamed for the activities of the party just because he is a member of the party. ***Richwell Siamunene v Sialubalo Gift***[17] refers.

[6.46] We therefore cannot disturb the finding that the allegation that the 1st respondent distributed mealie meal to prison warders was not proved as the finding was supported by the evidence on record.

Campaign rally at Mulenga Compound:

[6.47] About the allegation that the 1st respondent held a campaign rally at Mulenga Compound during the ban, the appellant argued that the trial court erred to find that it was not proved to the required threshold because the picture on which this allegation was premised, was not dated. Counsel contended that the trial court should have discounted the 1st respondent's assertion that the picture was taken prior to his adoption and found as a result, that the said picture was taken during the period when there was a suspension on campaign rallies.

[6.48] We note that at paragraph 32.19 of the Judgment, the trial court opined that the averment by the 1st respondent that the picture was an image from pre-adoption meeting was inconceivable.

Nonetheless it reasoned that as there was no corroborative evidence to confirm the date of the picture, it did not support the allegation of a rally being held at Mulenga Compound during the ban to the threshold required.

[6.49] We opine that the finding was supported by the evidence. It is settled that it is incumbent upon the Petitioner to prove the allegations in the petition to a fairly high degree of convincing clarity. In our view even if we were to agree with the appellant's counsel that the image was taken during the period when campaign rallies were banned, the issue was not proved to the requisite standard as to warrant nullification of the results as we shall discuss later in this judgment.

Rally at Kamfinsa Secondary School:

[6.50] The evidence regarding the campaign meeting at Kamfinsa Secondary School in Kamfinsa ward was that on 2nd August, 2021, the 1st respondent together with the DEBS met with teachers wives at the school where money and mealie meal was distributed and the people were urged to vote for the then Republican President Edgar Chagwa Lungu.

[6.51] After analysing the evidence of the Petitioner's witnesses and RW3, the trial court found that the 1st respondent was not present at the meeting although he had placed himself at the school. The Court reasoned that although the evidence of RW3, Joseph Katongo, was corroborated by the evidence of Moono Bwantu (PW9), Mirriam Chama (PW10) and Prudence Teswa Chola (PW13) on the directives and inducements made at the meeting, coupled with the violence, there was no evidence that the 1st respondent attended the meeting. Furthermore, that PW10 seemed hesitant, nervous and uncomfortable and was not convincing in her evidence. PW13 was also not convincing especially in light of the discrepancies in the amount of money alleged to have been given at the meeting.

[6.52] In addition, the trial Judge observed that RW6 was very casual in her approach and demeanor, her evidence seemed rehearsed and she displayed no serious understanding of why she was in Court, fidgeted with her mask when she appeared uncomfortable with the questions and could not really answer with conviction or clarity why she was even there or what purpose she served.

[6.53] The trial court also noted that after listening to the audio evidence, she heard the DEBS say words to the effect that the electorate should support the debt swap and asked if they should forget the person who gave them relief.

[6.54] The trial court found that these words uttered by the DEBS were both an inducement and a threat. The trial Judge concluded therefore that the words attributed to the DEBS, the gifting of mealie meal or money were not done with the consent, knowledge or approval of the 1st respondent and or that of his agent. She observed at paragraph 32.34 of the Judgment that the appellant had been able to place several videos and pictures in support of her various allegations save for the meeting at Kamfinsa School.

[6.55] The trial court's finding at page 113, lines 13 to 23 of the record of appeal, was as follows:

> ***I ask myself the critical question, in this Petition, as to whether the words attributed to the DEBS on the material day, and the gifting of mealie meal and or money, can be placed directly on the shoulders of the 1st Respondent, more so, that I have found that he was not present at the said meeting. There has not been any evidence presented to the Court, to the required threshold, to satisfy the Court that the words, actions and gifting alleged to have been done at the said meeting, was with the consent and or specific knowledge and***

approval of the 1st Respondent, and or with the consent of his agent. I therefore find that this allegation has not been proved to the required standard.

The allegation was accordingly dismissed.

[6.56] We note the appellant and the 1st respondent's arguments at paragraphs 5.1 and 5.2 respectively, in relation to the allegations that the 1st respondent donated K3000 and bags of mealie meal to the people who attended his campaign rally at Kamfinsa Secondary School.

[6.57] The gravamen of the trial court's decision is that although the 1st respondent placed himself at the scene, there was no evidence to prove that he was at the meeting where the DEBS uttered words which were both an inducement and a threat.

[6.58] The trial court observed that both parties' witnesses were unimpressive and problematic. It observed that RW3 who supported the 1st respondent's claim that he was at the Kamfinsa Secondary School to inspect a classroom block, was a witness with an interest to serve whilst RW6 was casual in her approach and demeanor in Court and her evidence appeared rehearsed.

[6.59] The trial court was equally not impressed with the appellant's witnesses as stated above. It is settled that an appellate Court will not lightly interfere with findings of a trial court based on demeanor as that Court had the opportunity of hearing and seeing the witnesses and is entitled to decide whom to believe. It was thus incumbent upon the appellant to prove to a fairly high degree of convincing clarity that the 1st respondent attended the meeting at Kamfinsa School and gave K3,000 to the attendees as alleged.

[6.60] Therefore, although the 1st respondent placed himself at the school, the appellant bore the burden to adduce cogent evidence that he was at the meeting in the school hall and addressed the people and gave money as alleged. All the appellant proved via audio evidence was that the DEBS addressed the people who gathered in the school hall as found by the trial court and this therefore corroborated the oral evidence of the witnesses. No audio or video evidence was produced to prove that the 1st respondent addressed the people and gave them money as alleged. We cannot fault the trial court for dismissing this allegation as it was not proved.

Were the rallies illegal? Were the majority affected?

[6.61] We hasten to state that the appellant's main argument in this appeal is that having found as a fact that the 1st respondent held illegal rallies at Ndeke and Wesley Nyirenda Secondary Schools and at KCF, the trial court should have made a finding that the said illegal rallies affected the outcome of the elections as the 1st respondent held rallies in three out of the four wards in Kamfinsa constituency. Therefore, the malpractice was widespread as to influence the majority of voters in the Constituency. Moreover, that the trial court erred when she held that the appellant had a burden to prove the statistics of the registered voters and to additionally prove that the voters had a change of heart due to the illegal conduct of the 1st respondent.

[6.62] Our perusal of the judgment does not reveal any finding by the trial court that the 1st respondent held illegal campaign rallies but that he held campaign rallies in government buildings contrary to the Electoral Code of Conduct. We note the appellant's insistence that the rallies were illegal because they were held during the ban which was effected by the 2nd respondent on 3rd June 2021, via the covid 19 guidelines. Furthermore, that the 1st respondent contravened

section 11(d) of the Electoral Code of Conduct and Article 229 of the Constitution, when he held the said rallies as the 2nd respondent is empowered by Article 229 of the Constitution to issue the said guidelines in its conduct of elections.

[6.63] We must state from the onset that these arguments are flawed and meritless. The appellant failed to prove how the appellant contravened the Constitution while section 11(d) of the Code simply empowers the 2nd respondent to impose any administrative measures on any person, candidate or political party for any breach of its Code. The EPA is clear in its provisions as to the grounds upon which an election can be nullified.

[6.64] Moreover, in finding that the appellant had not proved that the 1st respondent's conduct of holding rallies was so widespread, that it prevented or may have prevented the majority of voters from voting for the candidate of their choice, the trial court placed reliance on our decision in the case of **Margaret Mwanakatwe v Charlotte Scott and another.**[1]

[6.65] In concluding that the appellant did not provide statistics to prove that the majority of the electorates in the constituency were prevented from electing a candidate of their choice, the trial court

also relied on the Supreme Court decision in the case of **Mubika Mubika v Poniso Njeulu,**[14] that:

> ***The evidence therefore, does not indicate widespread vilification of the respondent, neither does it indicate that the majority of the registered voters were influenced by the respondent. In this type of allegation, statistics of registered voters who attended rallies should have been given to assist the trial court on the extent of influence in the Constituency.***

[6.66] We are alive to the fact that the burden of proof for election petitions is set by statute being the EPA as provided in section 97(2)(a) 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;***

[6.67] We have had occasion to pronounce ourselves on the import of section 97(2)(a) in a plethora of cases including **Nkandu Luo and The Electoral Commission of Zambia v Doreen Sefuke Mwamba and The Attorney General,**[12] where we illuminated 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 agent, 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...***

Furthermore, that:

> ***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 a candidate of their choice.***

[6.68] It is clear that the appellant apart from proving that the 1st respondent held rallies in government buildings contrary to section 15(1)(k) of the EPA as determined by the trial court, also needed to prove that the electoral malpractice or misconduct was so widespread that it prevented or may have prevented the majority of the electorate from electing a candidate of their choice.

[6.69] We reiterate that it is a legal requirement under section 97 (2) (a) of the EPA that apart from proving electoral malpractice; cogent evidence that the alleged electoral malpractice was so widespread that the majority of the voters were or might have been prevented from electing a candidate of their choice, must be presented before the trial court for an election to be voided. The appellant in *casu* failed to do so during trial. Not a single number or estimate of how many people attended the rallies held in the government buildings was given to demonstrate that the majority of voters in Kamfinsa Constituency were or might have been prevented from electing a candidate of their choice. It is also unknown as to how many inmates ate the beef supplied by the 1st respondent and, in line with the case of **Mubika Mubika v Poniso Njeulu,**[14] how many of those were actually registered voters.

[6.70] We are alive to the argument by the appellant that the 1st respondent held rallies in three out of the four wards, therefore the rallies were widespread. However, the appellant did not adduce any evidence concerning this assertion. For obvious reasons, we cannot take this argument for a fact.

[6.71] The trial court cannot be faulted for finding that the appellant failed to prove her case to the requisite standard set by section 97(2) (a) of the EPA. The trial court used the correct standard of proof as provided in the EPA and pronounced by this court in several of our decisions.

[6.72] In light of all the preceding paragraphs grounds one to four, six and seven have no merit except to the extent stated on ground one on supplying cows and ground seven that it was proved that campaigns were held in government buildings only.

[6.73] We now move to consider ground five which impugns the trial court's finding that the appellant failed to prove the allegations against the 2nd respondent to the requisite standard. It is argued that the available evidence was that the Gen 20 Forms were illegible and had clerical errors. And, that there were several irregularities and discrepancies in the Gen 20 forms which put the authenticity of the results in question.

[6.74] The 2nd respondent contends that the trial court made a finding of fact that the clerical errors by way of overwritten or illegible documents and being given the original as opposed to copies of the Gen 20 forms; did not cause any detriment or loss to the appellant.

Our decision in the case of **Charles Nakasamu v Simon Kakoma and Electoral Commission of Zambia**[18] was relied upon wherein we observed thus:

> ***Evidence on record shows that there were anomalies as regards 29 votes that were allocated in favour of a 5th candidate who was not a candidate for the ward in question. This anomaly was indeed an omission by the election officer in breach of his official duty in connection with the election. Evidence on record also shows that this anomaly was addressed and corrected once it was brough to the attention of the election officer, so that the name of the 5th candidate did not appear on the 2nd respondent's official Declaration of the Result of the Poll-Councilor Form on page 77 of the Record of Appeal. Apart from this anomaly there is no other cogent evidence that the election was not conducted substantially in conformity with the provisions of the EPA.***

[6.75] And also in **Nkandu Luo and the Electoral Commission of Zambia v Doreen Sefuke Mwamba and the Attorney General,**[12] wherein we elucidated:

> ***That where there has been substantial compliance with the provisions of the Electoral Process Act an election cannot be annulled on the basis of section 97 (2) (b) of the Act.***

[6.76] The 2nd respondent canvassed that the appellant did not call any witnesses to support the host of allegations on the Gen 20 Forms or tender any tangible evidence in the lower court to prove that the

election was so flawed and not conducted in substantial conformity with the law or that the clerical errors by the electoral officers did affect the election results.

[6.77] We note the arguments by both parties on this score. We are of the firm view as aforestated that the appellant had the burden to prove the allegation to the requisite standard against the 2nd respondent.

[6.78] The trial court took note of the appellant's witnesses' testimonies on the issue of Gen 20 Forms. She observed that PW11 Joseph Muyutu was the polling agent for the UPND at Cecina Stream 3 Polling Station in Bupe Ward and PW12 George Malupande was the polling agent at Kafue Bridge Secondary School Stream 1 in Kafue Ward. Therefore, their evidence only related to the two polling stations.

[6.79] The Judge found that when PW11 was removed from the polling station for about 45 minutes, another polling agent from the UPND party remained in the room and did observe whatever may have happened. The trial court opined that PW11's evidence was therefore based on apprehension of what may have or could have hypothetically happened as opposed to what actually happened at the polling station.

[6.80] With regard to George Malupande (PW12), who testified that he and other polling agents were sent out of the polling station at Kafue ward and allowed back after the intervention of the Petitioner and the Town Clerk, the trial court noted that PW12 conceded under cross-examination, that he made no report to the 2nd respondent. PW12 was shown the Gen 20 Form and he confirmed that he appended his signature to signify his agreement with the results attained at that polling station. The trial Judge further noted that PW12 admitted that he was present from 06:00 hours in the morning till 09:00 hours the following day when counting ended and he confirmed that UPND won at that particular polling station. Accordingly, his evidence was equally found to be speculative as no cogent evidence was adduced to support the allegations of electoral malpractice at the polling station.

[6.81] The trial court also analysed the appellant's evidence in relation to the Kamfinsa Correctional 01 polling station. The appellant testified that the total number of votes cast was 783 of which 41 were rejected giving a total of 778 votes. When referred to the 2nd respondent's bundle of documents, she agreed that her results and those of the 1st respondent were 299 and 406 respectively. The trial

court noted that the appellant conceded that the mistake in the total initially stated to be 783 was corrected to 778. The appellant also admitted that she did not know that the EPA empowers the 2nd respondent to correct clerical mistakes within 7 days. Based on the evidence adduced by PW11, PW12 and the appellant, the trial court came to the conclusion that the allegations against the 2nd respondent had not been proved to the required standard.

[6.82] As noted by the trial court, the appellant only called PW11 and PW12 who testified about what transpired at Bupe and Kafue Wards respectively. No witnesses were called to testify to the other allegations against the 2nd respondent. It was incumbent upon the appellant to adduce evidence to prove that the results were manipulated, which she failed to do even by her own testimony.

[6.83] It is not sufficient to make averments in a Petition and fail to adduce evidence to support the same.

[6.84] We cannot interfere with the finding of fact as it was based on the evidence presented by the parties to the trial court. Ground five also fails.

[6.85] The net result is that the appeal is devoid of merit and is accordingly dismissed. Consequently, we uphold the judgment of the trial court that the 1st respondent was duly elected as Member of Parliament for Kamfinsa Constituency.

[6.86] Each party to bear own costs.

A.M. SITALI
CONSTITUTIONAL COURT JUDGE

M. S. MULENGA
CONSTITUTIONAL COURT JUDGE

P. MULONDA
CONSTITUTIONAL COURT JUDGE

M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE

J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE

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



2026/HP/EP/041

IN THE MATTER OF:	ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA
IN THE MATTER OF:	SECTION 81, 83, 84, 97, 98 & 100 OF THE ELECTORAL PROCESS ACT
IN THE MATTER OF:	REGULATION 15 OF THE ELECTORAL CODE OF CONDUCT 2016
IN THE MATTER OF:	THE HIGH COURT ELECTIONS PETITION RULES 2026 S.I. NO. 31 OF 2026
AND	
IN THE MATTER OF:	THE PARLIAMENTARY ELECTION FOR CHAMA SOUTH CONSTITUENCY DECLARED ON 16TH AUGUST 2026

BETWEEN:

DANIEL PHIRI	PETITIONER
AND	
NKHATA JERIX	1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

2ND RESPONDENT'S LIST AND DESCRIPTION OF DOCUMENTS

The following is the 2nd respondents list of documents relating to the matter in question in the action, which are or have been in possession, custody or power of the above 2nd Respondent.

1. The 2nd respondent has in their possession, custody or power of the documents relating to the matter in question in this suit set forth in the first and second parts of the first schedule hereto.

2. The 2nd respondent has or had but does not now have in their possession or power documents relating to the matters in this suit set forth in the second schedule

3. The 2nd respondent has not and never had in its possession custody or power or the possession custody or power of its agent or power of its agent or in the possession, custody or power or any person or persons on its behalf any deed account book of accounts voucher receipt, letter, memorandum, paper or writing of any other documents whatsoever relating to the matters on question in this suit or any other documents whatsoever relating to the matters on question in this suit or any of them wherein any entry has been made relating to such matter or any of them other than and except the documents set forth in the first and second schedule hereto.

FIRST SCHEDULE
PART 1

ITEM NO.	DESCRIPTION OF DOCUMENTS
1.	GEN 20 Forms
2.	Record of Proceedings at the Totalling of Votes
3.	Dispute Determination forms
4.	District Conflict Management Committee Consolidated Report

PART 2

Correspondence passing between the petitioner and his advocates after the commencement of or relating to the institution of the proceedings in this suit.

SECOND SCHEDULE

Original of the documents listed in part 1 of the first schedule hereto

Dated at Lusaka this _____ day of _____2026

Filed by : Jaques & Partners

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Petitioner

To: Nkhata Jerix
1st Respondent

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



2026/HP/EP041

IN THE MATTER OF:	ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA
AND	
IN THE MATTER OF:	SECTION 81, 83, 84, 97, 98 & 100 OF THE ELECTORAL PROCESS ACT, NO. 35 OF 2016
AND	
IN THE MATTER OF:	REGULATION 15 OF THE ELECTORAL CODE OF CONDUCT, 2016
AND	
IN THE MATTER OF:	THE HIGH COURT (ELECTION PETITION) RULES, 2016 SI NO. 31 OF 2026
AND	
IN THE MATTER OF:	THE PARLIAMENTARY ELECTION FOR CHAMA SOUTH CONSTITUENCY DECLARED ON 16TH AUGUST, 2026

BETWEEN

DANIEL PHIRI	PETITIONER
AND	
NKHATA JERIX	1ST RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA	2ND RESPONDENT

SKELETON ARGUMENTS

1. INTRODUCTION

1.1. **MAY IT PLEASE THIS HONOURABLE COURT**, these are the 2nd Respondent's skeleton arguments in support of its Affidavit in Opposition to the Election Petition of Chama South Constituency.

2. STANDARD OF PROOF

2.1. My Lord/Lady, the Constitutional Court in the case of **Kufuka v Ndalemei (Appeal 15 of 2016) [2018] ZMCC 4 (29 January 2018)** espoused that before arriving at a decision to nullify an election, the trial Court must bear in mind the standard of proof required in election petitions. The case of **Michael Mabenga v Sikota Wina and others (SCZ 15 of 2003) [2003] ZMSC 75** stated that:

> **"Proof of an election petition, although a civil matter is higher than balance of probability, but less than beyond all reasonable doubt."**

2.2. The Constitutional Court in the case of **Nkandu Luo and Another v Doreen Sefuka Mwamba (CCZ Selected Judgment No. 51 of 2018)** held:

> **"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... in addition to proving the electoral malpractice or misconduct alleged, the Petitioner has a 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 electorates from electing the candidate of their choice."

2.3. This decision was further fortified by the Supreme Court in their decision of **Mwalimu Simfukwe v Evaristo David Kasunga No.50 of 2013 (unreported)** in which it was said that:

"...the burden of proof was on the Respondent, who was the Petitioner in the Court below. He was required to prove all the allegations in the Petition, to a standard higher than on a balance of probabilities:"

2.4. My Lord/Lady, in view of the foregoing authorities, we respectfully submit that the Petitioner has not discharged the burden of proof imposed upon a petitioner in an election petition. The evidence adduced before this Honourable Court does not sufficiently establish, to the requisite standard of proof.

3. WHAT NEEDS TO BE PROVED

3.1. **Section 97(2)** of **the Electoral Process Act** states that:

"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—

(a) 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."

3.2. The allegation raised by the petitioner do not, in itself, satisfy the requirements of section 97(2)(b) of the Act. The provision does not contemplate that an election is rendered void merely upon proof of non-compliance; rather, the Petitioner must establish that the non-compliance was such that the election was not conducted in accordance with the principles laid down in the relevant provisions of the Act and that such non-compliance affected the result of the election.

3.3. My Lord/Lady, the 2nd Respondent respectfully submits that the allegations advanced in the Petition, even taken at their highest, do not satisfy the statutory threshold for the nullification of an election under section 97(2) of the Electoral Process Act No. 35 of 2016.

3.4. **Section 97(2)(a)** requires the Petitioner to establish, firstly, that a corrupt practice, illegal practice or other misconduct was committed in connection with the election by the candidate, or with the knowledge and consent or approval of the candidate or that candidate's election or polling agent. Secondly, the Petitioner must establish that the majority of voters in the constituency were or may have been prevented from electing the candidate whom they preferred. And based on the evidence advanced by the Petitioner has completely fallen short of the threshold required.

3.5. My lord/Lady **Section 36(1)** of **The Electoral Process Act** read together with **paragraph 5(1) and (2)** of the Schedule to the said Act entails that, agents have a statutory duty to witness the count and announcement and countersign the results. In **Mutelo K v Kang'ombe & Another (2022) ZMCC,** the Court recognised an agent's GEN 20 signature as signifying "agreement with the results attained at that polling station." A signed GEN 20 is therefore strong evidence of the result witnessed and agreed to by the agent.

3.6. We further submit that the evidence does not demonstrate a pattern of electoral malpractice and misconduct which was sufficiently widespread and material to have affected the free exercise of the electorate's choice. In particular, the evidence does not establish that the malpractice complained of was of such a nature and extent that

it swayed, or may have swayed, the majority of the electorate from electing the Petitioner.

3.7. In the Supreme Court case of **Mazoka and Ors v Mwanawasa and Ors (SCZ EP 1 of 2002) 2005 ZMSC 25 (16 February 2005)** stated:

> **"...that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity in that the proven defects and from the electoral flaws were such that the majority of voters were prevented from electing the candidate whom they preferred..."**

3.8. The Petitioner cannot simply point to alleged isolated irregularities and invite the Court to speculate that they affected the result. There must be evidence demonstrating the material effect of those irregularities upon the result. In the absence of such evidence, the allegation remains one of irregularity without proof of consequence.

3.9. Furthermore, in the Supreme Court case of **Mazoka and Ors v Mwanawasa and Ors (SCZ EP 1 of 2002) 2005 ZMSC 25 (16 February 2005),** the Court stated:

> **"The few partially proved allegations are not indicative that the majority of the voters were prevented from electing the candidate whom they preferred; or that the election was so flawed that the dereliction of duty seriously affected the result which could no longer reasonably be said to reflect the true free choice and free will of the majority of the voters."**

3.10. The foregoing authorities establish that it is not sufficient for a petitioner merely to establish the existence of irregularities, breaches, derelictions of duty or other electoral wrongs. The petitioner must go further and demonstrate that the defects complained of had a material effect on the election. In particular, the petitioner must establish that the proven defects were such as to prevent the majority of voters from electing the candidate whom they preferred, or that the election was so seriously flawed that the defects affected the result to such an extent that it could no longer reasonably be regarded as reflecting the true free choice and free will of the majority of the voters.

3.11. In the present case, however, the Petitioner has failed to establish any such material effect. The allegations therefore remain allegations without the necessary evidential link between the alleged wrongdoing and the outcome of the election. Consequently, the Petitioner has failed to satisfy the threshold established in Mazoka v Mwanawasa.

4. RELIANCE ON SECTIONS OF THE ELECTORAL PROCESS ACT THAT DO NOT APPLY

4.1. My Lord/Lady, the Petitioner cited a number of Sections of the Electoral Process Act to place reliance on in invoking the jurisdiction of the Court. However, these Sections are not relevant as they do not speak to the issues that are alleged by the Petitioner in their Petition.

4.2. Furthermore, the petition was further brought pursuant to **Section 81** of **the Electoral Process Act** among other provisions which provides that:

"A person shall not, either directly or indirectly, by oneself or with any other person corruptly—

(a) give, lend, procure, offer, promise or agree to give, lend, procure or offer, any money to a voter or to any other person on behalf of a voter or for the benefit of a voter in order to induce that voter to vote or refrain from voting or corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election;

(b) give, lend or procure, offer, promise or agree to give, lend, procure, offer or promise, any money to a voter or for the benefit of a voter or to any other person or on behalf of that person on behalf of any voter or to or for any other person for acting or joining in any procession or demonstration before, during or after any election;

(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 endeavour to procure the return of any candidate at any election or the vote of any voter at any election;

(d) upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procure or engage, promise or endeavour to procure, the return of any candidate at any election or the vote of any voter at any election;

(e) advance or pay or cause to be advanced or paid any money to or for the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or knowingly

pay or cause to be paid any money to any person in discharge or repayment of any money wholly or partially expended in bribery at any election;

(f)before or during any election, receive or contract for any money or loan for oneself or for any other person for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any election;

(g) after any election, receive any money on account of any person having voted or refrained from voting or having induced any other person to vote or refrain from voting at any election; or

(h) convey or transfer or be concerned with the conveyance or transfer of any property, or pay or be concerned with the payment of any money, to any person for the purpose of enabling that person to be registered as a voter, thereby to influence that person's vote at any future election, or pay to or be concerned with the payment of any money on account of any voter for the purpose of inducing that person to vote or refrain from voting.

(2) A person who contravenes any provision of subsection (1) commits an offence.

(3) Nothing in this Act shall be construed as applying to any money paid or agreed to be paid for, or on account of, any expenditure bona fide and lawfully incurred in respect of the conduct or management of an election."

4.3. My Lord/Lady, allegations of corrupt practices are criminal in nature and demand cogent proof. A party alleging bribery must specifically plead the material facts stating with precision who committed the act, to whom the money was paid, and the circumstances under which it occurred. A critical examination of the Petition and the Affidavit verifying facts reveals no such particulars or evidence, respectively. The Petitioner has provided no facts, no specific allegations, and not a single exhibit demonstrating any contravention of **Section 81** of **the Electoral Process Act.**

5. CONCLUSION

5.1. My Lord/Lady, in conclusion, it is respectfully submitted that the Petitioner has failed to discharge the burden of proof required in an election petition. The allegations advanced against the 2nd Respondent remain largely unsubstantiated and have not been supported by cogent evidence demonstrating that any corrupt practice, illegal practice, misconduct or non-compliance with the Electoral Process Act was committed by the 2nd Respondent or with its knowledge, consent or approval.

5.2. Further, the Petitioner has failed to establish the essential nexus between the alleged irregularities and the outcome of the election. In particular, there has been no sufficient demonstration that the alleged defects were so widespread or substantial as to prevent the majority of voters from electing the candidate of their choice, or that the election was conducted in such a manner that its result could no longer reasonably be regarded as reflecting the free choice and will of the electorate.

5.3. We therefore respectfully submit that the Petition is devoid of sufficient evidential and legal basis to warrant the nullification of the election of the 1st Respondent. The 2nd

Respondent accordingly prays that this Honourable Court dismisses the Petition in its entirety, with costs to the 2nd Respondent, and grant such further or other relief as this Honourable Court may deem just and appropriate.

WE SUBMIT

Dated the ..... day of 2026

Per: Jaques & Partners

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